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

% **Order reserved on: 11 January 2023**
Order pronounced on: 12 January 2023

\+ I.A. 507/2023 in CS(OS) 20/2023

SUSHIL ANSAL ..... Plaintiff

Through: Mr. Siddharth Agarwal, Sr. Adv. with Mr. Gautam Khazanchi, Mr. Kumar Vaibhav, Ms. Somaya Gupta & Ms. Sukanya Joshi, Advs.

versus

ENDEMOL INDIA PVT. LTD. & ORS. ..... Defendants

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Nidhish Mehrotra, Ms. Anushree Rauta, Mr. Rahul Dhote, Mr. S.S. Ahluwalia, Ms. Devangini Rai, Mr. Mohit Bangwal, Ms. Narayani P. Chaudhary, Advs. for D-1

Mr. Nidhish Mehrotra, Ms. Anushree Rauta, Mr. Rahul Dhote, Mr. S.S. Ahluwalia, Ms. Devangini Rai, Mr. Mohit Bangwal, Ms. Narayani P. Chaudhary, Advs. for D-2

Mr. Rajiv Nayar and Mr. Amit Sibal, Sr. Advs. with Mr. Manav Kumar, Mr. S. Debarata Reddy, Ms. Shivangi Sharma, Mr. Saurabh Seth, Ms. Manjula

Das, Mr. Vinay Tripathi, Mr Rishabh Sharma, Mr. Darpan Sachdeva and Mr. Abhishek Grover, Advs. for D-3

Mr. Vikas Pahwa, Sr. Adv. with Ms. Raavi Sharma, Ms. Manisha Jain for D-4 & 5

Ms. Vrinda Bhandari, Ms. Natasha Maheshwari, Mr. Madhav Aggarwal, Advs. for D-6

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. The present suit has been instituted for a decree of mandatory and permanent injunction restraining defendant No. 3 from exhibiting, broadcasting, telecasting and releasing on its digital/OTT platforms, the series titled 'Trial by Fire'. The web series is to be aired on 13 January 2023. The plaintiff further seeks a decree of mandatory and permanent injunction against the defendants from publishing the book **'Trial by Fire: The Tragic Tale of Uphaar Fire Tragedy'**[1], including and extending to publication of audio/video adaptations of the Book and from exhibiting, broadcasting, telecasting defamatory, libellous, slanderous and false statements made by way of the Book on digital / OTT platforms. A further relief of delivery-up is also sought

[11] The Book

against the defendants.

2. The Court has heard Mr. Siddharth Agarwal, learned senior counsel appearing for the plaintiff, Mr. Sethi who appeared for defendant Nos. 1 and 2, the producer and co-producer of the web series in question, Mr. Nayar and Mr. Sibal, learned senior counsels, on behalf of defendant No. 3, Mr. Pahwa, learned senior counsel who appeared for defendant Nos. 4 and 5, the authors of the Book and Ms. Bhandari, learned counsel who appeared for defendant No. 6 which had published the Book.

3. Parties have addressed submissions before this Court on the application for ad interim injunction which has been moved and in terms of which prayers identical to those that are sought in the principal suit are claimed by way of interim injunctive reliefs. For the purposes of appreciating the submissions which have been addressed, it would be pertinent to note the following salient facts.

4. On 13 June 1997, a fire broke out at the erstwhile Uphaar Cinema situate at Green Park, New Delhi. 59 innocent persons are stated to have lost their lives in the said incident. Investigation in respect of that incident was transferred to the Central Bureau of Investigation on 23 July 1997. Apart from the above, FIR No. 207/2006 is also stated to have been registered against the plaintiff and other named accused in relation to allegations pertaining to evidence tampering. On 20 November 2007, the competent court passed judgment in Sessions Case No. 13/2007 [hereinafter for the sake of brevity to be referred to as the **"Main Uphaar Case"**] wherein

the plaintiff was convicted for offences under Sections 304A together with Sections 337 and 338 of the **Indian Penal Code, 1860**[2] read with Section 14 of the Cinematograph Act, 1952. The plaintiff was sentenced to rigorous imprisonment for a period of two years along with a fine of Rs. 5,000/-. The plaintiff is stated to have preferred an appeal against the aforesaid judgment of conviction which was disposed of by way of an order of 19 December 2008 with this Court while upholding the conviction, modifying and reducing the sentence imposed to a period of one year together with fine of Rs. 5,000/-.

5. The plaintiff is stated to have assailed the aforesaid judgment by way of Crl. Appeal No. 597/2010 before the Supreme Court. On the said appeal, the Supreme Court upheld the conviction of the plaintiff. However, the learned Judges comprising the Bench differed on the issue of sentencing. The matter was consequently referred to a Bench comprising of three learned Judges of the Supreme Court. On 22 September 2015, the Supreme Court enhanced the punishment awarded to the plaintiff from one year to two years with an option to pay a fine of Rs. 30 crores in lieu of the additional one year of imprisonment which had come to be imposed. It was further provided that in the event the fine were to be paid by the plaintiff, the sentence would stand reduced to the period of incarceration already undergone. The Association of Victims of Uphaar Tragedy preferred review petitions which came to be dismissed on 09 February 2017.

6. Insofar as the evidence tampering case is concerned, the Trial

[2] IPC

Judge vide judgment dated 08 October 2021 convicted the plaintiff under Sections 120B read with Section 409, Section 120B and Section 201 read with Section 120B of IPC. The plaintiff was sentenced to undergo simple imprisonment for seven years for the aforementioned offences and further directed to pay a fine of Rs. 2.25 crores. An appeal was preferred by the plaintiff which came to be disposed of on 18/19 July 2022 with the Appellate Court while upholding the conviction, reducing the imprisonment of the plaintiff to the period of imprisonment already undergone subject to the payment of a fine of Rs. 3 crores. Undisputedly, the fine so imposed is stated to have been paid by the plaintiff without prejudice to its rights. The Association of Victims of Uphaar Tragedy have preferred a revision petition before this Court against the aforesaid order of the Appellate Court which is presently pending consideration. The plaintiff has also preferred a revision petition which too remains pending on the board of this Court.

7. It is alleged that on 04 January 2023 the official trailer of the web series "Trial by Fire" came to be released. It is alleged that the said series claims to be based on the Book authored by defendant Nos. 4 and 5 and that it purports to be based on true events. The plaintiff asserts in the suit that his acquaintances reached out to him and brought to his attention that the trailer of the impugned series would lead to a lowering of their opinion of the plaintiff. It is further asserted that it was only upon discovering that the impugned series was based on contents of the Book authored by defendant Nos. 4 and 5 that he

purchased a copy of the same on 08 January 2023 and upon reading the same, discovered that it was replete with false and libellous statements. These facts and assertions are evident from a reading of paragraph 81 of the plaint. In paragraph 81, the plaintiff further asserts that the aforesaid events are causing and will cause loss of reputation, humiliation, stigmatisation and irreparable injury. It is further asserted that if the web series were to be published, it would also have a deleterious effect on the outcome of the revision petitions which are pending before this Court and arise out of the evidence tampering case. In the plaint, the plaintiff asserts in paragraph 26 as follows: -

> "26. It is a matter of record that the impugned series is purportedly based on the Impugned Book. It is stated that the Book was published and released in 2016 i.e. at the time when the review petitions re: Main Uphaar case were still pending before the Hon'ble Supreme Court of India. The Plaintiff was not aware of the contents of the Impugned Book or the tone, tenor and version of events presented by the authors, and had no occasion to read it as the Plaintiff's time and resources were devoted to contesting the pending legal proceedings, and the effects thereof."

