

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**Reserved on: 23<sup>rd</sup> September, 2022**

**Decided on: 14<sup>th</sup> October, 2022**

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**CS(OS) 498/2021**

**RUBA AHMED & ORS.**

..... Plaintiffs

Represented by: Mr. Sudhir Nandrajog, Mr. Sanjiv Sindhvani, Sr. Advocates with Mr. Yatin Grover, Mr. Sadaf Chowdhary, Ms. Achal Shekhar Sharma & Mr. Mannat Sandhu, Advocates.

versus

**HANSAL MEHTA & ORS.**

..... Defendants

Represented by: Mr. Saurabh Kirpal, Sr. Advocate with Ms. Shyel Trehan, Ms. Malvika Kapila Kalra, Mr. Nikhil R. Ahuja, Ms. Tanwangi Shukla, Ms. Tanima Panigrahi, Mr. Nikhil Arora & Mr. Rohan Poddar, Advocates for D-1 to 4.

**CORAM:**

**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

**J U D G E M E N T**

**I.A.13532/2021 (U/O XXXIX Rules 1 & 2 r/w Section 151 of CPC, 1908)**

1. An application under Order XXXIX Rule 1 & 2 read with Section 151 Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC"*) has been filed for *ad-interim* injunction for restraining the defendants from releasing

the movie “FARAAZ” in any manner whatsoever, amounting to infringement of plaintiff’s fundamental right to privacy and fair trial; to restrain the defendants from using plaintiff’s daughter’s name and also the name of their best friend Faraaz and their image/caricature/ lifestyle/likeness in the forthcoming movie “FARAAZ” in any manner; to direct the defendant to remove all references/press release/videos/posters/advertisement /content/publicity material containing the names of the daughter’s of the plaintiffs and also name of their best friend Faraaz and their image/caricature/ lifestyle/likeness from all websites, television channel, newspapers, social media and or other modes of advertisements and promotion in any other mode of electronic or print media in respect of forthcoming movie “FARAAZ” amounting to infringement of plaintiffs right to privacy and fair trial; and in the alternative direction is sought to be issued to the defendants to hold a pre-screening before the court of law in the presence of the plaintiffs and their representatives to ascertain the infringing content in the movie.

2. It is submitted that the plaintiff No. 1 is the mother of one Ms. Abinta Kabir, who is also the Co-Founder and General Secretary of the Foundation *Abinta Kabir* which has been created in the memory of her daughter.

3. The plaintiff No. 2 is the mother of one Ms. Tarishi Jain, who is also the Co-Founder and Chairman of the Foundation – “*Live Life Like Tarishi Foundation*”, which has been created in the memory of Ms. Tarishi Jain.

4. Both Ms. Abinta Kabir and Ms. Tarishi Jain lost their lives in the Holey Artisan (Dhaka, Bangladesh) Terrorist Attack on 01<sup>st</sup> July, 2016.

5. The defendants have produced a movie by the name of “FARAAZ” to which an objection has been taken by the plaintiffs on the ground that it may depict the daughters of the plaintiffs in bad light in relation to the Terrorist Attack on 01<sup>st</sup> July, 2016 which would be difficult for the plaintiffs as they would have to revisit the traumatic incident all over again. In several interviews, the defendants have informed the public at large that the movie is being made on the true-life events and it is also mentioned in the news articles that “FARAAZ” stood up for the lives of his two friends – Ms. Abinta Kabir and Ms. Tarishi Jain and refused to leave his friends. He could not save himself; he could not save them either.

6. It is stated that there is a reasonable apprehension of the plaintiffs that the movie “FARAAZ” has been created to show Faraaz Ayaaz Hossain as a protagonist or something of the attack, as the movie has been named after Faraaz Ayaaz Hossain. However, if such depiction is made, it shall be completely false as the plaintiffs were amongst the first witnesses to meet the survivors after the attack and are well aware of series of events. Glorifying or exaggerating upon one victim of the attack, will be a gross misinterpretation of the facts if the movie is portrayed to have been based on true events/inspired by real events.

7. Moreover, the facts pertaining to entire incident are a part of investigation and ongoing Court case pending before the Courts of Bangladesh and any movie created on distorted facts would only influence the case to the extent that it will hamper the ongoing matter before the Courts in Bangladesh. Moreover, the plaintiffs have come to know that some arrests have taken place in India with respect to said attack and the matter is *sub judice*. Making a movie on an event while the matter is *sub*

*judice* before an Indian Court, is also violation of *Right to Fair Trial* under Article 21 of the Constitution of India, 1950 (*hereinafter referred to as* “Constitution”), especially when an Indian victim is involved in the matter.

8. It is further asserted that after the articles, press releases, video releases etc. got published, the plaintiff No. 1 through her counsel in Bangladesh sent a Legal Notice dated 09<sup>th</sup> August, 2021 and the plaintiff No.2 through her counsel in India sent a Legal Notice dated 17<sup>th</sup> August, 2021 calling upon the defendants to refrain from production/release of the movie. The defendants through their counsel gave a Reply dated 04<sup>th</sup> September, 2021 to the plaintiffs refusing to comply with the demands of the plaintiffs.

9. It is asserted that the Disclaimer states that “the said movie is a work of fiction” though this is contrary to the interviews given in the Media Houses, where it is claimed to be a true story. The defendants are making mutually inconsistent pleas at different intervals. It is also asserted that such depiction of the daughters of the plaintiff’s or their friend Faraaz amounts to defamation as indirectly impacts on their reputation. Hence, the suit has been filed for permanent injunction and also has sought interim injunction under Order XXXIX Rule 1 and 2 CPC as stated above.

