

Bombay High Court

Zee Telefilms Ltd. And Film And ... vs Sundial Communications Pvt. Ltd. ... on 27 March, 2003

Equivalent citations: 2003 (5) BomCR 404, 2003 (3) MhLj 695, 2003 (27) PTC 457 Bom

Author: A Shah

Bench: A Shah, D Deshmukh

JUDGMENT A.P. Shah J.

1. These are appeals from an order of Bobde J. granting ad-interim injunction restraining the defendants from infringing the copyright of the plaintiffs' original work titled "Krish Kanhaiyya" and proceeding further with broadcasting of their television serial "Kanhaiyya". In view of the peculiar facts and circumstances of the case and the nature of dispute, the parties have agreed that Notice of Motion should itself be disposed off at this stage.

2. This suit has been brought by the plaintiffs against the defendants for breach of copyright and misuse of confidential information. The claim is for various relief's in respect of the plaintiffs' work titled 'Krish Kanhaiyya'. In essence, the plaintiffs' case is as follows. The plaintiff No. 1 is a Company engaged in the business of television programming, video programming, multi media programming and feature films, television serial production etc. It consists of a group of entrepreneurs, who have worked in different television networks and who then decided to start their own business in January 2002. With this in mind, they have come up with various creative concepts for television programmes, which they intend to produce for television networks for broadcasting thereon. According to the plaintiffs, by the custom of their business, the concepts generated by them are registered with Film Writers' Association and the titles for such programmes are registered with Indian Motion Pictures Producers' Association. The concepts generated are expressed through concept notes, character sketches, detailed plots and episodes, main story lines that are put down in writing. It is this written expression of their original concepts and ideas which are registered with Film and Writers' Association and the title under which such concepts are sought to be translated into audiovisual form and telecast is registered with Indian Motion Pictures Producers' Association. Apart from this, the concepts are also translated into audiovisual form through production of what is known as a pilot, which is na audiovisual representation produced on videotape and representative of some episodes, which will subsequently be duly reproduced in finished form for the purpose of telecasting.

3. In or about January 2002, immediately after incorporation of the plaintiff No. 1 Company, the plaintiffs worked on various concepts and came up with a concept titled 'Kanhaiyya' which was registered with the Film Producers' Association on 22nd February 2002 in the name of plaintiff No. 2, who is an employee of the plaintiff No. 1. The first concept, as registered, was based on a family where 'Kanhaiyya' who is an avatar of Lord Krishna, appears as a child and is a succor to them and helps them. He plays with them, performs small miracles for them. If they behave badly or fight, he goes back. He adds joy and happiness to the entire family. The idea was thereafter evolved into various episodes and different adventures. Subsequent to this, the plaintiff No. 1 and its various employees, including the plaintiff No. 2 worked further on the theme and concept of 'Kanhaiyya' and evolved it in greater detail. This was duly incorporated in the concept notes annexed to the plaint at Exhs. 'B' and 'C'. Around the second week of April 2002, the employees of the plaintiff No. 1

presented the concept under the title 'Kanhaiyya' to Ms. Vinta Nanda, the then Director - Ideation of defendant No. 1 and other employees of the defendant No. 1. The presentation was made with a clear understanding that it was confidential and will not be used, exploited in any manner other than through the plaintiffs, it being the plaintiffs' original ideas, concepts, thoughts and expressions, with the copyright vesting in them in terms of Section 13 of the Copyright Act, 1957. In fact, when the plaintiffs specifically asked whether a nondisclosure agreement would be entered into, Ms. Vinta Nanda categorically stated that it was not the policy of the defendant No. 1's channel to enter into any nondisclosure agreement since the repute of the defendant No. 1's channel was such that nobody could imagine that their concepts would be taken away and entrepreneurs like the plaintiffs would never be exploited or cheated.

4. The concept was thereafter worked on with a title changed from 'Kanhaiyya' to 'Krish Kanhaiyya' and a detailed concept note, character sketches, detailed plot of first episode and ten episodic plots were sent to the defendant No. 1. Encouraged by the positive response of the defendant No. 1, the plaintiffs in association with Cinevistaas Ltd. produced a pilot, since such pilot programme duly represented on videotape would be a greater deciding factor for the television channel to decide on production and broadcasting, on the concept originated by the plaintiffs. The pilot of 'Krish Kanhaiyya' alongwith the developed concept was sent to the defendant No. 1 around 10th October 2002 and was also sent to Star TV, Sony TV and Sahara TV since the defendant No. 1 had not yet made up their mind as to whether to air and broadcast the serial 'Krish Kanhaiyya'. The evolved concept was also registered with Film and Writers' Association on 12th November 2002. The pilot is structured around the following:-

"A rich dysfunctional family;

Internal feuds (within the family);

Affected family member cries and asks God for help;

Lord Krishna appears in a human (child) form (of Kanhaiyya) in front of the family member who prays for help;

Kanhaiyya enters the house, posing as Kish relative of the family member;

Kanhaiyya then proceeds to weave his magic and miracles around the family that is on the verge of breaking apart;

Kanhaiyya brings happiness to all."