8. Referring to certain statements directed against the plaintiff and carried in the Book, it is asserted that the same is based on a one-sided narration of the unfortunate incident which occurred and that the tone of the entire work is based on exaggerations, hyperbolic statements that are clearly prejudicial to the plaintiff. It is further asserted that while the plaintiff was ultimately convicted for the offence of causing death by negligence referable to Section 304A of the IPC, the Book carries various defamatory statements including allegations that the

plaintiff is a murderer and a killer. According to the plaintiff, a series which is based on the Book would necessarily result in infringing the right of privacy guaranteed to the plaintiff quite apart from causing irreparable harm to his reputation.

9. Appearing for the plaintiff, Mr. Agarwal, learned senior counsel had while taking the Court through some of the extracts of the Book contended that since it contains libellous statements and allegations against the plaintiff, it is manifest that the web series would follow an identical tenor and thus clearly establishing the allegation of defamation that has been levelled by the plaintiff. It was submitted that the manner in which the entire incident has been portrayed in the Book is clearly at variance with the facts which came to be recorded in the course of trial and that a reading of its contents would establish that they have been made in reckless disregard of the concurrent findings which came to be returned against the plaintiff in the course of the criminal trial. Mr. Agarwal laid emphasis on the fact that the trailer of the series had already garnered approximately 1.5 million views and is being widely shared on various online platforms. Learned senior counsel argued that the reach and impact of the visual medium has always been recognised as being far greater than that of a written work. Mr. Agarwal contended that the Court must necessarily take into consideration the impact which the web series is likely to have and cause irreversible harm and prejudice to the plaintiff. It was thus urged that an immediate and a pre-broadcast injunction is clearly warranted.

10. Referring to the description of the series as appearing on the official web page of defendant No. 3, it was submitted by Mr. Agarwal that the reference to a "25 year long battle" clearly demonstrates that the web series is likely to negatively impact and prejudice the trial of the evidence tampering case also. It was in that context that it was asserted that the streaming of the impugned series would not only cause reputational damage to the plaintiff but also unfairly prejudice its case in the pending revision petition.

11. Appearing for defendant No. 3, Mr. Nayar and Mr. Sibal, learned senior counsels, submitted that the production of the web series which is to be ultimately aired on 13 January 2023 was a fact which was duly publicised right from 18 December 2019. Learned senior counsels have placed for the consideration of the Court various press releases and articles which had appeared at the relevant time and alluded to the production of the web series based on the Book written by defendant Nos. 4 and 5. Mr. Nayar had also referred to various articles which had been published in leading newspapers in this respect. It was further pointed out that the trial and conviction of the plaintiff was a fact which had been widely reported in various newspapers during the course of the criminal proceedings. It was further pointed out that the fact that the Supreme Court had ultimately provided no jail term, except the term already undergone, to the plaintiff and other convicts and had merely imposed a fine were facts which were also widely reported and available in the public domain. Learned senior counsel had also drawn the attention of the Court to

various articles which appeared in leading newspapers reporting the conviction of the plaintiff in the evidence tampering case. These newspaper articles had been published way back in November 2021. It was then pointed out that defendant No. 3 had on 14 December 2022 itself disclosed its intent to broadcast the impugned web series on its OTT platform with effect from 13 January 2023. The aforesaid announcement by defendant No. 3 was also reported in leading newspapers. The submission in essence was that the plaintiff was clearly not entitled to ad-interim injunction having chosen to approach the Court at the last minute. Learned senior counsel further referred to the Disclaimer to be carried as part of the web series and submitted that it had been duly clarified that the web series was inspired by the Book authored by defendant Nos. 4 and 5 and that since it was a work of fiction, any resemblance or similarity of characters was purely unintentional and co-incidental. The Disclaimer which was placed for the perusal of the Court reads thus:-

> "This series is a work of fiction, inspired by the book titled "Trial By Fire: The Tragic Tale of the Uphaar Fire Tragedy" written by Neelam Krishnamoorthy and Shekhar Krishnamoorthy, published in 2016.
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> Certain characters, places, names and events in this series are fictional and have been creatively conceptualized for the purposes of dramatization. The series does not make any claims of authenticity or correctness of any events, incidents, depicted in the series. Any resemblance or similarity of the characters, places, names and events in the series to any actual events, entities, places or persons (living or dead) is purely unintentional and coincidental."

12. It was contended on behalf of defendant No. 3, that the grant of

a pre-publication injunction is to be considered only in exceptional situations and must meet an extremely high threshold. Reliance in this respect was placed on the decision rendered by a Division Bench of this Court in **Khushwant Singh and Another vs. Maneka Gandhi**[3]**.** The relevant passages of the said decision are extracted hereinbelow: -

> **"59.** It would be appropriate to first consider the portions which have been extracted by the respondent in her plaint as derogatory and defamatory. It is not seriously disputed before us on behalf of learned counsel for the respondent that as mentioned in the chart, other than the three passages complained of, the others had already been commented upon and published in previous magazines and books. We have considered the submissions of learned counsel for the respondent that the languagte for expressing the subject matter gives a different connotation than what was published earlier. We are unable to agree with the said submission advanced on behalf of counsel for the respondent. The words may not be exact but the concept and meaning sought to be conveyed are more or less same, if a comparison is made of the passages complained of and the publications in India Today of April 15, 1982, April 30, 1982, Pupul Jaykar's and Ved Mehta's book. In so far other three passages are concerned the author has owned up to the statements on the basis of either the information which he has or as his own views and comments. The question thus to be considered is the effect of such prior publications on the claim made by the respondent in respect of these publications. There is force in the submission of the learned counsel for the appellants that not only was there wide publicity about these aspects in view of the same relating to the then first family of the nation but the respondent possibly drew strength from the media to put forth her point of view against what she claimed was the injustice meted out to her by her late mother-in-law. Thus the controversy in question which is being commented upon did not really remain in the four walls of the house but drew wide publicity and comments even to the extent of poll surveys being carried out in respect of the controversy in question. No grievance was made at that stage of time. It is not a case of prevention of repeated defamatory statements as is sought to be made out by learned counsel for the respondent. The reliance placed by learned

[3] 2001 SCC OnLine Del 1030

counsel for the respondent on the judgment of the Madhya Pradesh High Court in *Harishankar's case* (supra) and of the Andhra Pradesh High Court in *K. V. Ramanaiah's case* (supra) is thus misplaced. The controversy in question related to the disputes between the respondent and her late mother-in-law, the then Prima Minister Mrs. Indira Gandhi. The respondent did not make grievance about the reporting of their disputes in the press. The nature of controversy was more or less the same as is now sought to be published by appellant No. 1 in his autobiography and thus the respondent cannot make a grievance of the same matter now being published so as to seek prevention of the publication itself. The silence of the respondent and her not making a grievance against the prior publication prima facie amounts to her acquiescene or at least lack of grievances in respect of publication of the material. Needless to add that the remedy of damages against the appellant is still not precluded in so far the respondent is concerned.