10. The **defendants in their written statement** have essentially not challenged the core facts. It is stated that in this was one of the deadliest terrorist attack in which many people lost their lives. This horrendous incident has been covered in great detail both in Bangladeshi and global media, in print and has also been subject of multiple extensive literary pieces as well as audio and video programmes including:

- a) Book titled “*Holey Artisan – A Journalistic Advent*” by Nurruzaman Labu and this book remained in circulation since February, 2017. The defendant has borrowed some ideas and concepts available in the book which is in public domain and has woven an independent Novel creating fictional story based on July, 2016 attack which premise of the story being told in the film.
- b) A podcast documentary by British Broadcasting Corporation (BBC) titled “siege at the holey artisan bakery” which was released on 12th January, 2017 and is available on the website.
- c) A motion picture titled “Shonibar Bikel” (Saturday Afternoon) has been shown across the world since 2019 and has won Awards at Film Festivals.

11. Further, the July, 2016 attack is continually memorialized both in Bangladesh and around the world including recent Fifth Anniversary. The material available in public domain reveals intricate details of the attack; the identities of the victims; the identities and complete detailed accounts of the lives of the victims including the daughter’s of the plaintiffs, their ordeal and the manner in which the terrorists conducted themselves, the version of the attack by the survivors and the identity of the plaintiff as the parents of the two victims.

12. It is asserted that the defendants in exercise of the fundamental rights under Article 19(1)(a) and 19(1)(g) of the Constitution, have collectively been involved in the creation and production of the feature length cinematograph film, which is titled “FARAAZ”. It is a fictional work in July, 2016 attack has been depicted with utmost sensitivity and is inspired from the material available in public domain. The defendants have not

indicated the involvement of plaintiff's daughters in the film. Moreover, the film is not about the daughters of the plaintiff and no character in the film has the names of the daughters of the plaintiff. It does not contain any reference to the names or the characters of the daughters. The defendants have never claimed that the film is a true exact reproduction of July, 2016 attack.

13. It is further asserted that no case of defamation and/ or breach of Right to Privacy has been made out by the plaintiffs as it rests essentially on apprehension and not on facts. Their suit is based purely on conjectures and surmises and thus, no relief ought to be granted.

14. It is further asserted that there is no *prima facie* case is made out to seek pre-screening of the film. The plaintiff's have failed to show any right which can be said to have been infringed and thus, the question of interim relief of pre-screening cannot be granted. In fact, the claim for pre-screening is an endeavour for a roving and fishing inquiry into the facts which cannot be permitted as it amounts to infringement of the right of the defendants under Article 19(1)(a) and (1)(g) of the Constitution.

15. It is further stated that Faraaz Hossain was posthumously awarded the Mother Teresa Memorial International Award for Social Justice for 2016 for his acts of bravery on the day of attack, a fact which is widely reported and information regarding the same is readily available in public domain. PepsiCo INC. has launched the annual "Faraaz Hossain Courage Award" from 2016, for the next twenty years. In addition to the certificate of recognition, the award carries a cash prize of Taka equivalent of US \$10,000 (Ten Thousand US Dollars). It is further detailed that there is plethora of information available in the public domain regarding this attack. It is

asserted that the plaintiffs have sought the injunction only to target the defendants and the film despite there being no basis.

16. It is claimed that there is no prohibition on the production and publication of any feature film pertaining to different subjects such as terror attacks and in the past various movies have been made on the attacks and such incidents which have happened, some of them being “*The Attacks of 26/11*”, “*Madras Café*”, “*Neerja*”, “*The Stoneman Murders*”, “*United 93*”, “*World Trade Center*”, “*Patriots Day*”, “*Stronger*”, “*Utoya-July 22*”, “*Hotel Mumbai*”, “*9/11*”, “*The Day We Died*”, “*The Mumbai Siege: 4 Days of Terror*” and such other films.

17. It is further submitted that the Bangladeshi Censor Board may have prohibited the exhibition of the Bangladeshi film on this attack but it is an entirely internal issue and ought not to approach of this Court as there are different constitutional guarantees afforded in India and vis-à-vis Bangladesh. It is further claimed that prior to the release/ exhibition of the film it shall be examined by the Central Board for Film Certification (CBFC), who would ensure the standards laid down in Section 5B of the Cinematograph Act, 1952, and thereafter grant the Censor Certificate.

18. It is claimed that the exhibition/ publication of the film does not impinge on any right of privacy or right of fair trial as claimed by the plaintiff. It is further explained that the plaintiffs are also seeking a prayer for restraining the defendants from utilizing the name of Mr. Faraaz, when in fact, they have no such right to claim on behalf of Mr. Faraaz as they are neither the legal heirs nor have they been authorized in any capacity to act for and on behalf of Mr. Faraaz Hossain.

19. It is also claimed that the application is liable to be dismissed as it suffers from delay and laches. The plaintiffs were aware of the making of the film since at least from February, 2020, but for the reasons best known to them, they have waited for more than one year to institute the present suit. It is, therefore, submitted that neither the suit of the plaintiffs has any merit nor are they entitled to any interim protection.

