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

Reserved on: 6th February, 2025

Date of decision: 25th April, 2025

\+ **CS(COMM) 773/2023 and I.A.21148/2023**

USTAD FAIYAZ WASIFUDDIN DAGAR ..... Plaintiff

Through: Mr. Neel Mason, Mr. Arjun Harkauli, Mr. Aditya Mathur, Mr. Vihan Dang and Mr. Ujjawal Bhargava, Advocates.

versus

MR. A.R. RAHMAN & ORS. ..... Defendants

Through: Mr. Amit Sibal, Senior Advocate, Mr. Kaushik Moitra, Ms. Vaishnavi Rao, Mr. Anurag Tandon, Ms. Arunima Nair, Ms. Subhalaxmi Sen, Ms. Shailza Agarwal, Mr. Abhishek Grover, Advs with Mr. Sai Shravanam for D-1 (M: 9899193616).

Mr. PS Raman, Sr. Adv., Mr. Sidharth Chopra, Ms. Sneha Jain, Mr. Vivek Ayyagari & Mr. Kuber Mahajan, Advs for D-2 (M:9958393111)

Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra, Ms. Sneha Jain, Mr. Vivek Ayyagari & Mr. Vivek Ayyagari, Advs. for D-2 & 3.

Mr. Harsh Kaushik, Ms. Anushree Rauta, Mr. Shwetank Tripathi, Mr. Harsh Prakash, Mr. Deepank Singhal & Ms. Anchal Raghuwanshi, Advs. for D4. (M: 9782830038).

Mr. Mohit Bangwal, Adv.

Mr. Kunal Gupta, Adv.

Mr. Rahul Dhote, Adv.

Mr. Akshat Agrawal & Mr. Amaan Shreyas, Advs. for Intervenor

Mr. Anukool Chawla, Mr. Ankit Kothari, Ms. Abhiti Vachher (D-5 & 6)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

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Shiva Stuti - The Suit composition[1]

"Shiva Shiva Shiva
shankar aadidev
shambhu bholanaath
yogi mahaadev,
mahaabali shiv, aadi ant shiv
purannsakalkaaj har har mahaadev

Translation:
Shiva Shiva Shiva, God of Gods
Shambu Bholanath, the Great Yogi, Great Lord.
He has great power, he is the beginning and the end
He helps to complete all work, Har Har The Great Lord"

The dhrupad composition which follows is a paean to one of the great gods of the Hindu pantheon, Lord Shiva. The text includes many of his epithets - Shankar 'the Beneficent', Aadidev, 'the First God', Shambu, 'the Benevolent', Bholanaath, 'the Innocent Lord', Yogi 'the Great Yogi', Mahaadev, 'the Great Lord', Har, 'the Destroyer'. Images of Shiva generally depict him either as a Yogi deeply absorbed in meditation, or as Nataraja, Lord of the Dance, performing the tandav, a divine dance symbolising the eternal cosmic cycle of creation and destruction. In some forms it is a dance of joy; in others it is wild and frenzied, its every movement animated by a terrible destructive fury. In this performance it is the latter, wilder aspect of Shiva's nature that is being evoked. The composition is, like its Bhimpalasi predecessor, in two parts (sthayi and antara), though set now to sultaal, a ten-beat rhythmic cycle which divides into five equal groups (i.e. 2 + 2 + 2 + 2 + 2). It is rendered at an extremely quick tempo, with each cycle only lasting just over two seconds. The composition starts on the first beat of the taal, with each section covering four cycles. In the sthayi, notice the distinctive syncopation which occurs towards the end of each cycle, giving the melody its special lilt."

[1] *See* Annexure A for the embedded audio file of the suit composition – *Shiva Stuti (performed by the Junior Dagar Brothers and the Plaintiff)*, impugned song – *Veera Raja Veera* (Hindi version) and Amir Khusro's composition – *Yaar-e-man Biya Biya.*

1. The Plaintiff - Ustad Faiyaz Wasifuddin Dagar has filed this suit seeking, *inter alia,* permanent and mandatory injunction for recognition of the copyright in the above extracted musical composition "*Shiva Stuti*" (hereinafter "*the suit composition / Shiva Stuti*"). The Plaintiff also seeks to restrain Defendant Nos. 1 to 4 from utilizing the suit composition as part of sound recording of the song "*Veera Raja Veera*" (hereinafter "*the impugned song / Veera Raja Veera*") without obtaining authorisation from Plaintiff and without attribution of moral rights of the original authors / composers of the suit composition.

2. The Plaintiff has also preferred ***I.A. 21148/2023*** under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908 seeking, *inter alia,* appropriate directions to the Defendants to give credit to the original authors / composers of the suit composition, namely Late Ustad N. Faiyazuddin Dagar and Late Ustad Zahiruddin Dagar during every playout of the impugned song across all modes and mediums including digital, internet, Over-The-Top platforms, satellite, cable television etc. By way of the present judgement the Court shall dispose off the said application.

A. Factual Background

3. The Plaintiff - Ustad Faiyaz Wasifuddin Dagar, is the son of Late Ustad N. Faiyazuddin Dagar and nephew of Late Ustad N. Zahiruddin Dagar. The Plaintiff's uncle and father sang as a duo (*jugalbandi*) in their family tradition of Hindustani classical music, known as the *Dagarvani* style/ *Gharana*. The Plaintiff's uncle and father were popularly known as the "*Junior Dagar Brothers*".

4. It is stated that the Plaintiff's ancestors have been *Dhrupad* vocalists for nearly 20 generations and have developed the *Dagarvani Gharana* within the traditional structure of Dhrupad genre of Hindustani classical music. The Plaintiff himself is an accomplished Dhrupad vocalist of the *Dagarvani Gharana*, and he was awarded the Padma Shri in the year 2010 in recognition of his contributions to Hindustani classical music.

5. The Defendant No. 1 – Mr. A.R. Rahman is a renowned music director and composer whose works have been celebrated across the world. The Defendant No. 1 is the music director of the film ***"Ponniyin Selvan – 2"*** (hereinafter "*PS – 2 / the film*") in which the impugned song – *Veera Raja Veera* is featured. The Defendant No. 2 – Madras Talkies and Defendant No. 3 – Lyca Productions Private Limited are the co-producers of the film. Mr. Mani Ratnam who is the co-owner of Defendant No. 2 is also the director of the film. Defendant No. 4 – Tips Industries Limited is the holder of the rights over the audio and audio-visual songs utilised in the film. Defendant No. 5 – Shivam Bharadwaj and Defendant No. 6 – Arman Ali Dehlvi have been credited as the singers of the impugned song. It is not disputed that the Defendant No. 5 and Defendant No. 6 were long standing disciples of the Plaintiff.

6. It is the case of the Plaintiff that the suit composition was written and composed by the Junior Dagar Brothers sometime in 1970s and thus, the suit composition is a work of joint authorship. The Junior Dagar Brothers are stated to be the first copyright holders in the suit composition.

7. It is undisputed that the suit composition has been composed in *Raga Adana* in *Sultaal* (10 beat cycle) within the *Dagarvani* tradition of Dhrupad. The suit composition – *Shiva Stuti* - along with its lyrics has been composed

as a tribute to Lord Shiva, evoking various attributes and forms of the said God.

8. It is stated that the Junior Dagar Brothers had performed the suit composition, along with several other compositions, at the Royal Tropical Institute in Amsterdam on 22nd June, 1978. The said institute had recorded the said performance, which was later published and made available as a musical album titled "*Shiva Mahadeva by the Dagar Brothers*", by an international music company – PAN Records.

9. The Plaintiff's father and uncle passed away in the year 1989 and 1994, respectively. Thereafter, it is stated that the legal heirs of the Junior Dagar Brothers had entered into an oral family settlement agreement, whereby, the copyright in the suit composition and all original compositions of Junior Dagar Brothers stood transferred to the Plaintiff.

10. It is also stated that after the death of the Plaintiff's father, the Plaintiff had performed the suit composition with his uncle on various occasions. The Plaintiff alleges that various compositions (*Bandish*), including the suit composition, are used by him to train his students/disciples.

11. The facts leading up to the filing of present suit are that allegedly Defendant No. 5 and Defendant No. 6 had shared the suit composition with the Defendant No. 1 for being utilized as a music composition for the film PS – 2, without the permission or authorisation of the Plaintiff. The sound recording of the impugned song was released on 28th March, 2023 on audio streaming platforms. Thereafter, on 8th April, 2023 the audio-visual recording of the impugned song was released on an online platform – YouTube. It is interesting that in the said audio-visual recording, the Defendants have credited the impugned song as a "*Composition based on a Dagarvani*

Tradition Dhrupad".

12. It is stated by the Plaintiff that the initial communication to the public of the audio-visual version of the impugned song by the Defendants did not cite/ specify the suit composition as part of the song credits. It is alleged that the mention of *Dagarvani* tradition as an inspiration has been a result of the correspondence that thereafter happened between the parties.

13. On 13th April, 2023, the Plaintiff, after learning of the alleged unlawful utilisation of the suit composition by the Defendants, wrote a letter to Defendant No.1 and Mr. Mani Ratnam, regarding alleged infringement of moral rights of the Junior Dagar Brothers and copyright of the Plaintiff over the suit composition. The Plaintiff also suggested resolving the dispute with mutual consent of the parties since the impugned song had already been released. It is alleged that Defendant No.1 had assured the Plaintiff *via* phone call on 14th April, 2023 that moral rights of the Junior Dagar Brothers shall be duly acknowledged. The Defendant No.1 requested for some time to speak with the production team of the film in respect of the said assurances.

14. It is stated that since the Plaintiff did not receive any response from Defendant No.1, ld. Counsel for Plaintiff issued a legal notice to the Defendant No.1 *vide* email dated 20th April, 2023. In the said email, the Plaintiff, *inter alia,* expressed his willingness to grant a non-exclusive license in the suit composition to the Defendant No. 1. In response to the letter dated 13th April, 2023 and email dated 20th April, 2023, the Defendant No.2 – Madras Talkies issued a reply dated 24th April, 2023, whereby, all claims of the Plaintiff *qua* the suit composition have been rejected.

15. Thereafter, the film PS – 2 was released in the theatres on 28th April,

2023, on Amazon Prime (OTT platform) on 2nd June, 2023 and whereas the Hindi dubbed version was released on Amazon Prime (OTT platform) on 23rd June, 2023.

16. Thus, the Plaintiff being aggrieved by actions of the Defendants infringing moral rights of the Junior Dagar Brothers and copyright of the Plaintiff over the suit composition, has preferred the present suit, after attempting to amicably resolve the same.

17. The Plaintiff has also preferred an application under Order XXXIX Rule 1 and 2 seeking the following prayers:

> ***"Prayers***
> *a. Pass an order of interim injunction directing the Defendant Nos. I to 4, their respective directors, officers, employees, agents, assignees, representatives and all other persons acting for and on their behalf to give credit to the authors of the Suit Composition, namely the Junior Dagar Brothers, namely Ustad N. Faiyazuddin Dagar and Ustad Zahiruddin Dagar during every playout of the Impugned Song across all modes and mediums including without limitation digital, internet, Over-The-Top (OTT) platforms, satellite, cable television;*
>
> *b. Pass an order of interim injunction restraining the Defendants, their respective directors, officers, employees, agents, assignees, representatives and all other persons acting for and on their behalf from exploiting the Suit Composition in any manner whatsoever across all modes and mediums, including without limitation digital, internet, Over-The-Top (OTT) platforms, satellite, cable television, without a valid license from the Plaintiff;*
>
> *c. Pass an order of interim injunction restraining the Defendant No. 5 and Defendant No. 6 from exploiting*

the Suit Composition in any manner whatsoever across all modes and mediums, including without limitation digital, internet, Over-The-Top (OTT) platforms, satellite, cable television, without a valid license from the Plaintiff;

d. Pass an order of interim injunction restraining the Defendants, their respective directors, officers, employees, agents, assignees, representatives and all other persons acting for and on their behalf from utilising the Impugned Song in any manner whatsoever across all modes and medium including without limitation digital, internet, Over-The-Top (OTT) platforms, satellite, cable televisions, without a valid license from the Plaintiff in respect of the Suit Composition;

e. Pass an order of interim injunction directing the Defendant Nos. 1 to 4, their respective directors, officers, employees, agents, assignees, representatives and all other persons acting for and on their behalf to take down the Impugned Song (whether playout being recorded or utilised in/for the purpose of public performance) across all modes and mediums;

f. Pass an order of interim injunction directing the Defendants to tender an unconditional apology, acknowledging the moral rights of the Junior Dagar Brothers and the copyright of the Plaintiff in respect of the Suit Composition and publish the same on all platforms across all modes and mediums wherein the Impugned Song is made available;

g. Pass an order of ad-interim injunction in terms of prayers (a), (b), (c), (d), (e), and (f);
h. Grant any other relief in favour of the Plaintiff and against the Defendants as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case and in the interest of justice."

B. Proceedings before the Court

18. On 20th October, 2023 the present suit was listed for consideration and after hearing the parties, summons was issued to all Defendants. Further, notice was issued in the application for interim injunction being ***I.A. 21148/2023***. It was submitted by ld. Counsel for the Plaintiff, relying upon the notation chart placed on record, that though the lyrics of the impugned song are different from the suit composition, the *taal* / beat are identical. It was also submitted that the composition of the impugned song is identical to the suit composition in *Raga Adana*. In response to the same, ld. Counsel for Defendant No. 1 had sought time to take instructions. However, the ld. Sr. Counsel appearing for Defendant No. 2 and 3 had submitted that they are willing to attempt an amicable resolution. Whereas on behalf of Defendant No. 4 it was submitted that the suit composition lacks originality and mere manner of singing cannot be the subject matter of copyright.

19. The Court, on the said date, had also heard the suit composition and the impugned song in open court. Thereafter, considering the submissions of the parties and the music compositions in question, the Court had passed certain *ad-interim* directions. The relevant paragraphs of order dated 20th October, 2023 reads as under:

> *"20. In the present suit, the Plaintiff prays for an injunction against the said Defendants. The grievance of the Plaintiff is that in the film PS2, a song by the name 'Veera Raj Veera' has been filmed, which according to the Plaintiff is based on the 'Shiva Stuti' composition in which the Plaintiff owns rights. The said song in the film has been sung by Defendant Nos. 5 and 6.*

21. The case of the Plaintiff is that although the lyrics of the song 'Veera Raj Veera' are different, the taal and the beat are identical and the composition itself is identical to the Plaintiff's original composition based on the Raga Adana. In order to establish this, a chart has been filed comparing the musical notations along with the affidavit of the Plaintiff.

22. Ld. counsel for the Plaintiff - Mr. Neel Mason has pointed out that Plaintiff learned of the said song in April 2023 when it was released for the first time in social media and on television, etc. Immediately, thereafter, Plaintiff wrote a personal letter to Defendant No.1 on 13th April 2023 wherein it was brought to the notice of Defendant No.1 that the 'Shiva Stuti' composition has been imitated in the 'Veera Raj Veera' song. No reply was sent by Defendant No.1. There was no response thereafter except a brief telephonic conversation between Plaintiff and Defendant No.1, wherein he is stated to have been assured that the manner in which the dispute can be resolved would be communicated. However, no such reply was received from Defendant No.1. Defendant No.2 thereafter replied to the legal notice and stated that the claim of copyright infringement is misconceived as the same is a traditional song. Further, the allegations of Defendant No.2 in the said reply were that the attempt of Plaintiff is to earn monetarily and an attempt to gain publicity. Thereafter, Plaintiff sent an email dated 20th April 2023 through counsel intimating the Defendant No. 1 of the infringement of the Plaintiff's copyright and moral rights of the Junior Dagar Brothers i.e. the Plaintiff's father and uncle. But there was no reply.

23. In view thereof, the Plaintiff filed the present suit.

24. Today, ld. Counsel On behalf of Defendant No.1,

submits that the suit papers have been served upon him recently and he would need to seek instructions in the matter. On behalf of Defendant No.2 and 3, Mr. Raman, ld. Sr. counsel submits that the composition for the "Veera Raj Veera" song was given by Defendant No.1 for incorporation into the film. In any event, Defendant Nos. 2 and 3 are willing to attempt an amicable resolution.

25. On behalf of Defendant No. 4 it is submitted that there is no originality claimed in the composition and the mere manner of singing cannot be the subject matter of copyright.

26. The Court has today heard the two compositions. At this stage, since Defendant No. 1 is yet to make submissions, the Court does not wish to make any observations in this regard. However, in terms of the Copyright Act, 1957, musical work is defined in Section 2(p) as under:

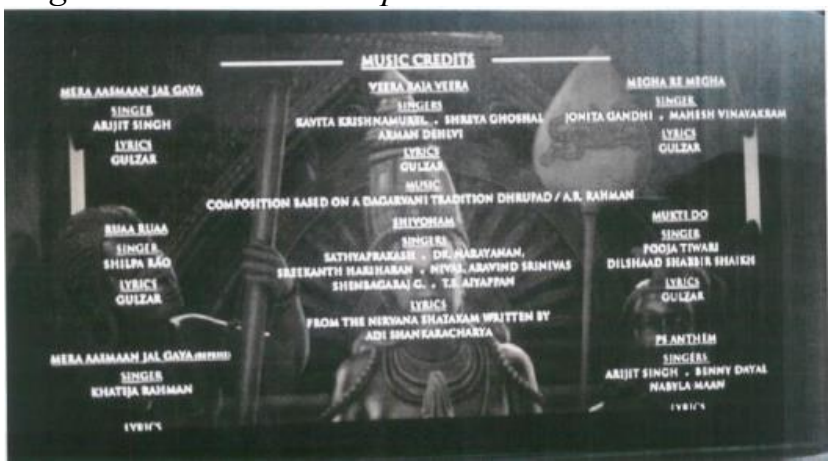
> *"2.[(p) "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music;]"*

27. Considering the definition of musical work, there can be an infringement of copyright in a musical work even without the words, the lyrics and the action being similar.

28. The Plaintiff has attempted to establish infringement with the chart consisting of the notations and taal and the beat. The Defendant No.1 would be required to respond to the same.

29. At this stage, ld. Counsel for Plaintiff points out that Defendant No.1 has been given credit in respect of this

song to the effect that the composition is based on Dagarvani tradition dhrupad. The same reads as under:



However, it is, further pointed out that in another YouTube video, there is an error in the said credit that is given for the composition of the song. The same is as under:



In the above video instead of Dagarvani the word Dargavani has been used.

30. After having heard ld. Counsels for the parties and after hearing the two compositions that were played before the Court today, in order to consider the ad-interim relief that is prayed for the following directions

are issued:

> *i. Defendant No.1 shall produce the raw recording of 'Veera Raj Veera' song along with its reply to the notation chart which has been handed over by Plaintiff today.*
> *ii. Insofar as the YouTube credit is concerned, the typographical error where the Dagarvani is mentioned as Dargavani shall be corrected within the next 48 hours, and the corrected credit shall be reflected on the You Tub video."*

20. It is noted that during the course of proceedings, an application for intervention was filed on behalf of Pandit Abhishek Kumar Mishra. The Court rejected the said application since the said applicant has no locus *qua* the *lis* between the parties. The relevant portion of the order dated 10th November, 2023 is extracted hereunder:

> ***"I.A. 22199/2023 (u/O I R 8A CPC & O 1 R10(2) CPC)***
> *8. This is an application moved on behalf of Pandit Abhishek Kumar Mishra seeking intervention in the matter.*
>
> *9. The present is not a Public Interest Litigation and is a dispute between the parties in respect of a particular song. Considering the nature of the suit, intervention is not permitted.*
>
> *10. Ld. counsels for the Applicant are, however, free to assist the Court on any legal issues. Short written submissions is permitted to be filed.*
>
> *11. Accordingly, this application is disposed of."*

21. On 5th March, 2024, the Court after hearing the preliminary

submissions of the Defendant No.1 and considering the fact that the present suit had been filed after release of the film – PS2, directed the parties to seek instructions if instead of first adjudicating the application for interim injunction, the present suit itself may be finally decided subject to certain deposit as directed by the Court. The order dated 5th March, 2024 reads as under:

> *"1. This hearing has been done through hybrid mode.*
>
> *2. Arguments have commenced on behalf of Defendant No.1. Mr. Amit Sibal, ld. Sr. Counsel has made his submissions.*
>
> *3. Considering the fact that the suit was filed post the release of the film, let the parties seek instructions if, instead of hearing the interim injunction application, the suit can itself be finally decided subject to certain deposit which can be directed by the Court. Considering the nature of the matter, one witness on each side can lead evidence.*
>
> *4. List for further submissions on 15th April, 2024."*

22. Since, the parties were not amenable to the above suggestion of the Court, the proceedings in the interim application for injunction continued. During the course of proceedings, the parties have been permitted on several dates to place on record audio and audio-visual recordings of the suit composition, impugned song as also renditions of the suit composition by third parties. The parties have also placed on record audio recordings of certain other musical works which have been relied upon during the course of their submissions.

23. The ld. Sr. Counsels and Counsels have been heard by the Court at length on several dates. Finally, on 6th February, 2025 arguments were

concluded in the interim application being ***I.A. 21148/2023*** and the matter was reserved for judgement.

C. Submissions of the parties

Submissions on behalf of the Plaintiff

24. Mr. Neel Mason and Mr. Arjun Harkauli, ld. Counsels have addressed the Court and made detailed submissions on behalf of the Plaintiff. It is submitted that the Plaintiff is a descendant of a long line of Dhrupad vocalists of about 20 generations known as the Dagar *Gharana*. The singing style of the Dhrupad vocalists from the said *Gharana* is known as the *Dagarvani* style. It is submitted that the Plaintiff himself is an accomplished Dhrupad vocalist and composer in the *Dagarvani* style who has been awarded with the Padma Shri in the year 2010.

25. The Junior Dagar Brothers had also composed and performed Hindustani classical compositions in the *Dagarvani* style. Mr. Mason, ld. Counsel for the Plaintiff submits that one of the earliest compositions of the Junior Dagar Brothers is the suit composition which was composed in *Raga Adana* in the 1970s. The suit composition was performed by the Junior Dagar Brothers in various international concerts including the one held at the Royal Tropical Institute in Amsterdam on 22nd June, 1978. It is submitted that the suit composition is also part of an album which was released in after the death of the Junior Dagar Brothers titled '*Shiva Mahadeva by the Dagar Brother*s'. The said album was released by the music company PAN Records.

26. It is argued that the grievance of the Plaintiff is that in the film PS-2, impugned song has been filmed based on the suit composition in which the

Plaintiff owns rights. It is submitted that although the lyrics of the impugned song are different, the *taal/* beat of the impugned song is identical to the suit composition. In support of this, the ld. Counsel drew the attention of the Court to the notation chart comparing the musical notations of the suit composition with those of the impugned song filed along with the affidavit of the Plaintiff. It is submitted that the said notation chart would show that the manner in which the musical notes/ *swars* appear in the two compositions is almost identical.