5. Thereafter, the plaintiffs met the Chairman of the defendant No. 1 and certain price negotiations appears to have taken place. However, the plaintiffs did not hear from the defendants and they therefore pursued the production of the show with Sony Entertainment Television. Soon after Sony Entertainment Television expressed its willingness to produce this concept of Kanhaiyya, the plaintiffs learnt that the defendants were doing the show based on the concept of 'Kanhaiyya'. The

plaintiffs made several attempts to reach the Officers of the defendant No. 1 to request not to infringe the copyright. They, however, failed to contact anybody responsible. The plaintiffs found that the defendant Nos. 2 and 3 have applied to Indian Motion Pictures Producers' Association for registration of the name 'Krish Kanhaiyya'. The plaintiffs also came across promotional materials for the production 'Kanhaiyya' as also harding announcing the launch of 'Kanhaiyya' by the defendants. As a result, M/s. Sony Entertainment Television has declined to sign the contract after coming to know that M/s. Zee Television of the defendants is going to produce and broadcast serial 'Kanhaiyya' from 9th March 2003. Enquiries by the plaintiffs have shown that rather 'Kanhaiyya' coming down to earth in the form of a boy as per the concept of the plaintiffs, he comes down as a girl in the show being produced and proposed to be aired by the defendants. The name is also deceptively similar, being 'Kanhaiyya' rather than 'Krish Kanhaiyya' and the word 'Kanhaiyya' was also the original name, which has been conceptualized by the plaintiffs. Again similar to the plaintiffs' work, the defendant's show is also based around a dysfunctional large family with internal fights and 'Kanhaiyya' coming down, weaves magic around the family and gets them to come together with their troubles going away. The plaintiffs contend that the defendants' infringing copy is distinctly similar to that of the original work of the plaintiffs in all material ways with a few cosmetic changes. In fact, no matter what dressing or trimming may be sought to be done by the defendants to somehow create an impression of dissimilarity to escape any action for breach of copyright and passing off the basic work as taken would clearly establish the deception and infringement, the primary test of infringement being that it has basic similarity, that becomes most relevant. It is further contended that there is clear breach of confidentiality by the defendant No. 1 since plaintiffs' work was disclosed to the defendant No. 1 in confidence on the understanding that the defendant No. 1 would not use it in any way except through the plaintiffs. The plaintiffs have relied upon the affidavits of their employees and also the affidavit of Sunil Mehta, Vice Chairman and Managing Director of M/s. Cinevistaas Ltd., who had prepared the pilot episode for 'Krish Kanhaiyya'.

6. Alongwith the suit, the plaintiffs took out Notice of Motion seeking an injunction restraining the defendants from infringing the copyright of the original work of the Plaintiffs titled 'Krish Kanhaiyya' through producing or in any manner exploiting or broadcasting through television or any other medium, or otherwise any programme deceptively similar to the original concept and format of the plaintiffs as per Exhs. 'A', 'B' and the attachment to Exh. 'C' to the plaint. In response to the notice, the defendants appeared before the learned single Judge. On behalf of the defendant No. 1, Shri B.L. Gautam, Director (Commercial) has filed a cryptic affidavit stating merely that the defendants had not at any stage parted with the pilot which was handed over by the plaintiffs to them or informed to the defendant Nos. 2 and 3 or anyone else of the concept, theme and content of the plaintiffs' pilot, concept note, script or any other material in relation to the plaintiffs' proposed serial. Shri Gautam claimed that the defendant Nos. 2 and 3 had independently submitted their serial for approval of the defendant No. 1 which was approved and accordingly, the defendant Nos. 2 and 3 have produced this concept. He stated that the TV serial 'Kanhaiyya' is not in any manner identical in terms of theme, concept, story, characters, idea to that of the plaintiffs. Further affidavits have been filed on behalf of the defendant Nos. 2 and 3 setting up a claim that the original concept of serial 'Kanhaiyya' and the written content therein was provided by two well known writers Shri Suresh Valmiki and Shri Abhay Krishna. It was claimed that they are originators of the

original concept and idea and basic script and the serial is based, conceived, conceptualized and written on the concept / theory of 'Karma' which is the essence of the 'Bhagved Gita'. It was emphatically stated that the theme of the subject matter and the pilot of defendants' serial is completely different and distinct from that of the plaintiffs. Shri Sachdeva, Proprietor of defendant Nos. 2 and 3 maintained that in his serial, there is no divine child or form or avatar. There is an orphan child who is blessed with sagacity and wisdom beyond his age, he is not God or divine. He lays no claim or pretence to being either God, super natural or divine, either as Krishna or otherwise. At no point of time in the serial will the child appear as Lord Krishna. At no point of time will the child assume a divine form or claim to be Lord Krishna or perform super natural acts. Even the advice that the child offers, is offered casually and in the course of normal conversation. Besides the grand mother, who is a Krishna Bhakt who sees Krishna in everything, no member of the family even suspects or associates the child with the 'divine'. As the serial develops, some coincidences / incidents (not miracles) will be introduced, so as to develop in the audience the nagging suspicion that 'could this child have something to do with Krishna?'. However, on each occasion, there will be a perfectly natural or human explanation offered by the child. This is to sustain audience curiosity and interest. His serial therefore emphasizes the natural over super natural. It seeks to convey the message that one should do ones deeds, act by himself / herself and not look to divine help. The plaintiffs pilot and concept, does exactly the reverse.