20. **Arguments have been addressed on behalf of the parties and written submissions have also been filed.**

21. **Learned counsel for the plaintiff** has argued that privacy is a common law right for it finds its birth in inalienable human right. It is not given to any human, but already exists upon birth. The Constitution of India is not the fountainhead of this right but merely affirms this inherent Human Right within the ambit of Article 21 as an intrinsic part of “Right to Life” and liberty. It is thus at a higher pedestal that Constitutional Right, being an inalienable human right. Reliance has been placed on the observations made by Justice Sanjay Kishan Kaul in *Justice K.S. Puttaswamy and Ors. v. Union of India (UoI) and Ors.* (2017) 10 SCC 1 wherein it was observed that the right to privacy can be claimed both against the State and non-State actors. It is therefore not just a vertical right but can be exercised horizontally too. For this reliance has also been placed on *Sangamitra Acharya and Ors. v. State and Ors* 2018 SCC OnLine Del 8450 and *Om Prakash Chautala v. Kanwar Bhan and Ors.* (2014) 5 SCC 417.

22. Learned counsel for the plaintiff has referred to United Nations’ Universal Declaration of Human Rights, drafted in 1946 and adopted in 1948 to trace back the genesis of this basic human right and has also made a reference to *Tofan Singh v. State of Tamil Nadu* (2021) 4 SCC 1. It is



argued that that the capacity of non-State actors to invade homes and privacy has got enhanced in recent times as observed in Puttaswamy Case (Supra) (Para 472-473). It is submitted that while it may be erroneous to claim privacy in respect of information available in public domain, but there are certain recognized exceptions to the suit which are:

(i) When a female is the victim of a terrorist hostage situation leading to her barbaric murder then her name, image and character should not be further be subjected to indignity by being publicized in press/media. (R. Rajagopal Vs. State of Tamil Nadu AIR 1995 SC 264 and Phoolan Devi. Vs. Shekhar Kapoor and Ors. 57 (1995) DLT 154.

(ii) Interest of decency and bona fide gesture, requires the defendants to approach the plaintiff at the outset at the time for conception of idea for movie about the reference to their daughters' and roles therein or any other character resemblance.

23. It is further argued that “*in public interest*” is different from “*what is of interest to the public.*” These are two separate concepts having different parameters. Public interest is not immutable and even time-gap can make a difference as was observed in Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481 and also in Puttaswamy case (Supra).

24. It is further argued that the plaintiffs have “*a right to be left alone*” which supersedes the right of the defendant to commercially exploit a tragic incident. The plaintiffs who are the grieving mothers of the daughters who died in this unfortunate, tragic incident in unforeseen circumstances, are private persons living a life away from public glare and a life far distinct

from the people who hold public office or are a celebrity. Even after the attack, the plaintiffs chose to mourn the loss of their respective daughters in private, staying away from media glare or any form of unwanted publicity. Neither then nor now, anyone has the license to violate their right to privacy. Dissemination of information by press cannot be equated with the right of a movie maker or Production House to commercially exploit the unfortunate incident at the expense of the fundamental rights of the plaintiff. It has been aptly put by Justice Sanjay Kishan Kaul in *Puttaswamy case* (Supra) that “if an individual permits someone to enter the house it does not mean that others can enter the house”. Reference has also been made to the *CPIO Judgement* (Supra) wherein a reference was made to the observations made by House of Lords in *Campbell v. Mirror Group Newspapers Limited* (2004) UKHL 22, that the mind that has to be examined is “not that of a reader in general, but that of the person who is affected by the publicizing/dissemination of his information”.

25. The plaintiff has further argued that not only has the defendant failed to take the consent whatsoever from the family of the plaintiffs’ prior to launch/production of the movie ‘FARAAZ’, but they have continued to take contrary stand on social media/ entertainment news interviews *vis-a-vis* replies to Legal Notice and Written Statements filed in this Court wherein it is claimed to be work of fiction. News reports show that the defendants have claimed the movie to be based on true events while in total contrast in their Written Statement, it is claimed to be a fictional account of the July, 2016 attack and similar is the contention to the reply to the legal Notice dated 04.09.2021. It is further stated that while on one end, it has been denied that

the film contains the character of clients' daughters but in the Written Statement of defendant no. 4 it is submitted that no character in the film has the names of the plaintiffs daughters and the film does not contain any reference to the plaintiffs names and/or their characters.

26. During the Court proceedings, defendants have given an oral assurance that they would not proceed with the movie. They also sought to address the concerns of the plaintiffs and settlement talks were initiated between the parties. The defendants offered to change the name of the movie; issue a disclaimer; and not to use the names and photos of the plaintiffs' daughters or base any character in the movie on the plaintiffs' daughters. The plaintiffs' agreed to these changes, but defendants failed to confirm all of the above understanding in writing and eventually the settlement talks did not fructify. An affidavit dated 12.01.2022 was filed by the defendants on the directions of the Court, but it was found to be far from satisfactory and it did not in any way disclose any intent of the defendants to agree to any compromise. The defendants were therefore enjoined from screening the movie on 18.01.2022 till the next date of hearing.

27. It is argued that while the screening of the movie "FARAAZ" was under injunction, the defendants proceeded to enter the said movie in the BFI London Film Festival by screening it to the selection team, sometime in June 2022. This was intimated to the Court in August 2022 when they became aware that the Festival intended to make the movie listing public on September, 2022. A belated permission was sought from this Court to enter the film Festival to circumvent the injunction order. In respect of this, a

contempt petition under Order XXXIX Rule 2A has already been filed before this Court.

28. It is argued that while defendants has no hesitation in screening the movie to the Selection Team of the Festival's Organisers, a simple request of pre-screening of the movie to the plaintiff has not only been denied repeatedly but vehemently opposed by the defendants. It is submitted that in several cases like in **RG Anand v. Delux Films (1978) 4 SCC 118** and **Essel Vision Productions Ltd. v. Manisha Kulshreshtha & Ors. Order dated 13th April, 2018 in (FAO 135/2018)**, the courts have granted pre-screening to the aggrieved parties.