27. Ld. Counsel for the Plaintiff, relying on the said notation charts, submits that while no copyright is being claimed by the Plaintiff in *Raga Adana* in which the suit composition has been composed, or in the particular style of singing *i.e.,* the *Dagarvani* style, replication of the suit composition would not be permissible. According to Mr. Mason, ld. Counsel, Defendant Nos. 1, 5 and 6 who are the music composer and singers of the impugned song, respectively, have admitted having access to the suit composition. However, the stand of Defendant No.1 is that it is an independent composition inspired by *Dagarvani* tradition as acknowledged in the film itself.

28. It is argued by the ld. Counsel that the Plaintiff does not claim any rights on any specific note/ *swara,* however, as a principle, the notes/*swaras* cannot appear in two different and original compositions in identical form and manner. In effect, Mr. Mason, ld. Counsel has attempted to argue that even though two separate compositions would be based on the same *Raga,* the compositions if original would still be different. Reliance is placed by the ld. Counsel for the Plaintiff on the following two decisions: (i) ***Ram Sampath v. Rajesh Roshan, 2008 SCC OnLine Bom 370*** **and (ii) Sulamangalam R. Jayalakshmi v. Meta Musicals, 2000 SCC OnLine Mad 381.**

29. The crux of the submission of the ld. Counsel for the Plaintiff on the strength of these two judgments is that the main part of the suit composition has been lifted in the impugned song. Further, it is urged that even copying of the small part of an original composition can be injuncted by the Court and it is not necessary that the entire composition ought to be copied.

30. Insofar as the originality of the suit composition is concerned, it was submitted by Mr. Arjun Harkauli, ld. Counsel, that that every *Raga* is merely a set of principles, which the proponent has to follow. However, various *swaras*, which are in the *Raga*, can be mixed and matched and need not to be used in the same order. There can be repetitions, dragging, skipping and selection from within the *Raga,* which would make the composition sound completely different. The selection and the manner, in which the composition is made, is done by the composer. The *Raga* merely sets out the principles but the composition is new. The violation of copyright takes place if there is imitation of the composition when the principles of *Raga* are in public domain.

31. It is argued by the ld. Counsel that though there is no copyright in the *Raga*, the musical compositions are themselves original in nature. Every composer can set the composition to a particular *Raga*, which would then become the original composition of that composer.

32. In the present case, relying on the notation chart it is submitted that the composition begins with two notes from the *Avroha*, both of which are dragged and two notes from the *Aroha* which are again dragged and switched back to the *Avroha*. This particular manner in which the notes are picked, dragged or switched from the *Aroha* and *Avroha* is unique and would not be violative of the discipline of the *Raga*. Whenever a particular composition is

played, for an untrained person the similarity would be easily perceptible. However, a person trained in classical music can identify the *Raga* depending upon the notes which are picked. The *Raga* itself neither restricts the choice of the notes either from the *Aroha* or *Avroha,* nor switching between the same in a manner as to make it a new and original composition. Thus, the submission on behalf of the Plaintiff is that the composition can be enumerable and the permutations are also enumerable.

33. On a query from the Court as to what is the relief that has been sought by the Plaintiff considering that the music, including the impugned song, as also the film have been released on almost all platforms including theatre, OTT, music apps and other platforms, Mr. Mason, ld. Counsel submits that the first prayer of the Plaintiff would be for an interim mandatory injunction directing the Defendants to remove the offending portion of the impugned song. In the alternative, it is prayed that the Court may direct monetary deposits in view of the interim order dated 20th October, 2023 if infringement is found. Further, it is submitted without prejudice, that pending trial the Defendants ought to be directed to acknowledge the moral rights of the Junior Dagar Brothers by inserting the following in the credit of the film:

"*Based on the original composition by*
Late Ustad N. Faiyazuddin Dagar and Late Ustad N. Zahiruddin Dagar"

34. It is submitted by Mr. Mason, ld. Counsel that the above prayers are without prejudice to each other.

35. It is, further, submitted that the music is continuously available on various music platforms, music channels as also on OTT platforms, therefore, any relief which is granted could still acknowledge the Plaintiff's rights.

Submissions on behalf of the Defendant No. 1

36. Mr. Amit Sibal, ld. Sr. Counsel has addressed the Court and made detailed submissions on behalf of Defendant No. 1. It is submitted that no evidence has been placed on record by the Plaintiff to show that the suit composition is the original composition of the Junior Dagar Brothers. In respect of the music album titled "*Shiva Mahadeva by the Dagar Brother*s" released in 1996, it is submitted that the accompanying inlay card, does not claim copyright of the Junior Dagar Brothers over the suit composition.

37. It is submitted by the ld. Sr. Counsel that Dhrupad is one of the oldest forms of Hindustani classical music traces its origin to the *Samaveda i.e.*, almost 3000 years ago. The said genre of Hindustani classical music is passed from generations to generations through oral tutelage and is, therefore, bound by very strict rules for composition. The same is contrasted with other genres of Hindustani classical music such as *Thumri* and *Khayal* which give more freedom to the artist or the composer. Thus, it is submitted by the ld. Counsel that since the *Dhrupad* style is based on extremely strict rules, the copyrightable elements would be minimal.

38. Ld. Sr. Counsel has argued that the suit composition is in *Dhrupad* genre which is in public domain and no specific averments have been made in the plaint as to which part of the suit composition is original and which part is based upon the traditional *Dhrupad* genre. It is submitted that the *Raga*s form fundamental building blocks of Hindustani classical music especially the *Raga Adana* in the *Dhrupad* genre. Thus, the manner of singing *i.e.*, *Dagarvani* style and the suit composition itself is not original and capable of

copyright protection.

39. It is urged by the ld. Sr. Counsel that individual note sequences of a particular *Raga* cannot have any copyright inasmuch as every particular *Raga* has to follow a discipline which is prescribed. Though there are various options for composers, however, when two people operate in the same discipline, the similarity is bound to arise.

40. The ld. Sr. Counsel has in support of his submissions referred to the textbook on *Raga* which has been filed by the intervener called '*Raga* Parichay by Harishchandra Shrivastava' wherein insofar as *Raga Adana* is concerned, it shows the basic *swaras* which form part of the said *Raga*. On the basis of these references to the textbook, it is argued that the notation comparison which has been filed on record by the Plaintiff merely shows that the Defendant is following the discipline of *Raga* which is integral part of the said *Raga*.

41. The next argument raised by the ld. Sr. Counsel is that the suit composition is not an original composition since there are several renditions of the same existing in the public domain. Ld. Sr. Counsel relies upon other recordings by different artists to show that almost all the artists sing the suit composition in a similar form and, thus, there is no originality in the Plaintiffs work as it is a traditional composition. The performance by Ustad Zia Fariduddin Dagar and his disciple Pandit Ritwik Sanyal has been played in the Court at the request of the ld. Sr. Counsel. It is also urged that the family tree of the Plaintiff would reveal that there are several parts of the Dagar family who have all performed *'Shiva Stuti'* in a similar form as the suit composition. However, the assignment which is claimed from other members of the family by the Plaintiff vide document dated 10th October, 2023 does

not include those persons whose recordings are relied upon by the Defendants.

42. The ld. Sr. Counsel has pointed out that initially the Plaintiff had claimed in the plaint that neither the Junior Dagar Brothers nor the Plaintiff himself had ever permitted/authorised their students to utilize the suit composition in any manner including for commercial exploitation. However, the Plaintiff has changed its stand after the Defendants had pointed out the various performances of different third parties. It is now claimed by the Plaintiff that the said performances by either family members of Dagar Family or their disciples were performed after seeking permission from the family members of Junior Dagar Brothers.

43. It is further submitted that initially the Plaintiff had claimed to be the sole owner of the suit composition, however, in the replication filed by the Plaintiff, he has completely changed his stand by stating that he is only a co-owner of the suit composition.

44. Further countering the Plaintiff's claim of originality in the suit composition the ld. Sr. Counsel has argued that some of the notations and lines which are claimed as original by the Plaintiff are actually germane to the *Raga Adana* itself. It is his submission that these notations are not only part of the grammar of *Raga Adana* but also of *Ragas* such as *Darbari Kanada, Jaunpuri,* etc. He further submits that various lines of the suit composition can also be found to be present in compositions which are centuries old such as the 13th century composition of Amir Khusro called "*Yaar-e-Man Biya Biya".* The said composition has also been sung by Ustad Amir Khan and ld. Senior Counsel has played the said composition during the Court proceedings to show the similarities in the said composition and the suit composition.

45. Thus, it is argued that since neither the authorship nor the originality in the suit composition has been established by the Plaintiff, the suit composition does not deserve copyright protection.

46. The ld. Sr. Counsel thereafter has addressed the issue of alleged infringement of the suit composition by the impugned song. In this regard, at the outset, it is argued that the impugned song is itself an original composition, which uses the fundamentals of western music.

47. There is no *prima facie* case of infringement of copyright as substantial similarity between the suit composition and impugned song has not been demonstrated after deleting the elements which are in public domain. It is submitted that the test for infringement in respect of musical works, especially, in respect of Hindustani classical music would require the Court to separate the protectible elements from those that are common-place and existing in the public domain. It is only the protectible elements that have to be compared for the test of substantial similarity.

48. In support of the submission the ld. Sr. Counsel has referred to a decision of the United States Court of Appeals for the Ninth Circuit in ***Marcus Gray v. Katheryn Elizabeth Hudson*** **[28 F. 4th 87 (9th Cir. 2022)]** to argue that common place musical elements cannot be copyrightable. In this case, the Court is stated to have accepted the *scene a faire* doctrine in respect of musical works.

49. Further, it is argued that the individual notes cannot be copyrighted and that it is only the arrangement in which there can be copyright. If the arrangement is compared, the Plaintiff's and the Defendant's arrangement are totally different. It is submitted by the ld. Counsel that the Plaintiff's

arrangement is based on Hindustani *Ragas* whereas the Defendant's arrangement has a blend of Hindustani, western and various other genres of music.

50. He also sought to distinguish the two judgments cited by the Plaintiff, namely, ***Sulamangalam R. Jayalaxmi (supra)*** passed by the Madras High Court as also the Bombay High Court's judgment in ***Ram Sampath (supra).*** In respect of the decision in ***Sulamangalam R. Jayalaxmi (supra)***, it is his submission that the Defendant was making a version recording and also using photographs of the singers of the Plaintiff which was clearly impermissible. In ***Ram Sampath (supra)*** also, the Defendant therein had agreed that the Plaintiff's authorship of the work was not disputed which is not the case herein. Further, in the said case the Plaintiff therein had also led expert's evidence to show the similarity between the two works. However, in the present case the Plaintiff has not led any expert evidence in support of its case.

51. The ld. Sr. Counsel has also referred to the Defendant No.1's notes to argue that there is so much more in the impugned song when compared to the Plaintiff's work. The ld. Senior Counsel showed various parts of the impugned song in different formats *i.e.*, only with the voice, only the orchestra, only the music and thereafter the overall recording to show that the various vertical elements have to be seen together and merely a single element cannot be compared in isolation. It is argued by the ld. Sr. Counsel that the *swaras* of the impugned song would also show that in the initial part, there are ten different harmonies and even in the later part, there are three accompanying harmonies. All of these have been combined to create the impugned song.

52. It is argued by the ld. Sr. Counsel that granting protection to the suit

composition would amount to promoting a monopoly adversely affecting the artists and composers of Hindustani classical as also Carnatic music. In this regard, reliance is placed on ***Apple Computer Inc. v. Microsoft Corporation, 35 F.3d 1435 (9th Cir. 1994)*** and ***R.G. Anand v. Delux Films, (1978) 4 SCC 118***.

53. In Hindustani or Carnatic music, the voice is the soul of the composition. Though, there can be no doubt that even a small part of note can be infringing, however, if the fundamental core notes are themselves in public domain, there cannot be any infringement.

54. It is submitted that the Defendant No. 1's impugned song does not use *Raga Adana* for the composition. Reliance is placed upon the affidavit of Mr. Sai Shravanam filed by the Defendant No. 1. The said expert had played *tabla* in the original recording of the impugned song. As per the expert the *sul taal* is not used even once by the Defendant No. 1 in the impugned song. Further, it is stated the initial musical framework of the impugned song is inspired by the suit composition and *Dagarvani* tradition. The impugned song is not specifically recorded based on *Raga Adana*, rather, the same improvises with the notes of *Raga Jaunpuri* or *Raga Darbari Kanada* and then develops based on shades of *Raga Bihag* or *Raga Hameer Kalyani*. It is submitted by the ld. Counsel that the impugned song being a mélange of different elements, the same is not infringing the suit composition.

55. Finally, it is submitted that no case is made out for an interim injunction as the impugned song was released on 29th March, 2023 and the present suit has been filed in October, 2023. The film has also been released on Amazon Prime which is an OTT platform, thus, due to the belated nature of the filing no injunction is liable to be granted.

Submissions on behalf of Defendant No. 2

56. Mr. P.S. Raman, ld. Senior Counsel appearing for Defendant No.2 - Madras Talkies firstly submits that the producer has exercised all due diligence in engaging Defendant No.1 who is a reputed music composer. The movie project itself is one which has been given life to by the Director/Producer - Mr. Mani Ratnam and is based on a well-known Tamil series called '*Ponniyin Selvan*'. The storyline published in the 1940-50s and was a personal accomplishment for Mr. Mani Ratnam to produce, direct and bring this story for viewing by the public.

57. The film in question *i.e.*, PS-2 is the second part of a two part series. Insofar as the first movie Ponniyin Selvan-I is concerned, there is no dispute. The present suit is limited to the second part – PS-2. It is his submission that the present suit has been filed belatedly on 16th October, 2023 since the impugned song along with the trailer of the film was released on 8th April, 2023, the film was released on 28th April, 2023 and the OTT release of the film took place on 28th June, 2023.

58. Ld. Sr. Counsel submits that initially, a notice was issued on behalf of the Plaintiff to the Defendants on 20th April, 2023. However, in the said notice, it is interesting to note that the Plaintiff has actually quantified the amount that would be payable for non-exclusive license for the Plaintiff's work. Having done so, the Plaintiff has already pre-estimated the monetary value and thus, under the provisions of the Specific Relief Act, 1963 no injunction would be liable to be granted under such circumstances. Reference is also made to paragraph 35(g) of the prayer clause in the plaint where a sum

of approximately over Rs. 2 crores is sought as damages for infringement of copyright and the moral rights.

59. The next submission made by Mr. Raman, ld. Sr. Counsel is that the balance of convenience completely tilts in favour of the Defendants, as though the theatrical release of the film has already been done, the film is available even today on OTT platforms. The songs are also available on various online music platforms and any injunction which is granted would result in a situation where the Defendants may be compelled to pull down all the songs or make edits into the film or OTT platforms. Thereafter, if the Plaintiff loses or does not establish authorship or ownership, the Defendants cannot be adequately compensated. On the other hand, if the Plaintiff succeeds in a suit, the monetary value ascribed can always be paid to the Plaintiff and at that stage, the Court would determine as to whether the said amount would be payable by Defendant No.1 or Defendant No.2.

60. Insofar as the issue on merits is concerned, Mr. Raman, ld. Sr. Counsel broadly adopts the arguments and submissions made by Mr. Amit Sibal, ld. Sr. Counsel for the Defendant No. 1 to the extent that the intricacies of music compositions including the delineation between *Raga* and *taal* and the fact that there are various doubts that have been raised in respect of the Plaintiff's authorship would have to be gone into in the present suit.

61. The Plaintiff themselves has contended that the dhrupad style of music is a common style in northern India and therefore whether copyright can be claimed in such a style of music is also a legal issue which would have to be decided. Under such circumstances, the grant of an injunction would be completely untenable in these facts and circumstances.

Submissions on behalf of Defendant No. 3

62. Mr. Saikrishna, ld. Counsel appearing for Defendant No. 3 submits at the outset that the test of copyright infringement in a case involving music copyright cannot be the same as in other works. The test for infringement would have to be evolved specifically in the context of Indian classical music where the dictates of the *Raga* or discipline of *Raga,* also known as *dharma* of the *Raga,* has to be followed and there is very little scope for flexibility in the same. When the rigors of the *Raga* are outlined and no departure is permitted for composers, who work within limitations, the necessity to delineate the protectable and the unprotectable elements is essential. Classical music by its very nature would consist of a vast section of unprotectable elements and thus, the gleaning of the two categories of elements that form the compositions is important.

63. The next question that arises is whether the infringement is to be determined from the viewpoint of a lay observer or a discerning listener. In the context of music copyright, especially based on classical music, it ought to be from the point of view of a discerning listener, who can distinguish the protectable and non-protectable elements.

64. Two musical compositions may sound similar leading to a conclusion of infringement. However, if the unprotectable elements are removed, then the said compositions would be different. Unless and until there is bodily incorporation, therefore, in the case of classical music-based composition, infringement cannot be held. The term 'substantial lifting' has to, therefore, be interpreted as virtual identity.

65. There are several peculiarities, which are associated with Indian Classical Music and considering the limited options that are available for any

composer, the identity standard is quite high. The difference between virtual identity and absolute identity needs to be born in mind while deciding such cases. Reliance is placed upon *Nimmer on Copyright*[2] to argue that in a case where the copyright is on a thin line, the similarity has to be supersubstantial and not merely substantial. The thin copyright subject matter has to be, therefore, first be gleaned from the overall competition. In the said context differences have to be determined between the three categories of works namely creative works, derivative works and compiled works. The said categorization would assist the Court in determining as to whether the work itself is capable of heavy copyright protection or thin copyright protection. In the case of *Ragas*, since the range of expression is limited, the test of substantial similarity has to be the test of virtual identity. The number of combinations in traditional *Ragas* being regimented, the scales being standardized, there is very little creativity that can be done by a composer and it is only once the said differentiation is made and the protectable elements are separated that infringement can be established.

66. Ld. Counsel relies upon the decision in ***Michael Skidmore v. Led Zeppelin [952 F.3d 1051 (9th Cir. 2020)]*** to argue that the public domain cannot be cheated by giving copyright protection what is not deserving so. The specific tradition of a genre has to be borne in mind, the common stock elements, standardized views of notes etc. would also have to be borne in mind while deciding how much of the composition is protectable. Further, in the case of *Ragas* there would be a rigorous public domain which also needs

[2] *(2023 edition)*

to be safeguarded and protected. The virtual identity standard would, therefore, govern such works which are based on Indian Classical *Ragas*.

67. It is further argued that the manner in which these *Ragas* are transmitted from generation to generation, through oral discourse, would also have to be borne in mind.

68. In ***Ets-Hokin v. Skyy Spirits, Inc., [323 F.3d 763]***, the Court was again concerned with a copyright in case of a photograph where in respect of the said sky bottle, there were several unoriginal elements and in such cases use of certain elements being indispensable, the copyright would be a thin copyright.

69. It is argued by ld. Counsel that in Section 14 of the Copyright Act, 1957 (hereinafter "*the Act*"), the word 'substantial' in the case of musical compositions would, therefore, has to be read as identical where works which are protectable and unprotectable elements are concerned. Reference is made to Section 2(a) (iv) & (v) of the Act which use the word 'alteration' to argue that the word 'alter' in such a case would have to be given a restricted meaning. A large scale meaning cannot be applied to alterations. Reliance is placed upon the ***Barbara Taylor Bradford & Anr. v. Sahara Media Entertainment Ltd. & Ors. [2003 SCC OnLine Cal 323]***.

70. It is, thereafter, urged that whenever such works are involved even before embarking on the test of substantial similarity under Section 14 of the Act, the Court would have to first identify as to what part of the musical composition is, in fact, the original composition under Section 13 of the Act. Only thereafter, the test under Section 14 of the Act needs to be considered.

71. Finally, it is submitted that the entire test of infringement considering the nature of the work being a classical based *Raga* has to be from the ears of

the discerning listener, who is able to distinguish between the elements that deserve to be protected and those which do not deserve to be protected.

72. Reliance is also placed upon ***Structured Asset Sales, LLC v. Edward Christopher Sheeran [673 F.Supp.3d 415(S.D.N.Y. 2023)]*** wherein the Court examined a similar test so as to determine as to whether there was a wrongful appropriation by the Defendant in the background of unprotectable elements from being part of the work. This decision brings out a distinction between mere copying and wrongful copying. According to ld. Counsel, mere copying in the case of classical *Raga* based compositions, is not sufficient. It has to be established that the copying was wrongful based upon the original protectable elements. The said case has been upheld by the United States Court of Appeal.

Submissions on behalf of Defendant No. 4

73. Mr. Kaushik, ld. Counsel appearing for Defendant No. 4 - Tips Industries Limited, firstly submits that Tips Industries had acquired the rights from the producer through a series of agreements. The first agreement is dated 26th November, 2019 which was entered between Defendant No. 2 - Madras Talkies and Defendant No. 3 - Lyca Productions Pvt. Ltd., under which the entire rights in the film PS-2 was granted in favour of Defendant No.3- Lyca in terms of clauses 3, 3.1 and specifically 3.1(g) which assigns the rights in the music and the lyrics. This agreement was with effect from 25th April, 2019. The second agreement is the composer agreement executed between the Defendant No. 2 producer and Defendant No. 1 composer, by which, the producer engaged the composer for rendering various services. This agreement though entered into on 8th June, 2022 was with effect from 1st

April, 2019. Clause 5.1 of the said agreement is referred to and relied upon by the ld. Counsel.

74. The final agreement relied upon by Mr. Kaushik is the agreement dated 5th July, 2022 between Defendant No. 4 - Tips Industries and Defendant No. 3 - Lyca Productions wherein in terms of Clauses 1 to 4, the rights in various songs including the song videos and the music *qua* the film PS-2 were transferred to Tips Industries with effect from 21st June, 2022.

75. He thus submits that insofar as Defendant No. 4 is concerned, it has acquired rights through the proper course of agreements from the concerned producers of the film.

76. He further submits that the present case is not a fit case for granting injunction as the Plaintiff could be monetarily compensated in the event he succeeds in the main suit. On merits the ld. Counsel adopts and relies on the submissions of Mr. Raman, ld. Sr. Counsel.

Submissions on behalf of the Defendant Nos. 5 & 6

77. Mr. Ankit Kothari, ld. Counsel appearing for Defendant Nos. 5 and 6, the singers of the Hindi version of the impugned song submitted fairly, at the outset, that both the said singers were disciples of the Plaintiff. It is submitted that they were taught the suit composition – '*Shiva Stuti'* as a traditional composition. It is argued that the entire mission of the *Junior Dagar brothers* was of spreading the *Dagarvani* tradition and art of Hindustani classical music rather than restricting it through copyright. This is clear from a reading of inlay card accompanying the CDs of the music albums placed on record by the Plaintiff. It is also stated clearly in the said inlay card that the publication

of the recordings is a homage to the memory of the original *Junior Dagar brothers*.

78. Ld. Counsel submits that there have been at least 60 performances of the suit composition which have been placed on record by Defendant Nos. 5 and 6. In respect of these performances, the only response of the Plaintiff is that some of the singers have the blessings of the Plaintiff. However, it is to be noted that none of the said singers have given any credit to the Plaintiff. It is also argued that there is no assignment or transfer of rights in law in favour of the Plaintiff.

