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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 231/2021**

ZEE ENTERTAINMENT ENTERPRISES LTD Plaintiff

Through: Mr. Amit Sibal, Senior Advocate with
Mr. Saikrishna Rajagopal, Mr.
Sidharth Chopra, Ms. Sneha Jain, Ms.
Savni D. Endlaw, Mr. Yatinder Garg,
Ms. Snehima Jauhari, Mr. Sudarshna
MJ, Mr. Saksham Dhingra, Mr.
Rishbh Sharma and Mr. Aishvary
Vikram, Advocates.

versus

TEJENDRA MODI AND ORS Defendants

Through: Mr. Mukul Rohatgi, Senior Advocate
with Mr. Tejas Karia, Mr. Pavit Singh
Katoch, Mr. Shashank Mishra, MR.
Aashish Somasi, Ms. Akshi Rastogi
and Ms. Tanushree Arvind,
Advocates for D-9.
Mr. Santosh Pratap, Advocate for
D-4.
Mr. Tushar Bhardwaj, Advocate for
D-5.
Mr. Hrishikesh Chitale and Mr.
Vijay Kari Singh, Advocates for D-6.
Mr. Sidharth Tyagi, Advocate for
D-7.
Ms. Chandrima Mitra and Mr. Parag
Khandhar, Advocates for D-14.
Counsel for D-2 (Appearance not
given).

**CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA**

O R D E R

**% 01.06.2021
[VIA VIDEO CONFERENCING]**

I.A. No. 6972/2021 (application for placing the amended memo of parties on record)

1. Mr. Amit Sibal, learned Senior Counsel for the Plaintiff states that pursuant to the direction of this Court, Defendant Nos. 10 to 12 have provided the details and particulars of Defendant Nos. 1 to 8 and accordingly the memo of parties needs to be amended. The application is allowed, and the amended memo of parties annexed to the application is taken on record.

2. The application stands disposed of.

I.A. No. 6973/2021 (for exemption from filing signed/affirmed/notarized affidavits)

3. The present application under Section 151 of the Code of Civil Procedure, 1908 (in short 'CPC') on behalf of the Plaintiff seeks exemption from filing signed/affirmed/notarized affidavits.

4. The Plaintiff submits that due to the current COVID-19 pandemic and resultant restrictions, they are unable to file signed/affirmed/notarized affidavits. Due to the urgency of the matter, Plaintiff has filed the application without the signed/affirmed/notarized affidavits.

5. The application is allowed, subject to the Plaintiff filing the exempted documents within two weeks from the day the lockdown restrictions imposed by the Government of NCT of Delhi are lifted and the facility for

attestation of affidavits is resumed.

6. The application stands disposed of.

I.A. No. 7045/2021 (application under Section 151 of the Code of Civil Procedure, 1908 praying for exemption from filing apostilled affidavit)

7. The present application under Section 151 CPC on behalf of Defendant No. 9- WhatsApp LLC seeks exemption from filing apostilled affidavit.

8. The abovementioned Defendant submits that due to the current COVID-19 pandemic and resultant restrictions, they are unable to file apostilled affidavits. Defendant No. 9 states that the authorized signatory resides in the State of California, United States where stay-at-home orders are in place. As a result of the same, the concerned authority is accepting apostille requests at a very slow rate. Due to urgency of the present matter, Defendant No. 9 has filed the application without apostilled affidavits.

9. The application is allowed, subject to Defendant No. 9 filing the apostilled affidavits within two weeks from the day the stay-at-home orders imposed by the State of California are lifted.

10. The application stands disposed of.

I.A. No. 7044/2021 (application under Order XXXIX, Rule 4 read with Section 151 of Code of Civil Procedure, 1908 to vacate, set aside, or modify the ex-parte interim order dated 20th May, 2021)

11. By way of this application, Defendant No. 9 seeks a modification of the *ex-parte ad interim* order dated 20th May, 2021 passed by this Court in the application under Order XXXIX Rule 1 and 2 CPC.

