

PERSONALITY RIGHTS IN INDIA: AN ANALYSIS OF SHIVAJI RAO GAIKWAD V. VARSHA PRODUCTIONS BY SIDDHARTH BADKUL *

ABSTRACT

Promptly before the release of movie Main Hoon Rajinikanth; Rajnikant approached the High Court of Madras for the protection and enforcement of personality rights vested in him. However, personality rights do not have any statutory recognition in India per se. In contemporary era the notion has gained significance due to the increasing number of celebrity endorsement and commercialization. Celebrity rights are either secured as right to privacy or they can be ensured as the property of a persona.

In the light of the aforementioned aspects, the present case commentary critically analyses the recent judgment of Hon'ble High Court of Madras in Shivaji Rao Gaikwad v. Varsha Productions. The comment begins with the introduction and background of the issue in question followed by the maturation of personality rights in India. Subsequently, the commentary contains appreciation of the facts of the case, the issues involved therein, the arguments of the parties and the decision of the Hon'ble Court. The commentary further presents a multi-dimensional analysis of the judgment, considering the hits and misses of the Court while delivering the judgment.

INTRODUCTION

Society sees a person in a specific manner. Additionally, where the big names are included, their imaginative tries are viewed as an expansion of their personalities, as can be derived from the speculations of Kant and Hegel, who saw private property as the epitome of the personality. They bolster the inclusion of private property rights as a part of one's personality as they advance self-expression and human improvement and therefore adding to the interest of the general public.¹

* University of Petroleum & Energy Studies, Dehradun

¹ Garima Budhiraja, *Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime*, 7 NALSAR STU L. RW 86 (2011).

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

In consonance of Article 6 bis of Bern Convention the Indian Copyright Act, 1957 related to the provision of moral rights. The does not directly provides moral rights to the author, but such rights are provided as the special right to author. These rights are independent and parallel of the author's economic rights.² Arguably, it is logical for moral rights standards to include some kind of protection for an author's personality, since the moral rights doctrine is itself based on the idea that the author's personality is reflected in his works.³

Personality rights by and large comprise of two sorts of rights: the right to publicity, or to keep one's representation and resemblance from being commercially misused without authorization or contractual remuneration, which is like the utilization of a trademark; and the right to privacy, or the right to be left alone and not have one's charisma epitomized *carte blanche*.⁴

The right of informational privacy can offer a mixed bag of rights which on one hand, provides the right to deny access to certain personal information; and on the other, then it privileges the individual to prohibit the publicity of his own name and picture, which has shown itself in the 'right to publicity' which is principally the right of a person to govern the utilization of his or her name, picture, resemblance or other unequivocal parts of his or her uniqueness.⁵

ORIGIN AND EVOLUTION OF PERSONALITY RIGHTS IN INDIA

In the absence of statutory support and sufficient judicial precedents governing personality rights *per se*, the legal system in India, at present, is lacking in dealing with the modern phenomena of celebrity's integrity rights.⁶ However, Courts at several instances has upheld the claims of personality rights.⁷

² Nidhi Kumari, *Moral Rights Of Author*, Academike (Apr. 6, 2015), <http://www.lawctopus.com/academike/moral-rights-author/> (last visited Jun 6, 2015).

³ Mira T. Sundara Rajan, *Bharati and His Copyright*, THE HINDU, Dec. 22, 2004 at , <http://www.thehindu.com/2004/12/22/stories/2004122200621000.htm>.

⁴ A. S. Vishwajith & Samira Varanasi, *I Am MINE...OR Am I? Analysing the Need for a Property Right in Personal Information*, 5JIPL 106 (2012). (hereinafter Vishwajith)

⁵ *Id.*

⁶ Tabrez Ahmad & Satya Ranjan Swain, *Celebrity Rights: Protection Under IP Laws*, 16 J. OF INTELL. PROP. RTS. 7-16 (2011).