60. The right to publish and the freedom of press, as enshrined in Art. 19(1)(a) of the Constitution of India is sacrosanct. This right cannot be violated by an individual or the State. The only parameters of restriction are provided in Art. 19(2) of the Constitution of India. The total matter of the book is yet to be published, including the chapter in question. The interim order granted by the learned single Judge is a pre-publication injunction. The contents of subject matter had been reported before and the author stands by the same. In view of this we are of the considered view that the respondent cannot make a grievance so as to prevent the publication itself when the remedy is available to her by way of damages. We are not examining the statements attributed to appellant No. 1 on the touchstone of defamation. It would not be appropriate to do so for us at this stage but what we do observe is that the statements are not of such a nature as to grant injunction even from publication of the material when the appellants are willing to face the consequences in a trial in case the same are held to be defematory and the pleas of the appellants of truth are analysed by the trial Court.

61. It is no doubt true that the reporting of the matter in controversy in the prior publication does not make them public documents as held by the learned single Judge of this Court in *Phoolan Devi's case* (supra). However, the question is not of the documents being public documents but the subject matter being in the ambit of public domain in terms of there being prior reporting of the matter in controversy and the comments on the

same. It may be useful at this stage to consider the judgment in *Phoolan Devi's case* (supra) rendered by learned single Judge of this Court. On a careful reading of the judgment it is apparent that the matter in question was peculiar as it related to the rights being claimed to show a woman being raped and gang-raped if the concerned woman was alive and did not want this to be made public. It was in those circumstances that the order was passed though we may add that subsequently on an apparent settlement the same was made public and the plaintiff therein was compensated in terms of the mutual settlement. In fact the learned single Judge specifically dealt with this aspect and observed that the display and the graphic details of being paraded nude, raped and gang raped does not only hurt the feelings, mutilate the soul, denigrate the person but reduce the victim to a situation of emotional abandonment.

62. An important aspect to be examined is the claim of right of privacy advanced by the learned counsel for the respondent to seek the preventive injunction. This aspect was exhaustively dealt with in the case of *Auto Shankar reported as R. Rajagopal's case* (supra). The Supreme Court while considering these aspects clearly opined that there were two aspects of the right of privacy. The first aspect was the general law of privacy which afforded tortuous action for damages from unlawful invasion of privacy. In the present case we are not concerned with the same as the suit for damages is yet to be tried. The second aspect, as per the Supreme Court, was the Constitutional recognition given to the right of privacy which protects personal privacy against unlawful governmental action. This also is not the situation in the present case as we are concerned with the inter se rights of the two citizens and not a governemntal action. It was in the context of the first aspect that the Supreme Court had given the illustration of the life story written. Whether laudatory or otherwise and published without the consent of the person concerned. The learned counsel for the respondent Mr. Raj Panjwani, sought to draw strangth from this aspect i.e. the lack of consent of the respondent to publish her life story in the autobiography written by appellant No. 1. However, this will give rise to tortuous action for damages as per the Supreme Court since this is the aspect which is concerned with the first aspect dealt with by the Supreme Court in respect of the invasion of privacy.

64. It is also relevant to state that the Supreme Court in *R. Rajagopal's case* (supra) was concerned with the preventive action sought for by governmental authorities. Even there the

Supreme Court did not rule in their favour. The observations in *New York Times' case* (supra) popularly known as *Pentagon's case* succinctly laid down the correct view in this behalf i.e. that there is a heavy burden on governmental authorities to show justiication for imposition of a prior restraint. The remedy would thus be by way of damages and not an order of restraint.

67. We are unable to accept the contention advanced on behalf of the respondent by Mr. Raj Panjwari that if the statements relate to private lives of persons, nothing more is to be said and the material must be injuncted from being published unless it is with the consent of the person whom the subject matter relates to. Such pre-censorship cannot be countenanced in the scheme of our constitutional framework. There is also some force in the submission of the learned counsel for the appellant that the prior publication having occurred much prior to the suit being filed, the principle denying the relief for interlocutory injunction where the plaintiff has been dilatory in making the application, as observed in the *Indian Express Newspaper's case* (supra) would also apply to the present case.

69. People have a right to hold a particular view and express freely on the matter of public interest. There is no doubt that even what may be the private lives of public figures become matters of public interest. This is the reason that when the controversy had erupted there was such wide publicity to the same including in the two editions of India Today. As observed in *Silkin* v. *Beaverbrook Newspapers Ltd.* (supra), the test to be applied in respect of public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury.

70. It is interesting to note that in *Fraser's case* (supra) while considering the proposed publication of Sunday Times, Lord Denning had noted that the Sunday Times had been frank enough to admit that the article would be defamatory of the plaintiff yet Sunday Times claimed that the defence would be that the facts are true. In the present case the first plea is that the statement is not defamatory apart from the fact that it has been published and commented upon in the past. The second plea is that the appellants will prove the truth of the said statements. Lord Denning had observed that the courts will not restrain the publication of an article even where they are defamatory once the defendants expressed its intention to justify it or make a fair comment on the matter of public interest.

> **71.** There is no doubt that there are two competing interests to be balanced as submitted by the learned counsel for the respondent, that of the author to write and publish and the right of an individual against invasion of privacy and the threat of defamation. However, the balancing of these rights would be considered at the stage of the claim of damages for defamation rather than a preventive action for injuncting of against the publication itself.
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> **74.** There have to be great dangers to the community if valuable rights of freedom of speech and expression enshrined under Art. 19(1)(a) of the Constitution of India are to be curtailed. In the observations by the Supreme Court in *R. Rangarajan's case* (supra), Benjamin Franklin was quoted where he observed "men differ in opinion, both sides ought equally to have the advantage of being heard by the public."