29. It is further argued that dissemination of information through literature and film do not merely differ with respect to how much time they take to convey information but also on how the information is conveyed. A film engages in showing, allowing it to retain a credibility which the literature lacks. A film has far-reaching mass appeal and many a times greater than that of public records/information available in form of news articles, texts, books and other such literary formats. A movie is much different from a journalistic/press account in a paper, article or perhaps a book. The scenes in a movie, however depicted are bound to have a cascading effect not just on the plaintiff but also the well-wishers.

30. The defendants are looking at exploiting the unfortunate occasion for purely commercial gains thereby displaying a totally insensitive attitude to the plight of the plaintiffs. The movie is bound to bring back the memories of the worst moments of the plaintiffs' daughters' gruesome murders and open the grieving mothers' wounds afresh. There is no credible, public

record of what exactly happened in the night of 01.07.2016, how the victims were killed by the terrorist and in what order and at what time. It is not even verified if the terrorists were willing to let Faraaz go or that he chose to stay behind with his friends as claimed by some of his family members.

31. The learned counsel has further argued that the decisions in *Krishna Kishore Singh v. Sarla A. Saraogi and Ors* 2021 SCC OnLine Del 3146 (SSR Case), *Bhavnagar University v. Pallittana Sugar Mills Private Limited* (2003) 2 SCC 111, *Bharat Petroleum Corporation Ltd. and Anr. v. N.R. Vairamani and Anr*, MANU/SC/0850/2004, are all on their own factual position and are not parametria to the facts involved in the present case. Likewise, the Judgement of *Khushwant Singh and Anr. v. Maneka Gandhi* 2001 SCC OnLine Del 1030 is not applicable to the present case.

32. It is thus argued that the plaintiffs have a right of privacy and a right of being left alone to grieve in privacy of their homes and the defendants may be enjoined from screening the movie with the sole motive of commercial exploitation of a tragic incident.

33. **Learned counsel for the defendant has argued** that essentially the plaintiffs' entire case rests on three aspects namely:

- (i) Violation of right to privacy;
- (ii) Fair Trial; and
- (iii) Defamation.

34. Insofar as **Right to Privacy** is concerned, the Constitution Bench in *Puttaswamy Case* (supra), *Maneka Gandhi* (supra) and *Rajagopal Case*

(supra) has clearly defined the right of privacy of an individual. It has been held that the respective rights of the individual have to be balanced with the right of free speech under Article 19(1)(a) of the Constitution and there cannot be any pre-publication injunction granted in respect of screening of a movie. The only remedy available is damages. Furthermore, from the pleadings of the plaintiff, it is quite evident that they have no knowledge of the content but their averments are based solely on speculations. It is further asserted that all the information in regard to the tragic incident in which Faraaz was one of the victim, is available in public domain, there being number of books, articles, news and documentaries which have been made and are in public domain. There is no case of irreparable loss and injury made out by the making or screening of the movie.

35. It has been re emphasized vehemently that the names of the daughters are not being used and a disclaimer has been put that this is a fictional piece of work inspired by a true incident. The family of Faraaz has already given a “No Objection” to the use of name of Faraaz in the movie. It is further submitted that majority of the movie is based on the incident which happened on 01.07.2016 and there is no reference of any friendship of Faraaz with the two daughters prior to the incident. Furthermore, the characters of the two daughters have been fictionalized. The movie in no way, has insensitively depicted the incident in which the two daughters of the two plaintiffs unfortunately were also involved.

36. It is submitted that the other limb of arguments of the plaintiffs was infringement of **Right of Fair Trial** but the big question which arises is right of fair trial of whom: some terrorists who are facing trial in Bangladesh

or some terrorists who have been arrested in India. It is asserted that apparently it is the Right of Fair Trial of the terrorists which is sought to be protected which cannot be considered as any ground for restraining the screening of the movie. The Right of Fair Trial, if any, can only be of the accused and cannot be agitated by the plaintiff in this case.

37. It is asserted that the movie is intended to capture humanity, the sacrifice of Faraaz and there is nothing defamatory shown about the girls. It is a movie which takes humanity to a different level and does not defame the two girls in any manner.

38. It is submitted that the defendant is willing to give a special mention about the NGOs which are being run by the two plaintiffs, give a list of all the victims and also give due acknowledgement to the daughters of the plaintiff, if the same is acceptable to the plaintiff.

39. The third limb is of **defamation** but there is not a single averment of what aspect of the movie is defamatory. Rather, from the pleadings it is evident that the entire case of the plaintiffs is based on apprehension and no concrete facts have been averred entitling the plaintiff to interim protection.

40. **Submissions Heard.**

41. The plaintiffs have sought injunction against the defendants from broadcasting/ screening of movie 'FARAAZ' which is claimed to have been made on the real incident of terror attack which took place in Bangladesh. Essentially, for the plaintiffs to be entitled to any interim injunction under Order XXXIX Rule 1 and 2 CPC, the triple test of *prima facie* case, balance

of convenience and irreparable loss and injury has to be satisfied before being able to get any injunctive relief.

## I. PRIMA FACIE CASE

42. The plaintiffs, in order to be successful, have to establish that there is a *prima facie* case i.e. a right exists in the plaintiff with the corresponding obligation in the defendant of which there is an apprehension of breach.