79. Lastly, it is submitted that any grant of injunction could severely prejudice the rights of individual artists to sing the suit composition which is a traditional composition.

Submission on behalf of the intervenor

80. Ld. Counsel Mr. Akshat Agrawal appearing for the Intervenor submits that in Hindustani classical music, there are various strands which can be termed as super sets such as *Khayal, Dhrupad* and *Dhumri* and within the said strands, there are various subsets for example in the *Dhrupad Raga*, there are various *Gharanas*. *Dagarvani* is one of the *Gharana*s for Dhrupad Strands. He submits that every *Gharana* has certain essential elements which constitute such *Raga*. The three elements, namely, *Aroha, Avroha* and *Pakad* are prescribed in musical textbooks *qua* each of the *Raga*s. There is rigidity attached to the manner in which the renditions in a particular *Raga* are to be made or performed and, therefore, the similarities are bound to be there. Thus, according to him, until and unless there is virtual identity in the

two performances, the test of substantial similarity cannot be applied in the context of Hindustani Classical Music.

81. The performance of *Raga* is rooted in tradition and since the same is transmitted orally, there is no fixation of any particular composition. This also renders the test of originality challenging in such cases as no specific time period can be fixed for the creation of a particular composition. If the competing parties are from the same *Gharana* and are rendering the same *Raga*, the similarities are inevitable. Though there can be improvisations by different artist, in all probabilities, the same would sound similar to a lay person. It is his submission that Section 14 of the Act would have to be differently applied when such traditional classical music is being considered in a copyright manner.

Rejoinder and sur-rejoinder submissions on behalf of the parties

82. Mr. Neel Mason and Mr. Arjun Harkauli, ld. Counsels for the Plaintiff have made the rejoinder submissions on behalf of the Plaintiff. In respect of the argument that similarities exist between the works due to rigidity of the *Raga*, it is submitted that the *Raga* is merely a rule of composition but does not itself become a composition.

83. The ld. Counsel submits that it would be incorrect to categorize the suit composition has a derivative work since it is based on a *Raga*. It is submitted that any composition based on a *Raga* would be an original work and accordingly, the same would not fall within the category of works that are provided only thin protection. Reliance is placed on Nimmer on Copyright, 2023 Edition, to buttress his submission.

84. It is next argued that the standard of originality in India has been prescribed in the decision of the Supreme Court in ***Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.*** It is submitted that a composition based on a *Raga* would satisfy the test of originality as laid down in ***Eastern Book Company (supra).*** Further, in respect of infringement the submission that the test to be applied in the present case would be that of virtual identity is rebutted. It is submitted that the test for infringement would be that of substantial similarity.

85. It is further submitted that the Court should apply the lay listener's test and not that of expert listener and in support of the same he relies upon the decision in ***Ram Sampath (supra)*** and ***Super Cassettes Industries Ltd.* v. *Hamar Television Network Pvt. Ltd. & Anr., 2010 SCC OnLine Del 2086.*** Reliance is also placed on the decision of the United States Court of Appeals in ***Katheryn Elizabeth Hudson (supra)*** to argue that even a combination of unprotected elements can be protected if the creativity is not revealed. In the present case, the highest that the Defendants can argue is that the suit composition is a combination of unprotected elements but it is still an original work entitled to copyright protection.

86. The ld. Counsel has also submitted that initially the suit composition may have been transmitted orally however, after the recording of the performance of the suit composition in Amsterdam in 1978, the musical work satisfied the requirement of fixation. Furthermore, since the Defendants have already admitted access to and inspiration from the suit composition, the right of the Plaintiff cannot be defeated on the ground of lack of fixation.

87. The reliance is placed upon the decision of Allahabad High Court in ***Nav Sahitya Prakash and Ors. v. Anand Kumar and Ors., AIR 1981 All 200***,

to argue that even if the Plaintiff is a co-owner, a suit for infringement is maintainable.

88. The ld. Counsel has highlighted the varying stance of the Defendants at different stages *qua* the basis on the impugned song *i.e.*, from the same being composed on fundamental of western classical to the same being based in different *Raga*s such as *Raga Darbari Kanada, Raga Jaunpuri* etc.

89. On the contrary, Mr. Amit Sibal, ld. Sr. Counsel appearing for Defendant No. 1 has reiterated his submissions with respect to the issue of originality and test for infringement to be applied in the present case. It is submitted that since the Plaintiff does not deny that the note sequences in the suit composition are common-place the said sequences have to be excluded in the analysis for infringement.

90. Reference is again made to the composition called "*Yaar-e-man Biya Biya*" composed by Amir Khusro. It is stated that the said composition was in *Raga Darbari Kanada* which is stated to be the parent *Raga* of *Raga Adana*. Further, it is said that the Plaintiff has not rebutted the submission of Defendant No. 1 that the Amir Khusro's composition pre-dates the suit composition and that the same share identical notations.

91. The ld. Sr. Counsel in sur-rejoinder submits that it is not disputed that copyright is permissible in Hindustani classical music compositions. However, it is submitted that since a composition within the *Raga* would have to adhere to the discipline of a *Raga*, the test for infringement would be in a very narrow compass after excluding common-place elements. In order to segregate the protectable from unprotectable elements would require an expert listener. Reliance is placed on ***Ram Sampath (supra)*** to submit that the expert evidence for infringement analysis is essential.

92. Further, the decision in ***Hamar Television (supra)*** is distinguished on the ground that issue in that case was with respect to broadcasting of recordings and whether the same would be covered with fair dealing exception. However, that is not the case here.

93. The claim of originality is also rebutted by the Defendant No. 1 and it is stated that the test of modicum of creativity laid down in ***Eastern Book Company (supra)*** is not satisfied in the present case by mere elongation of *Swara* 'g' in the suit composition. It is submitted that the elongation of a *Swara* is a normal and common place practice in a *Raga*, and that alone cannot permit a copyright in the sequence and arrangement.

94. It is clarified in sur-rejoinder submissions that the impugned song is not composed in *Raga Adana*. Rather the impugned song is composed in *Raga* Darbari *Kanada*. In respect of the argument of the Plaintiff that the *taal* / beat has been copied from the suit composition it is submitted that the *taal* / beat are completely different in the two compositions. The suit composition admittedly uses *sul taal* (10 beat) whereas the impugned song uses Ardh Jhap *taal* (5 beat). In support of the same, the affidavit of the expert – Mr. Sai Shravanam is relied upon by the ld. Sr. Counsel.

95. In respect of the relief of attribution is concerned, it is submitted that the Plaintiff has failed to establish that the authorship and infringement of the suit composition. Thus, granting attribution in the interim would not be capable of reversal later. Further since no attribution is claimed in respect of the other renditions already in public domain, granting attribution *qua* the impugned song would create confusion in the minds of general public. The balance of convenience is not in the favour of the Plaintiff.

96. Insofar as deposit is concerned, there is no attachment before judgment that can be sought in the present case as no damages have been awarded and the suit is at the interim stage. There are no pleadings that the Defendants are likely to move out their assets outside the jurisdiction of the Court as required under Order XXXVIII Rule 5 CPC.

97. Reliance is placed on Raman Tech (2008) 2 SCC 302 in respect of the submission that maintenance of accounts is a usual course of action in an IP suit. Lastly, it is submitted that there is no public domain material, which shows any claim of ownership by the Plaintiff over the suit composition and, thus, the Defendants cannot be blamed for having not given any attribution or even approaching the Plaintiffs prior to the impugned song being launched by the Defendants.

98. Heard the ld. Counsel for all the parties. The Court has also perused the various written submissions and reference material on Hindustani classical music handed over by the parties during the course of oral submissions.

D. Analysis and Findings

99. The conflict between rewarding creativity and stifling creativity is at the core of this case. The Plaintiff prays that the contribution and creativity of the Junior Dagar Brothers deserves to be rewarded. The Defendants argue that recognizing copyright in such a case would stifle creativity.

100. In view of the facts of the case and submissions made by the parties, the following broad issues arise for *prima facie* determination:

(i) Whether the suit composition is an original musical work of the Junior Dagar Brothers?

(ii) *Whether the impugned song infringes copyright of the Plaintiff in the suit composition?*

(iii) *Whether the Plaintiff is entitled to any relief ?*

Issue I: Whether the suit composition is an original musical work of the Junior Dagar Brothers?

(A) Musical works and struggle with Indian Classical Music

101. The tryst between Indian classical music and Copyright Law has been a long one. In the opinion of the Court, the complex nature of the subject matter of the present suit *i.e.,* claim of copyright over a composition in Hindustani classical music, requires an appreciation of the legislative framework and the unique issues arising therefrom. It is also necessary to consider the reason for the legislature to evolve/amend the Act to extend protection to certain creative works, including to works based on Hindustani classical music.

102. Western classical music is a form of music where the musical work is reduced into writing in the form of notations, such as those depicted below:



103. Such depiction in writing was not compulsory in Indian classical music since traditionally the compositions were taught and communicated by the *Guru* to the *Shishya* in oral form. In fact, fixation of music itself was not

compulsory in Indian classical music.

104. Presently, the term "musical work", has been defined in Section 2(p) of the Act as under:

> *"musical work" means a work consisting of music and includes any graphical notation of such work* ***but does not include*** *any words or any action intended to be sung, spoken or performed with the music"*

105. The above definition shows that a musical work is a work consisting of music and includes any graphical notations of such work. It, however, does not include the lyrics. This definition of musical work was introduced in the year 1995 by way of an amendment. The unamended definition of *`musical works'* which existed prior to 1995, was as under:

> *"musical works" means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise generally produced or reproduced."*

106. The said amendment was introduced in Parliament as part of the Copyright (Second Amendment) Bill, 1992 (hereinafter "*the Amendment Bill*") which was subsequently referred to the Joint Parliamentary Committee. In a press communique dated 15th September, 1992 issued by the said Committee, it was noted as under:

> *"2. The Bill seeks to extend effective Copyright protection to promote the creation of literary, artistic, dramatic and musical works, cinematograph films and sound recording by providing certain additional exclusive rights to their authors and creators, which is not available to them under the existing law, and by improving the existing provisions of the Copyright Act, 1957 in various ways."*

107. A perusal of the evidence placed by the said Committee before Parliament, along with its report, would show that it was recognised by experts that in Indian classical music, it is not necessary for music notations to be in writing, since Indian classical music did not have a tradition of publishing notations, though, each composition has its own notations.

108. Some of the earlier judgments rendered by the Supreme Court and this Court bring out this paradigm and variation between the Western and Indian Classical Music. In the judgment ***Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn., (1977) 2 SCC 820***, the Supreme Court has highlighted the fact that Copyright Law in India is *"fairly complicated"* and cases in Copyright Law can involve *"knotty points"*.[3] This judgment brought out the difficulties in distinguishing between the copyright owner of a song utilised in a cinematograph film *i.e.,* whether the producer of the cinematograph film can defeat the rights of the composer of music or lyric? In this context, Justice Krishna Iyer observed that there was a need for the Legislature to intervene in the context of such works. The decision of Justice Krishna Iyer has a footnote, at the end of the judgement, which is relevant in this context:

> "*The judgment just delivered is on behalf of the Court, which makes this footnote, in a sense, otiose. But I do append the abbreviated opinion solely to belight a slightly penumbral area of the law and to voice a need for legislative exploration to protect a category now left in the cold."*

109. Justice Krishna Iyer was of the opinion that if a piece of music becomes part of a cinematographic film, the Producer of the film would be entitled to

[3] Paragraph 5

exercise its rights qua the whole film but the privilege of the composer, insofar as the musical work itself is concerned, cannot be ignored or deprived. It was opined that the music composer's copyright would not perish if the music is included in a film. In this context, in respect of the unamended Section 2(p) of the Act, the observations of the Court are extremely relevant and are set out below:

> *"**24.** A somewhat un-Indian feature we noticed in the Indian Copyright Act falls to be mentioned. Of course, when our law is intellectual borrowing from British reports as, admittedly it is, such exoticism is possible. "Musical work", as defined in Section 2(p), reads:*
>
> > *"(p) musical work means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced"*
>
> *Therefore, copyrighted music is not the soulful tune, the superb singing, the glorious voice or the wonderful rendering. It is the melody or harmony reduced to print, writing or graphic form. **The Indian music lovers throng to listen and be enthralled or enchanted by the nada brahma, the sweet concord of sounds, the rags, the bhava, the lava and the sublime or exciting singing. Printed music is not the glamour or glory of it, by and large, although the content of the poem or the lyric or the song does have appeal.** Strangely enough, 'author', as defined in Section 2(d), in relation to a musical work, is only the composer and Section 16 confines 'copyright' to those works which are recognised by the Act. This means that the composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps, both*

> *deserve to be recognised by the copyright law. I make this observation only because* ***art, in one sense, depends on the ethos and the aesthetic best of a people, and while universal protection of intellectual and aesthetic property of creators of 'works' is an international obligation, each country in its law must protect such rights wherever originality is contributed****. So viewed, apart from the music composer, the singer must be conferred a right. Of course, law-making is the province of Parliament but the Court must communicate to the lawmaker such infirmities as exist in the law extant."*

110. Similar observations were also echoed by a ld. Single Judge of this Court, Justice Jaspal Singh, in ***Gramophone Co. of India Ltd. v. Super Cassettes Industries Ltd.***, ***1995 (58) DLT 99,*** wherein the Ld. Judge observes as under:

> *"**22.** There is yet another difficulty.* ***"Musical work" is not merely a combination of melody and harmony or either of them. It must necessarily also have been "printed, reduced to writing or otherwise graphically produced or reproduced". As we know figurations, progressions and rythemic patterns are sometimes used in creation of melodies. Every musical composition has a structure, or shape, that is, the arrangement of individual elements so as to constitute a whole and that musical notation means a visual record of musical sound (heard or imagined) or a set of visual instructions for performance of music****. Its main elements are pitch (location of musical sound on the scale), duration, timbre, and volume. There are various systems of notation like verbal, alphabetical, numerical, graphic and tablatures.* ***The words pl 11.7" "printed, reduced to writing or otherwise graphically produced or reproduced" are thus not an empty formality****. What is surprising is that the defendants have no where claimed that the combination of melody and*

> *harmony which one finds in the records made by the plaintiff as well as the defendants had ever been printed, reduced to writing or otherwise graphically produced or reproduced.* ***What is more surprising is that the plaintiff too nowhere pleads the record made by it as being a combination of such melody and harmony or either of them which had been printed, reduced to writing or graphically produced or reproduced. The result is that the record made by the plaintiff cannot be claimed to be of a "musical work" both by the plaintiff as well as the defendant****. Probably this was an added reason for Mr. Jetley to look towards section 14 of the Act."*

111. Another author in copyright law - Shri Jagdish Sagar observes in respect of the amendment in the definition of musical work as under:[4]

> *"The amendment to the definition of 'musical work' is intended to protect Indian classical music in particular in view of the difference in some important respects between Indian and western classical music which difference has been brought out thus:*[5]
>
> > *"Western classical music is created by composers who conventionally record their compositions in writing on paper, using an elaborate, well-established system of musical notation. Performers who can read the notation then perform their works: personal contacts between composer and performer is not necessary and, even before the era of sound recordings, a composer's works could be performed long after his death. This composer-performer dichotomy has become the paradigm in the conceptualization of music as a form of*

[4] Bushan Tilak Kaul, Copyright Protection: Some Hassles And Hurdles, Journal of the Indian Law Institute 46, no. 2 (2004): 236–68. http://www.jstor.org/stable/43951906.

[5] Jagdish Sagar, Entertainment Media & IP Rights: An Indian Perspective in S.K. Verma & Raman Mittal, Intellectual Property Rights: A global vision 210 to 211 (ILI 2004).

> *copyrighted work, and of the different rights arising out of its creation and use, but it does not precisely fit the Indian situation.* ***Indian civilization gave birth to the only other classical form of music that has reached heights of sophistication comparable to that of West, but on altogether different principles. Here the same persons both compose and perform simultaneously, improvising, within the framework of a highly developed discipline, on pre-selected traditional themes ('Ragas') as they sing or play on musical instruments****"*

112. Further, in the context of performer's rights and Hindustani classical music, the same author has opined as under:[6]

> *"Performers' rights serendipitously offered a solution to a peculiarly Indian problem. South Asia is possibly the only civilization with a classical music that is as sophisticated as that of the West – indeed, unlike in South-East Asian countries, for example, there are few takers for Western classical music in India.* ***But our classical music does not fit the traditional copyright paradigm, in which the work is distinct from the performance. In India, the classical musician is both a composer and a performer: he or she improvizes, within a strict and difficult discipline that it takes a lifetime to acquire, on any one of a range of traditional, well-identified themes. Every performance is a composition, a once-and-for-all creation that gives a distinct identity to every recorded performance by the same maestro. However, our law at the time defined a musical work in terms of notation, in blind adherence to the language of the earlier law enacted during the British Raj. This was actually an irrelevant, alien***

[6] Jagdish Sagar, Chapter 18: Copyright: An Indian perspective, in World Trade Organization, The Making of the TRIPS Agreement Personal Insights from the Uruguay Round Negotiations –, https://doi.org/10.30875/7dd37ce0-en

> ***concept for our music***. *In 1977, the Supreme Court, in passing, suggested that the government should consider giving performers a right, but the government did not respond, I believe for want of understanding. India never acceded to the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), but now the new compulsion to amend our Act to introduce performers' rights was put to good use. We not only introduced performers' rights into our Act, but simultaneously* ***amended the definition of a "musical work" to drop the requirement of notation. As a result, the Indian classical musician now has, so to speak, two strings to his or her bow: a performance, once fixed, is now protected both as a performance and as a musical work****."*

113. The definitions under the Act as they stand today, therefore, take note of all these difficulties in protection of certain creative works and performances as observed by the Courts. The relevant definitions are set out below for ease of reference:

> *"**2. Interpretation. —** […]*
>
> *(d) **"author"** means,—*
> *(i) in relation to literary or dramatic work, the author of the work;*
> *(ii) in relation to a musical work, the composer;*
> *(iii) in relation to an artistic work other than a photograph, the artist;*
> *(iv) in relation to a photograph, the person taking the photograph;*
> *(v) in relation to a cinematograph film or sound recording, the producer; and*
> *(vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created*

xxx xxx xxx

(f) ***"cinematograph film"*** *means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films;*

(ff) ***"communication to the public"*** *means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether a simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.*
Explanation.—For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;

(ffa) ***"composer"*** *in relation to a musical work, means the person who composes the music regardless of whether he records it in any form of graphical notation;*

(p) ***"musical work"*** *means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music;*

(q) ***"performance"****, in relation to performer's right, means any visual or acoustic presentation made live by one or more performers;*

> *(qq)* ***"performer"*** *includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;*
>
> *XXXX*
>
> ***3. Meaning of publication. —*** *For the purpose of this Act, "publication" means making a work available to the public by issue of copies or by communicating the work to the public.*
>
> ***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: Provided that—[....]"*

114. A combined reading of the above provisions would show that in the context of a musical work, the composer is the author as per Section 2(d) of the Act and also the first owner of the copyright as per Section 17 of the Act. The definition of composer under Section 2(ffa) of the Act is an exhaustive definition and not an inclusive definition. The composer under the law, therefore, means **only** the person, who composes the music in a musical work. It is not necessary for the composer to record the composition in a graphical notation. In contrast, the definition of musical work is a *means and includes* definition. It means a work consisting of music and could also include a graphical notation. Thus, for a work to qualify as a musical work, it is a basic pre-condition that it has to be a work consisting of music. In the context of Indian Classical Music, even if the music does not consist a graphical notation, it is protectable. Even fixation is not mandatory. Any person, who performs a work, which could include a singer or musician, would become a performer and such performer's presentation would be

deemed to be a performance. Thus, the pain expressed by Justice Krishna Iyer in ***Indian Performing Right Society Ltd. (supra)*** was assuaged with the amendments in the law, which were three-fold:

(i) Recognition of rights of composers in Indian Classical Music irrespective of whether the work was reduced into writing or not;

(ii) Recognition of rights of singers, who provide enormous value addition to music compositions, and

(iii) Recognition of rights in performances by other performers which could include musicians, orchestra, etc.

115. It is evident from the above discussion that copyright law in India has evolved and adapted to extend protection to traditional creative works including works based on Hindustani classical music. Therefore, there is no doubt that so long as the composition in Hindustani classical music is an original work of the composer, the same would be entitled to protection under the Act. The composer would also be entitled to exercise and claim all rights under the Act, including moral rights, *qua* the said composition.

(B) Whether the suit composition is an original musical work entitled to copyright protection?

116. The first aspect to be established by the Plaintiff is that the suit composition is an original musical work.

117. Considering the complexity of the subject matter under consideration *i.e.,* Hindustani classical music, it would be necessary to appreciate certain fundamentals and core aspects of the said species or form of music, as also the *Raga* system within the same.

118. There are primarily two traditional forms of music or *Shastriya Sangeet* in India, namely, Hindustani Classical (North Indian Classical) and Carnatic Classical (South Indian Classical). Both are based on the same 8 *swaras*, namely, *Sa Re Ga Ma Pa Dha Ni Sa*. In India, apart from the traditional Hindustani Classical and Carnatic Music, there is folk music as also blended music, fusion music or semi-classical music. Folk music differs from region to region. Blended music, semi-classical music or popular music also exist in India which is however, not relevant for the present discussion.

119. Hindustani Classical Music has various genres such as *Dhrupad, Khayal, Dhamar* etc. A musical composition in any of the genres of Hindustani classical music would in turn be composed within the confines of a *Raga*. There is no set definition of the term '*Raga*'. Various musicologists and experts of Hindustani classical music have provided different interpretations. However, in general a *Raga* may be described as a familiar recognizable pattern which can be stored in the memory and reproduced by voice or instrument and can be readily recognised when so reproduced by others.[7]

120. The *Raga*s can be categorised on the basis of heptatonic scales known as *'Thaat'*. Each *Thaat* consists of *swaras* or tonal intervals in a set pattern. It is widely accepted that there are 12 *swaras* in the Hindustani classical music based on major (*shudh swara*) or minor notes (*komal swaras*), which are:

> *Sa (S), Komal Re (r), Shuddha Re (R), Komal Ga (g), Shuddha Ga (G), Shuddha Ma (m), Teevra Ma (M), Pa (P), Komal Dha (d), Shuddha Dha (D), Komal Ni (n), Shuddha Ni (N).*

[7] Narendra Kumar Bose, Melodic Types of Hindustan: A Scientific Interpretation of the *Raga* System of Northern India (1960) (Jaico Publishing House)

121. In addition to the above, the said notes can be sung in three different octaves or '*Saptak*' *i.e., Mandra* (lower), *Madhya* (middle), and *Taar* (upper). The *Raga*s also have other essential elements which are necessary to be considered while creating a composition within a particular *Raga*. As per one publication, some of the major elements are as under:[8]

(a) ***Aroha*****:** sequence of notes in ascending order

(b) ***Avroha*****:** sequence of notes in descending order

(c) ***Pakad :*** characteristic set of notes for each *Raga* which act as an identifier for a listener.

(d) ***Ragabhav*****:** the mood or emotion connected with a particular *Raga* sought to be evoked by the composition.