13. It was further contended that no injunction in any case is liable to be issued based merely on a teaser or a trailer that may have been aired. It was submitted that till such time as the web series is viewed in its entirety and an assessment made with respect to its contents and whether a case of defamation is at all made out even prima facie no injunction is liable to be granted. It was further asserted that since all aspects of the accident which had occurred on 13 June 1997, the criminal prosecution which ensued thereafter and ultimately led to the conviction of the plaintiff was in the public domain, no injunction was liable to be granted. Learned senior counsel submitted that public interest in fact clearly outweighs the apprehension of the plaintiff and therefore also the prayer for ad interim reliefs was liable to be refused. Mr. Nayar and Mr. Sibal also placed reliance upon the following passages as appearing in **R. Rajagopal vs. State of Tamil Nadu[4].**

[4] (1994) 6 SCC 632

"**26.** We may now summarise the broad principles flowing from the above discussion:

(*1*) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(*2*) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(*3*) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false *and* actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in

> matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule…"

14. Mr. Sethi, learned counsel appearing for the production house, the defendant Nos. 1 and 2 here, submitted that the role attributed to the plaintiff and the facts which ultimately led to their conviction constitutes material which has always remained and existed in the public domain and therefore, the prayer for grant of ad interim reliefs is misconceived. Referring to the findings as returned by the Supreme Court in its final judgment in **Sushil Ansal vs. State**[5], Mr. Sethi drew the attention of the Court to the scathing observations and findings that had come to be returned and recorded against the plaintiff. This, according to Mr. Sethi, is evident from the following passages of the aforesaid decision: -

> **"122.** The question then is whether the negligence of the Ansal brothers, the occupiers of the Cinema, was so gross so as to be culpable under Section 304-A IPC. Our answer to that question is in the affirmative. The reasons are not far to seek:
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> **122.1.** In the first place the degree of care expected from an occupier of a place which is frequented every day by hundreds and if not thousands is very high in comparison to any other place that is less frequented or more sparingly used for public functions. The higher the number of visitors to a place and the greater the frequency of such visits, the higher would be the degree of care required to be observed for their safety. The duty is continuing which starts with every exhibition of cinematograph and continues till the patrons safely exit from the cinema complex. That the patrons are admitted to the cinema for

[5] (2014) 6 SCC 173

a price, makes them contractual invitees or visitors qua whom the duty to care is even otherwise higher than others. The need for high degree of care for the safety of the visitors to such public places offering entertainment is evident from the fact that Parliament has enacted the Cinematograph Act and the Rules, which cast specific obligations upon the owners/occupiers/licensees with a view to ensuring the safety of those frequenting such places. The annual inspections and the requirements of no-objection certificates to be obtained from the authorities concerned is yet another indicator of how important the law considers the safety of the patrons to be. Any question as to the nature and the extent of breach must therefore be seen in the backdrop of the above duties and obligations that arise both under the common law and the statutory provisions alike.

122.2. Judged in the above backdrop it is evident that the occupiers in the present case had shown scant regard both for the letter of the law as also their duty under the common law to care for the safety of their patrons. The occupiers not only committed deviations from the sanctioned building plan that heightened the dangers to the safety of the visitors but continued to operate the Cinema in contemptuous disregard for the requirements of law in the process exposing the patrons to a high degree of risk to their lives which some of them eventually lost in the incident in question. Far from taking any additional care towards safety of the visitors to the Cinema the occupiers asked for permission to place additional seats that further compromised the safety requirements and raised the level of risks to the patrons. The history of litigation between the occupiers on the one hand and the Government on the other regarding the removal of the additional seats permitted during a national Emergency and their opposition to the concerns expressed by the authorities on account of increased fire hazards as also their insistence that the addition or continuance of the seats would not affect the safety requirements of the patrons clearly showed that they were more concerned with making a little more money out of the few additional seats that were added to the cinema in the balcony rather than maintaining the required standards of safety in discharge of the common law duty but also under the provisions of the DCR, 1953."

15. Mr. Pahwa, learned senior counsel appearing for the authors, opposing the prayers for ad interim reliefs as sought and while

principally adopting the submissions noticed above, contended that the Book authored by defendant Nos. 4 and 5 had admittedly been published as far back as in 2016. It was submitted that the contents thereof was based on the perception of two parents who had lost their teenaged children in the tragedy and how, according to them, the justice system itself had failed to punish the guilty adequately. It was submitted that the right of the authors to express their view on various aspects relating to the aforesaid tragedy, the extreme anguish which they had suffered in the course of the criminal trial were matters which clearly deserve to be placed in the public domain. Mr. Pahwa submitted that the plaintiff is in any case not entitled to the grant of injunctive or equitable reliefs since the suit itself is based on a concealment of a material fact, namely, of the plaintiff having complete knowledge of the publication of the Book way back in 2016 itself. It was submitted that during the pendency of the review petition before the Supreme Court, an application had been made by the review petitioner seeking a restraint upon the plaintiff and another co-accused from being permitted to travel abroad. Mr. Pahwa drew the attention of the Court to paragraph 3 of the said application in which it was alleged that as per media reports, the plaintiff was on the verge of fleeing the country and disposing off his assets. It was pointed out that the aforesaid assertion was based on reports which had been published in the Tehelka Magazine in its issue dated 15 December 2016. It becomes relevant to note that in the said article, a reference was specifically made to the Book authored by defendant Nos. 4 and 5 and how the entire story was based on their opinion of

the system having woefully failed them at all times. In view of the above, it was contended by Mr. Pahwa that it would be wholly incorrect for the plaintiff to assert that he derived knowledge of the aforesaid Book only on or about 08 January 2023.

16. Ms. Bhandari, learned counsel appearing for the publishing house, submitted that from the contents of paragraph 26 and 28 of the plaint, it is manifest that the plaintiff was fully aware of the Book which has been in circulation right from 2016. It was contended that the impugned Book is liable to be appreciated and viewed bearing in mind the experience of the two parents who had lost their teenaged children in the tragedy. According to Ms. Bhandari, the contents of the Book were liable to be duly published and disseminated in order to enable the public to derive complete knowledge of all aspects relating to the ghastly incident which had led to 59 innocent persons losing their lives. Ms. Bhandari had also placed for the perusal of the Court a series of articles which had come to be published in all leading newspapers in respect of the Uphaar Cinema Tragedy and the unrelenting fight of the parents for justice. The Court was also shown articles which appeared in leading newspapers carrying reviews of the Book authored by defendant Nos. 4 and 5 as well as various interviews which were conducted and which had chronicled their unflinching fight to obtain justice. Those articles, according to Ms. Bhandari, constitute irrefutable evidence of the Book being in circulation since 2016 and its theme and content being matters of public knowledge. This according to learned counsel clearly

disentitles the plaintiff from the grant of any ad interim relief.

17. It was then contended that the only statements which are alleged to be defamatory and form part of the contents of the Book are those which are set forth in the plaint. In view of the aforesaid, it was her submission that the plaintiff cannot possibly be permitted to rely upon any other passages or extracts of the said Book in support of his allegation that he had been defamed. As a defendant, according to Ms. Bhandari, the publishing house would be obliged only to respond to various allegations and averments which are made in the plaint. According to learned counsel, a defendant is neither obliged nor expected to reply to documents that may be filed in the suit. Ms. Bhandari argued that the allegation of defamation is thus liable to be tried only in respect of the extracts which have been set out in the plaint. Those, according to learned counsel, cannot possibly be construed as being defamatory. Ms. Bhandari referred to the following observations as appearing in **Harvest Securities Pvt. Ltd. & Anr. vs. BP Singapore Pvt. Ltd. & Anr.**[6] in support of the aforesaid submission**: -**

> "4. I am unable to agree. As far as my understanding goes, without the plaintiffs in the plaint pleading the slanderous/libellous statement for which compensation is claimed, the defendants have no opportunity to respond thereto. The defendants are required to file the written statement to the pleas in the plaint and not qua the documents even if served on the defendants along with the plaint. I am also of the *prima facie* view that such pleas would be a material fact within the meaning of Order 6 Rule 2 of the CPC and which are necessarily required to be as per Rule 4 of Order 6 of the CPC.