43. The contours of *prima facie* case was explained in **A. Balakrishnan v. Kanagavel Kamaraj and another 1999 (III) CTC 247, Madras High Court**, wherein it was observed that for grant of injunction under Order XXXIX, Rules 1 and 2 of CPC, the plaintiff would have to prove that there is an obligation existing in his favour and he has a subsisting legal right to enforce it. The plaintiff in order to get an order of injunction, must prove that he has got a right and there is a breach of the same by defendant.

44. In the present case, in order to be successful in getting injunction against the defendants, the plaintiffs have claimed that they have *prima facie* case in their favour essentially on three grounds :

- (a) Right to privacy;
- (b) Right to fair trial; and
- (c) Defamation.

### (a) ***Right to privacy***

45. Right to privacy has been defined in the case of **Puttaswamy Case (Supra)** as under:



*'Privacy' is "the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions".*

46. It has been observed that the sphere of privacy stretches at one end to *those intimate matters* to which a reasonable expression of privacy may attach and to *matters of anonymity* on the other hand. A distinction has been made between anonymity on one hand and privacy on the other. Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal.

47. Learned counsel for the plaintiffs have argued that while Right to Privacy has been interpreted as part of Right to Life and Liberty guaranteed as a constitutional right under Article 21 of the Constitution of India, but it is having its genesis in the basic human right. Every human being born has a right to human dignity of which privacy is the most important component. It was argued that the privacy being a Common Law right, it need not be agitated against the State, but can be a subject matter for injunction under common law dealing with torts in the Civil law.

48. In the case of *Rajagopala Case* (supra) the Hon'ble Supreme Court recognized the Right to Privacy to be both, the fundamental right and a right under common law/ tort law.

49. The distinction between natural rights and constitutional rights was succinctly explained in *Puttaswamy Case* (supra) (para 557). It has been

observed that right to privacy of any individual is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. It is born with the human being and extinguishes with human being. It has been further observed that privacy has been hailed to be an intrinsic element of right to life and personal liberty under Article 21 and as a constitutional value embodied in the fundamental freedoms embedded in Part III of the Constitution. Whether the privacy has the nature of being both in common law right as well as a fundamental right, in both forms it is identical.

50. It was further observed that the Common Law rights are horizontal in their operation. When they are violated by one's fellow men, he can be named and proceeded in an ordinary court of law. The constitutional or fundamental rights on the other hand, provide a remedy against the valued right by the State as an abstract entity as well as by identifiable public officials being individuals clothed with powers of the State. It is perfectly possible for an interest to be simultaneously recognized as a common law right and a fundamental right.

51. Having concluded that Right to Privacy is the right exalted to the level of basic human right violation of which gives a right to seek injunctive remedy under the law of Torts, no further discussion is required on this aspect to hold that right to privacy being a basic human right, is entitled to be protected under common law by way of an injunctive relief.

52. Now the facts need to be considered to ascertain whether on the facts of the case, if *prima facie* case is made out in favour of the plaintiffs.

(i) **Right to Privacy: a right in *personam*:**

53. The **first aspect** for consideration is whether this right extends even after the death of a person and can be agitated by the legal heirs to protect the dignity of the person who is no more in this world.

54. The Madras High Court in the case of *Managing Director, Makkal Tholai Thodarpu Kuzhumam Limited v. Mrs. V. Muthulakshmi*, (2007) 6 Mad LJ 1152, held that the right to privacy does not subsist after the death. Therefore, it was held that no case was made out for grant of interim injunction to restrain the release of the serial “*Santhana Kaadu*” based on the life of Late forest brigand *Veerappan*. In the said case while considering the interim injunction application it was observed that the Right to Privacy of the plaintiff and her daughters would not be affected and there shall be no humiliation of the plaintiff and the daughters, having safeguarded their interest while disposing of the interim injunction application.

55. In *Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair*, (1986) 1 SCC 118 it was observed that under the Common law the general rule was that on the death of either party extinguishes the cause of action in Tort by one against the other. This was expressed by the maxim *actio personalis moritur cum persona* (a personal action dies with the person). It was thus, held that in a suit for defamation, the cause of action does not survive in favour of the legal heirs and it being the personal right and the suit has to necessarily fail.

56. In the case of *Deepa Jayakumar v. A.L. Vijay & Ors.* 2021 SCC OnLine Mad 2642, the petitioner who was a near relative of the Former

Chief Minister sought an injunction on a web series of the respondents by asserting posthumous rights in the life history of a great leader; and telecast of the same through defendant no. 2 purely on commercial basis against which an injunction was sought by the grandson/defendant. It was claimed that since T.V Serial was purely a business venture, the plaintiff took the objection that the defendants have no right to make the movie on this national leader without the knowledge and consent of the plaintiff since the defendant were not the competent person to make such films.

57. It was observed in Deepa Jayakumar (supra) that the “right of privacy of an individual”, cannot be inherited after his or her death by his legal heirs. It is clear that a privacy or reputation earned by a person during his or her life time, extinguishes with his or her death. After the death of a person, the reputation earned cannot be inherited like a movable or immovable property by his or her legal heirs. Such personality right, reputation or privacy enjoyed by a person during his life time comes to an end after his or her life time. Therefore, the court was of the opinion that “posthumous right” is not an “alienable right” and the appellant/plaintiff is not entitled for an injunction on the ground that the “posthumous right” of her aunt is sought to be sullied by the respondents/defendants by reason of the release of the film titled as “*Thalaiivi*”.