(e) ***Alaap*****:** A generic term which connotes elaboration of musical ideas, on the melodic axis in or out of *Raga*, with or without tala, in vocal or instrumental music.

(f) ***Alankaars & Taans*****:** comparable to the concept of an arpeggio in western music. These are embellishments allowing vocal improvisation in the performance.

(g) ***Chalan*****:** A characteristic way or movement of organising tonal/rhythmic material in musical manifestation of all kinds.

122. Further, a composition in Hindustani classical music could be composed or sung in any particular *taal* which is the beat or the rhythm. The same lyrics would sound different when adapted or rendered in a different genre or a different *Raga* considering the nuanced choices available to a

[8] Ashok Da. Ranade, Keywords and Concepts Hindustani Classical Music (1990) (Promilla & Co.)

composer in Hindustani classical music. In the same genre, there can be different styles of performance as well, which are called as *Gharanaas.*

123. A composition in Hindustani classical music would have to follow the structure and rules of a *Raga* to identify as a composition within the said *Raga*. However, the various possibilities and choices available to a composer within the structure of a *Raga* are several in number. There are millions of compositions which are composed, sung and rendered in different *Ragas* and in different traditions/*Gharana*s. However, each of the said compositions would be original compositions so long as they are not copied from an existing composition.

124. Musical compositions in the same *Raga* can be varied in nature depending upon the time when the composition is made, the mood of the composer, the purpose of the composition, etc. The same *Raga* can be the basis of a composition for different Gods or Kings. It could depict bravery, joy, destruction though based on the same *Raga.*

125. A composition based on a traditional *Raga* may be adopting the rules of the *Raga* but the sheer permutations and combinations that are available in the same *Raga* are innumerable. The *Raga* in the present case on which the composition is based is *Raga Adana* which is a traditional *Raga.* As per the literature placed on record, in the form of basic text books teaching the principles of *Raga,* it has a basic *Aroha, Avroha* and *Pakad* and the *Alaap* is prescribed. There are several compositions that can be composed and sung in *Raga* which is not disputed. Such compositions which are composed would be original compositions and original musical works based on the said *Raga.* The composer of the work has enormous flexibility in the manner in which the composition would proceed including in the choice of *swaras,* the manner

in which every *swara* which is dragged, the manner in which the *swara* is combined with another *swara,* the manner in which the *Aroha* and *Avroha* are transitioned, etc. This flexibility which can be utilized by composers in composing their original works under a particular *Raga,* shows that, while the *Raga* may prescribe certain rules, within the same, there is sufficient scope for original creativity.

126. There are thousands of composers in Hindustani Classical Music. They compose lakhs of original musical compositions. Each of such works would be original musical works. Recognition of such works as 'original' would not deprive other composers from composing works in the same genre, same *Raga* or same *Taal*. Musicians understand the difference in each of the compositions very easily. A good analogy to understand this would be by comparing music with language. All Classical music compositions are based on the eight *Swaras - Sa, Re, Ga, Ma, Pa, Dha, Ni, Sa.* Similarly, all English literary works would be based upon the same English alphabet A - Z. Every *Raga* is based on the principles prescribed for a *Raga*. Similarly every language is bound by the Rules of grammar too. The said Rules prescribe a discipline for use of the language and nothing more. Innumerable number of literary works can be written based on the same Alphabet and same rules of grammar. Similarly innumerable number of musical compositions can be based on the same Eight *Swaras* and the principles of a *Raga*. Just because the alphabet is in public domain would not mean literary works such as books, articles, etc. do not have copyright in each of the individual creative works. Similarly, every musical composition would also be entitled to copyright.

127. Thus, the mere fact that a particular composition is belonging to a specific genre on a particular *Raga,* in a particular tradition, does not mean that the composition cannot be original.

128. In a composition based on Hindustani classical music the composer would have the option to employ or select the finite elements or principles of a *Raga* and compose the same in infinite possible arrangements. It is not the individual note or *swara* of the *Raga* that the composer may claim copyright on, rather, it is this original expression in the form of selection and arrangement of the common building blocks, requiring high level of skill and understanding of the nuances of Hindustani classical music, that the composer enjoys copyright in.

129. At this stage it is necessary to consider the decision of the Supreme Court in ***Eastern Book Company (supra)*** wherein the Court has laid down that originality in works does not require the same to be novel or non-obvious as is the case for a valid Patent, rather, the work should be a result of skill and judgement of the author. The relevant portion of the said judgement reads as under:

> *"32. The word "original" does not mean that the work must be the expression of original or inventive thought. The Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing.* ***The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been***

involved in making the compilation. *The words "literary work" cover work which is expressed in print or writing irrespective of the question whether the quality or style is high. The commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright. The word "original" does not demand original or inventive thought, but only that the work should not be copied but should originate from the author.* ***In deciding, therefore, whether a work in the nature of a compilation is original, it is wrong to consider individual parts of it apart from the whole. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense.*** *If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. In each case, it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.*

[…]

57. ***The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author.*** *On the*

*face of the provisions of the Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court. We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments**. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital.** The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author."*

[...]

*60. **Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity**. Arrangement of the facts or data or the case law is already included in the judgment of the Court. Therefore, creativity of SCC would only be addition of certain facts or material already published, case law published in another law report and its own arrangement and presentation of the judgment of the Court in its own style to make it more user-friendly. **The selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality so as to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely a trivial variation,***

> ***not the variation of the type where limited ways/unique of expression are available and an author selects one of them which can be said to be a garden variety. Novelty or invention or innovative idea is not the requirement for protection of copyright but it does require minimal degree of creativity.*** *In our view, the aforesaid inputs put by the appellants in the copy-edited judgments do not touch the standard of creativity required for the copyright."*

Thus, for enjoying copyright protection as a musical work, the composition can be based on a known *Raga* but has to be original in expression.

130. Ld. Counsels for the parties have relied upon the decisions of the Courts in the United States of America in respect of the issue of originality in a musical work. It is to be noted that the musical works under consideration in the said decisions were popular songs which do not share the complexities of the level which is seen in Hindustani classical music. Further, American jurisprudence differs from the copyright regime and jurisprudence in India. However, the said cases do assist the Court in understanding the view taken by the American Courts *qua* originality issues in musical works.

131. The U.S. Court of Appeals in ***Michael Skidmore v. Led Zeppelin, [952 F.3d 1051 (9th Cir. 2020)]*** was considering a copyright challenge to the iconic rock song 'Stairway to Heaven' performed by the band Led Zepplin as infringing the song 'Taurus'. The case of the Plaintiff was not based on infringement of the entire 'Taurus' composition. Rather, the claim was limited to the opening notes of 'Stairway to Heaven' being substantially similar to the eight-measure passage at the begging of 'Taurus'. The Court of Appeals has discussed the law in United States *qua* originality in musical compositions necessary to claim copyright protection. The relevant paragraphs are extracted

hereunder:

> *"**Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality**. Feist, 499 U.S. at 345 ("The sine qua non of copyright is originality"; "[t]he vast majority of works make the grade quite easily . . . ."); see also 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship . . . .").*
>
> ***Even in the face of this low threshold, copyright does require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded**. See 17 U.S.C. § 102(b); Feist, 499 U.S. at 345–46. **Nor does copyright extend to "common or trite" musical elements, Smith, 84 F.3d at 1216 n.3, or "commonplace elements that are firmly rooted in the genre's tradition**," Williams, 895 F.3d at 1140–41 (Nguyen, J., dissenting). **These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author**. See Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 2003) ("[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law"). **Authors borrow from predecessors' works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works**. See id. at 813 **("we must be careful in copyright cases not to cheat the public domain**"); Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) ("General ideas . . . remain forever the common property of artistic mankind."); 1 Nimmer § 2.05[B] ("In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.").*
>
> *[...]*
>
> ***Copyright Office Compendium § 802.5(A) (3d ed. 2017). Emphasizing the importance of original***

creation, the Copyright Office notes that "a musical work consisting entirely of common property material would not constitute original authorship." Id. Just as we do not give an author "a monopoly over the note of B-flat," descending chromatic scales and arpeggios cannot be copyrighted by any particular composer. Swirsky, 376 F.3d at 851.

We have never extended copyright protection to just a few notes. Instead we have held that "a four-note sequence common in the music field" is not the copyrightable expression in a song*. Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976). In the context of a sound recording copyright, we have also concluded that taking six seconds of the plaintiff's four-and-a-half-minute sound recording—spanning three notes—is de minimis, inactionable copying. See Newton, 388 F.3d at 1195–96. One of our colleagues also* ***expressed skepticism that three notes used in a song can be copyrightable by observing that of the "only 123 or 1,728 unique combinations of three notes," not many would be useful in a musical composition****. See Williams, 895 F.3d at 1144 n.6 (Nguyen, J., dissenting). The Copyright Office is in accord, classifying a "musical phrase consisting of three notes" as de minimis and thus not meeting the "quantum of creativity" required under Feist. Copyright Office Compendium, § 313.4(B) (3d ed. 2017). At the same time, we have not foreclosed the possibility that "seven notes" could constitute an original expression. Swirsky, 376 F.3d at 852. To the contrary, our sister circuit observed decades ago that "****the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes****." Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936).*

In view of our precedent and accepted copyright principles, the district court did not commit a reversible error by instructing the jury that a limited set of a

> ***useful three-note sequence and other common musical elements were not protectable***. *The district court also instructed the jury on copyright originality in Jury Instruction No. 20, which states:*
>
> > *An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff's work is limited to the part created:*
> >
> > *1. independently by the work's author, that is, the author did not copy it from another work; and*
> >
> > *2. by use of at least some minimal creativity.*
>
> ***Despite Skidmore's claim that the following language has no support in the law and was prejudicial—"any element from prior works or the public domain are not considered original parts and not protected by copyright"—this is black- letter law. See 17 U.S.C. §§ 102(b), 103. Reading this sentence with the preceding one—an "original work may include or incorporate elements taken from prior works or works from the public domain"—we conclude that Jury Instruction No. 20 correctly instructed the jury that original expression can be the result of borrowing from previous works or the public domain.*** *"*

132. Similar views have also been reiterated by the United States Court of Appeals in the case of ***Edward Sheeran (supra)*** *qua* the necessity to exclude common building blocks and unprotectable elements from the purview of copyright. The decision in the case of ***Katheryn Elizabeth Hudson (supra)*** has been relied upon by the Plaintiff in support of its argument that copyright would subsist even in an arrangement of unprotectable elements. The relevant portions of the said judgement are extracted hereunder:

"II. Protection of the Unprotectible Musical Elements in Combination

Although no individual musical component of the Joyful Noise ostinato is copyrightable, we still must consider whether the Joyful Noise ostinato is protectible as a "combination of unprotectable elements." Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003); see also Swirsky, 376 F.3d at 848 ***("[A] substantial similarity can be found in a combination of elements, even if those elements are individually unprotected."). That is the case only if the "selection and arrangement" of those elements is original in some way****. Satava, 323 F.3d at 811.*

*We begin this analysis with some guiding principles. To start, the fact that the ostinatos here are only eight notes long does not foreclose the possibility of a protected arrangement of commonplace musical elements. See Swirsky, 376 F.3d at 852 ("****It cannot be said as a matter of law that seven notes is too short a length to garner copyright protection."). "Each note in a scale . . . is not protectable, but a pattern of notes in a tune may earn copyright protection****." Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002), overruled on other grounds by Skidmore, 952 F.3d 1051 (emphasis added). On the other hand, despite "the famously low bar for originality," Skidmore, 952 F.3d at 1069, "[t]rivial elements of compilation and arrangement . . . fall below the threshold of originality." United States v. Hamilton, 583 F.2d 448, 451 (9th Cir. 1978); accord Satava, 323 F.3d at 811–12.*

One circumstance where an arrangement of individual elements lacks enough creativity to garner copyright protection is when that arrangement is "practically inevitable" or in keeping with "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course*." Feist, 499 U.S. at 363.*

[...]

Likewise, the portion of the Joyful Noise ostinato that overlaps with the Dark Horse ostinato consists of a manifestly conventional arrangement of musical building blocks. Joyful Noise and Dark Horse contain similar arrangements of basic musical features mainly in that both employ the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm. This combination is unoriginal because it is really nothing more than a two-note snippet of a descending minor scale, with some notes repeated. See Skidmore, 952 F.3d at 1070 (holding that descending scales are not copyrightable). ***Allowing a copyright over this material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure****. See Satava, 323 F.3d at 812 & n.5 (expressing concerns over monopolization when limited creative choices are available); see also Skidmore, 952 F.3d at 1079–80 (Watford, J., concurring) ("There are relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical conventions and styles . . . . [O]nce [the artist] settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear)."); Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232 (11th Cir. 2002) (per curiam) (recognizing "the limited number of musical notes (as opposed to words in a language), the combination of those notes[,] and their phrasing"); Darrell, 113 F.2d at 80.*

[...]"

133. Thus, the jurisprudence in the United States of America, while requiring removal of common domain elements, also recognises rights in a particular pattern or expression.

134. Coming to the facts of the present case, it is noted that the challenge raised against the originality of the suit composition, is that the same is a traditional composition and is in public domain as it has been performed by various artists. It is argued that since the music is transmitted orally, the composition itself is not original as it is a traditional composition. It is further alleged that the *Dhrupad* genre traces back to *Samaveda* which is more than 3000 years old. Since the said genre is a known genre and the practice of the same is common to thousands of artists and composers, there can be no copyright.

135. This Court is of the opinion that every work or composition which is made in a particular genre or *Raga* or style follows the basic principles of the said genre or *Raga.* It cannot, however, be said that due to the fact that they follow a particular discipline, there cannot be any originality in the same.

136. Under Section 13 of the Act, only original works can be protected *i.e.*, for a work to claim copyright, it has to be an original musical work. Section 13(1) of the Act reads as under:

> *"**Section 13 - Works in which copyright subsists.***
> *(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,--*
> *(a) **original literary, dramatic, musical and artistic works**;*
> *(b) cinematograph films; and*
> *(c) sound recording."*

137. Coming to the Plaintiff's work, the various documents place on record, which are also discussed above, including earlier published CDs, agreements, etc. would show that suit composition, which is based on *Raga Adana*, is the original work of the Junior *Dagarvani* Brothers. There is no other work/rendition, which has been placed before the Court, which would demonstrate that the same was either copied from anywhere or was inspired from any other work. The only work that deserves to be considered is the composition of Amir Khusro, which is known as "*Yaar-e-man Biya Biya*". The mere comparison of notes of the suit composition and Amir Khusro's composition would show that musical works are not identical and they also sound different, when they are played.

138. The recognition of originality of the suit composition at the *prima facie* stage is clearly based on verifiable evidence dating back to 1970s. There is no evidence to dislodge arguments of originality of the Plaintiff's work. The Defendant No.1 has himself placed on record the musical notes of the suit composition and Amir Khusro's composition, which would show that the *Swaras* though appear to be similar, are in fact in different octaves. The change of even one *Swara* can make a difference in the musical composition. Further, the *taal* is also not alleged to be the same for both compositions. The Defendants have not placed anything on record to show as to which genre the said composition belongs to and which *Raga* is Amir Khusro's composition is based on. The differences in the suit composition and Amir Khusro's composition are evident and the same are demonstrated herein below:

Amir Khusro's Composition – "*Yaar-e-man Biya Biya*"

BEATS		1	2	3	4	5	6	1	2	3	4	5	6
LYRIC		Yaar	,	E	man	,	Bi	Yaa	,	Bi	Yaa	,	,
Swara		R	,	R	R	S	S	n	,	S	P	,	n
LYRIC		Yaar	,	E	man	,	Bi	Yaa	,	Bi	Yaa	,	,
Swara		R	,	R	R	S	S	n	,	S	d	,	n

Suit Composition – "*Shiva Stuti*"

SHI	-	VA	-	SHI	-	VA	SHI	-	VA
R'	-	S'	-	n	-	S'	P	-	n
R'	-	S'	-	n	-	S'	n	-	P

139. Further, though the suit composition is based on *Raga Adana* the manner in which the *swaras* are picked, the combination of *swaras* with different *swaras* in Aroha and Avroha, the repetition of some *swaras*, the Aalaap, the dragging of some *swaras*, the transition and the merger are all unique to suit composition that differs from the prescribed notations for *Raga Adana*. The suit composition also has a specific *asthayi antara* which is set out herein below:

> *"shiva shiva shiva*
> *shankar aadidev*
> *shambhu bholanaath*
> *yogi mahaadev,*
> *mahaabali shiv, aadi ant shiv*
> *purannsakalkaaj har har mahaadev"*

140. Further, the melodic structure of *Raga Adana* is as under:

"Aroha: Sa Re Ma Pa k.Ni Pa Ma Pa k.Ni Sa Re Sa
Avroha: Sa Pa k.Ni Pa Ma Pa Ma K.Ga Ma Re Sa"

141. While the above is the prescribed *Aroha* and *Avroha* of *Raga Adana,* the suit composition follows as under:

	A	B	C	D	E	F	G	H	I	J	K	L	M
1	Rang	Adana								Taal	Sool (10 beats)		
2	Bandish	Shiva Shiva											
3			Gray shaded cells - syllables of composition			White shaded cells - Corresponding musical Notes							
4													
5			Beats										
6			1	2	3	4	5	6	7	8	9	10	Notes
7	ASTHAYI	A	SHI	-	VA	-	SHI	-	VA	SHI	-	VA	
8			R'	-	S'	-	n	-	S'	P	-	n	(this is repeated, sometimes the last swar is 'P' instead of 'n')
9			R'	-	S'	-	n	-	S'	n	-	P	(Additional - Sung before the next phrase)
10		B	SHAN	-	KA	RA	AA	-	DI	DE	-	VA	
11			g	-	g	g	g	-	m	R	-	S	
12		C	SHAM	-	BHU	-	BHO	-	LA	NA	-	THA	
13			S	-	R	m	P	-	P	n	m	P	
14		D	YO	-	GI	-	MA	-	HA	DE	-	VA	
15			R'	R'	R'	S'	n	-	S'	P	-	n	
16			R'	R'	R'	S'	n	-	S'	n	-	P	(Additional - Sung before the next phrase) Back to Asthayi - Shiva Shiva
17													
18			1	2	3	4	5	6	7	8	9	10	Notes
19	ANTARA	E	MA	AA	HA	-	BA	U	-	SHI	-	VA	
20			m	P	d	-	n	S'	-	S'	-	S'	
21		F	AA	AA	DI	-	AN	N	THA	SHI	-	VA	
22			S'	n	R'	-	R'	S'	S'	n	-	P	
23		G	PU	U	RA	NA	SA	KA	LA	KA	AA	JA	
24			m	P	n	S'	g'	g'	m'	R'	-	S'	
25		H	HA	RA	HA	RA	MA	-	HA	DE	-	VA	
26			R'	R'	R'	S'	n	-	S'	n	-	P	
27			R'	R'	R'	S'	n	-	-	P	-	n	(Alternate - Sung before the next phrase) Back to Asthayi - Shiva Shiva

142. The former *i.e.,* the prescription of *Raga Adana* would itself be in public domain. However, the specific composition relating to *Shiva Stuti* is an original composition.

143. A perusal of the above would show that within *Raga Adana,* every composition can be of different combinations and permutations. However, the

suit composition which is the subject matter herein is based on a specific permutation and combination in which the originality belongs to Junior Dagar Brother. The suit composition is composed in a specific *taal* – sul *taal* (10 beats) instead of the chau*taal* (12 beats) common for compositions in *Raga Adana*. Although the use of the *swaras* "G M R S" is common for all *Raga Adana* and *Kanada Raga*s, the same differs from the standards due to the fact of dragging of the *Swara* "g" in the suit composition.

144. Although, the elements highlighted above in respect of the suit composition may not be protectable elements individually, however, the suit composition has to be seen as a whole for the selection and arrangement of each of element of the *Raga Adana* in the suit composition. Having done so, in the opinion of this Court, though the composition is based on *Raga Adana,* the suit composition is an original musical work.

145. This Court thus has no hesitation in concluding that musical works based on Hindustani Classical Music, though belonging to the same genre, same *Raga* and same *Taal,* can be original compositions and original musical works. The suit composition *Shiva Stuti* is one such original composition and cannot be deprived of its originality.

(C) Whether the Junior Dagar Brothers are authors of suit composition?

146. The first aspect which the Plaintiff would have to *prima facie* satisfy for grant of interim relief is that the Junior Dagar Brothers are the authors of the suit composition.

147. The suit composition in which the Plaintiff asserts rights is the '*Shiva Stuti'* composed in the *Dhrupad* genre sung in *Raga Adana* in *Sultaal* by the Junior Dagar Brothers in their own tradition – referred to as the "*Dagarvani"*

Tradition. The two Junior Dagar Brothers, namely, Late Ustad N. Zahiruddin Dagar and Late Ustad N. Faiyazuddin Dagar are stated to have passed away in 1989 and 1994, respectively, and thus copyright asserted in the suit composition subsists till date, in terms of Section 22 of the Act, which is 60 years from the beginning of the calendar year next following the year in which the author dies.

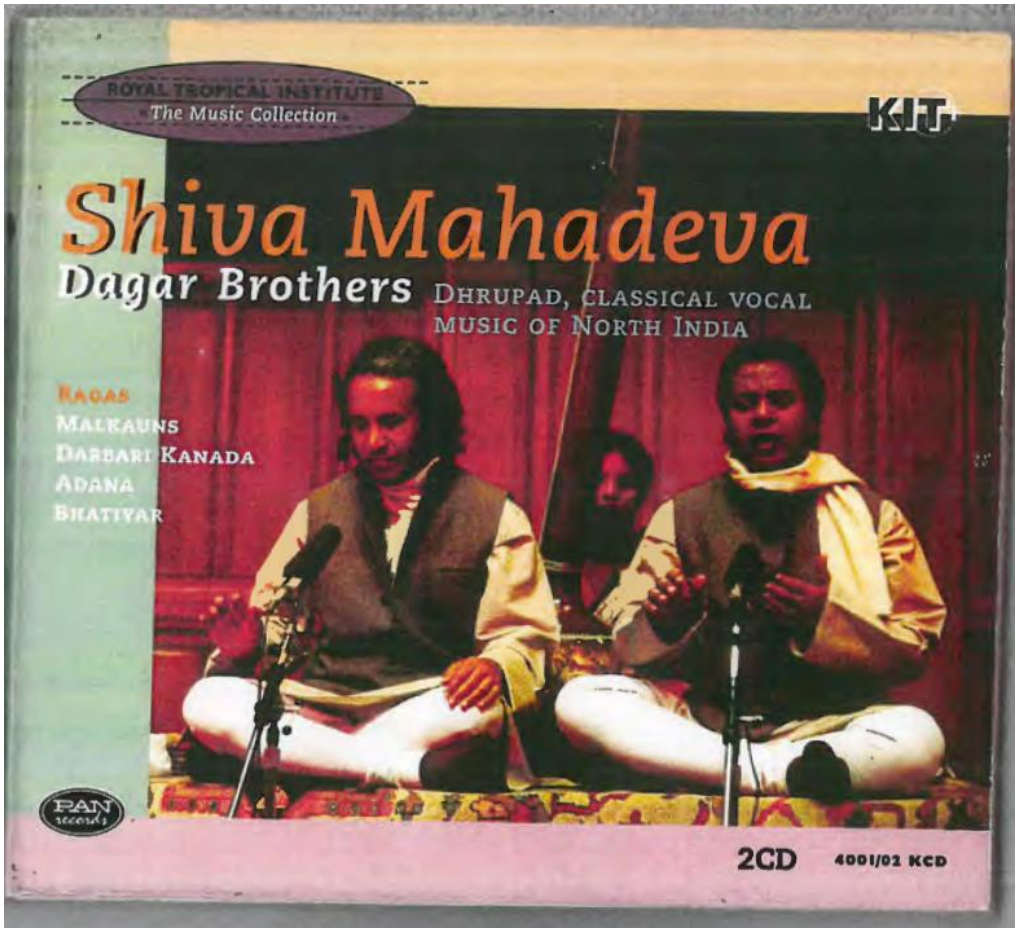
148. The Plaintiff is the son of Late Ustad N. Faiyazuddin Dagar and as one of his legal heirs, claims right over the suit composition owing to an oral family settlement dating back to 1994. As per the said agreement, the Plaintiff is stated to have acquired rights in the suit composition. In support of the same, the Plaintiff has placed on record a confirmation letter dated 10th October, 2023 signed by the legal heirs and family members of the Plaintiff, namely, Nilofar Dagar, Safia Anjum Khan and Qamar Dagar.