[6] 2014 SCC OnLine Del 1055

> The same would also be a fact constituting a cause of action within the meaning of Order 7 Rule 1 of the CPC."

18. At the outset, it would be apposite to recall the fundamental precepts which govern the grant of ad interim injunctive relief. Apart from the often repeated trinity test of prima facie case, balance of convenience and irreparable injury, courts are also bound to weigh in consideration whether the issuance of the injunction would cause greater harm and perpetuate injustice, the time when the plaintiff first derived knowledge of the offending material, whether the plaintiff, if not having acquiesced, remained inert or failed to take proactive action for protection of its rights and whether it has approached the Court in good faith. These aspects assume greater significance when what is sought is a pre-publication or broadcast injunction.

19. A pre-publication or broadcast injunction would essentially be sought at a stage when the offending material is either unavailable to be comprehensively reviewed and assessed or where it is alleged that there is a grave, imminent and immediate possibility of violation of rights. In such a situation the following factors would clearly be entitled to be accorded primacy- the promptitude with which the plaintiff approaches the Court, its obligation to establish, at least prima facie, that the impending publication/broadcast is completely divorced from the truth, replete with falsehood, or evidences an imminent vilification of the individual.

20. If the Court finds that the plaintiff has either failed to initiate action with promptitude or approached the court at the first available

opportunity, that would be a circumstance which would weigh heavily against the grant of an ad interim injunction. Further, if the court were to find that the material which is likely to be broadcast or published already exists in the public domain and has existed as such for a considerable period of time without an objection having been raised, that too would detract from the right of the plaintiff to seek ad interim injunctive relief.

21. On a more fundamental plane, the Court would also take into consideration the imperatives of striking a balance between the aspects of freedom of speech and expression, the dissemination of information amongst the public at large on the one hand and the injury likely to be caused to the individual. It is in the above context that courts have formulated the "high pedestal" test when it comes to the grant of a pre-publication or broadcast injunction. Courts have deliberately formulated the high threshold test because the injunction would essentially be sought at a stage when the offending material is either not available to be evaluated and examined or where it is impracticable to arrive at even a prima facie conclusion whether the content is defamatory or libelous. Courts at that stage are essentially left to grapple at straws, called to base their decisions on unsubstantiated and unproven allegations and essentially asked to issue a restraint on the assumption that what would be published or broadcast would be defamatory, slanderous or amounting to libel. Such a tenuous approach cannot possibly be countenanced when a court of law is called upon to grant injunctive or equitable relief.

22. It is in light of the aforesaid that it is imperative that the plaintiff be held to be bound and obliged to establish a strong prima facie case as a critical and essential pre-condition. Secondly, such a plaintiff must be held bound to establish that what is about to be published or broadcast is fundamentally removed from the truth, denigratory or slanderous. In the absence of the aforesaid tests being met, an injunction would justifiably be refused.

23. When the aforesaid basic precepts are applied to the facts of the present case, the Court finds itself unable to hold in favour of the plaintiff for reasons which follow.

24. The Court at the outset notes that the web series in question is yet to be aired. It has thus had no occasion to view the same in its entirety. It would be wholly inappropriate to grant injunctive reliefs at the ad interim stage even before the fictional work is viewed and properly examined in its entirety. In the absence of the aforesaid material being available to be viewed or examined it would also be inexpedient to even venture to return prima facie findings with respect to the allegation of the plaintiff that the series would carry defamatory and vilifying statements. The Court also takes into consideration the Disclaimer which is proposed to preface the web series and which merely claims to be *"inspired"* by the Book authored by defendants 4 and 5.

25. If the claim for ad interim relief were to be considered therefore, solely on the basis of the contents of the Book, then too the plaintiff would clearly not be entitled to ad interim reliefs for the

following reasons. Undisputedly the work authored by defendants 4 and 5 was published way back in 2016. This is clearly evident from the various newspaper articles and media reports which have been placed for the perusal of the Court. The plaintiff chose, for reasons best known to him, not to initiate any injunctive action in respect of the said work when it came to be originally published on 19 September 2016. A slothful or sluggish plaintiff seeking an injunction of the nature which is sought in these proceedings cannot be allowed to claim such reliefs.

26. Undisputedly, the horrific incident which occurred on 13 June 1997 has been the subject matter of public debate and discussion since then. The unimaginable tragedy which unfolded on that date had made a nation bow its head in shame. The negligent conduct of the plaintiff is well documented and also fell for adverse comment by our Supreme Court as would be evident from the extracts of its decision reproduced hereinabove. Paragraph 122 of the said decision is an iteration of avarice and greed.

27. The Court must also necessarily bear in mind at this stage that the work on which the web series is based has been penned by parents who had lost teenaged children in the unfortunate incident. It is a story which alleges a systemic failure, manifests a cry of anguish against the manner in which the incident was prosecuted and tried. It essentially represents their perspective and opinion. A fictional rendition of their trials and tribulations cannot, prima facie, be presumed to be defamatory. More fundamentally, their personal experience and

perception of the incident or the culpability of the plaintiff would remain their belief, impression and understanding of the entire episode. Ultimately it would be for a reasonably informed individual acting upon contemporary standards to form his/her opinion. In any case and prima facie the Court finds itself unconvinced to record or arrive at the conclusion that the narrative penned by defendant Nos. 4 and 5 could be said to be wholly fantastical or deprived of a semblance of the truth as conceived.

28. The Court further finds that information and reportage with respect to the tragedy which unfolded has remained in circulation for the past 26 years. Commencing from the date when the First Information Report came to be recorded and right up to the ultimate conviction of the plaintiff, the press as well as social media platforms have consistently tracked and reported developments relating to the said crime. This material was always available in the public domain. Prior to the institution of the present proceedings, the plaintiff neither alleged nor asserted that his right to a fair trial was or had been prejudiced. This Court is thus of the prima facie opinion that the right of defendant Nos. 4 and 5 to narrate their tragic journey through police precincts and court halls far outweighs the asserted and yet unsubstantiated loss of reputation of the plaintiff.

29. Regard must also be had to the fact that the Book itself had come to be published at a time when the review petitions were pending before the Supreme Court. It was also in circulation at the time when the Supreme Court ultimately proceeded to dismiss the

review petitions and while the plaintiff was facing trial in the evidence tampering case. The plaintiff stood convicted in that case on 08 October 2021. He chose not to seek any injunctive relief in respect of the aforesaid Book even at that stage. The Court consequently finds no justification to consider the grant of an ad interim injunction based on something which came to be published way back in 2016.