⁷ *ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*, 2003 (26) PTC 245; *Magna Publications Co. Ltd., and Others v. Shilpa S. Shetty*, AIR 2008 SC 681; *Manisha Koirala v. Shashilal Nair*, (2003) (1) AIIMR 426; *Ms. Barkha Dutt v. Easy Ticket, Kapavarapu, Vas, Case No. D2009-1247 (WIPO)*; *Shilpa S. Shetty v. Magna Publications Co., Ltd. and Ors.*, AIR 2001 Bom 176; *Sonu Nigam v. Amrik Singh (alias Mika Singh) & Anr*, CS 372/2013(Bombay High Court); *Titan Industries Ltd. v. M/S Ramkumar Jewellers*, CS(OS) 2662/2011.

LAW MANTRA THINK BEYOND OTHERS

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In *ICC Development (International) Limited v Arvee Enterprises*⁸, Delhi High Court held that publicity rights are the facet privacy rights and any violation such rights would draw Articles 19 and 21 of the Constitution. It called for a more advanced position in *DM Entertainment Pvt. Ltd. v. Infant Gift House*,⁹ which relied on *Ali v. Playgirl Inc.*¹⁰ and focused upon "*proprietary interest in the profitability of his public reputation or persona*" to hold that the privilege of attention secures against "*the unauthorized appropriation of an individual's very persona which would result in an unearned commercial gain to another*".¹¹ The judgment is noteworthy as it perceives personality rights as a right more similar to an alienable property right and linking it to Article 21 than only ensuring the integrity of an individual.¹² The Indian Courts are therefore amenable to perceiving the proprietary right of a person in his persona.

FACTS OF CASE

An application was filed by the plaintiff before the Hon'ble High Court of Madras under Order XIV Rule 8 of Original Side Rules read with Order XXXIX Rules 1 & 2 and Section 151 of CPC seeking the Hon'ble High Court to grant interim injunction restraining the defendant from using the plaintiff's name/image/caricature/style of delivering dialogues in the forthcoming project/film titled 'Main Hoon Rajnikanth' or in any of the forthcoming projects/films in any manner whatsoever amounting to infiltration of the plaintiff's personality rights by such unauthorised use.¹³

ISSUE INVOLVED

Issue in the instant case relates to personality rights of celebrities and the granting interim injunction restraining the defendant against infringing the personality rights vested in the plaintiff.

PLAINTIFF'S CASE

⁸ 2003 (26) PTC 245 (Del).

⁹ *Id.*

¹⁰ 447 F Supp 723.

¹¹ Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-control and Fair Information Practices*, [2000]WIS. L. REV. 743, 751. (hereinafter Paul)

¹² *Freeman v Apple Inc*, No 5:2010-CV-05881.

¹³ *Shivaji Rao Gaikwad v. Varsha Productions*, 2015 SCC OnLine Mad 158: (2015) 1 LW 701 : (2015) 2 CTC 113 (hereinafter Shivaji).

LAW MANTRA THINK BEYOND OTHERS

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Journal.lawmantra.co.in

Plaintiff is a famous and well acclaimed actor in the Indian film industry and has voluntarily chosen not to commercialise his name and reputation by not authorising any biopic featuring him or create any work based upon his personality.¹⁴ The plaintiff argued that, firstly, he has the right to command and control the use of his name, image, likeness or other unequivocal aspects of his distinctiveness. Any misuse of the aforesaid amounts to infringement of the personality right and copyright besides amounting to acts of passing off.¹⁵ Secondly, the misuse of the name, image, etc. of the plaintiff would create confusion amongst the trade and public.¹⁶ Thirdly, in having his name, image, caricature being associated with such feature film of immoral and promiscuous nature, he would be subject to defamation, slander and gross damage to vast reputation and goodwill amongst the public, which has been built over the hard work of several years by the plaintiff.¹⁷ Lastly, the defendant has used the name/image/caricature/style of delivering dialogues of the plaintiff, without the plaintiff's consent or permission in any manner whatsoever and is trying to make unlawful benefits based upon the goodwill emanating from the well-known personality status of the plaintiff.¹⁸

DEFENDANT'S CASE

Denying the averments made by the plaintiff, the defendant stated that, there is no *malafide* and dishonest intention and the defendant did not seek to derive any association, relationship or affiliation with the plaintiff. Promotional activity of the film does not create any false impression about plaintiff's personal and professional life. Further, neither the film portrays any confusion amongst the public and industry nor does it defame or invade the privacy and the goodwill of the plaintiff, inflicting any damage upon his marketable reputation.¹⁹

In response to the plaintiff, the defendant stated that, the cause of action seems to have been accumulated on mere apprehension and on an unreliable source of information taken from the internet, which has been generated by the third party elements beyond the control of the defendant.²⁰

¹⁴ *Id.* at ¶ 4.2.