58. In the case of A. Balakrishnan (supra), it was observed that history of a national leader is not an asset which could be inherited by any person nor can the plaintiff say that what late *Kamaraj* did for the Nation, was for himself or that he is a sole beneficiary. In this context, it was observed that making of movie on a National Leader, on the basis of various reports which

have already been published in journals, weeklies and newspapers would give any case to the plaintiff that these publications have affected the reputation of the family of a great Leader. The basic dilemma about the need to balance two important rights one is Right of Freedom of Speech and Expression including artistic expression and the other is Right to Privacy, thus got addressed. While both are fundamental rights, but a balance has to be struck and the boundaries and contours of these two rights have to be determined both tentatively and definitely for the purpose of grant of interim relief and also for final disposal.

59. In today's world and technology has become extremely intrusively pervading into every aspect of a life where it is to a liking or not. To find an area within which a person may be left alone is the purpose of the action. Reliance may also be placed on the judgement of Court of Appeal in *Metter v. Los Angeles Examiner* (supra) of 1939 where the Court held that where one willingly or not, becomes an actor in the occurrence of the general or public interest, it is not an evasion of his right to privacy to publish his photograph with an account of such occurrence. The Court also held that the right of an invasion of right of privacy was purely personal and that the plaintiff must prove invasion of his own right of privacy before he can seek any protection.

60. In *Kelly v. Johnson Publishing Co.* 160 Cal. App. 2d (Cal. Ct. App 1958) decided on May 22, 1958, the Court of Appeal of California was considering the suit for wrongful invasion of the right of privacy and for libel filed by the two sisters of deceased boxing champion in regard to the Article published about his life making certain observations which the two

sisters considered libelous. It was claimed that the publication was done falsely, maliciously, wrongfully and unlawfully without occasion or excuse and had caused plaintiffs great mental pain and anguish, humiliation and mortification and had cause that evil opinion of their deceased brother in the minds of his former associates and the public generally and was far from the truth.

61. The first ground on which the suit was sought to be maintained was the ground of right to privacy. A reference was made to *Prosser on Torts*, 2d ed., 641; *Mau v. Rio Grande Oil, inc*, 28 F Supp. 854, 846, wherein it was observed that right of action for violation of 'ones' right of privacy being purely a personal one, appellant must allege and prove an invasion of his own right of privacy before he can recover damages (*Metter v. Los Angeles Examiner*; 35 Cal. App. 2d. 304, 310).

62. In *Kelly (Supra)*, it was observed that a gist of the cause of action in a privacy suit is not injury to the character, reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any affect which the publication may have on the property, business, pecuniary interests or the standing of the individual in the Committee. It concerns one's own peace of mind while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective, it impairs the mental peace and comfort of the person and it does not extend to the plaintiff's dog. The action of right to privacy is a personal one and cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity. The cause of action does not survive the individual and cannot exist after death. It was observed that no

cause of action accrues in favour of the plaintiff where defendants alleged wrong acts or directed towards the third person unless it is proved that the privacy right of the plaintiff have been invaded. There is neither any reason nor authority in the case that there should be extension of liability to cover such a situation. Such rule would open the Courts to persons whose only relation to the asserted wrong is that they are related to the victim of the wrongdoer and were therefore brought unwillingly into the limelight. Every defamation, false imprisonment, and malicious prosecution would then be an actionable invasion of the privacy of the relatives of the victim. The rule therefore appears to be uniform that the right of privacy cannot be asserted by anyone other than those whose privacy is being invaded. The publication which was an article about the deceased brother of the plaintiff was held to be not invading the privacy of the plaintiff and or having brought them into unjustifiable or any other publicity.

63. In *Kelly v. Post Publishing Co.* 327 Mass 275, it was observed that the law does not provide the remedy for every annoyance that occurs in everyday life. In the said case, the only reference to the plaintiff was that the girl whose body appeared in the photograph was their daughter. This can hardly be interfered with their privacy.

64. **In the present case**, the plaintiffs are the respective mothers of two girls who also became a victim in the terror attack which took place in Bangladesh. The Right of Privacy which is agitated by the plaintiffs is that of the two daughters who have admittedly died in the attack. As already discussed above, Right to Privacy is essentially is a right in *personam* and is not inheritable by the mothers/ legal heirs of the deceased persons.

65. The only circumstance wherein the plaintiffs may be able to sustain an injunctive relief is in the case *of appropriation of identity as defined by Prosser* which means that where one person uses another's name, the focus is on plaintiff's name as a symbol of identity and not on the name *per se*.

66. In the present case, the mother's right to privacy is in no way getting impinged by the movie which is sought to be screened by the defendants. Neither is the privacy of the mother's/ plaintiff's in any way being compromised nor is there any affront to their dignity and privacy, merely because their two daughters happened to be the victims of the terror attack. The plaintiffs may have been successful if their personal right to privacy was in any way being infringed by the making of this movie but unfortunately, no such circumstance has been pleaded by the plaintiffs.

67. Learned counsel for the plaintiff has vehemently argued that the plaintiff's have a *right to be left alone*. The outreach of a movie is much more than of the literary material, articles and write ups which may be available in the public domain. There may be plethora of printed material available in the public domain, but the fact remained that the featuring of the movie would result in trauma and emotional upheaval to the plaintiffs, every time the movie is featured or viewed. It is asserted that the two plaintiffs are entitled to be left alone to grieve in privacy and they may not be subjected to emotional trauma by repeated screening of movie, for this, reference may be made to *Bradley v. Cowles Magazines, Inc.* 26 III. App. 2d 331(III.App. Ct. 1960), Appellate Court of Illinois, First District, First Division, wherein a suit for damages was brought by the mother in respect of an Article published revealing the facts concerning the murder of the child. The