30. The Court also finds itself unable to countenance the submission of Mr. Agarwal that since a web series is likely to have a wider circulation and a greater impact than a written work, the grant of an injunction should be considered at this stage. This since the plaintiff chose to remain indolent and took no pre-emptive steps in respect of the said work at the first available opportunity. The Court consequently finds that there exists no justification to grant ad interim relief to the plaintiff even after he failed to take appropriate steps for injunctive reliefs in respect of the Book authored and published in 2016. As was noted hereinabove, a grant of injunction at an ad interim or ex parte stage must necessarily be weighed bearing in mind whether the plaintiff has chosen to approach the Court for relief with due promptitude. The case of the plaintiff woefully fails on this score.

31. The Court is also constrained to observe that prima facie the plaintiff clearly appears to have concealed material facts and practiced misrepresentation while asserting that he became aware of the contents of the Book only on or about 08 January 2023. The disclosures which were made in the application moved by the review petitioner before the Supreme Court and which was referred to by Mr.

Pahwa clearly establishes that the work penned by defendants 4 and 5 had been specifically noted and referred to in the article which came to be published in Tehelka Magazine and formed part of the record of the said application. The plaintiff stood duly served with the said application and also appeared through counsel before the Supreme Court when the same came to be disposed of on 06 December 2016. In fact, and as the order passed by the Supreme Court on that occasion would bear out, the plaintiff through its counsel furnished a statement that they would not leave India till the disposal of the review petitions. Despite having been duly apprised of the Book which had been authored by defendant Nos. 4 and 5, the plaintiff, for reasons and motives unknown, chose not to initiate any action. Prima facie the Court is of the opinion that the assertion that he came to know about the contents of the said work only on 08 January 2023 is implausible.

32. That then takes the Court to consider whether a pre-broadcast injunction is liable to be granted in the facts of the present case. As the Division Bench in **Khushwant Singh** had noticed and observed, the right to publish and disseminate information is liable to be treated as sacrosanct. It had found in the facts of that case that the contents of the Book in respect of which an injunction had come to be granted and the various allegations made therein in respect of a public personality, had been in the public domain and thus clearly disentitled the plaintiff to the grant of any pre-publication injunction. It had further observed that the various publications which had referred to incidents and which had also been alluded to in the offending work clearly indicated

that the material in respect of which an objection had been taken already existed and was a matter of public knowledge. It was thus emphasised that while a prior publication may not qualify as a public document what is important to be borne in mind is whether the subject matter itself was in the public domain. On applying the aforesaid test to the facts which obtain here, the Court comes to conclude that the narrative of the authors was available in the public sphere right from 2016. This clearly disentitles the plaintiff from the grant of ad interim reliefs.

33. While dealing with the balancing of public interest and the right of privacy and reputation that may be claimed by an individual it had been observed by the Court that while considering the aforesaid, a claim for damages for defamation would be a remedy more suited than a preventive action for injuncting the publication itself. In **Khushwant Singh**, the Division Bench had again reiterated the imperative of the plaintiff approaching the Court with due dispatch and on the first available opportunity.

34. The Court notes that while dealing with the issue of a pre-publication injunction, a Division Bench of the Court in **Pushp Sharma vs. D.B. Corp. Ltd. And Ors.**[7] had while reiterating the principles laid down in **Khushwant Singh** made the following pertinent observations:

> **"21.** The plaintiff's position that the *Bonnard* (supra) principle cannot apply under all circumstances, especially when the content

[7] 2018 SCC OnLine Del 11537

which is to be published or disseminated through electronic media or the internet requires closer scrutiny. New technology undoubtedly poses new challenges. This challenge highlights the necessity of the Court's duty to balance the rights rather than to dilute them. *Dr. Shashi Tharoor* (supra) dealt with this aspect, in the light of all the relevant case law, including the judgment of the High Court of Australia in *Australian Broadcasting Corporation* v. *O'neill*, 2006 HCA 46. *Bonnard* (supra) principle has been accepted and continued to apply in Canada in *Compass Group Canada (Health Services) Ltd.* v. *Hospital Employees Union*, 2004 BCSC 128 ACWS (3d) 578 which states that the alleged defamation should be restrained in exceptional cases, only in the rarest and clearest cases" and that the burden upon the plaintiff is to demonstrate that the material complaint was manifestly defamatory and that any jury verdict to the contrary would be considered perverse by the Court of law." It was also emphasized later in *Hutchens* v. *SWCA M.Com*, 2011 ONSC 56 that the plaintiff should be able to demonstrate - in order to obtain interlocutory relief - that the defendant when given the chance would be unable to fine it imposes to justify the content of this speech.

22. Undoubtedly, the new age media, especially the electronic media and internet posts greater challenges. That *per se* ought not to dilute valuable right of free speech which, if one may say so, is the lifeblood of democracy. The salutary and established principle in issues that concerned free speech are that public figures and public institutions have to fulfil a very high threshold to seek injunctive relief in respect of alleged libel or defamation [see *R. Rajagopal* (supra)]. Also, the judgment in *Kartar Singh* v. *State of Punjab*, 1956 SCR 476 underlines that "*those who fill public positions must not be too thin-skinned in respect of references made upon them*". This court is also of the opinion that the mere frame of the relief - of permanent injunction does not alter the principle. The cause of action which the plaintiffs base their suit upon, is alleged defamation. Therefore, the ordinary principles of injunctive relief, at the *ex parte* stage, having regard to the nature of the subject matter, i.e. restraint of speech, would be the same. Another interpretation would mean that the plaintiff can at will change the governing principles, by the mere device of claiming a different relief and arguing that if refused, the suit would be defeated. It is not uncommon that in a suit for permanent injunction, the plaintiff is unable to secure temporary injunction. That *per se* would not disentitle the plaintiff, if otherwise entitled, to any relief. Much depends on what is actually proved.

23. We feel that adding further would not be appropriate except to say that whenever interlocutory or *ex parte* injunctive relief of the

> kind which this Court is now concerned with, is sought, the threshold for considering the *prima facie* strength has to necessarily be of a very high order. The consequence of not following established rules and principles would be that the Courts unwittingly would, through their orders, stifle public debate. The Members of the public and citizens of this country expect news and fair comment as to whether a public institution - including a media house or journal (which cannot claim any exemption from being public institutions as they are the medium through which information is disseminated, and are one of the pillars of democracy) functions properly. In case there are allegations which result in controversies as to the reliability of the news which one or the other disseminates to the public, that too is a matter of public debate. Unless it is demonstrated at the threshold that the offending content is malicious or palpably false, an injunction and that too an *ex-parte* one, without recording any reasons should not be given. Democracy presupposes robustness in debates, which often turns the spotlight on public figures and public institutions - like media houses, journals and editors. If courts are to routinely stifle debate, what cannot be done by law by the State can be achieved indirectly without satisfying exacting constitutional standards that permit infractions on the valuable right to freedom of speech."

35. **Pushp Sharma** had reiterated the principle of the high threshold which is liable to be met while considering a justification to issue a pre-publication injunction. It was held that unless it is established at the outset that the offending content is malicious and palpably false, an injunction should not be issued. As was noticed by the Court hereinabove that exercise is yet to be undertaken since the content of the web series is yet to be viewed and evaluated in its entirety. The Court notes that in **Pushp Sharma** the learned Judges had alluded to the **Bonnard vs. Perryman**[8] principle which has been consistently followed by the English Courts.