7. Mr. Sundaram, learned senior counsel appearing for the plaintiffs and Mr. Tulzapurkar, learned senior counsel appearing for the defendants have made elaborate submissions at the Bar. The video film of the plaintiffs' pilot project and also of the defendants' first episode have been seen by us in the presence of the parties and their learned counsel.

8. The plaintiffs have claimed injunction on three grounds:-

i) breach of confidentiality by the defendants;

ii) infringement of their copyright in the work of 'Krish Kanhaiyya';

iii) reverse passing off of the plaintiffs' work i.e. the defendants are wrongfully representing the plaintiffs' work as their own.

The Claim in confidence:-

9. The basic principles of the law of confidence are conveniently set out in Copinger and Skone-James on Copyright (13th Edn.) paragraph 21.1, pages 720-721, as follows:-

"There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of his who gave it, without obtaining his consent or, at any rate, without paying him for it. It has for long been clear that the courts can restrain a breach of confidence arising out of a contract or any right to property..... The ground of equitable intervention is that it is unconscionable for a person who has received information on the basis that

it is confidential subsequently to reveal that information. Acceptance of information on the basis that it will be kept secret affects the conscience of the recipient of the information. In general it is in the public interest that confidences should be respected, even where the confider can point to no specific financial detriment to himself. If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without his consent, express or implied, he will be guilty of an infringement of the plaintiff's rights."

10. The law of the confidence is different from law of copyright. In paragraph 21.2 (page 721), the learned author has pointed out that right to restrain publication of work upon the grounds, that to do so would be breach of trust of confidence, is a broader right than proprietary right of copyright. There can be no copyright of ideas or information and it is not infringement of copyright to adopt or appropriate ideas of another or to publish information received from another, provided there is no substantial copying of the form in which those ideas have, or that information has, been previously embodied. But if the ideas or information have been acquired by a person under such circumstances that it would be a breach of good faith to publish them and he has no just case or excuses for doing so, the court may grant injunction against him. The distinction between the copyright and confidence may be of considerable importance with regard to unpublished manuscripts / works submitted, and not accepted, for publication or use. Whereas copyright protects material that has been reduced to permanent form, the general law of confidence may protect either written or oral confidential communication. Copyright is good against the world generally while confidence operates against those who receive information or ideas in confidence. Copyright has a fixed statutory time limit which does not apply to confidential information, though in practice application of confidence usually ceases when the information or ideas becomes public knowledge. Further the obligation of confidence rests not only on the original recipient, but also on any person who received the information with knowledge acquired at the time or subsequently that it was originally given in confidence.

11. On the general principles of law of confidence, the learned counsel for the plaintiffs relied upon *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, (1948) 65 RPC 203 and in particular in the statement of principles in the judgment of Lord Greene (at page 213):-

"If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

12. With regard to the requirement of form and degree of development of information or ideas, learned counsel for the plaintiffs placed strong reliance on *Seager v. Copydex Ltd.*, (1967) 2 All ER 415. In this case the plaintiff, in the course of discussion with the defendants of a carpet grip described as 'the germ of the idea' for a different form of carpet grip which the plaintiff had devised. Later the defendants developed and marketed the carpet grip which was unwittingly based on the plaintiff's alternate type of grip. The Court of Appeal concluded that the plaintiff's idea was 'the springboard' which enabled the defendants to devise their own grip and held that the defendants were liable for breach of confidence. The learned counsel also referred to a judgment of Megarry J in *Coco v. A.N. Clark (Engineering) Ltd.* (1969) RPC 41 where springboard doctrine was elaborately discussed. He also referred to a judgment in *Franchy v. Franchy (Extension Ch D)*, (1967) 5 Reports of Patent and Design and Trade Mark Cases 149 where Cross J. observed:-

"Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them."

13. Our attention was also drawn to the case of *CMI Centers for Medical Innovation GMBH an Anr. v. Phytopharm PLC*, (1999) Fleet Street Reports 235 where the Court held that for a plaintiff to succeed in a breach of confidence action he had to address at least four matters; i.e. (i) he had to identify clearly what was the information he was relying on; (ii) he had to show that it was handed over in the circumstance of confidence; (iii) he had to show that it was information of the type which could be treated as confidential; and (iv) he had to show that it was used without his licence or there must be threat to use it. It was added that at interlocutory stage, the plaintiff does not have to prove (ii) and (iv) as he will at the trial. But he must address them and show that he has at least a seriously arguable case in relation to each of them.

14. In the light of these settled principles, the plaintiffs' counsel submitted that when the original idea or concept is protected and if any offending work is developed from the original idea or concept, in such an event, the offending work is liable to be restrained. This protection is strengthened when there is evidence that original idea or concept was disclosed in confidence to the defendants, who thereupon used it to develop it for their own commercial exploitation, de-hors the originator of the concept / idea. The learned counsel submitted that when the plaintiffs had submitted their proposal for consideration same was done on the understanding that broadcaster will either accept or reject it. Therefore the defendants by using the information imparted to them in strict confidence by the plaintiffs breached the confidence reposed by the plaintiffs in them, by misappropriating the concept of the plaintiffs' programme and by announcing of the making of the serial on similar lines, the defendants have inflicted huge loss and damage to the commercial potential of the plaintiffs' programme by luring away the potential advertising sponsors. The learned counsel contended that the novelty / originality in an idea can be derived from the application of human ingenuity to well known concept, that novelty / originality may consist of any significant twist or slant of well known concept, which take sit out of the public realm. In television industry the most important aspect is who goes on air first, since once the show is televised novelty ceases and the advantage to be derived therefrom is lost as everyone remembers the first. The learned counsel

heavily relied upon the decisions of Australian and English Courts as well as a decision of the Delhi High Court directly dealing with the issues of breach of confidentiality vis-a-vis the television industry.