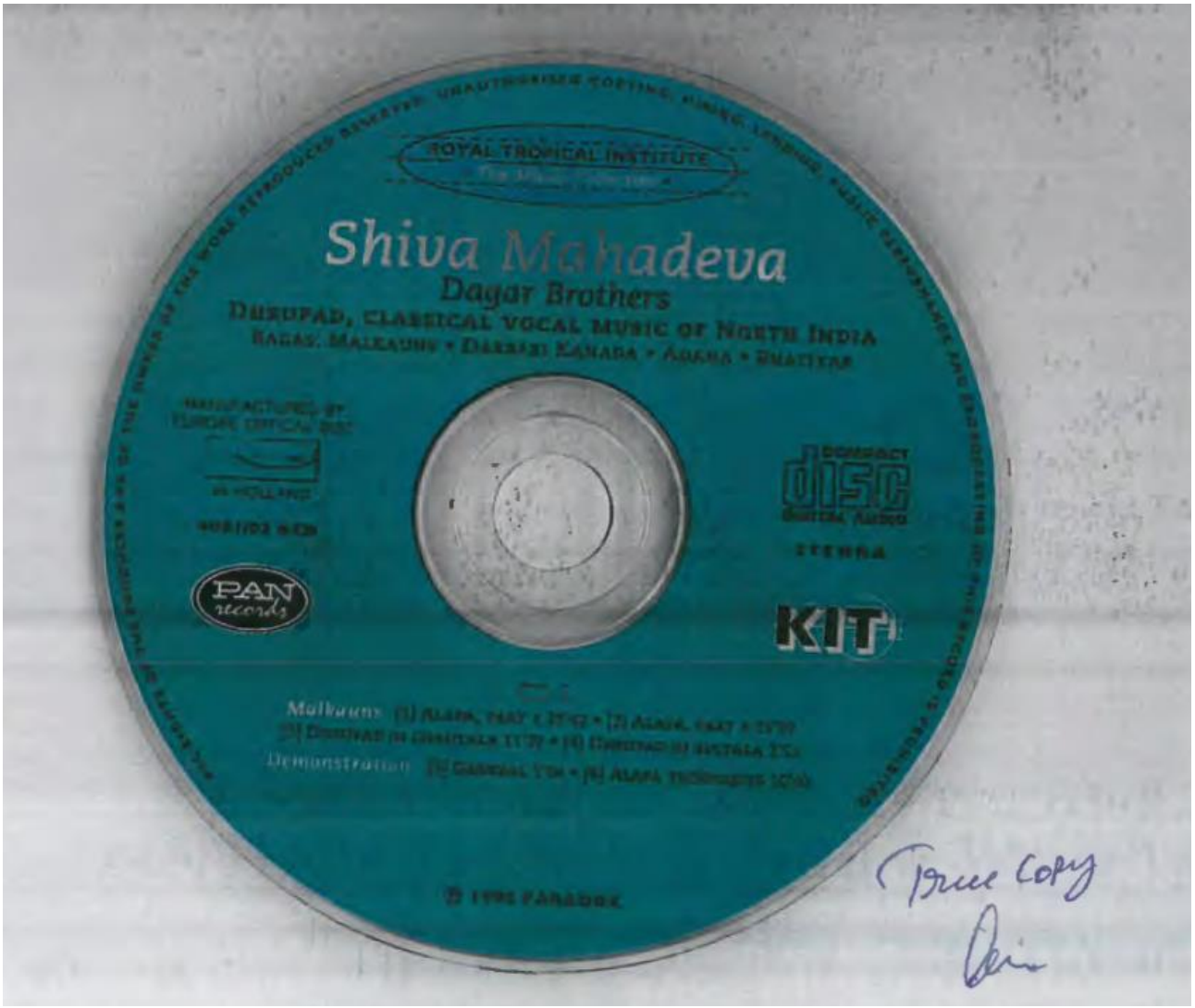
149. The stand of the Plaintiff is that the suit composition is an original composition in *Raga Adana* in *sultaal* and the Junior Dagar Brothers are its joint authors. The Plaintiff relies upon a page from an old diary, wherein lyrics of the suit composition have been recorded, which is stated to be in the handwriting of one of the Junior Dagar Brothers, to show that the suit composition is an original musical work.

150. The rendition of the work by the Junior Dagar Brothers has been submitted in Court by the Plaintiff. One of the earliest available evidence of the suit composition having been rendered by the Junior Dagar Brothers is the rendition of the *Shiva Stuti* on 22nd June, 1978 in an international concert in Amsterdam as part of the 'Holland Festival 1978'. The said rendition of the suit composition by the Junior Dagar Brothers was recorded by the Royal Tropical Institute, Amsterdam and the same was released by Pan Records as

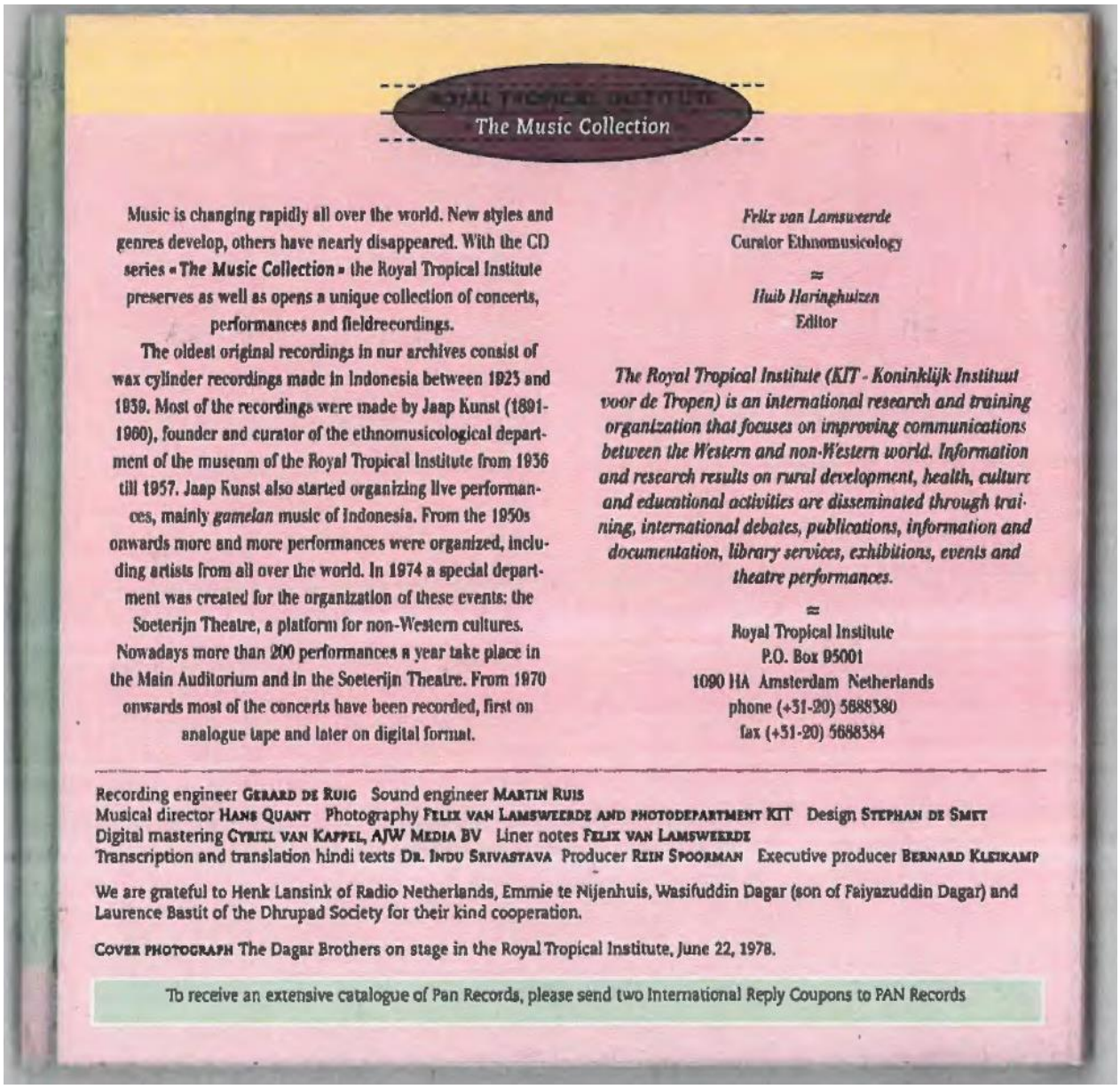
part of a musical album titled "*Shiva Mahadeva Dagar Brothers*". The said album is stated to have been released sometime in the year 1996 as a tribute to the Junior Dagar Brothers after their death.

151. The cover photograph of the Compact Disk (hereinafter "*CD*") of the said album is also from the Royal Tropical Institute and the publisher of the CD appears to have obtained the photograph from the said institute. The copyright notice on the said CD reads as - ***"© and ℗ 1996 Paradox".*** The photographs of the CDs of the said music album along with copy of the accompanying inlay card have been placed on record by the Plaintiff. The relevant photos of the said music album are extracted hereunder:




ROYAL TROPICAL INSTITUTE
Shiva Mahadeva
Dagar Brothers
DHRUPAD, CLASSICAL VOCAL MUSIC OF NORTH INDIA
RAGAS: MALKAUNS • DARBARI KANADA • ADANA • BHATIYAR
PAN records
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Felix van Lamsweerde
Curator Ethnomusicology

≈

Huib Haringhuizen
Editor

The Royal Tropical Institute (KIT - Koninklijk Instituut voor de Tropen) is an international research and training organization that focuses on improving communications between the Western and non-Western world. Information and research results on rural development, health, culture and educational activities are disseminated through training, international debates, publications, information and documentation, library services, exhibitions, events and theatre performances.

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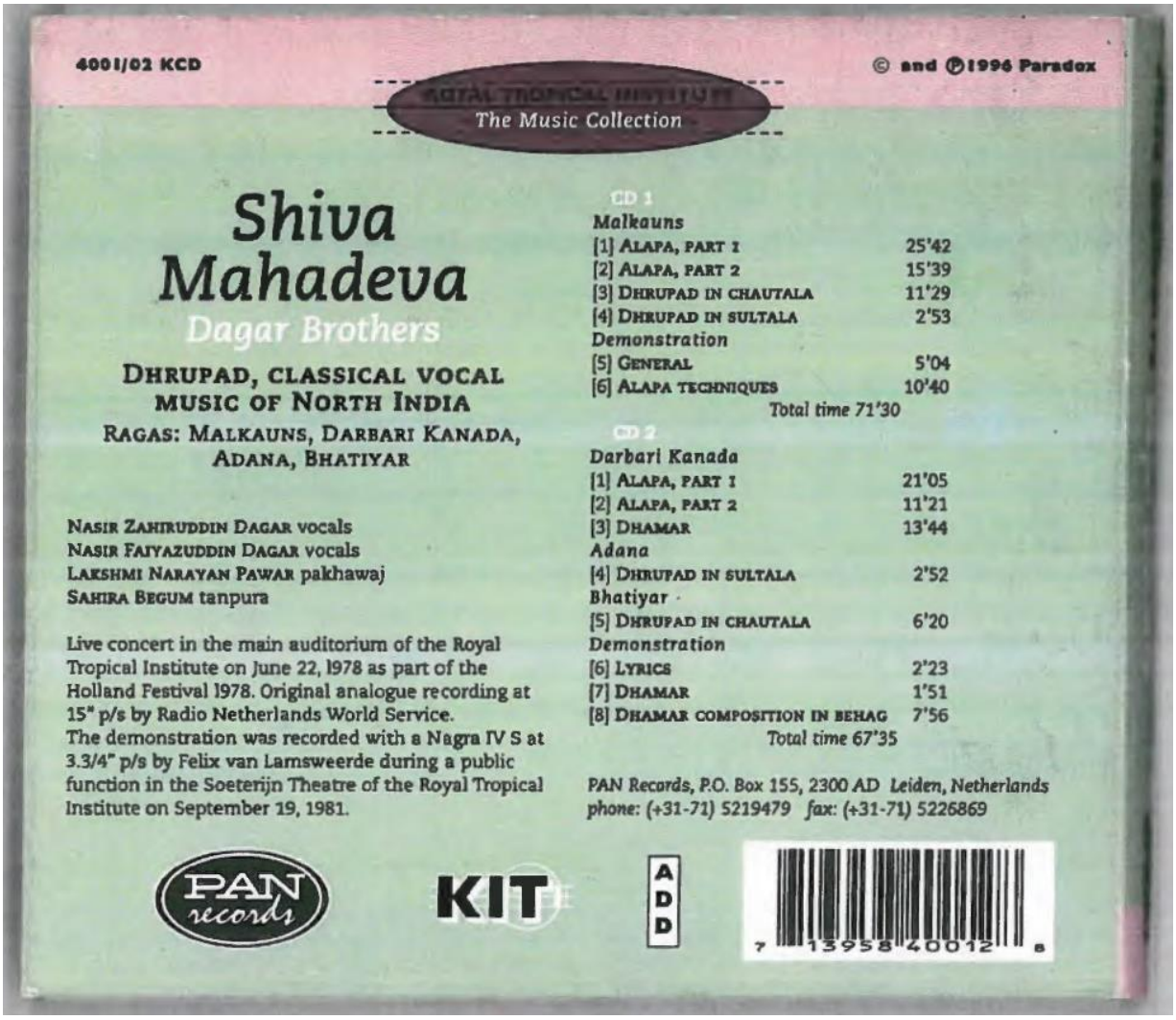
Recording engineer GERARD DE RUIG Sound engineer MARTIN RUIS
Musical director HANS QUANT Photography FELIX VAN LAMSWEERDE AND PHOTODEPARTMENT KIT Design STEPHAN DE SMET
Digital mastering CYRIEL VAN KAPPEL, AJW MEDIA BV Liner notes FELIX VAN LAMSWEERDE
Transcription and translation hindi texts DR. INDU SRIVASTAVA Producer REIN SPOORMAN Executive producer BERNARD KLEIKAMP

We are grateful to Henk Lansink of Radio Netherlands, Emmie te Nijenhuis, Wasifuddin Dagar (son of Faiyazuddin Dagar) and Laurence Bastit of the Dhrupad Society for their kind cooperation.

COVER PHOTOGRAPH The Dagar Brothers on stage in the Royal Tropical Institute, June 22, 1978.

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4001/02 KCD

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ROYAL TROPICAL INSTITUTE
The Music Collection

Shiva Mahadeva

Dagar Brothers

DHRUPAD, CLASSICAL VOCAL MUSIC OF NORTH INDIA

RAGAS: MALKAUNS, DARBARI KANADA, ADANA, BHATIYAR

NASIR ZAHIRUDDIN DAGAR vocals
NASIR FAIYAZUDDIN DAGAR vocals
LAKSHMI NARAYAN PAWAR pakhawaj
SAHIRA BEGUM tanpura

Live concert in the main auditorium of the Royal Tropical Institute on June 22, 1978 as part of the Holland Festival 1978. Original analogue recording at 15" p/s by Radio Netherlands World Service.
The demonstration was recorded with a Nagra IV S at 3.3/4" p/s by Felix van Lamsweerde during a public function in the Soeterijn Theatre of the Royal Tropical Institute on September 19, 1981.

CD 1

Malkauns	
[1] ALAPA, PART 1	25'42
[2] ALAPA, PART 2	15'39
[3] DHRUPAD IN CHAUTALA	11'29
[4] DHRUPAD IN SULTALA	2'53
Demonstration	
[5] GENERAL	5'04
[6] ALAPA TECHNIQUES	10'40
Total time 71'30	

CD 2

Darbari Kanada	
[1] ALAPA, PART 1	21'05
[2] ALAPA, PART 2	11'21
[3] DHAMAR	13'44
Adana	
[4] DHRUPAD IN SULTALA	2'52
Bhatiyar	
[5] DHRUPAD IN CHAUTALA	6'20
Demonstration	
[6] LYRICS	2'23
[7] DHAMAR	1'51
[8] DHAMAR COMPOSITION IN BEHAG	7'56
Total time 67'35	

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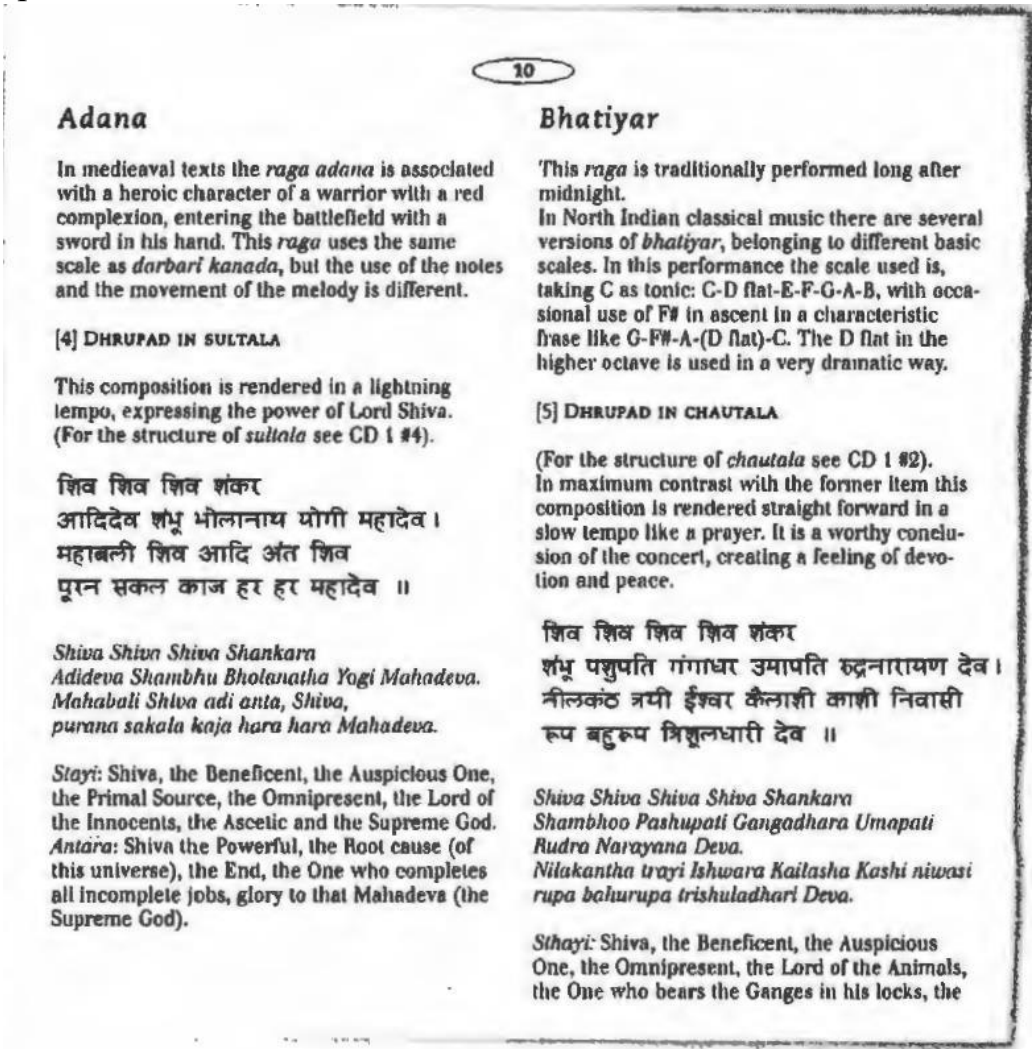
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152. The above documents clearly show, at least at the *prima facie* stage, that there is independent evidence of the suit composition having been composed and rendered by the Junior Dagar Brothers and thereafter the same being published. In the said CD, the suit composition is under the title "*Dhrupad in Sultala"* and the accompanying printed inlay card sets out this composition as under:



10

Adana

In medieaval texts the *raga adana* is associated with a heroic character of a warrior with a red complexion, entering the battlefield with a sword in his hand. This *raga* uses the same scale as *darbari kanada*, but the use of the notes and the movement of the melody is different.

[4] DHRUPAD IN SULTALA

This composition is rendered in a lightning tempo, expressing the power of Lord Shiva. (For the structure of *sultala* see CD 1 #4).

शिव शिव शिव शंकर
आदिदेव शंभू भोलानाथ योगी महादेव।
महाबली शिव आदि अंत शिव
पूरन सकल काज हर हर महादेव ॥

Shiva Shiva Shiva Shankara
Adideva Shambhu Bholanatha Yogi Mahadeva.
Mahabali Shiva adi anta, Shiva,
purana sakala kaja hara hara Mahadeva.

Stayi: Shiva, the Beneficent, the Auspicious One, the Primal Source, the Omnipresent, the Lord of the Innocents, the Ascetic and the Supreme God. *Antara*: Shiva the Powerful, the Root cause (of this universe), the End, the One who completes all incomplete jobs, glory to that Mahadeva (the Supreme God).

Bhatiyar

This *raga* is traditionally performed long after midnight.
In North Indian classical music there are several versions of *bhatiyar*, belonging to different basic scales. In this performance the scale used is, taking C as tonic: C-D flat-E-F-G-A-B, with occasional use of F# in ascent in a characteristic frase like G-F#-A-(D flat)-C. The D flat in the higher octave is used in a very dramatic way.

[5] DHRUPAD IN CHAUTALA

(For the structure of *chautala* see CD 1 #2).
In maximum contrast with the former item this composition is rendered straight forward in a slow tempo like a prayer. It is a worthy conclusion of the concert, creating a feeling of devotion and peace.