¹⁵ *Id.* at ¶ 4.3.

¹⁶ *Id.* at ¶ 4.4.

¹⁷ *Id.* at ¶ 4.5.

¹⁸ *Id.* at ¶ 4.6.

¹⁹ *Id.* at ¶ 6.

²⁰ *Id.* at ¶ 6.

LAW MANTRA THINK BEYOND OTHERS

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The defendant argued that, the plaintiff's name also happens to be the first name of the protagonist in the movie; hence the same is in bone fide use in the film.²¹ In pursuant to the Supreme Court ruling in the case of *Wander Limited v. Antox India*,²² wherein it was held that infringement action is available against the violation of a specific property right acquired under and recognised by the statute, the defendant argued that in the instant case, "Personality Right" is undefined and such rights are not recognised under any statute in India.²³ Relying upon *Eastern Book Company v. D.B Modak*,²⁴ the defendant argued that, the plaintiff cannot claim exclusivity on material in the public domain because 'Rajinikanth' has been used previously in several other movies on different occasions and according to Section 17 of the Copyright Act states only the first owner can claim copyright.²⁵ Lastly, relying upon *Precious Jewels v. Varun Gems*, the defendant argued that section 35 of the Trade Marks Act permits *bonafide* use of the name as a saving for, even if the mark or name is registered and belongs to someone.²⁶

RATIO DECIDENDI

The High Court observed that, though there is no definition for the personality right under any statute in India, however, the Courts in India have recognized the personality right in the name, in various judgments. For this purpose, the Court referred to *ICC Development (International) Ltd. v. Arvee Enterprises*.²⁷ The Court also referred to *Titan Industries Ltd. Vs. M/S Ramkumar Jewellers*²⁸ and observed that, Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable.²⁹

Relying upon *Star India P. Ltd. v. Leo Burnett (India) P. Ltd*³⁰ and *Ms. Barkha Dutt v. Easy Ticket, Kapavarapu, Vas*³¹, the Court concluded that, it is seen that if any person uses

²¹ *Id.* at ¶ 10.

²² CDJ 1990 SC 365.

²³ Shivaji, *supra* note 13 at ¶ 11.

²⁴ CDJ 2007 SC 1395.

²⁵ Shivaji, *supra* note 13 at ¶ 12.

²⁶ Shivaji, *supra* note 13 at ¶ 13.

²⁷ *Supra* note 8, ("The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc.,. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc.").

²⁸ 2012 (50) PTC 486 (Del.), ("The Celebrity must be identifiable from defendant's unauthorized use. Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable. The right of publicity extends beyond the traditional limits of false advertising laws.").

²⁹ Shivaji, *supra* note 13 at ¶ 21.

³⁰ 2003 (270) PC 81, ("It is necessary for character merchandizing that the characters to be merchandized must gain some public recognition that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears.").

LAW MANTRA THINK BEYOND OTHERS

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Journal.lawmantra.co.in

the name of a celebrity without his/her permission, the celebrity is entitled to an injunction, if the said celebrity could be easily identified by the use of his name by the others.³²

Lastly, in the opinion of the Court, even assuming for a moment that the impugned movie is not a biopic of the plaintiff, since the name found in the title of the impugned movie is identified only with the plaintiff, who happens to be a celebrity and not with any other person, the defendant is not entitled to use the said name without the permission of the plaintiff/celebrity.³³

ANALYSIS

The court recognized the right of integrity as “the most important moral right”.³⁴ The notion of "integrity based personality right" is an outflow of the celebrity's personality and hence so misrepresentation, dissection or distortion of the work abuses is abusive to the personality of the celebrity, influences negatively his aesthetic character, identity and honour, and along these lines hinders a lawfully secured personality interest.