15. The first decision in *Talbot v. General Television Corporation Pvt. Ltd.*, reported in (1981) RPC 1, is a case which on the facts has some remarkable similarities with the present case. In that case, the plaintiff, a film producer, developed an idea for a television series, which he submitted in the form of a written submission to the defendants. He heard no more about his proposal. The defendants subsequently broadcast the first segment of a series of programmes which they claimed were their own idea, but which the plaintiff claimed were derived from his. The plaintiff sought an injunction on the ground of breach of confidence, and the hearing of the application was treated as the trial of the action. The learned Judge found in favour of the plaintiff. He said (at 8-9):-

"It is clear that an obligation of confidence may exist where there is no contractual relationship between the parties. Where a plaintiff sues, relying upon breach of confidence, he must establish three elements. These are : (1) that the information was of a confidential nature; (2) that the information was communicated in circumstances importing an obligation of confidence; and (3) that there has been an unauthorised use of the information to the detriment of the person communicating it (i.e. the plaintiff). Both counsel agreed that the three elements that I have referred to were the relevant principles to be applied in this case. Mr. Gillard (counsel for the defendant) submitted that none of those elements had been established by the plaintiff, and further submitted that, even if they were, there were two other reasons why the plaintiff's claim should be dismissed. Mr. Archibald (counsel for the plaintiff) submitted that the plaintiff had made out his case for relief and that none of the matters raised by Mr. Gillard afforded any reason why relief should be denied to the plaintiff. Mr. Gillard began by submitting that the information which the plaintiff alleged had been misused by the defendant did not have the necessary quality of confidence. He put it that the plaintiff was seeking to protect an idea for a programme about millionaires, how they succeeded and what viewers could learn from them, and that this was not original. He pointed to evidence that there had been programmes before on the careers of successful men and that it was a usual practice for interviewers to ask such people the secret of their success. He also put it that there was authority for the proposition that there is 'no property in an idea' (or in knowledge) and that as all the plaintiff had conveyed to the network was an idea, it was not susceptible of protection. The authorities he referred to were *F.C. of T. v. United Aircraft Corporation* (1943) 68 CLR 525 at 534 per Latham CJ and Halsbury, 4th ed. vol. 9, para 829. But the passages referred to deal with the point indifferent contexts (those of the construction of the word 'idea' in a statute and in copyright law) and do not support Mr. Gillard's submission in this case. What Mr. Archibald said was that this abstract proposition could only divert one from the real problem, and he referred to what Lord Upjohn said in *Boardman v. Phipps* (1966) All ER 721 at 759, (1967) 2 AC 46 at 127) where his Lordship pointed out that 'the real truth is that it (i.e. information) is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship.' The real problem, Mr. Archibald said, was to decide whether the idea, or concept, had been sufficiently developed. Where it had been developed to the point of setting out a format in which it could be presented, so that it was apparent that the concept could be carried into effect, then, said Mr. Archibald, it was something that was capable of being the subject

of a confidence. Without deciding that it is always necessary for a plaintiff to go that far, I am satisfied that where a concept or idea has been developed to the stage where the plaintiff had developed his concept, it is capable of being the subject of a confidential communication. The plaintiff had developed his concept so that it would be seen to be a concept which had at least some attractiveness as a television programme and to be something which was capable of being realised as an actuality."

16. In the case of *Fraser v. Thames Television Ltd.*, reported in (1983) 2 All E.R. 101, breach of confidence was claimed when three actresses developed an idea for a television series in which they proposed to appear and this idea was disclosed orally and in confidence to defendants and the defendants used this idea to create television series with other actresses. It was held that the court would prevent a person who had received an idea expressed in oral or written form from disclosing it for an unlimited period or until that idea becomes general public knowledge provided (a) that the circumstances in which it was communicated imported an obligation of confidence and (b) that the contents of the idea were clearly identifiable, original, or of potential commercial attractiveness and capable of reaching fruition. Applying that test to the facts the Court held that the communication of the idea for the series had been made in confidence and the idea was a distinct concept having sufficient originality, commercial attractiveness and likelihood of realisation so as to fix the defendants with an obligation of confidence which they had breached, when they used the idea as a basis for their own television series. The Court observed:-

"I accept that to be capable of protection the idea must be sufficiently developed, so that it would be seen to be a concept which has at least some attractiveness or a television programme and which is capable of being realised as an actuality (see per Harris) in *Talbot's case* (1981) RPC 1 at 9). But I do not think this requirement necessitates in every case a full synopsis. In some cases the nature of the idea may require extensive development of this kind in order to meet the criteria. But in others the criteria may be met by a short unelaborated statement of an idea. In *Talbot's case* itself I do not think the detailed submission (at 5) added very much of substance to the idea which is set out in one sentence (also at 5).

Unquestionably, of course, the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a significant twist or slant to a well known concept (see *Talbot's case*). This, I think, by analogy, is consistent with the statements in *Saltman's case* and *Coco's case* that novelty in the industrial field can be derived from the application of human ingenuity to well known concepts."