12. Issue notice. Ms. Sneha Jain, learned counsel for the Plaintiff accepts notice.

13. Reply to the application be filed within a period of four weeks from today. Rejoinder thereto, if any, be filed within a period of two weeks thereafter.

14. Mr. Mukul Rohatgi, learned Senior Counsel for the Applicant/Defendant No. 9 has stated that his client has already complied with the direction of this Court in the order dated 20th May, 2021 to suspend the accounts of Defendant Nos. 4 and 8 on WhatsApp. However, he submits that the direction requiring WhatsApp to suspend any other accounts purportedly used to sell pirated copies of the film in question on the WhatsApp Service within 24 hours of the Plaintiff's request to WhatsApp should be modified. Mr. Rohatgi argues that an "intermediary" under the Information Technology Act, 2000 (in short 'IT Act'), is immune from liability for making available or hosting content circulated on the WhatsApp Service. The only situation wherein liability will arise is if the intermediary obtains "actual knowledge" that specific content is unlawful, and despite the same, it fails to expeditiously remove or disable access to such content. By referring to the judgment of the Supreme Court in *Shreya Singhal v. Union of India*¹, it is argued that the direction of this Court *vide* order dated 20th May, 2021 requires his client to disable accounts on the WhatsApp Service upon mere receipt of Plaintiff's request, which does not constitute "actual knowledge" of unlawful content under the Act. That apart, it is argued that the communication exchanged between the accounts on the WhatsApp platform, are entirely encrypted and WhatsApp is precluded from reading the messages sent over WhatsApp Service. In these circumstances, the impugned direction, would give the Plaintiff unfettered discretion to remove

WhatsApp accounts.

15. Mr. Sibal, on the other hand, submits that the directions to Defendant No. 9- WhatsApp LLC are just and proper. The Plaintiff is a responsible company and would not misuse the order, and any request made by the Plaintiff is always subject to judicial scrutiny. In order to rule out any ambiguity, Plaintiff shall, at the time of making a request of suspension of an account, place on record an affidavit disclosing the material, basis whereof the request is made. He submits that this Court may put further safeguards, as it deems necessary, to rule out any possible indiscretion, instead of modifying the injunction order. Mr. Sibal submits that besides the judgment of the Supreme Court in *Shreya Singhal* (*supra*) stands fully complied, as the directions have been given by this Court.

16. The issue requires consideration. This Court has been issuing such directions in relation to infringement of copyright, especially in matters where the content is published on the websites which are also referred to as “rouge websites”. However, the Court *prima facie* finds merit in the contention of Mr. Rohatgi that since the messages between WhatsApp users are protected with an end-to-end encryption protocol, Defendant No. 9 would not be in a position to review any accounts reported by the Plaintiff in the future to confirm that they are in fact selling pirated copies of the film in question. Thus, it would be appropriate that any further direction for suspension of WhatsApp accounts be issued by the Court. Accordingly, the direction contained in the order dated 20th May, 2021 insofar as it directs Defendant No. 9 to suspend the accounts, on the request of the Plaintiff is kept in abeyance till the next date of hearing. It is clarified that Plaintiff shall

¹ (2015) 5 SCC 1.

be at liberty to approach the Court to seek such orders against the other account holders if the need so arises.

17. Mr. Sibal and Mr. Saikrishna Rajagopal, both submit that it may be clarified that such an application, if filed by the Plaintiff would also be considered by the concerned Vacation Bench. It can only be observed that if such an application is filed and the urgency is expressed, the Registry would in terms of criteria laid down for listing of urgent matters place the matter before the concerned Vacation Bench.

18. List on 8th September, 2021.

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19. Learned counsel for the Defendant Nos. 2, 4, 6 and 7 have joined the proceedings. They state that they would like to amicably settle the matter. They may, if they so desire, approach their counterpart, for exploring such an option.

20. List before the Joint Registrar for marking of exhibits on the date already fixed i.e., 10th August, 2021.

21. List before the Court on 8th September, 2021 for consideration on the pending applications.

SANJEEV NARULA, J

JUNE 1, 2021

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