शिव शिव शिव शिव शंकर
शंभू पशुपति गंगाधर उमापति रुद्रनारायण देव।
नीलकंठ त्रयी ईश्वर कैलाशी काशी निवासी
रूप बहुरूप त्रिशूलधारी देव ॥

Shiva Shiva Shiva Shiva Shankara
Shambhoo Pashupati Gangadhara Umapati
Rudra Narayana Deva.
Nilakantha trayi Ishwara Kailasha Kashi niwasi
rupa bahurupa trishuladhari Deva.

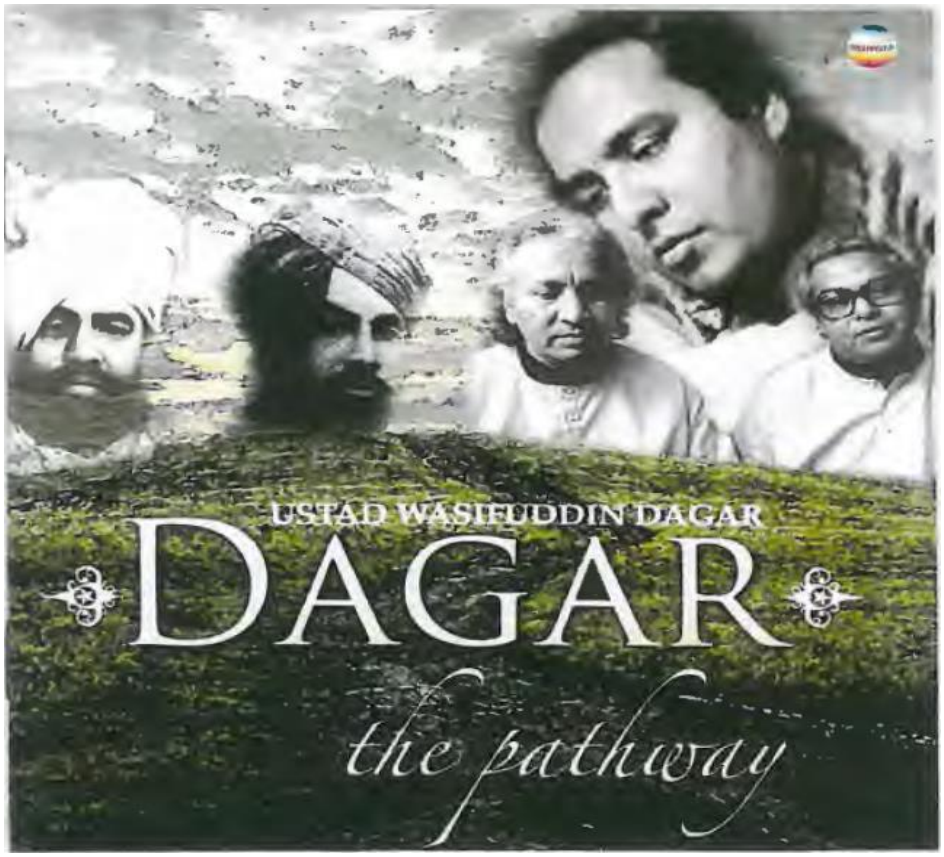
Sthayi: Shiva, the Beneficent, the Auspicious One, the Omnipresent, the Lord of the Animals, the One who bears the Ganges in his locks, the

153. It is interesting to note that it is acknowledged clearly in the inlay card that *Raga Adana* uses the same scale as the *Raga* '*Darbari Kanada'*, however, the use of notes and movement of the melody is different. The relevant extract

from the inlay card is set out below for ease of reference:

> *"Adana*
>
> *In medieaval texts the Raga Adana is associated with a heroic character of a warrior with a red complexion, entering the battlefield with a sward in his hand. This Raga uses the same scale as darbari Kanada, but the use of the notes and the movement of the melody is different."*

154. The Plaintiff has also placed on record copy of another CD titled "*Dagar – The Pathway*" which contains recordings of performances by the Plaintiff at the Deben Bhattacharya Memorial Concert on 16th June, 2007 at the *Bibliotheque nationale de France*, Paris. The cover photos of the said CD are extracted hereunder:





155. The accompanying inlay card to the said CD has also been placed on record and the relevant portion containing a rendition of the suit composition is extracted hereunder:

after a few more repetitions the music sinks slowly downwards into the lower register, rising again to come to rest finally on the fundamental *Sa*.

3. *Dhrupad* Composition and *Layakari* in *Raga Adana* (Track 3)

shiva shiva shiva
shankar aadidev
shambhu bholanaath
yogi mahaadev.
mahaabali shiv, aadi ant shiv
purannsakalkaaj har har mahaadev

Shiva Shiva Shiva, God of Gods
Shambu Bholanath, the Great Yogi, Great Lord.
He has great power, he is the beginning and the end
He helps to complete all work, *Har Har* The Great Lord
[Translation: Dr. Lalita du Perron]

For the next item in his concert, Wasif chose one of the most popular varieties of the *Kanada* group of *ragas*, namely the magnificent *Raga Adana* (or *Adana Kanada*, as it is sometimes called). Traditionally performed in the hours between midnight and 3 a.m., this *raga* is often viewed as the lighter counterpart of another late-night jewel of the *Kanada* group, *Darbari Kanada*. It differs from the latter, however, in its tendency to emphasise the higher melodic regions. Both *ragas* normally include a flat *Ga*, *Dha* and *Ni*, though some artists prefer to perform *Adana* without *k.Dha*. In this performance it is not sung. The melodic structure is as follows:

Ascent: *Sa Re Ma Pa k.Ni Pa, Ma Pa k.Ni Sa Re Sa*
C D F G Bb C, F G Bb C D C

Descent: *Sa Pa k.Ni Pa Ma Pa Ma k.Ga Ma Re Sa*
C G Bb G F G F Eb F D C

As can be seen, *k.Ga* is omitted from the ascent, while in descent it occurs in the *vakra* (oblique or crooked) phrase *k.Ga Ma Re Sa*, which is one of the characteristic features of the *Kanada ragas*. As with *Bhimpalasi*, the *k.Ni* is often taken slightly sharp in ascent. The most important notes of *Adana* are top *Sa* (the *vadi* – reflecting the *raga*'s focus on the upper regions) and *Pa* (the *samvadi*).

Before beginning the performance, Wasif sings a few phrases from the new *raga*, followed by a brief preview of the opening of the composition. Then, while the *pakhavaj* player is retuning his instrument, he introduces the next item. The *dhrupad* composition which follows is a paean to one of the great gods of the Hindu pantheon, Lord Shiva. The text includes many of his epithets – *Shankar* 'the Beneficent', *Aadidev* 'the First God', *Shambu*, 'the Benevolent', *Bholanaath*, 'the Innocent Lord', *Yogi* 'the Great Yogi', *Mahaadev*, 'the Great Lord', *Har*, 'the Destroyer'. Images of Shiva generally depict him either as a Yogi deeply absorbed in meditation, or as *Nataraja*, Lord of the Dance, performing the *tandav*, a divine dance symbolising the eternal cosmic cycle of creation and destruction. In some forms it is a dance of joy; in others it is wild and frenzied, its every movement animated by a terrible destructive fury. In this performance it is the latter, wilder aspect of Shiva's nature that is being evoked. The composition is, like its *Bhimpalasi* predecessor, in two parts (*sthayi* and *antara*), though set now to *sultaal*, a ten-beat rhythmic cycle which divides into five equal groups (i.e. 2 + 2 + 2 + 2 + 2). It is rendered at an extremely quick tempo, with each cycle only lasting just over two seconds. The composition starts on the first beat of the *taal*, with each section covering four cycles. In the *sthayi*, notice the distinctive syncopation

which occurs towards the end of each cycle, giving the melody its special lilt. As before, the singer sings the opening portion ('*shiva shiva shiva*') a number of times before singing the rest. After repeating the *sthayi*, the singer proceeds directly to the *antara*. With the *antara* complete, the singer returns to the first line of the composition before beginning his *layakari*.The *layakari* involves complex rhythmic manipulation similar to that heard in the previous performance, albeit sung this time to the words of both *sthayi* and *antara*. In keeping with the general melodic orientation of the *raga*, the improvisation is centred mainly in the area around the upper tonic (i.e. *k.Ni*, *Sa* and *Re*). *Gamaks* feature prominently from the start. Spanning numerous *taal* cycles, they imbue the music with a muscular energy, evoking the spirit of Shiva's dance. At other times the singer focuses on a single phrase, repeating it over and over again in various rhythmic combinations, sometimes prolonging it with repeated top *Sa*'s, often hammered out with great force. He punctuates his improvisation with regular returns to the opening line of the composition, following this on occasion with a complete reprise of the *sthayi* or *antara*. As the performance progresses the repeated *Sa's* become still more prominent, emerging now in powerful bursts like the bolts of lightning hurled by Shiva himself, and interspersed with short, equally intense dabs of *gamak*. Following the reprise of the *antara* later, the music takes a softer turn. Rapid swings between upper *Sa* and *k.Ni* alternate with groups of repeated *Sa*'s here to drive the music onwards. With the end in sight the singer increases the volume back to its original level, treating us to one more round of *gamaks* before descending finally through the middle register to settle on the fundamental *Sa*.

4. Composition in *Raga Bengal Bhairav* **(Track 4)**

aye ri aye maa
apnon so paayo
achchhe saajan allah milaayo.
us banre ke kaaran sees nivaayo
man maanaa bhar paayo

156. There is also literature which has been filed on record including the agreement dated 1st July, 1995 between PAN Records and the Plaintiff representing the Junior Dagar Brothers which permitted PAN Records to manufacture and sell recordings consisting of performances of the Junior Dagar Brothers at the Royal Tropical Institute, Amsterdam on 22nd June, 1978. The said performances also included the suit composition. The said agreement is clear to the effect that only the performances have been licensed and not the rights in the original works of the Junior Dagar Brothers including the suit composition. Similar agreement also exists with M/s Navras Records Ltd., U.K. dated 27th March, 2007 by which the publishing and mechanical rights of the suit composition was granted. Some relevant clauses of the said agreements are extracted below:

> *"2. The Artist hereby grants, transfers and assigns to the Publisher, without limitations and restrictions whatsoever, the Worldwide* ***exclusive copyright in the products of his performance referred to in clause 5(ii)****, together with all rights necessary to enable us to exploit the same including without limitation the rights to use his name and likeness and the rights necessary under the* ***Copyright Designs and Patents Act 1988 (UK)*** *and the* ***mechanical licence for no extra payment for the right to synchronise and otherwise exploit any and all musical compositions performed, composed or co-composed by you.***
>
> *Accordingly, the publishing and mechanical rights of all composition and music contained herein shall belong to Navras Records Lid.*
>
> *xxxx*
>
> *10.The Publisher, having acquired the title rights as per above, reserves the right to reproduce parts of the same wider various compilations titles, either under the Navras label or, under licensing arrangement, by a*

third party. The Publisher also reserves the right to license the full recording to a third party at its own discretion. The Publisher also reserves the right to promote and / or sell these titles through the medium of radio, television and e-commerce channels through the Internet."

157. In the context of the above evidence, no document has been filed by the Defendants which would show that the Junior Dagar Brothers are not the authors of the suit composition. The third party performances relied upon by the Defendants are subsequent to that of the Junior Dagar Brothers in Amsterdam which dates back at least to 1978, as per the evidence on record. No *Shiva Stuti* composition of any third party prior to the 1970s has been placed on record by the Defendants. The Defendants have argued that the Junior Dagar Brothers may have been the first performers of the said composition but they are not the authors of the said composition. However, in the absence of any document to the contrary the said submission cannot be sustained at this stage.

158. Thus, in the opinion of the Court *prima facie* the Plaintiff has established that the Junior Dagar Brothers are the authors of the suit composition which is an original composition.

Issue II: Whether the impugned song 'Veera Raja Veera' infringes copyright of the Plaintiff in the suit composition 'Shiva Stuti'?

159. In the previous section, the Court has considered the originality and the ownership of the copyright in the suit composition. The question that is to be now determined is whether the impugned song *Veera Raja Veera* in the film PS-2 infringes the copyright in the suit composition or not.

160. Before going into this analysis, the legal position in respect of infringement of copyright deserves to be set out. Copyright law is a statute based law and is governed by the Act. Unlike in trademarks, copyright does not exist outside the statute. Copyright is recognized in three categories of works:

(i) **Original works**: The original works under the Act are only literary, dramatic, musical and artistic work. [Section 13(1)(a) of the Act]

(ii) **Derivative works**: Cinematograph films and sound recordings derived from other original works. [Section 13(1)(b) & (c) of the Act]

(iii) **Neighbouring rights**: Performance rights and broadcasting rights [Sections 37 & 38 of the Act]

161. The suit composition, having been *prima facie* established as an original work of the Junior Dagar Brothers, falls in the first category *i.e.,* an original musical work. The suit composition, which is referred to as '*Shiva Stuti*', does not include the lyrics (*asthayi*) performed with the music nor the voice of the Junior Dagar Brothers. It refers only to the musical composition, which forms part of the suit composition *i.e,.* musical notes (*swaras*), which is then blended with other elements of the *Raga Adana* and the *sul taal* in a unique, creative and distinctive manner. The notes of this composition may have never been written down by the Junior Dagar Brothers but they cannot be deprived of the copyright in the said work for this sole reason, especially, since the recording of their performance of the suit composition is sufficient

to satisfy the requirement of fixation.

162. The impugned song *Veera Raja Veera* is part of the film Ponniyinselvan 2 (`PS2') produced by Defendant No. 2 - Madras Talkies (owned by Mr. Mani Ratnam, who is also the director of the film PS-2) and Defendant No. 3 – Lyca Productions Pvt. Ltd. The impugned song, which is part of the said film, is sung in various languages with different lyrics. The picturization of the song is the same in all languages but what is important is that the musical composition, on which the song is based, is the same irrespective of the language in which the composition is rendered.

163. Infringement has neither been alleged in respect of the lyrics of the impugned song, nor in respect of the voice of the singer or the language in which it is rendered. The infringement has been alleged in respect of the musical composition which forms the basis or foundation of the impugned song.

164. Insofar as the composition is concerned, the most relevant written statement is that of Defendant No.1 – Mr. A.R. Rahman, who is the composer of the impugned song. In his written statement, the stand of the Defendant No.1 is that he had prepared the notation chart for the impugned song using Hindustani classical notations only for the purpose of the present suit proceedings. It is his case that the impugned song was, in fact, composed using Western musical fundamentals, unlike the suit composition, which is composed under the Hindustani classical music tradition. The Defendant No.1, in fact, claims that the impugned song is an original distinctive work based on the Western music fundamentals. The relevant pleadings in the written statement of Defendant No. 1 are set out below:

"8. […]
(b) ***Veera Raja Veera (Impugned Song) is an original, distinct work composed entirely by the Answering Defendant using the fundamentals of western music****. The principal notation chart of the Impugned Song, which was initially prepared by the Answering Defendant when first composing the Impugned Song on the piano, and is being placed on the record by the Answering Defendant, conclusively demonstrates that the Impugned Song is an original creative musical work of the Answering Defendant.* ***The Answering Defendant has always maintained from the outset that the Impugned Song was inspired by traditional Dagarvani Dhrupad****;* ***however, the said notation chart highlights that the Impugned Song consists of multiple, diverse, and intrinsic musical elements that are totally distinct from and go beyond the conventions of Indian classical music, which clearly establishes the originality and creativity of the Answering Defendant's expression.*** *The Plaintiff's attempts to represent the Impugned Song through Indian classical notation are misleading - not only does the Plaintiff's representation isolate one element of the Impugned Song while erroneously omitting all the other essential elements, but* ***such a representation artificially distorts the Impugned Song from a western musical composition into a Hindustani classical music composition****. Such distortion in order to allege similarities is akin to comparing apples with oranges and cannot be the basis for any valid claim of infringement whatsoever.* ***Thus, the Impugned Song is an original work composed using western music fundamentals, whilst the Suit Composition-over which the Plaintiff holds no copyright-is a work entirely within the Dagarvani Dhrupad tradition of Hindustani classical music****.*

[…]

44. It is reiterated that while the Answering Defendant had prepared the notation chart for the Impugned Song using Hindustani classical music notation pursuant to this Hon'ble Court's directions, the Answering Defendant submits that the ***Impugned Song was, in fact, composed using western music notations. Unlike the Suit Composition, which is admittedly composed under the Hindustani classical music tradition, the Impugned Song, in contrast, is entirely composed and fixed in a tangible form using western musical notation*** *and contains as many as 227 diverse layers / tracks of compositional elements far beyond the conventions of Hindustani classical music. The western notation chart i.e., the principal notation chart initially prepared to compose the Impugned Song evinces that the Impugned Song is an original and distinct work of the Answering Defendant. The said western notation chart will demonstrate that the Impugned Song does not merely contain one melodic line, but various elements of harmonic arrangements that are essential and intrinsic to the Impugned Song's composition and distinguish it as an original work of the Answering Defendant. Thus, the Impugned Song is not a composition within the Hindustani classical music tradition, unlike any of the aforementioned renditions of the Suit Composition by other renowned artists.* ***By attempting to allege similarities between the Suit Composition and the Impugned Song using the notation chart filed as Document A along with the Plaint, the Plaintiff is attempting to compare apples to oranges and is distorting the Impugned Song into a different genre of music altogether****.*

*45. It is also reiterated that given the theme of the movie Ponniyin Selvan-ll (**PS-2**) and the era in which it is set (i.e., the Chola Empire in the 10th Century AD), Defendant No.1, along with the Director (Mr. Mani Ratnam) and the Producers (Madras Talkies and Lyca Productions Private Limited, i.e., Defendant Nos. 2-3)*

> *of the film, necessarily had to introduce background scores which were inspired by traditional, classical compositions that captured the mood and theme of PS-2. In this background,* ***Defendant No.6 presented various traditional compositions, including the Suit Composition, in tarana form*** *(i.e., singing a tune with musical syllables that are non-lyrical / non-swara based but with signature phonetics that are attributed to a tarana) to Defendant No. 1 to see if such music could be utilized for conveying the theme of the film PS-2.* ***Thereafter, Defendant No.1 researched and shortlisted numerous compositions in Raga Adana by different performers in the Dhrupad genre of Hindustani Classical music****, and consequently composed the Impugned Song "Veera Raja Veera". The Impugned Song is entirely composed and notated with western musical notation and contains many diverse compositional elements that together comprise the composition of the Impugned Song. Defendant No.5 did not correspond with Defendant No. 1 during this stage.* ***The intention of the Answering Defendant was always to create a composition which brought out the bravery, strength, and determination of the characters in respect of whom it is sung****."*

165. The stand of the Defendant No.1 is, therefore, that any comparison between the suit composition and the impugned song would be that of apple and oranges. The Defendant No.1 also pleads that considering the theme of the film PS-2 and the fact that it was set around the Chola empire in 10th century A.D., certain background scores were introduced based on tradition classical compositions. The Defendant No. 5 and 6 are singers of the impugned song and, admittedly the disciples of the Plaintiff. It is the stand of the Defendant No.1 that Defendant No. 6 had presented various traditional compositions including the suit composition in *Tarana* form to explore the

possibility of utilisation of the said composition in the film PS-2. Thereafter, the Defendant No.1 shortlisted various compositions in *Raga Adana* and then composed the impugned song.

166. In addition to the above pleas in the written statement, the affidavit of Mr. Sai Shravanam, who is a music producer and sound engineer, has also been placed on record by the Defendant No. 1. Mr. Sai Shravanam has also played the *tabla* in the impugned song. It is his case that the suit composition is capable of being recorded in different notations. A differentiating chart between the rendition of Junior Dagar Brothers and Gundecha Brothers, who were disciples of Junior Dagar Brothers, has been set out. However, interestingly, this expert of the Defendant also states as under:

> *"viii. The Impugned Song from the film Ponniyin Selvan-2* ***has the initial musical framework based on the inspiration from "Shiva Stuti" Dhrupad and Dagarvani traditional music****. To explain this based on the strict rules of classical music,* ***the Impugned Song, as a whole is not specifically recorded based on Ragaa Adana. The Impugned Song improvises on a natural minor scale with notes pertaining to Ragaa Jaunpuri or Ragaa Darbari Kaanada, initially in the root pitch of C# in minor scale. The song further develops itself into a scale shift to Root note E in major scale (Graha Bedha, as referred in Carnatic music). It then expands itself based on shades of Ragaa Bihag or Ragaa Hameer Kalyani set to the root note of E, and further descends back to the Mukhda/Pallavi.*** *To clarify, a Mukhda/Pallavi introduces and sets the tone of the composition. When artistes improvise, they return to the Asthaai (first part of the composition) periodically, by picking up the Mukhda at the right time.*
>
> *[...]*

8. In light of the above, in my considered view, I submit that:

i. The Suit Composition is a Ragaa Adana composition in Dhrupad Style of Hindustani classical music and is similar to various other compositions under the same or other Ragaas. When notated, the swara combinations in the Suit Composition appear to be commonplace and traditional knowledge under Hindustani/Carnatic classical music;

ii. This is further evident from the fact that a 13th century composition of Amir Khusro which has been repeatedly performed by various artists, including but not limited to Ustad Amir Khan and Nairn Nazari, when notated, appears to be very similar to the Suit Composition;

iii. ***The Impugned Song has been composed based on Ragaa Jaunpuri or Ragaa Darbari Kaanada and Ragaa Bihag or Ragaa Hameer Kalyani, unlike the Suit Composition, which admittedly has been composed in Ragaa Adana****;*

iv. The Impugned Song has been composed on a five (5) beat rhythmic cycle known as Khanda Chapu or Ardh Jhap Taal, while the Suit Composition has been admittedly composed on an exclusive and unique ten (10) beat rhythmic cycle known as Sui Taal; and

v. ***It has never been the case of Defendant No.1 that the Impugned Song has not been inspired from the Dagarvani tradition of Dhrupad Style of Hindustani music, however, it, by no means, is an identical copy of the Suit Composition and has been created to match the needs of the film Ponniyin Selvan, which it is a part of****."*

167. Another stand of the said expert is that the impugned composition of the Defendant No. 1 follows *Ardh Jhap taal* (5 beats) whereas the suit composition follows the *Sultaal* (10 beats). As against these pleas taken in the written statement and in the expert's affidavit, initial submissions made by Mr. Amit Sibal, ld. Sr. Counsel appearing for Defendant No.1, were that the impugned composition is based on *Raga Adana*. Thereafter, during the course of submissions, the ld. Sr. Counsel argued that the impugned song is not in *Raga Adana* but in *Raga Darbari Kanada*. The submissions of the ld. Sr. Counsel in brief are as under:

i. That no evidence has been placed on record by the Plaintiff to show that the suit composition is an original composition.

ii. That the nature of the compositions is in Dhrupad style/ genre and which is in public domain and no specific averments have been made in the plaint as to which part of the composition is original and which part is based upon the traditional Dhrupad style.

iii. The Dhrupad *Raga* forms of fundamental building blocks of Hindustani Classical Music especially the *Raga Adana* in the Dhrupad genre, thus, the manner of singing and the composition itself is not original and capable of copyright protection.

iv. The Plaintiff has not established any copyright in the suit composition which is sung by several other artists of which recordings were also produced by the Defendants.

v. Even if the Plaintiff's composition is taken as an original composition, other artists are also entitled to reproduce the said '*Shiva Stuti'* in their own style, based on Dhrupad style in *Raga Adana*. Thus, the Defendants' composition is itself an original

composition. It also uses the fundamentals of western music as well and, therefore, does not infringement of the Plaintiff's composition.

vi. There is no *prima facie* case of infringement of copyright as substantial similarity between the two has not been demonstrated after deleting the elements which are in public domain.