17. The decision of the Delhi High Court is in the case of *Anil Gupta and Anr. v. Kunal Das Gupta and Ors.*, . In that case, the plaintiffs conceived the idea of producing a reality TV programme of match-making to the point of actual spouse selection in which real everyday ordinary persons would participate before a TV audience. The plaintiffs decided to name the concept 'Swayamvar' knowing that a large number of people would associate the name with the idea of a woman selecting a groom in a public forum and that would create the necessary instantaneous recall and recognition of mythological Swayamvar in the minds of a large number of people and give the programme a head-start. This concept was, according to the plaintiffs, disclosed to the defendants, who later on in

breach of confidence, announced a serial which was based on the plaintiffs' concept 'Shubh Vivah'. The learned Judge (Vijender Jain J) upheld the claim of breach of confidentiality. The observations of the learned Judge in paragraphs 27 and 29 are extremely material and reproduced below:-

"27. In the modern day, when the small screen has taken over the earlier means of mass communication like radio, idea / concept / script of a broadcaster has wider potentiality of capitalising revenue and if that idea / concept or script is not protected then in a given case, a person who has conceived an idea to be translated into the reality TV show which could be key to its success with audience then channels with their enormous resources could always be in a better position to take the idea / theme / concept from any author and then develop at their own end and the original author of the concept will be left high and dry, in appropriate cases interlocutory injunction may be issued restraining such breach of confidentiality of the theme, concept or scripts otherwise it would be catastrophic for the television industry. One has to bear in mind that persons who create an idea / concept or theme which is original, laws must ensure that such like people are rewarded for their labour. A concept for reality show on television was given to the company, which in this case is the defendants. Creator provides raw material to the entertainment industry, themes or concepts originates from the person who has conceived the same, protection is vital for the functioning of the industry. Otherwise authors of the idea who are individuals, their ideas can be taken by the broadcasting companies or channels owning companies and the persons who has conceived the same, would be robbed of its labour.

29. An idea per se has no copyright. But if the idea is developed into a concept fledged with adequate details, then the same is capable of registration under the Copyright Act. The novelty and innovation of the concept of the plaintiff resides in combing of a reality TV show with a subject like match making for the purpose of marriage. The Swayamvar quoted in Indian mythology was not a routine practice. In mythology, we have come across broadly understood only two Swayamvars, one in Mahabharat where the choice as not left on the bridge but on the act of chivalry to be performed by any prince and whosoever succeeded in such performance got the hand of Draupdi. Similarly, in Ramayana choice was not left to the bridge but again on performance of chivalrous act by a prince who could break the mighty Dhanusha (Bow). Therefore, originality lies in the concept of plaintiff by conceiving a reality TV programme of match making and spouse selection by transposing mythological Swayamvar to give prerogative to woman to select a groom from variety of suitors and making it presentable to audience and to explore it for commercial marketing. Therefore, the very concept of matchmaking in view of concept of the plaintiff giving choice to the bridge was a novel concept in original thought capable of being protected."

18. In the present case the allegations made in the plaint have practically gone unchallenged. There is no denial to the allegation that the plaintiffs conceived the programme 'Kanhaiyya' which was later on renamed as 'Krish Kanhaiyya'. The elaborate concept notes prepared for the purpose of developing the concept of 'Krish Kanhaiyya' have been annexed at Exhs. 'A', 'B' and 'C' to the plaint and have been duly registered. The plaintiffs have stated on oath that they presented this concept under that title 'Kanhaiyya' through the Director of the defendant No. 1 and two other employees alongwith brand extension possibility. They made this presentation in confidence with understanding that it could be used by the defendant No. 1 only on being produced by the plaintiffs.

The plaintiffs then piloted the film sometime in September 2000 and then produced the final pilot on 7th October 2002. Then pilot of 'Krish Kanhaiyya' was sent to defendant No. 1 alongwith the covering note to the defendant No. 1. Apart from the pleadings, meetings and correspondence as claimed by the plaintiffs have not been denied by the defendants. It was also not denied that in the meeting of 11th November 2002 there were discussions of airing and broadcasting of 'Krish Kanhaiyya' conceptualized by the plaintiffs, by Zee Telefilms Ltd. In this meeting Shri Sunil Mehta of Cinevistaas and Shri Subhash Chandra Goyal, Chairman of Zee Telefilms Ltd. were present. Shri Sunil Mehta has filed an affidavit which is not controverted by the defendants. Shri Mehta's affidavit is quite revealing and the relevant portion thereof is reproduced below:-

"Whilst there, per chance met with Mr. Subhash Chandra Goyal, the Chairman of Zee Telefilms Ltd. - the 1st Defendant, with whom during a half-hour discussion about several issues, 'Krish Kanhaiyya' was also discussed. Mr. Goyal has apparently seen and loved the pilot episode submitted and chose to discuss with me the financial aspects of the broadcasting of the program, and righaway offered a sum of Rs. 2,00,000/- for an episode for broadcast on prima-time. His interpretation for offering such a price was that Zee as a channel had primarily undertaken a policy-decision not to commission shows costing more than Rs. 2 to 2.5 lakhs per episode. During the course of discussions, he indicated that it was an in-house concept developed by Zee Telefilms Ltd., through an employee of his i.e. one M.s Vinta Nanda while she was working for his company. In reply, I specifically pointed out to Mr. Subhash Goyal that the concept of 'Krish Kanhaiyya' was originally that of Sundial Communications Pvt. Ltd. i.e. the Plaintiff, and had in fact been discussed by Sundial with Ms. Vinta Nanda when she worked for the 1st Defendant. Since Mr. Goyal appeared surprised by this information, I told him that I would obtain from Sundial Communications Ltd. the requisite material."