question which came up was that the right of privacy and damages for the anguish of the mother caused by the publication concerning the son. *It was observed that guaranty of the right of privacy is not a guaranty of hermitic seclusion. We live in a society geared in the opposite direction; a society that makes public demands and imposes public duties. Every election thrusts upon the shyest and most retiring citizen demands and obligations. A political campaign brings forth public insistence that he vote. Every television and radio program blares forth exigent calls to do or buy this or that. The census taker asks for the furnishing of private information. The mail brings importunities of every kind. The telephone serves a like purpose. Finally, the revenue collector pries into the very heart of what used to be a person's private affairs — how much he earned, how much he spent, how much he gave away.* This is the background of custom and habit against which the right of privacy must be defined. To find an area within which the citizen must be left alone is the purpose of the action. Even so, chance or destiny may propel a private citizen into the public gaze. It is important, therefore, that in defining the limits of this right, courts proceed with caution.

68. First and the foremost it has been explained by the defendants that there are innumerable articles, books, news reports and other material which has been extensively written and has covered the horrendous terror attack. To say that screening of a movie would cause any kind of trauma and upheaval may not be correct. Moreover, it also needs to be considered that the incident had happened in the year 2016 and the movie is intended to be screened now in 2022. The proximity to the incident is also proportionate to

the trauma that may be caused to the plaintiffs. The proximity to the incident is a relevant consideration to decide if this can be a reason for injuncting the screening of the movie.

69. In this context reference may be made to the affidavit filed on behalf of the defendants wherein a **Disclaimer** is sought to be given to say that *“this film is inspired by the attack that took place at the Holey Artisan Bakery, in Dhaka, Bangladesh on 01<sup>st</sup> July, 2016. Elements contained in this film are pure works of fiction. It is not a documentary and does not claim to accurately reflect those incidents that may have occurred on that dark and horrific night. Certain characters, institutions and events in the film are composites/dramatized/fictional and have been used for cinematic reasons and for dramatizing the performances portrayed in the film. The makers have taken creative liberty in dramatizing/fictionalizing events show in the film. The produce(s)/director/writers do not endorse, warrant, represent or make any claim pertaining to the accuracy or historical correctness of any event(s) and/or incidents shown in the film. The makers fully acknowledge and respect other perspectives and viewpoints with regards to the subject matter of this film. No identification of any actual persons, places, buildings and products is intended or should be inferred”*. The disclaimer *prima facie* takes care of the concerns expressed by the plaintiff. It may also be noted that during the course of the arguments it was stated on behalf of the defendants that the movie does not depict any relationship between Faraaz and the two girls prior to the date of incident. Majority of the movie concerns itself with the terror incident which had happened.

70. The other apprehension expressed on behalf of the plaintiffs was that there may be laudatory role assigned to Faraaz by depicting him to have gone to another level of humanity, as the saviour of the two girls; thereby indirectly undermining the character of the girls. However, it has been explained and assured that the names of the two girls have not been used and in no way is the identity of the two girls disclosed. Merely because the two girls may get identified from the material already available and the extensive reporting of the incident, would not be a sufficient ground to create an apprehension of a laudatory role given to Faraaz and rise into a higher level of humanity by sacrificing his own life to save the life of the two girls which is intended to be brought in the public domain.

71. It is argued that the laudatory manner in which Faraaz may be depicted may turn derogatory in discussions in public. The apprehensions as has been rightly pointed out which are harboured by the plaintiff do not rest on any concrete material but are based on what may be depicted in the movie. It is evident from the plaint that there is no concrete basis of the apprehension expressed by the plaintiffs but it is in the realm of conjectures which cannot give any *prima facie* case in favour of the plaintiffs.

72. The '**right to be left alone**', undoubtedly, is an aspect of Right to Privacy, but it can also operate within its limits and in the given circumstances, it cannot be termed as a right to be left alone especially when the two plaintiffs get barely any mention in the entire movie. The plaintiffs have not been able to make out any case of 'being left alone' once breach of Privacy itself has not been established.

**(b) *The Right to Fair Trial.***

73. *The second aspect is the Right to Fair Trial.* In the case of **Krishna Kishore Singh v. Sarla A. Saraogi & Ors. 2021 SCC OnLine Del 3146** while considering an injunction for restraining the defendants from showing a movie depicting the life of Sushant Singh Rajput it was observed that though right to fair trial is a fundamental right, but the Courts and Investigating Agencies do not rely upon cinematographic films to render a decision or carrying on their investigations. It was further observed that the pre-publication injunction must be granted only in exceptional circumstances because of the importance attached to the competing rights of free speech of the defendants. Learned Counsel for the defendants had argued that the plaintiffs have claimed right to fair trial, but of whom; of the terrorists who are the accused facing the trial. If so is the case then this cannot be claimed as a ground for seeking injunction against the defendants. This argument may not be totally acceptable in view of the fact that during the trial it is not only the rights of the accused which are determined, but also those of the victim. Any kind of mis-carriage of justice impacts the accused as well as the victim in the same way. However, in the present case though a right to fair trial has been pleaded, but it has not been explained as to whose right to fair trial has been claimed and in what manner would the movie impact the right of fair trial of any of the stakeholders.