168. The above positions of the Defendants have been captured in order to demonstrate the various contradictions and differing stands taken in the written pleadings and the oral arguments. In fact, in the written statement the plea of the Defendant No.1 composer is that the impugned composition is composed using Western music fundamentals and that it is a Western musical composition. Whereas in the expert's affidavit and in the oral submissions, the stand on behalf of Defendant No. 1 is that it is based on Hindustani classical music. Ld. Senior Counsel's submissions, on the other hand, are also that the genre of music is *Dhrupad*, the *Raga* is *Raga Adana*, which has various prescribed rules and disciplines and, therefore, there is not much play in the joints for any composer basing his composition on *Raga Adana*. Various text books and literatures are relied upon in this regard to argue that the rigid structure of a *Raga* ensures that there is repetition across compositions.

169. On behalf of the producers, Mr. P.S.Raman, ld. Sr. Counsel and Mr. Sai Krishna, ld. Counsel have appeared and their submissions in brief are as under:

i. Test for infringement in Hindustani classical music cannot be similar to other works. It should be evolved considering the nature and requirements of the *Raga*s.

ii. In the context of musical copyright, especially based on classical music, it ought to be from the point of view of a discerning listener, who can distinguish the protectable and non-protectable elements.

iii. The term 'substantial similarity' has to, therefore, be interpreted as virtual identity.

iv. The musical works based on Hindustani classical music should be granted a thin copyright protection, since in the case of *Raga*s there would be a rigorous public domain which also needs to be safeguarded and protected.

170. The question that the Court has to determine is as to whether the Plaintiff's copyright has been infringed.

171. The exclusive rights vested with the copyright owner is stipulated in Section 14 of the Act. Insofar as it relates to musical works, Section 14(a)(i) reads as under:

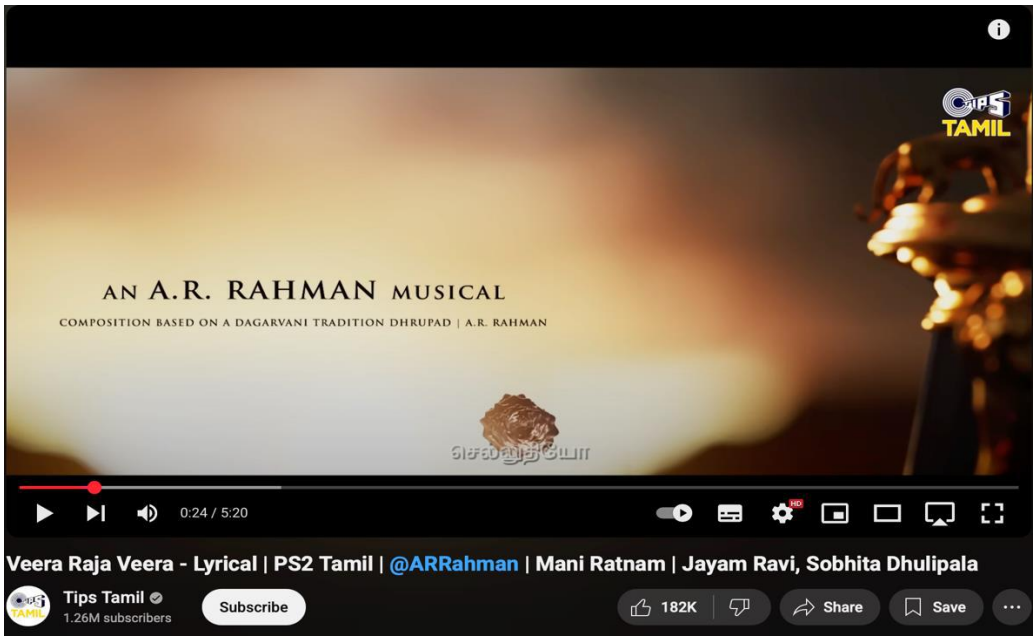
> *"**14. Meaning of copyright.—**For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely—*
>
> *(a) in the case of a literary, dramatic or musical work, not being a computer programme,—*
>
> *(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;"*

172. Further Section 51 of the Act clearly provides as under:

> *"**51. When copyright infringed**.—Copyright in a work shall be deemed to be infringed—*
> *(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights*

under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—
(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or"

173. A conjoint reading of Section 14 and Section 51 of the Act would show that infringement of copyright occurs if a musical work is performed or communicated to the public without the permission, consent or license of the author. It is not necessary that the entire work is to be copied. Copying a *substantial part* of the work would result in infringement. It is admitted position that the Defendant No.1 did not seek the license or consent of the Plaintiff or any other person connected with the *Dagavani* family for use of the suit composition in the film PS-2. However, the Defendants have acknowledged the *Dagarvani* tradition as an inspiration for the impugned song as under:



"Composition based on Dagarvani Tradition Dhrupad"

174. This fact is also acknowledged in the written statement that the impugned song is inspired from *Dagarvani* tradition. **The question is whether it is mere inspiration or infringement. The line is a difficult one to draw**.

175. While determining infringement, the two elements, that the Court looks at, are (i) access and (ii) substantial similarity. Insofar as first prong – access to the suit composition is concerned, the same is not even disputed in the present case. Clearly, both the Defendant Nos. 5 & 6 were persons, who are singers of the impugned song, were persons trained by the Plaintiff and they were disciples of the Plaintiff. In his written statement the Defendant No.1 acknowledges that the Defendant No. 6 had presented him with various compositions of *Dagarvani* tradition including the suit composition. Thus, access to the suit composition is clearly admitted.

176. The use of the suit composition in the film PS-2 is also not a mere accident. It was meant to give the feel of victory and valor. In the suit composition *i.e., 'Shiva Stuti'*, the bhav/emotion sought to be depicted is Lord Shiva's valor, and similarly, the purpose behind the impugned song, is to depict the valor of the Chola King/Prince, who is the main protagonist of the film. Thus, the selection of a composition based on the *Dagarvani* tradition, especially the *'Shiva Stuti'*, was a conscious and deliberate choice made by the Defendant No.1, who is himself an acclaimed composer of global renown. Therefore, the Defendant No.1, in his experience as a composer consciously chose the suit composition *i.e.*, *'Shiva Stuti'* finding it to be most suitable to depict bravery and valour of the Chola King/ Prince.

177. The next question that arises is as to whether there is substantial similarity in the two works. In Goldstein on Copyright, 3rd Edition, in the context of musical works and their infringement, it is opined as under:

> *"§2.8 **MUSICAL WORKS, INCLUDING ANY ACCOMPANYING WORDS***
>
> *Section 102(a) (2) of the 1976 Copyright Act includes "musical works, including any accompanying words" as protectible subject matter. The nature of the tangible medium in which the musical composition is fixed has no bearing on protectability. The Copyright Act will, for example, protect not only musical compositions that have been notated on paper but also those that have only been recorded on a tape or disk. This represents a significant change from the 1909 Act, which protected only compositions that had been reduced to readable form. This change is a substantial boon for composers in such fields as electronic music for whom it is far more practicable to record than to notate their works.*
>
> *Section 102(a) (2)'s inclusion of "accompanying words" in the category of musical works has two important implications for the protection of musical compositions. First, the inclusion means that, so long as the composition's words and music are integrated into an artistic whole, the composition's protectible elements will consist not only of the combination of music and words, but also of the music alone and the words alone. **A copier will be liable not only for copying the composition's words and music together, but also for copying just the music or just the words**."*

178. Thus, in order for a musical work to be an infringing work it is sufficient even if only the music is copied and not the words. It would be relevant to refer to the authoritative textbooks on Hindustani classical music placed on record, wherein the role of lyrics in compositions in a *Raga* has

been explained:[9]

> *"The object of Poetic Songs is to interpret the ideas and sentiments expressed by poetry. Words are, therefore, essential for them. On the other hand, the sole object of Raga music being melodic beauty, words are non-essential in it. In fact, melodic compositions, which give best expressions to Ragas, are those devoid of words. Some soft syllables, which are quite meaningless, are used in these compositions as aid to human voice and sometimes also for rhythmic purposes. They are called Alapa and Tarana. Instrumental music, which is one of the best means for the expression of Raga melody, has nothing to do with words or syllables. For rhythmic purposes strokes of the plectrum serve as substitutes for syllables.* ***It is clear from these facts that words of language have no necessary connection with Raga melody.*** *Nevertheless, most of the classical Raga songs are based on some sort of poetry. These are composed in praise of the Deity or a divine incarnation or the patron king of the composer."*

179. The question that now arises is whether the impugned musical work, based on the suit composition is an infringing work? In terms of Section 2(m) of the Act, reproduction of a musical work, without the consent of the author/owner would render such reproduction as an infringing copying. In the context of a musical work to assess of substantial similarity in order to render a work as an infringing work, the tests could either be –

- comprehensive non literal similarity or
- fragmented literal similarity.

The case of the Defendant is that, if the comprehensive test is applied, there

[9] Narendra Kumar Bose, Melodic Types of Hindustan: A Scientific Interpretation of the *Raga* System of Northern India (1960) (Jaico Publishing House)

is no similarity because there are various elements which have been added to the musical composition which would render them dissimilar such as the inclusion of *adlib*, instruments, female vocal charnam, harmonic arrangements etc. Insofar as the test of literal similarity is concerned, the case of the Defendant is that the literal similarity is due to the notes/*swaras*, which are standard notes/*swaras* forming the part of *Raga Adana*. Thus, the Defendant's case is that by applying both the tests, the impugned work is not infringing the suit composition.

180. On the other hand, the Plaintiff's case is that the comparison of notes would reveal that there is a substantial similarity between the Plaintiff and the Defendant's works. The law on this aspect is that even taking of a small portion of the work would constitute infringement if the same is immediately recognizable. The Plaintiff relies on the decision by the Bombay High Court in ***Ram Sampat (supra)*** where the Court observed as under:

> *"**14.** No difficulty arises in grant of an injunction where the defendant infringes copyright of the plaintiff by copying the whole or substantially the whole of work of the plaintiff in his work, whether such work is a literary work, a musical work or a work of any other type, in which copyright exists. A difficulty may however arise when the defendant takes a small portion of the work of the plaintiff and uses it in his work. Section 52 of the Copyright Act provides what shall not constitute an infringement. No defence under section 52 was raised either in the affidavit in reply or in the oral submissions. I would therefore examine the submission that infringement, if at all there by any, was of a small portion of about 6 seconds, de hors section 52 of the Copyright Act.*
>
> ***15.** Copinger and Skone James on Copy Right Fifteenth*

Edition deals with the infringement of a musical work by copying a part of the work in paragraph 7- 53 at page 409 thus:—

"As to whether a substantial part of a musical work has been copied, the question remains whether the alleged infringement has made use of a substantial part of the skill, labour and taste of the original composer. It is common practice in music copyright cases to call expert evidence to identify and explain the significance of similarities and differences between the works. Although the Court is often helped by such evidence, the issue of substantial part does not depend solely on a note for note comparison but must be determined by the ear as well as by the eye, for the most uneducated in music can recognise that an altered work of music is, in effect, the same as or is derived from the original work. In undertaking the comparison, the works as a whole should be considered, and it is wrong to isolate certain features and concentrate on those. It is clear that a relatively short part of a work can amount to a substantial part, particularly if what has been taken is the vital or essential part of the work, as opposed to being musical commonplace. A relevant question may be whether the amount taken is so small that it is impossible to recognize the original work, or whether it can still be recognized, but where the part taken has been added to other material it is important not to fall into the trap of asking whether the defendant's work sounds like the claimant's. The correct comparison is between the part taken by the defendant and the claimant's work, not between the defendant's work and the claimant's work. Where the claimant's work contains material that was not original to him, then in the usual way these parts should be left out of the comparison exercise and attention centred on those parts which were original.

Particularly in the field of popular music, the vital or essential part of the work may be a short refrain or hook

line. The problem here becomes even more acute with the modem practice of "sampling", whereby a short piece of music is taken and often repeated many times in the making of a new recording. The same point arises in relation to 'ringtones'. The piece taken is often a distinctive part of the original work and thus immediately recognizable, which is of course the reason why it was taken. In cases of this kind, although it will be relevant to ask whether the place which was copied was the result of any particular inventiveness on the part of the original author or was, for example, merely a hackneyed phrase, it is suggested that it will often be appropriate in these cases to apply the rule of thumb that "what is worth copying is worth protecting".
Even where the material in common is sufficient to amount to a substantial part, it of course still has to be established that the reason for this is copying. It is in the field of music copyright cases in particular that the difficult issue of subconscious copying can often arise.

16. *In my view for considering whether a copy of a part of the former musical work into the latter musical work amounts to an actionable infringement, the following factors would be required to be taken into consideration.* ***First is to identify the similarities and the differences between the two works. Second is to find out whether the latter would meaningfully exist without the copied part. It may be necessary to find the soul of a musical work. The soul cannot be determined merely by comparing the length of the part copied but whether the part copied is an essential part of a musical work. Though a musical work may have a length of several minutes, the listener often remembers a "catch part" to which he is immediately hooked on. It is necessary to look for such "catch part" to the "hook part". If the "catch part" or hook part, howsoever small, is copied the whole of the latter work would amount to actionable infringement. It is***

> ***necessary to remind oneself that the desire, of an infringer, is necessarily to copy "the attractive", "the catchy", the grain" and leave the chaff, for he would attract the audience only by the attractive, and not by the ordinary. These factors are only illustrative and there would be many other factors which may be required to be looked into depending upon the facts and circumstances of each case.*** *In the present case, though the part which is copied is small and is only of 6 seconds, it is repeated atleast four to five times in the defendants' work even as per their own admission. What was the need of repetition of the same part has not been explained in the affidavit in reply and that is perhaps because the defendant No. 1 knew that it was the "catch part" or the part to which the listener would be hooked to when he hears or re-hears the musical work. I think it was in University of London v. University of Tutorial Process Ltd. that Lord Justice Paterson said; "What is worth copying, is prima facie worth protecting" I would only add "what is worth copying 4-5 times over in the same work is most certainly worth protecting. In my view, therefore, even if it is held that the portion copied is only a small part of the work of the plaintiff, it amounts to an actionable infringement giving rise to a cause for action in damages as well as injunctive relief."*

181. The analysis of infringement in this case has various aspects. The first and the foremost aspect in the present case is that undoubtedly, the Defendant No.1 acknowledges that the impugned song is based of *Dagarvani* tradition. This is clear from the acknowledgement of the inspiration itself. In ***Trek Leasing, Inc. v. United States, 66 Fed. Cl. 8, 11 (2005),*** the Court has held that if the Plaintiff's material is used as a model, template or even as an inspiration, it can be clearly concluded as a factual matter that copying may have occurred.

182. The question then is whether copying occurred in the present case? The test in ***Ram Sampat (supra)*** is that if the vital part of the Plaintiff's work has been lifted by the Defendant, then there could be copying. The two works need not to be compared as a whole. If the part taken by the Defendant, regardless of it being small, is a substantial part of the Plaintiff's work, then there is infringement. In order to establish whether the suit composition has been infringed, a sure and determinative test is by listening to the works in question. The determination of infringement need not be from the point of view of an expert listener but a lay listener who listens to music. If such a listener finds two works to be similar, then there would be infringement.

183. In ***Francis Day and Hunter Ltd v. Bron (1963) Ch 587 at 594*** the rule of *'ear, not eye, is the principal judge'* has been upheld in cases of musical works, since music is primarily intended for appreciation by the ear. Hence it was held that whenever a question arises in the field of music copyright, such as originality or infringement, scholarly analysis may be useful, but the impact on the ear is ultimately more important: what it sounds like matters more than the notes which are written down.

184. Further, it is long settled under copyright law, especially in context of music, that even copying of six or seven seconds of a musical composition would constitute infringement if the work is readily identifiable with the Plaintiff. The decision of ***Bridgeport Music, Inc. v. Dimensions Films, 410 F.3d 792 (6th Cir. 2005)***, where the US Court of Appeal had held as under:

> *"This analysis admittedly raises the question of why one should, without infringing, be able to take three notes from a musical composition, for example, but not three notes by way of sampling from a sound recording. Why is there no de minimis taking or why should substantial*

> *similarity not enter the equation. Our first answer to this question is what we have earlier indicated. We think this result is dictated by the applicable statute.* ***Second, even [*802] when a small part of a sound re- cording is sampled, the part taken is something of value****. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound record- ing copyright holder, it is not the "song" but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical tak- ing rather than an intellectual one."*

185. The Defendants have relied upon certain decisions of the Courts in United States in ***Skidmore (supra), Edward Sheeran (supra)*** and ***Katheryn Elizabeth Hudson (supra),*** to argue that there is no infringement in the present case relying on the principles applied in the said cases.

186. In the opinion of this Court, the test laid down in foreign jurisdictions, cannot be automatically imported into India in the context of musical works as there is a difference between the manner in which Western music is composed and Indian music is composed. In Hindustani Classical music, when a musical composition is composed, the notes may or may not be written. It is the sound of the music or the aural effect of the music that would be the test insofar as Hindustani Classical Music is concerned. The musical composition may or may not have identical notes, but the aural effect of the notes could be the same for a lay listener. Hindustani Classical Music by its very nature has various hues and colours. Music is differently composed depending upon the context of the music, the time when it is sung, the *Raga* on which it is based, the purpose for which it is composed, etc. Such

differentiation may or may not exist in Western classical music. In the context of present case, the musical composition was required to depict valor and bravery. It required a particular sound, tenor and tempo. The manner in which the Aroha and Avroha takes place, the actual notations *i.e.*, the *swaras*, the *pakad* and the dragging, are all identical in both compositions in respect of the soul of the suit composition *i.e.,* the *asthayi*. This is clearly demonstrated from the following notation chart:[10]

	A	B	C	D	E	F	G	H	I	J	K	L	M
1	**Raag**	Adana								**Taal**	Sool (10 beats)		
2	**Bandish**	Shiva Shiva											
3			Gray shaded cells - syllables of composition			White shaded cells - Corresponding musical Notes							
4													
5			**Beats**										
6			**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**Notes**
7	**ASTHAYI**	A	SHI	-	VA	-	SHI	-	VA	SHI	-	VA	
8			R'	-	S'	-	n	-	S'	P	-	n	(this is repeated, sometimes the last swar is 'P' instead of 'n')
9			R'	-	S'	-	n	-	S'	n	-	P	(Additional - Sung before the next phrase)
10		B	SHAN	-	KA	RA	AA	-	DI	DE	-	VA	
11			g	-	g	g	g	-	m	R	-	S	
12		C	SHAM	-	BHU	-	BHO	-	LA	NA	-	THA	
13			S	-	R	m	P	-	P	n	m	P	
14		D	YO	-	GI	-	MA	-	HA	DE	-	VA	
15			R'	R'	R'	S'	n	-	S'	P	-	n	
16			R'	R'	R'	S'	n	-	S'	n	-	P	(Additional - Sung before the next phrase) Back to Asthayi - Shiva Shiva
17													
18			**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**Notes**
19	**ANTARA**	E	MA	AA	HA	-	BA	U	-	SHI	-	VA	
20			m	P	d	-	n	S'	-	S'	-	S'	
21		F	AA	AA	DI	-	AN	N	THA	SHI	-	VA	
22			S'	n	R'	-	R'	S'	S'	n	-	P	
23		G	PU	U	RA	NA	SA	KA	LA	KA	AA	JA	
24			m	P	n	S'	g'	g'	m'	R'	-	S'	
25		H	HA	RA	HA	RA	MA	-	HA	DE	-	VA	
26			R'	R'	R'	S'	n	-	S'	n	-	P	
27			R'	R'	R'	S'	n	-	-	P	-	n	(Alternate - Sung before the next phrase) Back to Asthayi - Shiva Shiva
28													
29													
30													
31	**Song**		Veera Raja Veera										
32	**Movie**		Ponniyin Selvan 2										
33			**Beats**										
34	**Part 1**		**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**Notes**
35		Copy A	YO	-	DHA	-	YU	-	DH	PAR	-	CHA	
36			R'	-	S'	-	n	-	S'	P	-	n	

[10] See Annexure B for the notations standard used in the chart.