19. The learned counsel for the defendants strenuously urged that the plaintiffs' plea of confidentiality is not supported in law. He submitted that the idea / concept of the plot conceived by the plaintiffs is neither original nor novel. In the absence of any originality in the idea conceived by the plaintiffs, the principles of confidentiality do not apply. According to him Lord Krishna appearing either in divine form or human form is not novel or a new concept. Similar themes have been used in TV serial 'Amanat' and the move 'Yahi Hai Zindagi'. We are unable to accede to the submission of the learned counsel. Merely because some of the components of the story are common or in public domain, the concept or idea does not become incapable of protection. In Coco case, Megarry J. observed tat something that has been constructed solely from materials in the public domain may possess necessary quality of confidentiality; for something new confidential may have been brought into being an application of skill and ingenuity of the human brain. Novelty depends upon the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components. Similarly in Thomas Marshal (Exports) Ltd. v. Guinel, (1978) 3 All ER 193 the Vice Chancellor observed at pages 209-210 as under:-

"If one turns from the authorities and looks at the matter as a question of principle, I think (and I say this very intently, because the principle has not been argued out) that four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade

setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e. that it is not already in the public domain. It may be that some or all of his rivals already have the information; but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned."

20. The concept developed by the plaintiffs is indeed novel, in the sense that Bal Krishna starts residing in the family whose life is disturbed and solves their troubles. The theme is set out in great detail in Exhs. 'B' and 'C' of the plaint. Thus the idea is developed into an expression, in the sense that concepts are prepared i.e. Exhs. 'B' and 'C' and a pilot was also prepared which was admittedly submitted to the defendant No. 1. The defendant No. 1 in obvious attempt to wriggle out of this sought to contend that at about the same time, the defendant Nos. 2 and 3 approached the defendant No. 1 with the concept of 'Kanhaiyya' and their serial is based on the concept and script prepared by Suresh Valmiki and Abhay Krishna. Keeping in view numerous striking similarities in two works and in the light of the material produced on record, it is impossible to accept that the similarities in two works were mere coincidence. The inference of unlawful exploitation of plaintiffs' original concept in defendants' TV serial is more in consonance with the materials placed on record and all probabilities of the situation therein disclosed. IN our opinion, the plaintiffs' business prospect and their goodwill would seriously suffer if the confidential information of this kind was allowed to be used against them in competition with them by the defendants and as observed by Lord Evershed (M.R.) it is not merely a matter of compensation in pounds, shillings or pence. Therefore, we feel that the plaintiffs would certainly be entitled to have injunction for breaching confidentiality.

The claim in copyright:-

21. The learned counsel for the defendants at the outset raised certain technical objections to the maintainability of the claim for infringement of copyrights. He argued that the pleadings of the plaintiffs were not at all clear as to the ownership of copyright since it is not stated who is the author. The objection is devoid of any substance. In paragraph 2 of the plaint it is clearly stated that "the concept was originated by the plaintiff No. 2 together with the other employees from the plaintiff No. 1 in the course of their employment whereby the authorship of the original work would vest with the plaintiff No. 1." This is sufficient to indicate who is the author of the work and in whom the authorship of the original work vests. In this regard, reference may be made to Section 17(c) of the Copyright Act, 1957, which reads as follows:-

"17. First owner of copyright - Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship to which Clause (a) or Clause (b) does not apply, the employer shall, in the

absence of any agreement to the contrary, be the first owner of the copyright therein;"

22. The next objection of the learned counsel for the defendants is that the plaintiffs have not pointed out the work in relation to which they claim a copyright. He argued that the plaintiffs have not claimed a copyright by using the words 'Literary work' or work in 'Cinematograph Film' with reference to their product. The objection is required to be stated to be rejected. It is apparent from the plaint that the plaintiffs are claiming copyright in respect of work as contained in the concept notes at Exhs. 'A', 'B' and 'C' and same has been claimed being literary work. The specific grievance of the plaintiffs is that the concept they have presented to the defendants is likely to be used for a television serial. The makes it clear the plaintiffs' apprehension is that their copyright as contained in the concept notes which is a literary work would be violated by making a television serial which is a 'cinematograph film' within the meaning of the Act.

23. The question that remains is whether the defendants' work violates the plaintiffs' copyright. The learned counsel for the defendants submitted that the entire claim of the plaintiffs is on the basis that the plaintiffs are entitled to the copyright in the concept / idea. He submitted that the settled position of law is that there is no copyright in a mere concept or an idea. He referred to the decision of the Supreme court in the case of R.G. Anand v. Delux Films and Ors., where the Court has held that there is no copyright in an idea, subject matters, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work. He also referred to a decision of this Court in the case of Indian Express Newspapers (Bom) Pvt. Ltd. v. Jagmohan where Jamdar J. observed:

"12. No doubt the central theme of the articles published by the second plaintiff and that of the drama and movie is the same, though the emphasis in the drama and the movie is more on human bondage, particularly of Indian women. The articles published by Ashwini Sarin also contain an autobiographical account of the part actually played by him in the affair. He has presented the whole affair in his own style, but that at the most would give the plaintiffs copyright in respect of these articles. There cannot, however, be a copyright in an event which has actually taken place. There is a distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and literary talent to these materials. Ideas, information, natural phenomena and events on which an author expends his skill, labour, capital, judgment and literary talent are common property and are not the subject of copyright."