Perhaps in view of the aforesaid, the Court settled the contention of the respondent concerning Section 17 of the Copyright Act that the plaintiff cannot claim exclusivity on material in the public domain in light of the fact that "Rajinikanth" has been utilized already as a part of different films on several occasions and that only the first owner can claim copyright. Subsequently, the Court reinforced the position that moral rights stay with the creator and are enforceable regardless of the possibility that all economic rights have been authorized/allocated³⁵ and additionally clarified that a celebrity once recognized can claim exclusivity and personality rights over his name despite the fact that it is already in the public domain.

Another crucial aspect delta by the Court is that regardless of limited law and legislative base of personality rights, the Court recognized such rights as not *res integra*. According to McCarthy the right of publicity, is "*the inherent right of every human being to control the*

³¹ **Case No. D2009-1247 (WIPO)**, (“the right to commercially use or exploit one's own name, vests with the person who has worked to create the fame and can lawfully restrict any other third party from exploiting that fame for commercial purposes.”).

³² Shivaji, *supra* note 13 at ¶23.

³³ *Id.*

³⁴ Nidhi, *supra* note 2.

³⁵ Anurag K. Agarwal & S.S. Sagar Priyatham, *Moral Rights in Copyright Law*, (2003) 8 SCC (Jour) 3.

LAW MANTRA THINK BEYOND OTHERS

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Journal.lawmantra.co.in

commercial use of his or her identity".³⁶ In addition to this Court observed that, no further proof of falsity, confusion, or deception is required to establish the infringement of personality rights.

However, there are certain grey areas which are yet to be dealt by the judiciary. One of the stones left unturned by the Court is with reference to continuous infringement of personality rights. In a contextually related foreign case of *Clark v. Associated Newspaper Ltd.*, it was held that "a parody, which occasions only a momentary and inconsequential deception is both successful and permissible; but a parody which occasions an enduring deception is neither".³⁷ However, in Indian context no such jurisprudence exists.

Moreover, the court did not clear up whether Personality rights fall under the category of copyright or under trademark. According to Section 13 of the Indian Copyright Act, 1957; copyright is granted to literary works, dramatic works, musical works, artistic works, cinematograph films and sound recordings.³⁸ Copyright law in India is intended to secure the expression of idea as opposed to an idea itself.³⁹ Personality rights in all possibilities would not suit the expression similar to other copyright eligible works under the Copyright Act, 1957 and would; in this way making it hard to bring it under the category of copyright law. So also, it is hard to test an infringement of personality rights on the premise of the consumer confusion rationale, which is the main objective of trademark law.⁴⁰

Another grey-area which the Court left untouched in the instant case, is that while associating publicity and personality rights as a facet of the fundamental right of privacy and human dignity (as done in a few past decisions) may have its own anomalies for specific reasons. Firstly, fundamental rights are enforced against state (under Article 12) and despite of the liberal methodology of interpretation an individual may find it hard to enforce his right against private entities. Secondly, fundamental rights can't be waived; thus a it would be difficult for an individual to engage in commercial transactions with his publicity rights vis-à-vis personality rights.⁴¹

³⁶ J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th ed. Clark Boardman Callaghan 2004).

³⁷ Anurag Pareek & Arka Majumdar, Protection of Celebrity Rights – the Problems and the Solutions, 11 J. OF INTELLECTUAL PROP. RTS. 415-423 (2006). (hereinafter Anurag).

³⁸ Vishwajith, *supra* note 4.

³⁹ K.P. Abinava Sankar & Nikhil L.R. Chary, *Idea-Expression Dichotomy in Judgment Reporting in India*, [3(2)] J. OF INT'L COM. L. & TECH. 129-138 (2008).

⁴⁰ Paul, *supra* note 11.

⁴¹ Anurag, *supra* note 39.

CONCLUSION

As effectively settled, India is a nation where protection of privacy is thought to be of vital significance. With more individuals from India turning out to be technologically oriented, it is high time that the privacy and personality rights have been conveyed as a moot point for debates. Instant case has been successful in this attempt. The case has effectively settled the principle that despite of the absence of express legislative support, personality rights form part of India's intellectual property regime and are an indispensable part of the right to privacy guaranteed under Article 21. Therefore, the case perceives the personality rights as the entitlement of celebrities to monetize their life's works and restrain others from adapting it vis-à-vis ensuring the right to privacy.