**(c) *Defamation and Emotional Trauma:***

74. *The third aspect which has been agitated is Defamation.* Defamation of a deceased person does not give rise to a civil right of action and common law in favour of the surviving family or relatives who are not themselves

defamed. A libel on the memory of the deceased person is not deemed to inflict on the surviving relatives of any such legal damage as sustained a civil action for defamation. The defamatory matter must be published concerning the plaintiff. As a matter of sound public policy, malicious defamation of the memory of a dead is condemned as an affront to the general sentiments of morality and decency, and the interest of society demand its punishment through the criminal courts but the law does not contemplate the offence as causing any special damage to another individual, though related to the deceased, and therefore, it cannot be made the basis for recovery in a civil action. *Where one is supposed to stand upon his own merits and where success or failure is entirely dependent upon the accidents of rank of family connection.* A defamation of such character however grievous or disturbing can afford no injury that can be measured by a pecuniary standard.

75. In this context it may be observed that **emotional trauma** *per se* may be relevant as a component of defamation, but cannot be the sole basis for making a *prima facie* case in favour of the plaintiffs.

76. The elements of *prima facie* case for the tort of **intentional infliction of emotional distress** were summarized in *Cervantez v. J. C. Penny Co.* (1979) 24 Cal. 3d. 579, 593 as follows: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Davidson v. City*

*of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal. Rptr. 252, 649 P.2d 894].)

77. In *Grimes v. Carter* (1966) 241 Cal. App. 2d 694 [50 Cal.Rptr. 808, 19 A.L.R. 3d 1310], the court was faced with the problem of whether the statutory requirement (since repealed) of posting a bond before bringing an action for defamation could be bypassed by a plaintiff who brings an action for the intentional infliction of emotional distress rather than defamation. The court, at page 702, stated: "*It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort.* To accede to the contentions of the plaintiff in this case would be, in the words of *Prosser*, a step toward 'swallowing up and engulfing the whole law of public defamation.' If plaintiff should prevail in her argument it is doubtful whether any litigant hereafter would file a slander or libel action, post an undertaking and prepare to meet substantial defenses, if she could, by simply contending that she was predicating her claim solely on emotional distress, avoid the filing of such bond and render unavailable such substantial defenses as, for example, justification by truth."

78. In *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal. App. 3d 573 [131 Cal. Rptr. 592], the court, in disallowing a cause of action for the intentional infliction of emotional distress, stated: "To allow appellant to

proceed with this cause of action would substantially defeat the purpose of the privilege enunciated in section 47 would exalt a judicially derived cause of action (see *Prosser, Intentional Infliction of Mental Suffering: A New Tort* (1939) 37 Mich.L.Rev. 874) above clear legislative intention and operate as a severe deterrent to communications otherwise protected. Therefore, no such cause of action, based upon the defamatory nature of a communication which is itself privileged under the defamation laws, can be permitted.” Similarly, in the case at bench, to allow an independent cause of action for the intentional infliction of emotional distress, based on the same acts which would not support a defamation action, would allow plaintiffs to do indirectly that which they could not do directly. It would also render meaningless any defense of truth or privilege.

79. The defamation, as already discussed above, is a personal right and is not pre-emptive in nature. Without having seen the movie and without there being any basis, the plaintiffs have not been able to explain as to which aspect of the movie is defamatory. The defamation essentially can be asserted only after the movie has been released.

80. In *Flynn v. Higham* 149 Cal. App. 3d 677 (Cal. Ct. App. 1983), Court of appeal of California, Second District, Division one, held that where the plaintiffs had filed a complaint captioned “defamation of character against the Publishing Company and various *Doe*’s” ,wherein the deceased father of the plaintiff was described as homosexual and a Nazi Spy. The theories for recovery of damage was propagated as defamation, intentional infliction of emotional distress and invasion of privacy. It was re-affirmed and reiterated that defamation of a deceased person does not give rise to a

civil right of action and common law in favour of family members; libel on a memory of a deceased person is not deemed to inflict on the surviving relatives of the deceased any such legal damage as will sustain an action for defamation.

81. *The plaintiffs have not been able to show that there is any prima facie case in their favour for seeking the injunction on any of the aspects agitated by them.*

## **II. THE BALANCE OF CONVENIENCE.**

82. It may be mentioned that it is almost for the last one year that the movie has been in making, but the injunction has been sought after about 8-9 months. Moreover, much has already been spent in making of the movie. Therefore, the balance of convenience lies in favour of the defendants with the right to seek damages in case any violation of right of the plaintiff is established on screening of the movie.

83. Much has been argued about the adamancy of the defendants to not give a pre-screening of the movie to the plaintiffs. It is argued that such adamancy only confirms the apprehensions of the plaintiffs of the movie being derogatory and defamatory towards two daughters of the plaintiffs. However, this argument again does not hold any merit for the simple reason that if any aspect of the movie despite the assurances and the disclaimer given by the defendants is found to be defamatory, the remedy can still be sought by the plaintiffs after the movie is released. No balance of convenience is made out in favour of the plaintiffs.



### **III. IRREPARABLE LOSS AND INJURY:**

84. For same reason irreparable loss and injury would be caused to the defendants if after having invested their money in preparing the movie, they are enjoined from screening the same, essentially when the plaintiffs have not been able to demonstrate what irreparable loss and injury is caused to the plaintiffs if the movie is screened.

### **CONCLUSION:**

85. It may thus be concluded that the plaintiffs have not been able to establish any of the three limbs i.e. *prima facie* case, balance of convenience or irreparable loss or injury in their favour. The plaintiffs are, therefore, not entitled to injunction.

86. The interim stay order stands vacated. The application is hereby dismissed.

### **CS(OS) 498/2021**

List this matter before the learned Joint Registrar for completion of pleadings on other applications on 24<sup>th</sup> November, 2022. In the mean while, proposed issues be filed by the parties.

**(NEENA BANSAL KRISHNA)**  
**JUDGE**

**OCTOBER 14, 2022**  
**va**