24. It is undoubtedly true that the law does not recognize property rights in abstract ideas, nor is an idea protected by a copyright and it becomes copyright work only when the idea is given embodiment in tangible form. When an idea is given embodiment in a tangible form it becomes subject of common law property rights which are protected by the courts at least when it can be said to be novel and new. The present case is not a case of a mere idea. The plaintiffs have developed this idea into various concept notes including a pilot, which are at Exhs. 'B' and 'C' to the plaint viz. concept notes, character sketches, detailed plot of first episode and ten episodic plots. Therefore, the submission of the learned counsel of the defendants that the copyright was claimed merely in an idea is unacceptable.

25. In R.G. Anand's case, the Supreme Court on a careful consideration and elucidation of various authorities and the case laws on the subject, laid down the following propositions:

"1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case, the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once to the conclusion that the defendant is guilty of an act of piracy.

"3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly identical no infringement of the copyright comes into existence.

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

7. Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage plays film has a much broader perspective, wider field and a bigger background where the defendants can be introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved."

26. We would now endeavour to apply the principles enunciated above to the facts of the present case in order to determine, whether or not plaintiffs have been able to prove the charge of violation of copyright levelled against the defendants by the plaintiffs. The defendants have set out the theme of their serial in paragraph 7 of the affidavit of Shri Gulshan Sachdeva, Proprietor of defendant Nos. 2 and 3. We have also viewed the video film of the plaintiffs' pilot project and the defendants' first

episode of their serial 'Kanhaiyya'. We think that the work of the defendants is similar in material and substantial aspects with that of the plaintiffs. The common feature is a dysfunctional family and the fact that the Lord Krishna enters the life of the family which has many problems and troubles, solves them and becomes succour to the family. In the defendants' programme, the child is called Kanhaiyya which in India unmistakably points to Lord Krishna. The visual that goes on prior to the commercial break shows the child with peacock feather which is again something unmistakably associated with Lord Krishna. Moreover, through the episode, the verses of the Bhagvat Gita are chanted in the background. It is therefore difficult to accept the dissimilarity relied upon by the defendants such as the fact that the child in their episode is not 'divine and does not perform miracles' and therefore there is a complete dissimilarity between the main role in the two concepts. Indeed, in the affidavit of Sachdeva, it is stated that as the serial develops, some co-incidents/incidents (not miracles) will be introduced, so as to develop in the audience the nagging suspicion that 'could this child have something to do with Krishan?' We have, therefore, no doubt in our mind that the intention is to portray the child as avatar of Lord Krishna, though he does not appear in the form of Bal Krishna.

27. Broadly, the similarities which were apparent upon viewing the two videos were as follows:-

Krish Kanhaiyya (Plaintiff) Kanhaiyya (Defendant) Family is rich and dysfunctional Family is rich and dysfunctional Main woman protagonist-Step mother, most affected by the environment in the house, prays for help to God Main woman protagonist-Dadi maa, most affected by the environment in the house, prays for help to God (Lord Krishna) The prayer is answered soon by the arrival of Kanhaiyya The prayer is answered soon by the arrival of Kanhaiyya God is in Bal Krishna form God is in child form The interaction with Kanhaiyya is heart warming and consoling and gives some support to the main woman protagonist The interaction with Kanhaiyya is heart warming and consoling and gives some support to the main woman protagonist Kanhaiyya attaches himself to the seeker of help Kanhaiyya attaches himself to the seeker of help Opening background is a flute sound - An instrument normally thought to be played by Lord Krishna Starts with rendition to Lord Krishna Opening title has a prominent peacock feather and the character of Lord Krishna on it with the title Krish Kanhaiyya written across it.

The opening title has the peacock feather with the main character's face and Kanhaiyya written all across it Their music is flute and other instruments Background is from Gita; Implying that it is Lord Krishna's words.

28. Even the character sketches in both works are similar. In both the father is a businessman having three children. In 'Krish Kanhaiyya' elder son is a cricketer, the second child is a budding scientist and does not sleep all night whereas in defendants' serial the second child who is a computer geed but does not sleep all night and spends too much time on computer. In 'Krish Kanhaiyya' youngest child is a daughter and talks to people through her doll whereas in defendants' serial youngest child is also a daughter and talks in third person. In both programmes the children do not get along the fight amongst themselves and show disrespect towards elders. In 'Krish Kanhaiyya' there is a Man servant - Man Friday Banvari who is incharge of management of the house whereas in defendants' serial the Man servant - Man Friday Shankar who is incharge of the

management of the house. In 'Krish Kanhaiyya' the main woman protagonist is the mother who is keen to bring about harmony and love in the family whereas in defendants' serial the main woman protagonist is Dadima who is keen to bring about harmony and love in the family. After viewing both the films a viewer would definitely form an opinion or would get a dominant impression that the defendants' serial has been based or taken from the original work of plaintiffs. It is true that there are some dissimilarities in the manner of presentation which are highlighted by the learned counsel for the defendants in his arguments. However, we think that these dissimilarities are trivial and insignificant. To quote the words of the learned Judge Hand in *Sheldon v. Metro Goldwyn Pictures Corporation* (1933) 81 F 2nd 49 that "It is enough that substantial parts were lifted; no play right can excuse wrong for showing how much of his work he did not pirate."