[8] (1891) 2 Ch. 269

36. In **Holley vs. Smyth**[9], the Court of Appeal speaking through Lord Justices Auld and Slade had an occasion to lucidly explain the principles which must govern the grant of pre-publication injunction and held thus:

> *"The Bonnard v Perryman rule*
>
> Since the Libel Act 1792 (Fox's Act) the questions 'libel or no' and whether any libel is justified or privileged have been the responsibility of the jury (before the Act the fact of publication and the truth of innuendoes were questions for the jury). The possibility of judicial intrusion on that responsibility at the interlocutory stage had to await another 60 years. As Lord Coleridge CJ pointed out in *Bonnard v Perryman* [1891] 2 Ch 269 at 281, [1891-4] All ER Rep 965 at 968 it was not until the enactment of the Common Law Procedure Act in 1854 that common law courts acquired the power to grant injunctive relief. And courts of equity still could not do so because they had no jurisdiction to adjudicate in libel matters. They had to wait until the Supreme Court of Judicature Act 1873 when they became the Chancery Division of the High Court and were thus invested with power to exercise their traditional injunctive role in the field of defamation as well as in other actions of tort.
>
> From the earliest days of the courts' consideration of their power to grant interlocutory relief in libel cases they seem to have been guided by two associated notions, one of high principle and one of principle and practicality. The first is the importance of protecting the individual's right to free speech. The second is an acknowledgement that the judges should not, save in the clearest case, usurp the jury's role by restraining at the interlocutory stage publication of a statement that the jury might later find to be no libel or true or otherwise defensible. Sometimes the second notion is expressed in the form that a judge should not interfere at the interlocutory stage unless the evidence before him so clearly establishes a culpable libel that he is confident that he would have to set aside a contrary verdict of the jury as perverse.
>
> It is instructive that Blackstone in his *Commentaries on the Laws of England* long before any court of common law considered the problem, set the scene in the following ringing tones for the first of those notions, one which was to guide the grant of interim injunctive relief in libel actions in later years, at least against the press:

[9] (1998) 1 All ER 853

> 'In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment.' (See 4 Bl Com (1854 edn) 182–183.)

The starting point in the jurisprudence is a passage from the judgment of Lord Esher MR in an earlier decision than *Bonnard v Perryman*, namely in *Coulson v Coulson* (1887) 3 TLR 846 at 846:

> '… the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document and to say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise the jurisdiction.'

(See also *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501 at 508 per Jessel MR). The main issue in the case appears to have been whether the threatened publication was libellous, but there was also plainly an issue as to the truth of the allegation. And Lord Esher MR's reference to the issues of justification and privilege as well as libel or no libel show that he intended his words to apply to all matters which were ultimately within the province of the jury. Lindley LJ, in a short concurring judgment, said much the same ((1887) 3 TLR 846 at 847):

> '… the Court was asked to exercise its jurisdiction without being sure that it was in possession of all the facts … [He] agreed with the rules laid down by the Master of the Rolls, and he was not prepared to say that the jury might not find this was no libel, or that the alleged libel was true.'

Lord Coleridge CJ, giving the leading judgment of the full Court of Appeal in *Bonnard v Perryman*, with which Lord Esher MR and Lindley, Bowen and Lopes LJJ concurred, in favour of discontinuing the interlocutory restraint in that case, repeated and adopted those words of Lord Esher MR in *Coulson v Coulson*. He held that 'in all but exceptional cases' (see [1891] 2 Ch 269 at 285, [1891–4] All ER Rep 965 at 969) the courts should not restrain by way of interlocutory relief the publication of a libel which the defence sought to justify save where it was clear that that defence would fail. He based that approach on the particular need in libel cases not to restrict the right of free speech, save in a clear case of an untrue libel, by intervening before final determination of the matter by a jury. This is how he put it:

> '… the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions … In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury,

> and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.' (See [1891] 2 Ch 269 at 284, [1891–4] All ER Rep 965 at 968.)

The remaining member of the court, Kay LJ, agreed with this general proposition (see [1891] 2 Ch 269 at 285, [1891–4] All ER Rep 965 at 969), but dissented from the court's decision to discontinue the interlocutory injunction on three grounds: first, the alleged libel was expressed in such a way as to suggest it was motivated by spite rather than to protect the interests of the public; second, the defendant had failed to rebut a strong prima facie case on the evidence that the libel was untrue; and third, the balance of convenience and inconvenience favoured the continuance of the temporary restraint since it would cause little harm to the defendant not to publish the alleged libel and much damage to the plaintiff pending the outcome of the trial. The first and third of those grounds do not accord with the majority's reasoning or the courts' application of the *Bonnard v Perryman* rule ever since.

Monson v Madame Tussauds Ltd [1894] 1 QB 671, [1891–4] All ER Rep 1051 was a case in which there were issues both as to whether the offending material was libellous and whether the defendant had, in any event, consented to its publication. The members of the court (Lord Halsbury and Lopes and Davey LJJ), in refusing interlocutory relief, differed as to the proper approach of the court on the first issue, but all indorsed the *Bonnard v Perryman* rule that such relief was only appropriate in the exceptional case of a libel to which there was clearly no defence.

More recent authorities acknowledge the strength of the rule and continue to articulate the two associated reasons for it to which I have referred, though not always giving the same relative importance to each.

In *Fraser v Evans* [1969] 1 All ER 8 at 10, [1969] 1 QB 349 at 360–361 Lord Denning MR gave primacy to the right of freedom of speech:

> 'The court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest. This has been established for many years since *Bonnard* v. *Perryman* ([1891] 2 Ch 269, [1891–4] All ER Rep 965). The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for the judge; but a better

> reason is the importance in the public interest that the truth should out. … There is no wrong done if it [the alleged libel] is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication.'

To similar effect, though in another context (namely the issue of lack of malice as part of a defence of justification for the publication of 'spent' convictions; see the Rehabilitation of Offenders Act 1974, ss 4(1) and 8(5)), is the following passage from the judgment of Griffiths LJ in *Herbage v Pressdram Ltd* [1984] 2 All ER 769 at 771, [1984] 1 WLR 1160 at 1162 when summarising a number of principles generally applicable to the grant of interim injunctions in defamation actions:

> '… no injunction will be granted if the defendant raises the defence of justification. This is a rule so well established that no elaborate citation of authority is necessary. It can be traced back to the leading case of *Bonnard v Perryman* … These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong[ed], can be compensated in damages.'

The modern authorities

There are a number of comparatively recent authorities in which the courts have expressly declined to restrain, as an exception from the general rule in *Bonnard v Perryman*, a threatened libel intended or calculated to damage a plaintiff and made as a means of putting pressure on him to compensate the defendant for some claimed wrong.

