

Bombay High Court

Sakshi Malik vs Venkateshwara Creations Pvt Ltd ... on 2 March, 2021

Bench: G.S. Patel

31-COMIPL3510-2021 WITH IAL3514-2021.D

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL IP SUIT (L) NO. 3510 OF 2021
WITH
INTERIM APPLICATION (L) NO. 3514 OF 2021

Sakshi Malik

...Plaint

Versus

Venkateshwara Creations Pvt Ltd & Ors

...Defendants

Mr Alankar Kirpekar, with Saveena T Bedi, i/b Lawhive Associates,
for the Plaintiff

Mr Akash Menon, with Bency Ramakrishnan, i/b Akash Menon, for
Defendants Nosf 1 and 2f

Mr Thomas George, with Nikhil Sonker, i/b Saikrishna & Associates,
for Defendant Nof 3f

CORAM: G.S. PATEL, J
DATED: 2nd March 2021

PC: -

1.

Leave to amend to correct the name of the 1st Defendant and to show it as a partnership firm rather than a private limited Atul G.

Kulkarni company. Amendment is to be carried out within one week from Digitally signed by Atul G.

today.

Kulkarni Date: 2021.03.03 11:04:16 +0530 2nd March 2021 31-COMIPL3510-2021 WITH IAL3514-2021.DOC

2. The Suit is an action for damages in defamation, and for a permanent injunction. For today, a very short ad interim order will suffice.

3. The Plaintiff is a model and an actor. She has had some success in Bollywood songs and in few movies. She has active social media accounts, including on Instagram. She has promotional partnerships with various brands.

4. At the heart of this dispute is the 1st and 2nd Defendants' utterly illicit use of a still image of the Plaintiff in their 2020 Telugu film entitled 'dV'. It was released on 5th September 2020 and has been available on Amazon Prime, operated by Defendant No. 3, since then.

5. It appears that as part of her professional work, the Plaintiff commissioned a photographer (via her Instagram social media account) to prepare a photo portfolio. This was a good five years ago, on 24th July 2017. The photo shoot itself took place during the afternoon and early-evening of 1st August 2017 at the terrace of the photographer's house in Mumbai.

6. A few days later, the photographer shared with the Plaintiff the photographs he had taken of her during the photo shoot. He sent them to the Plaintiff via a Google drive link or on Instagram. On 16th August 2017 the Plaintiff uploaded at least part of this photo portfolio to her Instagram account.

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7. The Plaintiff's photograph, one of those from this privately commissioned portfolio, has been used in that portion of the 1st and 2nd Defendants' film where there is a reference to a female escort or a commercial sex worker. What is depicted in the film is a message on a mobile screen with an image; and the image used is one of those from the Plaintiff's portfolio, apparently lifted from her Instagram account.

8. Mr Kirpekar for the Plaintiff has several complaints. First, there is the wholly unauthorised invasion of privacy. Second, there is the unauthorised use of private material. But most importantly, the complaint is about the nature of that use. For, Mr Kirpekar submits, the Plaintiff's image has been unauthorisedly used to depict her in the motion picture as an escort or commercial sex worker.

9. He says this is defamation per se.

10. Prima facie, I believe he is correct. Indeed, I do not believe there is any other way of looking at it.

11. The 1st and 2nd Defendants say that they contracted with a commercial agency to obtain a suitable image for this sequence. They were assured that they could legitimately use this image. This seems to me less than compelling. Surely any right-thinking motion picture producer would have insisted on seeing an approval or consent by the model or person who is featured or to be featured. It would be standard procedure almost anywhere, and this would be 2nd March 2021 31-COMIPL3510-2021 WITH IAL3514-2021.DOC true whether the issue is one of copyright in the photograph or of use with permission of an image of the model in question for a particular sequence.

It seems to me self-evident that it is not possible to use the image of any person for a commercial purpose without express written consent. If images are to be used without such express consent, they must be covered by some sort of legally enforceable and tenable licensing regime, whether with or without royalty. Simply using another's image, and most especially a private image, without consent is *prima facie* impermissible, unlawful and entirely illegal. In a given case, it may also be defamatory, depending on the type of use. This is where Mr Kirpekar places his case.

12. This is actually at the heart of the matter: the question of consent, or, more accurately, the damage done from the failure to obtain the Plaintiff's consent and permission to use her photograph and image in any manner at all. The fact that the image has been illicitly used is bad enough. It only makes matters worse when used in a plainly derogatory and demeaning vein.

13. The matter will need to be examined more closely at a later stage. At present, I am making no observations as to the tenability of the defence that may ultimately be taken in an Affidavit in Reply. I do, however, require the 3rd Defendant to take down the telecast of the film in all versions, irrespective of language and sub-titles, until such time as the 1st and 2nd Defendants have completely deleted all images of the Plaintiff from their work. It is not acceptable for them to merely pixelate or blur the images. The entire sequence which has the image of the Plaintiff is to be removed immediately. If the 1st and 2nd Defendants wish to replace the deleted segments, they are 2nd March 2021 31-COMIPL3510-2021 WITH IAL3514-2021.DOC free to do so but without using any of the Plaintiff's images in any shape, fashion or form without her express written consent.

14. The 3rd Defendant will have 24 hours to discontinue the availability of the film.

15. I note the statement made by the learned Advocate on behalf of 1st and 2nd Defendants that the necessary changes will be made within one week from today. The 1st and 2nd Defendants are hereby restrained from releasing their film on any media platform or through any medium or in any version until the deletions that I have indicated above are effected. Correspondingly, the 3rd Defendant is not to release any re-edited version of the film without a specific order of this Court following the deletion of the offending portion. I am making it clear that the 1st and 2nd Defendants will have to show Mr Kirpekar and his client the altered portion before I will permit the 3rd Defendant to re-release this film.

16. The learned Advocate on behalf of the Defendants undertake to file vakalatnama on or before the next date.

17. List the matter on 8th March 2021.

18. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J) 2nd March 2021