29. In the case of *Corelli v. Gray* (1913) 29 TLR 570 Sargant J observed as follows:-

"The plaintiff's case is entirely founded on coincidences or similarities between the novel and the sketch. Such coincidences or similarities may be due to any one of the four hypotheses - namely (1) to mere chance, or (2) to both sketch and novel being taken from a common source; (3) to the novel being taken from the sketch, or (4) to the sketch being taken from the novel. Any of the first three hypotheses would result in the success of the defendant; it is the fourth hypothesis alone that will entitle the plaintiff to succeed. Looking now at the aggregate of the similarities between the sketch and the novel, and the case is essentially one in which the proof is cumulative, I am irresistibly forced to the conclusion that it is quite impossible they should be due to mere chance coincidence and accordingly that they must be due to a process of copying or appropriation by the defendant from the plaintiffs' novel.

Thus it was pointed out in this case where the aggregate of the similarities between the copyrighted work and the copy lead to the cumulative effect that the defendant had imitated the original and that the similarities between the two works are not coincidental, a reasonable inference of colourable imitation or of appropriation of the labour of the owner of the copyright by the defendant is proved."

30. In the case of *Harman Pictures N.V. v. Osborne*, (1967) 1 WLR 723, it was held that similarities of incidents and situations undoubtedly afforded prima facie evidence of copy and in the absence of any explanation by the defendant regarding the sources, the plaintiffs must succeed. In this connection Goff J observed as follows:-

'But I have read the whole of the script very carefully and compared it with the book and I find many similarities of detail there also..... Also it is prima facie not without significance that apart from the burial of Captain Nolan the play ends with the very quotation which Mrs Woodham Smith used to end her description of the battle..... As Sir Andrew Clark points out, some of these might well be accounted for as being similar to other events already in the script, and in any event abridgment was necessary, but that may not be a complete answer.'"

31. In the case of *Mohendra Chundra Nath Ghosh v. Emperor*, the court while defining what a copy is held that copy is one which is so near to original as to suggest original to the mind of spectator and observed as follows:

"But the question is whether the offending pictures are copies of substantial portions of the copyright picture.... The figures may have been reduced in the offending pictures and slight modifications may have been introduced, or the clothes and colours may have been different, but there can be no doubt whatsoever that the main figures have an identical pose. These are not, in my opinion, coincidences due to the pictures being produced to represent common stock ideas."

32. Having considered two works involved in this case not hypercritically and with meticulous scrutiny but by the observations and impressions of the average viewer, we find that striking similarities in two works cannot in the light of the material placed on record be said to constitute mere chance. We feel that the only inference that can be drawn from the material available on record is unlawful copying of the plaintiffs' original work. The learned counsel for the plaintiffs submitted and not without sufficient force that if the concept of Lord Krishna in child form is removed from the serial of the defendants, their programmes would become meaningless. In order to find out similarity in the two concepts, what is to be seen is the substance, the foundation, the kernel and the test as to whether the reproduction is substantial is to see if the rest can stand without it. If it cannot, then even if many dissimilarities exist in the rest, it would nonetheless be a substantial reproduction liable to be restrained. In view of the foregoing discussion, we have no hesitation in holding that the plaintiffs have established that there has been infringement of their copyright.

The claim in reverse passing off:-

33. The learned counsel for the plaintiffs says that passing off lies in passing of one's product as that of another's whereas reverse passing of lies in passing off another's product as one's own. When an original idea/concept of one person is used as the original idea/concept of another's, the latter attempts to pass it off as though it is his idea/concept (which in fact is not his). The use of such an idea/concept itself can be restrained when the basis or root is tainted, any developments thereon, however they may vary in representation, would also be tainted. In this connection he drew our attention to a number of English decisions. We shall refer to only the latest judgment of the Appeal Court in the case of Bristol Conservatories Ltd. v. Conservatories Custom Built Ltd., reported (1989) R.P.C. 455 where the plaintiffs' complaint was that the defendants used albums of photographs of conservatories designed and installed by the plaintiffs to show their prospective customers, falsely claiming that the photographs show conservatories of their own design and work. Customers are thereby misled into believing that the defendants are the company which produced the conservatories; that their designs are the same as in the album (which they are not) and that the defendants have a well-established business (which they have not). The Appeal Court, following the earlier decisions came to the conclusion that this was the case of reverse passing off. We find some substance in the submission of the learned counsel that the action of the defendants may also amount to an act of reverse passing off. However, having held in favour of the plaintiffs on the issues of confidentiality and copyright, it is not necessary to express any opinion on this aspect and the issue of reverse passing off is expressly kept open.

34. In the result therefore, appeals are dismissed. Notice of Motion No. 783 of 2003 is made absolute in terms of prayer Clauses (a) to (f) and (h).

Parties to act on the copy of this order duly authenticated by the Associate/Personal Secretary as true copy.

Certified copy expedited.