In *Crest Homes Ltd v Ascott* [1980] FSR 369, a decision of this court given in 1975 but only reported in 1980, a dissatisfied buyer of a house, having unsuccessfully sought compensation from the builder, threatened to libel it with a view to coercing it to make compensation. The court discharged an interlocutory injunction granted at first instance restraining the libel. Lord Denning MR, with whom Stephenson and Geoffrey Lane LJJ agreed, held that neither the arguably unreasonable mode of the threatened libel nor the pecuniary motive for it was sufficient to take the case outside the general rule established by *Bonnard v Perryman*. Geoffrey Lane LJ, in his short concurring judgment, emphasised the strength of that general rule. He said (at 399):

> '… the line of authorities is long and weighty that interlocutory injunctions in these cases will not be granted

> unless the plaintiff shows that the defence of justification will not succeed …'

And he applied the rule notwithstanding his view that the defendant had chosen 'a vulgar and offensive way to air his grievances' and that the 'damage to the plaintiffs was likely to be extensive and plainly difficult to prove'.

In *Bestobell Paints Ltd v Bigg* [1975] FSR 421 Oliver J, following the *Crest Homes* case, declined to restrain a dissatisfied buyer of paint who, with a view to obtaining compensation from the seller, threatened to libel it. He held that the fact that the buyer may have been malicious or that his object was to put pressure on the seller to settle his claim was irrelevant (see at 434–436).

Lastly, in *Al Fayed v The Observer Ltd* (1986) Times, 14 July Mann J declined to treat as an exception to the general rule Mr Al Fayed's contention, assuming its truth, that The Observer had abused its right to freedom of speech by waging a persistent and irresponsible campaign against him as part of a vendetta by a commercial rival for the control of Harrods Ltd long after the public had lost interest in the matter. He held, after reviewing the authorities, that the only exception to the general principle is where the allegation is 'manifestly untrue' and that it applies whatever the motive or reason for the threatened publication.

I should also consider art 10 of the convention. It provides, so far as material:

> '(1) Everyone has the right to freedom of expression. This right shall include freedom … to receive and impart information … without interference by public authority …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the prevention of … crime, … for the protection of the reputation or rights of others …'

In *A-G v Guardian Newspapers Ltd* (*No 2*) [1988] 3 All ER 545 at 660–661, [1990] 1 AC 109 at 283–284 Lord Goff said that art 10 is consistent with English law and should guide the interpretation of English law when the latter permits. He referred to the restrictions on the right to speak freely stated in the article, including those 'prescribed by law and … necessary in a democratic society,' and observed ([1988] 3 All ER 545 at 660, [1990] 1 AC 109 at 283):

> 'It is established in the jurisprudence of the European Court of Human Rights that the word "necessary" in this context implies the existence of a pressing social need, and that

> interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusions.'

The criteria of 'pressing social need' and proportionality, derived from the jurisprudence of the European Court of Human Rights, for any exception to the general right of freedom of speech are of a piece with the rationale of the English courts' rigorous application of the *Bonnard v Perryman* rule over the last hundred years (see *The Observer v UK* (1991) 14 EHRR 153 at 191 (para 59)) where it was stated that exceptions 'must be narrowly interpreted and the necessity for any restrictions must be convincingly established'. See also *Thorgeirson v Iceland* (1992) 14 EHRR 843 at 865 (para 63)). Hoffmann LJ has recently underlined the importance of that principle in a different context in *R v Central Independent Television plc* [1994] 3 All ER 641 at 651–652, [1994] Fam 192 at 202–203:

> 'The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well intentioned, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to the clearly defined exceptions laid down by common law or statute. Furthermore, in order to enable us to meet our international obligations under the … Convention … it is necessary that any exceptions should satisfy the tests laid down in art 10(2). They must be 'necessary in a democratic society' and fall within certain permissible categories … It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.'

Even in the absence of authority, I would have been disposed to hold that in a case where a defendant proposes to publish information which he asserts he can justify, the court should not depart from the rule in *Bonnard v Perryman* merely because it regards his motives in the proposed publication as less high-minded than the pure desire to let the world know the truth. In many, perhaps most, cases the motives for the intended publication may be mixed and inquiry into motive, particularly on an interlocutory application, may be a somewhat speculative exercise. Under the general law the defendant's motives ordinarily afford no sufficient grounds for restraining him from exercising a legal right.

In my opinion, however, the authorities cited by Auld LJ, themselves establish that neither the would-be libeller's motive nor the manner in which he threatens publication nor the potential damage to the plaintiff is normally a basis for making an exception to the rule. I will merely refer briefly to three of these authorities.

In *Bonnard v Perryman* itself, as Kay LJ pointed out in his dissenting judgment ([1891] 2 Ch 269 at 285), the alleged libel was 'expressed in coarse and abusive language which would incline any one reading it to the belief that some personal feeling of spite or malignity against the plaintiffs, and not merely a desire to protect the interests of the public was among the actuating motives of the defendant.'

In *Bestobell Paints Ltd v Bigg* [1975] FSR 421 there was no doubt whatever that the defendant's threat was intended to put pressure on the plaintiffs to settle his claim; indeed the plaintiffs' counsel described the threat as 'blackmail' (though the judgment (at 424) makes it clear that, as in the present case, the accuracy or otherwise of that description was not tested in argument). Oliver J nevertheless declined to grant interlocutory relief. In the course of a comprehensive review of the authorities he said (at 434):

> 'It has never, so far as I know, been suggested that, in the ordinary case of libel, it makes any difference to the grant or withholding of interlocutory relief that the defamatory statement is alleged to have been published maliciously.'

In *Crest Homes Ltd v Ascott* [1980] FSR 396 the Court of Appeal clearly did not consider that the fact that the relevant statement was calculated to damage the plaintiffs in their business and was made with a view to putting pressure on them to settle the defendants' claim for compensation took the case out of the rule in *Bonnard v Perryman*. Lord Denning MR said explicitly (at 398):

> 'Next [plaintiffs' counsel] said that it was done so as to get [the plaintiffs] to give compensation. The defendant ought to have brought an action and not acted in that manner. That may be so but nevertheless it is not sufficient to take the case out of the general rule.'
>
> I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is clearly untrue. In my judgment, however, that is a discretion which must be exercised in accordance with established principles. In my judgment, Ian Kennedy J acted contrary to established principles in regarding the defendant's supposed motives in the present case as constituting exceptional circumstances sufficient to justify his declining to apply the rule."

37. Applying the **Bonnard** principle, the Court notes that the defendants are yet to be called upon to plead truth or justification. The test of justification is "might" and not "would succeed". The Court further bears in mind the pregnant observations as entered in **R vs. Central Independent Television**[10] [a decision which was noticed with approval in **Holley**] that freedom entails the right to publish even that which government and judges, *"however well intentioned, think should not to be published."*

38. Accordingly, and for the aforesaid reasons, the prayer for grant of ad interim reliefs stands refused. The application shall consequently stand dismissed at this stage.

YASHWANT VARMA, J.

JANUARY 12, 2023
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[10] (1994) 3 WLR 20, CA