	A	B	C	D	E	F	G	H	I	J	K	L	M
37		Copy A	LE	-	HAIN	-	TEE	-	RON	PAR	-	PA,	
38			R'	-	S'	-	n	-	S'	P	-	n	
39		Copy A	LE	-	HAIN	-	SHOO	-	RA	VEE	-	RA,	
40			R'	-	S'	-	n	-	S'	P	-	n	
41		Copy B (in higher octave)	BO	-	LO	-	JAI	-	JAI	KA	-	RA,	(REPEATED TWICE)
42			g'	-	g'	-	g'	-	m'	R'	-	S'	
43			TEER	-	PAR	-	KHE	EN	CHE	TEE	-	R	
44			P	P	P	P	P	P	P	n	m	P	
45			SA	-	RE	-	SHOO	-	RA	VEE	-	R	
46			P	P	P	P	P	P	P	n	m	P	
47		Copy A (strong similarity)	BA	RU	SE	-	AA	AA	G	PA	AA	NI	
48			R'	R'	S'	-	n	-	S'	P	-	n	
49		Copy A (strong similarity)	CHO	-	TI	-	PA	R	NI	SHA	-	NI	
50			R'	R'	S'	-	n	-	S'	P	-	n	
51		Copy A (strong similarity)	SA	-	GA	R	HA	AA	R	MA	-	NE	
52			R'	R'	R'	S'	n	-	S'	P	-	n	
53		Copy E	CHO	-	LA	-	RA	-	J	JA	AA	NE	
54			m	P	d	-	n	S'	-	S'	-	S'	
55		Copy E	SHA	-	TRU	-	KE	-	THI	KA	AA	NE	
56			m	P	d	-	n	S'	-	S'	-	S'	
57			DU	SH	MA	NA	PE	TU	TE	JA	-	B	
58			P	n	n	R'	S'	S'	S'	n	-	P	
59			BI	JI	LI	YON	KA	-	-	VA	-	R	
60			P	n	n	R'	S'	S'	S'	n	-	P	
61		Copy G (strong similarity)	TA	RU	KA	SHON	SE	-	CHU	TE	-	JAB	
62			P	n	S'	R'	g'	g'	m'	R'	-	S'	
63		Copy G (strong similarity)	TEE	EE	RO	ON	KI	-	JHAN	KA	-	R	
64			P	n	S'	R'	g'	g'	m'	R'	-	S'	
65		Copy B (in higher octave)	BO	-	LO	-	JAI	-	JAI	KA	-	RA	(REPEATED TWICE)
66			g'	-	g'	-	g'	-	m'	R'	-	S'	
67			(REPEAT OF 1st Phrase)										
68			YODHA YUDH PAR....										
69													
70			Beats										
71	Part 2	[redacted]	1	2	3	4	5	6	7	8	9	10	Notes
72			DE	VA	DA	SI	YA	AN	SA	JE	N	GI	
73			P	P	P	P	P	P	P	n	m	P	
74			MRU	DAN	GA	NAU	BA	TA	EIN	BA	JEN	GI	
75			S'	S'	S'	d	d	d	-	d	n	P	
76		Copy A (strong similarity) - in lower octave	SHA	AA	N	KA	HO	-	BA	YA	AA	N	
77			R	R	R	S	n"	-	S	P"	-	n"	

	A	B	C	D	E	F	G	H	I	J	K	L	M
78		Copy A (strong similarity) - in lower octave	SHA	BD	NA	MI	LE	-	EN	GE	JI	-	
79			R	R	R	S	n''	-	S	P	-	-	
80		Copy E	NAU	N	KE	-	KA	A	SHTI	YON	-	PE	
81			m	P	d	-	n	S'	-	S'	-	S'	
82		Copy E	BA	DU	BA	AN	UU	DU	RA	HE	-	HAIN	
83			m	P	d	-	n	S'	-	S'	-	S'	
84		Copy F (strong similarity)	THA	-	M	KA	RU	HA	WA	AA	ON	KO	
85			P	n	n	R'	S'	S'	S'	n	-	P	
86		Copy F (strong similarity)	BA	AA	DA	L	JU	D	RA	HE	-	HAIN	
87			P	n	n	R'	R'	S'	S'	n	-	P	
88		Copy G (~60% similarity)	LEH	RON	PA	R	RA	TH	BHA	GAA	-	YE	
89			P	n	S'	R'	g'	g'	m'	R'	-	S'	
90		Copy G (~60% similarity)	KI	RA	NO	ON	KI	-	LA	GA	AM	HO	
91			S'	R'	R'	P'	g'	-	m'	R'	-	S'	
92		Copy A (strong similarity) - in lower octave	HO	ON	TO	ON	PE	-	SI	RA	AA	KE	
93			R	-	R	S	n''	-	S	n''	-	P''	
94		Copy A (strong similarity) - in lower octave	RA	-	JA	-	TE	-	RA	NA	AM	HO	
95			R	-	R	S	n''	-	S	p''	-	n''	
96		Copy A	SHOO	-	RA	-	VEE	-	RA	SU	UR	MA	
97			R'	-	S'	-	n	-	S'	p'	-	n	
98		Copy A (strong similarity)	BO	-	LO	-	JAI	-	JAI	KA	-	RA	(EXTENDS TO NEXT CYCLE)
99			R'	-	S'	-	n	-	S'	d	-	n (+...P)	
100													
101													
102	Part 3		Following lines are repeated but in a different tune-										
103			Devdasiyan Sajengi Mridang naubate Bajengi										
104			Shaan Ka Ho Bayaan Shabd Na Milenge Ji										
105			Naoke Kashtiyon Pe Baadwan Udd Rahe Hain										
106			Thaam Kar Hawaaon Ko Baadal Judd Rahe Hain										
107			Lehron Pe Rath Bhagaye Kiranon Ki Lagaam Ho										
108			Honthon Pe Siraa Ke Raja Tera Naam Ho										
109													
110		Copy A	Shoorveer Surma Bolo Jay Jaykaar (this line is same as above notation)										
111													
112			These lines follow a different tune (away from main track)										
113			Aandhi Se Tez, Toofan Se Tez										
114			Chun, Chun, Chun, Chun										
115			Chali Re Chali Chingaari										
116			Angg, Angg, Angg, Angg,										
117			Laagi Re Laagi Angaari										

	A	B	C	D	E	F	G	H	I	J	K	L	M
118													
119			Beats										
120	Part 4	[redacted]	1	2	3	4	5	6	7	8	9	10	Notes
121		Copy A (strong similarity)	AA	AA	KA	ASH	KA	AA	AMP	THA	-	HAI	
122			R'	-	R'	S'	n	-	S'	P	-	n	
123		Copy A (strong similarity)	SA	AA	GA	R	HA	AA	AMPH	THA	-	HAI	
124			R'	-	R'	S'	n	-	S'	P	-	n	
125		Copy B (in higher octave)	TE	RI	TA	LA	VA	AA	R	HA	AA	YE	
126			g'	-	g'	g'	g'	-	m'	R'	-	S'	
127		Copy B (in higher octave)	CHA	AA	ND	KA	TU	NA	AA	JA	AA	YE	
128			g'	-	g'	g'	g'	-	m'	R'	-	S'	
129			KHO	OO	NU	PI	KE	SHA	T	TRU	-	KA	
130			P	P	P	P	P	P	P	n	m	P	
131			RA	NG	YU	N	BA	DAL	-	TA	AA	HAI	
132			P	P	P	P	P	P	P	n	m	P	
133		Copy A (strong similarity)	SA	AA	GA	R	AU	-	RU	MA	AN	GE	
134			R'	-	R'	S'	n	R'	S'	P	-	n	
135		Copy A (strong similarity)	PYA	-	SA	-	LA	G	THA	HAI	-	-	
136			R'	-	R'	S'	n	-	S'	d	-	-	
137		Copy E	SHE	E	R	-	DA	HAA	D	THE	-	HAIN	
138			m	P	d	-	n	S'	-	S'	-	S'	
139		Copy E (strong similarity)	CHATT	TAA	NE	EE	PHA	AA	DU	THE	EE	HAIN	
140			m	P	d	-	n	R'	S'	R'	n	S'	
141		Copy F	AI	SE	BA	RU	SE	-	HAIN	BHA	AA	LEY	
142			S'	n	R'	-	R'	S'	S'	n	-	P	
143		Copy F	PUR	ZA	PUR	ZA	KA	A	RU	DA	-	LEY	
144			S'	n	R'	-	R'	S'	S'	n	-	P	
145		Copy G (strong similarity)	JA	-	BHI	KA	MA	AA	N	KHE	EN	CHO	
146			P	n	S'	R'	g'	g'	m'	R'	-	S'	
147		Copy G (strong similarity)	TE	EE	EE	R	PYA	AA	SE	RA	KH	NA	
148			P	n	S'	R'	g'	g'	m'	R'	-	S'	
149		Copy A (strong similarity)	YU	DH	YE	-	JE	EE	TH	NA	AA	HAI	
150			R'	R'	R'	S'	n	R'	S'	n	-	P	
151		Copy A (strong similarity)	SHA	TRU	KO	-	DHE	E	R	KAR	-	NA	
152			R'	R'	R'	S'	n	R'	S'	d	-	n	(EXTENDS THE TAAL/ BEAT TO NEXT CYCLE)
153													
154	Part 5		Following lines are repetitions (already notated above)-										
155			Yoddha Yuddh Par Chale Hain										
156			Teeron Par Pale Hain Shoorveer										
157			Bolo Jay Jaykaar										
158			Bolo Jay Jaykaar										
159			Teer Par Khenchein Teer										

The fact that the impugned song, at the beginning *i.e.,* during the *alaap* as also when the actual composition/song begins, is so similar to the suit composition to lay listener, *prima facie* establishes that the impugned song is substantially similar to the Plaintiff's suit composition. Above all, the selection of the suit composition by Defendant No.1, after obtaining the same from the singers - disciples of the Plaintiff, was deliberate and not accidental.

187. In fact, truth has a way of exposing itself. The Defendant's written statement, where it tried to highlight the commonalities between the suit composition and Amir Khusro's composition, unconsciously reveals the identity between the Plaintiff and the Defendant's compositions. The following table is extracted from paragraph 39 of the written statement:

> *"39. It is also pertinent to note here that the purported 'hook' of the Suit Composition, which the Plaintiff is strongly relying upon to show alleged copyright infringement, is comprised of a combination of notes that is commonplace in Indian classical music. This is borne out by a comparison of a composition by Amir Khusro - "Yaar E Man Biya Biya", and rendered by Ustad Amir Khan and Naim Nazari, which composition predates the Suit Composition and uses nearly identical notational sequences to, inter alia, the purported 'hook' of the Suit Composition. The similarity between the first two lines of the Suit Composition, Amir Khusro's composition, and the melodic line in the Impugned Song can be seen below:*

Suit Composition			**Amir Khusro's Composition**				**Impugned Song**		
Shi Va	Shi Va	Shi Va	Yaar E	Man Bi	Yaa Bi	Yaa,	Vee Ra	Ra Ja	Vee Ra
R'-S'	**n-S'**	**P-n**	**R-R**	**R-S**	**n-S**	**P-n**	**R'-S'**	**n-S'**	**P-n**

188. The only answer by the Defendant to this identity is that there cannot be any monopoly on common placed notes or rules of discipline of a *Raga*. This argument is completely fallacious, inasmuch as the Defendants have vehemently highlighted that rules of a *Raga* cannot be changed but when asked a specific question as to whether the impugned song is based on *Raga Adana*, on which the suit composition is based, the answer of the Defendant

was that it is not based on *Raga Adana*.

189. If the impugned song is not based on *Raga Adana*, the Defendants are not bound by the principles of the said *Raga* or discipline of the said *Raga*. Thus, the defence being taken by the Defendant that the particular composition sounds similar because of the discipline of the *Raga* is also completely untenable and baseless as the suit composition is based on *Raga Adana,* however, the Defendant's impugned composition is not. Assuming that the similarities have occurred because the *Raga Adana* and *Raga* Darbari *Kanada*/ *Raga Jaunpuri* share certain similarities, even then this argument would not assist the Defendants since the impugned song is stated to have been composed as per Western music fundamentals. The beat *i.e.,* rhythm or *taal,* is not determinative of the compositions' identity, it is merely one of the factors which have to be considered. Every composition can be rendered in a different beat or *taal* but the composition can be the same.

190. The Defendants have also relied upon renditions by others artists of the suit composition, which have not been objected to by the Plaintiff. The said renditions are as under:

Sl. No.	***Artist***	***Artist's Teacher/Guru***	***Link to Rendition***
1.	*Gundecha Brothers*	*Ustad Zia Mohiuddin Dagar; Ustad Zia Fariduddin Dagar*	*https://www.youtube.com/watch?v =8Zn3gpG8crI&ab_channel= Rahul Kant*
2.	*Pandit Nirmalya Dey*	*Nimaichand Boral (disciple of Ustad Nasir Moinuddin Dagar); Ustad Zia Fariduddin*	*https://www.youtube.com/watch?app=desktop&v=xSBycW 6kUws&ab_channel=SocietyforIndianMusicandArts%28SIMA%29*

		Dagar	
3.	*Pandit Uday Bhawalkar*	*Ustad Zia Mohiuddin Dagar; Ustad Zia Fariduddin Dagar*	*https://www.youtube.com/watch?v=59fzA3Ipn-E*
4.	*Dr. Kaberi Kar*	*Ustad Rahim Fahimuddin Dagar*	*https://www.youtube.com/watch?v=Wf9DNWGiWXM*

191. The Plaintiffs have clearly stated that all the above renditions are by persons, who were either disciples or *shishyas* of the Junior Dagar Brothers, the Plaintiff or the family members of Junior Dagar Brothers belonging to the *Dagarvani* traditions. The said performers do not claim any rights in the composition but have only not been stopped from performing the suit composition. None of the said recordings are relating to any other work being published or composed based on the suit composition. All the works listed above are performances of the suit composition *Shiva Stuti* itself. None of the said disciples or performers have challenged the Plaintiff's copyright in the work and, if the Plaintiffs have chosen not to stop their own disciples and shishyas from performing the suit composition, the same would not mean that they would be prevented from asserting their copyright when the suit composition is commercially exploited as part of feature film that too without giving proper credit to the authors and the owners. Thus, this defence also fails.

192. In the ultimate analysis, therefore, this Court holds that the impugned song is not merely based on or inspired from the suit composition - *Shiva Stuti* but is, in fact, identical to the suit composition with mere change in lyrics. The adding of other elements may have rendered the impugned song more

like a modern composition but the basic underlying musical work is identical. The test, as suggested by the Defendants i.e., Super-substantial similarity or Virtual identity is not only untenable but would be contrary to the test laid down in the statute. This Court is in full agreement with the tests of infringement laid down in ***Ram Sampat (supra)*** - whether the soul of the composition has been copied is the determinative test.

193. In this case, the core of the impugned song *Veera Raja Veera* is not just inspired but is in fact identical in *Swaras* (notes), *Bhava* (Emotion) and Aural impact (impact on the ear) of the suit composition *Shiva Stuti,* from the point of view of a lay listener. Hence the Defendant's composition infringes the Plaintiff's rights in Shiva Stuti.

Issue III: Whether the Plaintiff is entitled to any relief ?

194. Coming to the relief, the film PS-2 had already been released by the time the suit was filed. At the inception of the suit itself, the Court had given an opportunity to the parties to try amicable resolution of disputes. However, the same did not fructify.

195. The impugned song, both as part of the cinematograph film PS-2 and as on standalone basis, is available on OTT platform and other online platforms. Since it is an integral part of an extremely successful film produced by the Defendants, for which music has been composed by the Defendant No.1, who is also a well-known composer, restraining further communication of the impugned song - *Veera Raja Veera* would result in major disruption for an acclaimed film as also for an acclaimed composer.

196. The suit composition may not be very well known but most music composers and artists are known within their domains and fields. Their creativity can, however, not go unrewarded. The Defendant No.1 has acknowledged in the film that he was inspired from *Dagarvani* tradition that by itself would not be sufficient.

197. The question of grant of interim relief during pendency of the suit in cases where the Plaintiff is seeking recognition of his moral rights has been considered by the Supreme Court in ***Suresh Jindal v. Rizsoli Corriere Della Sera Prodzioni T.V. Spa, 1991 Supp (2) SCC 3*** wherein the Plaintiff had rendered services to the Defendants, who were Italian film makers, for shooting a film in India. Since, the Defendants refused to recognise the role played by the Plaintiff he filed a suit seeking interim relief for being recognised as a Co-producer. The said interim prayer was denied by the High Court and the matter was thereafter considered by the Supreme Court which held as under:

> *"**4…**..... At the outset, we may point out that, according to the respondents, there had been no concluded contract regarding the part to be played by the appellant in the actual production of the film, though the appellant disputes this. It is, however, clear that the appellant did not play any part in the production of the film because, even according to him, he was totally excluded by the respondents from doing so. For obvious reasons, the question of specifically performing this portion of the contract (even assuming, as contended by the appellant, that there was a concluded contract in this respect which could be enforced) can no longer arise. At best the only issue that can be agitated in the suit would be whether the appellant is entitled to damages for having been excluded from being allowed to participate in the production of the film. <u>But, whatever may be the merits</u>*

of the appellant's claims in the suit, the facts as placed before us have, prima facie, left no doubt in our minds that the appellant did render some services to help the respondents to obtain the permission of the Government of India for shooting the film in India. Whether or not the appellant's claim that, but for his help such permission could not have been obtained, is correct, there is no doubt that he did make a valuable contribution in this respect. The only question before us now is whether the appellant is entitled to any interim relief on the basis of the undoubted part played by him in this regard.

[...]

6. The High court seems to have taken the view that, even if the appellant had rendered some services as claimed and the respondents refused to acknowledge it, he can be adequately compensated by the award of damages. of course, it is possible that the court may ultimately be able to assess some damages for this breach if it comes to the conclusion that there has been such breach. However, we think that in a matter of this type the award of damages is not a complete and adequate remedy or relief. As the appellant has made clear, he is not interested so much in the monetary aspect of the deal he claims to have entered into with the respondents. The gain by way of reputation as well as goodwill which the appellant would secure if his services are acknowledged in the title shots of the film is not one which can be adequately expressed in terms of money. By the time the suit is finally decided, any such exhibition of acknowledgement may become totally impossible or infructuous. In that situation, perhaps, there would be no alternative but to assess the damage somehow or other depending upon the findings of the court on the issues in the case. We, however, think, on the prima facie case made out and having regard to the fact that the necessary modifications in the "credit

titles" can be easily made as the film is still in the early stages of its exhibition, that it is just and necessary that the appellant should be granted interim relief at this stage by injuncting the respondents from exhibiting the film except after displaying an acknowledgement of the appellant's services.

7. *We have pondered on the nature of the relief that should be given to the petitioner. As we have already said,* ***there is no doubt in our minds that, whether there was a concluded contract as claimed by the appellant or not, the appellant did play some part in making the film possible and that the respondents are acting unreasonably in denying him the benefit of the limited acknowledgment he is entitled to have****. In view of respondent's disinclination to extend even this courtesy to the appellant, we were initially inclined to issue directions to the respondents to effect necessary changes in the title shots and introduce an acknowledgment of the appellant's services in appropriate language before distributing or exhibiting the film and its copies. We have no doubt that the grant of such a direction would be absolutely within the scope of suit and would mete out proper justice to the appellant. On second thoughts, however, we refrain from doing this. We learn that, though the picture was shot in India, it is being exhibited only in foreign countries. Even if we give a direction as proposed, it might be difficult for this Court to ensure that the respondents carry out these directions. Even the appellant would not be in a position to ensure that such directions are complied with. It is well known that a court will not issue directions over the compliance of which it has no control. In view of this we think that we should not issue such general directions as indicated above. We, therefore, restrict the scope of the interim relief and direct, in the interests of justice, that in case the film is proposed to be, or is, exhibited either on the T.V. or in any other medium in India, it shall not be so*

> *exhibited by the respondent or their agents unless it carries, in its title shots, an acknowledgment of the services rendered by the appellant to the producers in some appropriate language. We direct accordingly."*

The Supreme Court therefore recognised the importance of `Credits' for any creative contribution.

198. Delving into the moral rights of an author, a ld. Single Judge of this Court in ***Neha Bhasin v. Anand Raaj Anand, (2006) 132 DLT 196*** recognized the right of the singer therein to be credited as the lead female singer as against just a singer by relying on the decision of the Supreme Court in ***Suresh Jindal (supra).*** Further, in ***Fox Star Studios v. Aparna Bhat, 2020 SCC OnLine Del 36,*** the contribution of the Plaintiff towards the film were admitted, however, no acknowledgement was provided. In this regard the Court considering the imminent release of the film held as under:

> ***"39.*** *At this stage, the imminent release of the film tilted the scale in favour of the Plaintiff for grant of interim relief, inasmuch as if the film was released without the acknowledgment given to the Plaintiff,* ***and by the time the trial of the suit is concluded, the reliefs pleaded in the suit may themselves become infructuous, as the Plaintiff did not expect any monetary compensation for her role in the film.*** *The acknowledgments given to various professionals in the film and the addition of the Plaintiff and her contribution thereto would not put the Petitioner - Fox Star Studios to any inconvenience, apart from modification of one slide of the opening credits. The text of the acknowledgement, which has been directed by the Trial Court is extremely broad, and in fact may not be appropriate considering that the Plaintiff is a*

> *practising lawyer.* ***However, this should not deprive the Plaintiff from having her role recognized in the making of the film. There are various other professionals who have already been acknowledged in the credits of the film.***
>
> ***40.*** *The Defendants do not dispute that the Plaintiff was approached by them, was consulted by them and that her help/assistance was taken. She had not merely provided all help in terms of the history of the criminal trial, the proceedings emanating therefrom, and the public litigation which was filed but also provided documents, explained the nuances of litigation processes and corrected and modified the script. She has, therefore, helped in maintaining the integrity and the credibility of the film itself, in respect of the legal journey of the victim. The lead Producer/Director has in fact acknowledged the same without any hesitation, both in communications and even in the counter affidavit that has been filed before the Court.* ***Under such circumstances, it cannot be held that the Plaintiff is not entitled to any interim relief at this stage. Accordingly, while the acknowledgement given by the Trial Court may be broad, the Plaintiff deserves to be recognized for her 'some part' in the making of the film****."*

The Right to Paternity and Right to Integrity are the recognised Morals rights in a copyrighted work. The recognition of these rights as enshrined in Section 57 of the Act, is the minimum acknowledgement that is required in respect of a copyrighted work. Thus, the prayer for acknowledgement, sought for by the Plaintiff, is the minimum that can be granted once this Court is of the opinion that the work is original, the Junior Dagar brothers are the original authors

and composers and when the Court has found that the Defendant's work is an infringing work.

199. Above all, a perusal of the chronology of events that led to the filing of the present suit is relevant to the grant of relief. The Defendant No.1 who has earned global acclaim, initially did not give any recognition to the Plaintiff's work. When the Plaintiff contacted the Defendant No.1, the acknowledgement was given – *albeit* reluctantly. Further correspondence ensued but there was no resolution. The Defendant Nos. 6 and 7 who sang the impugned song are disciples of the Plaintiffs. These facts demonstrate the intricate link to the *Shiva Stuti* and *Veera Raja Veera* musical compositions. The balance of convenience is thus in favour of the Plaintiff as, once the movie and song lose their audience by the time trial is concluded, the Plaintiff would have lost any possibility of effective acknowledgment. Irreparable injury thus would be caused to the creative rights and moral rights of the original composers who are no longer alive.

E. Conclusion:

200. The Plaintiff has thus succeeded in *prima facie* establishing its case for copyright infringement by the Defendants. The balance of convenience is in favour of the Plaintiff and the Defendants would not suffer any irreparable harm if directions for recognition of the original authors of the suit composition is directed. Accordingly, as an interim measure, it is directed as under:

a. On all OTT and online platforms, in respect of the impugned song, the slide depicting the Credits, shall be replaced as under:

EXISTING SLIDE

"*Composition based on a Dagarvani Tradition Dhrupad*"

NEW SLIDE

"*Composition based on Shiva Stuti by*
Late Ustad N. Faiyazuddin Dagar and Late Ustad Zahiruddin Dagar".

b. The Defendant Nos. 1 to 3 shall also deposit a sum of Rs. 2 crores which shall be kept in a Fixed Deposit in the account of the worthy Registrar General of this Court and the same shall be subject to the outcome of the trial of the suit. The said deposit shall be without prejudice to the rights and contentions of the parties.

201. Costs of Rs. 2 lakhs are also awarded to the Plaintiff, to be paid by the Defendant Nos.1 to 3 within four weeks. The interim injunction application being ***I.A.21148/2023*** is, accordingly, allowed in the above terms.

202. Nothing said in this order shall bind the final adjudication of the present suit.

PRATHIBA M. SINGH
JUDGE

APRIL 25, 2025
Rahul/dk/msh

ANNEXURE-A

Audio Files of the Compositions:[11]

S. No.	Composition's name	Audio file
1.	Suit Composition– *Shiva Stuti (performed by the Junior Dagar Brothers)*	
2.	Suit Composition– *Shiva Stuti (performed by the Plaintiff)*	
3.	Impugned song – *Veera Raja Veera (Hindi version)*	
4.	Amir Khusro's composition – *Yaar-e-man biya biya (performed by Ustad Amir Khan)*	

[11] These audio files can be played only in the Adobe PDF viewer.