

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 8<sup>TH</sup> DAY OF FEBRUARY 2023 / 19TH MAGHA, 1944

BAIL APPL. NO. 759 OF 2023

CRIME NO.703/2022 OF Kozhikode Town Police Station, Kozhikode

O.S.NO.4/2022 BEFORE DISTRICT COURT, PALAKKAD

PETITIONERS/ACCUSED NOS.1 & 2:

- 1 VIJAY KIRGANDUR,  
AGED 47 YEARS, S/O.THIMMEGOWDA,  
HOMBALE FILIMS 2ND FLOOR, OPPO ORION MALL,  
BANGALORE, RAJAJI NAGAR, BANGALORE, KARNATAKA., PIN  
- 560010.
- 2 RISHAB SHETTY,  
AGED 39 YEARS,  
S/O Y.BHASKAR SHETTY, @WG72 347, DIRECTOR AND  
ACTOR, MAILA, SANDARA, BANGLORE, BANGALORE,  
KARNATAKA, PIN - 560098.

BY ADVS.  
ANOOP.V.NAIR  
E.ADITHYAN  
ROHAN MAMMEN ROY

RESPONDENTS/RESPONDENTS:

- 1 STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, PIN - 682031.
- 2 THE STATION HOUSE OFFICER,  
KOZHIKODE TOWN POLICE STATION,  
KOZHIKODE DISTRICT, PIN - 673001.

BY PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON  
30.01.2023, THE COURT ON 08.02.2023 DELIVERED THE FOLLOWING:

**“C.R”**

***A. BADHARUDEEN, J.***

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*B.A.No.759 of 2023*

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*Dated this the 8<sup>th</sup> day of February, 2023*

***O R D E R***

The petitioners, who are accused 1 and 2 in Crime No.703/2022 of Kozhikode Town Police Station, seek anticipatory bail in this matter by resorting to Section 438 of the Code of Criminal Procedure.

2. Heard the learned counsel for the petitioners as well as the learned Public Prosecutor.

3. Precisely the allegation of the prosecution is that accused 1 and 2 herein committed offence punishable under

Section 63 of the Copyright Act by using the music of 'NAVARASAM', which was exhibited in 'KAPPA' T.V owned by Mathrubhumi Printing and Publishing Co. Ltd., performed by Thaikkudam Bridge band by including the same music 'VARAHAROOPAM', in a Kannada movie 'KANTARA', produced by the 1<sup>st</sup> accused and directed and acted by the 2<sup>nd</sup> accused, who have thereby violated the copy right.

4. While arguing for anticipatory bail, it is submitted by the learned counsel for the petitioners that the entire allegations are false. According to him, the defacto complainant as well as Thaikkudam Bridge Band filed 2 separate suits before the District Court, Kozhikode alleging copyright violation and when the petitioners herein challenged the maintainability of the above suits, the District Court found that the suits were not maintainable before the District Court and were directed to be presented before the commercial court having jurisdiction to decide the issue.

Challenging one out of the order, FAO.No.147/2022 has been filed before this Court and the same was posted for judgment by this Court. According to the learned counsel for the petitioners, the petitioners never exhibited the song 'NAVARASAM' in the movie 'KANTARA' in the name 'VARAHAROOPAM' in any form. The song 'VARAHAROOPAM' is an independent creation and the same did not have any connection with 'NAVARASAM'. Further, the entire allegation is within the ambit of a civil suit.

5. The learned counsel for the petitioners submitted further that even the prosecution did not collect any materials to prove that the 'VARAHAROOPAM', an independent creation at the instance of the petitioners, is having similarity or the same is deceptively similar in any manner and the prosecution relied on to hold so, *prima facie*, on the premise that somebody who saw 'KANTARA' film as well as 'NAVARASAM' opined similarity. The learned counsel for the petitioners would submit that the petitioners are

ready to co-operate with the investigation by subjecting themselves for interrogation and other purposes. Therefore, in the background facts, as submitted, the learned counsel for the petitioners pressed for grant of anticipatory bail.

6. Whereas the learned Public prosecutor vehemently opposed anticipatory bail plea at the instance of the petitioners on the submission that the same would hamper the investigation. It is submitted by the learned Public Prosecutor that as per the report of the Investigating Officer and as could be read out from the case diary, the statements of the Senior Manager of Mathrubhumi KAPPA T.V staff, Assistant Manager DIVO Company, who are the distributors of 'NAVARASAM' & 'VARAHAROOPAM' revealed that they have noticed similarity of music 'NAVARASAM' & 'VARAHAROOPAM' only after the same was intimated by the DIVO Company. Further, the Assistant Manager of DIVO Company after noticing similarity of the music, the same was

shared with both parties and they had even participated at a Google meet to settle the matter amicably. Further, the investigation also would reveal similarities, as contended by the defacto complainant in between 'NAVARASAM' & 'VARAHAROOPAM' and *prima facie* an offence punishable under Section 63 of the Copy Right Act is made out. In such a case, the arrest and interrogation of the petitioners are necessary to accomplish meaningful investigation and successful prosecution.

7. Before discussing merits of the case and truth of allegations, *prima facie*, it is worthwhile to decide a question as to whether offence under Section 63 of the Copy Right Act is a non bailable or bailable offence? In this connection, it is pertinent to refer the judgment in Cri.Appeal No.807/2022 dated 20.05.2022 rendered by the Apex Court, wherein exactly the question was considered. In paragraph 7 of the above judgment, the Apex Court held that *offence under Section 63 of the Copyright Act is a cognizable and*

*non-bailable offence*, while setting aside the finding entered into by the High Court holding the view that the same is a non cognizable and bailable offence. Therefore, the legal position is well settled that an offence under Section 63 of the Copyright Act is non bailable and cognizable.

8. It is true that on noticing plagiarization of the work done by Thaikkudam Bridge band under the auspicious KAPPA T.V by name 'NAVARASAM', in 'KANTARA' film under the name and style 'VARAHAROOPAM', civil suits were instituted by the complainant M/s.Mathrubhumi owning KAPPA T.V. It is true that on hearing the above suits, the District Court found that the suits are not maintainable before the District Court, since the transaction is commercial in nature so that the jurisdiction is vested with the Commercial Court and the legal issue will be decided by this Court in F.A.O.No.147/2022. No doubt, the Copyright Act, 1957 has been enacted with a view to protect Copyright secured by a person

or a firm, as the case may be, without being infringed by third parties or any others. Section 63 of the Copyright Act, 1957 makes infringement of copyright or other rights conferred by the Copyrights Act as an offence. Section 63 is to the following effect:

*“63. Offence of infringement of copyright or other rights conferred by this Act:- Any person who knowingly infringes or abets the infringement of -*

*(a) the copyright in a work, or*

*(b) any other right conferred by this Act, except the right conferred by section 53A except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.”*

9. So, the prime question to be considered herein is whether there are *prima facie* materials in this case to see that there



is infringement of copyrights in so far as 'NAVARASAM', for which copyright was secured by KAPPA T.V owned by Mathrubhumi, by including the same in 'KANTARA' cinema under the name and style 'VARAHAROOPAM'. In this connection it is to be noted that initially, as admitted by both sides, the District Court granted stay in exhibiting the film 'KANTARA' with the above song and later when the civil suits were returned for filing before the proper court, the interim injunction initially granted by the District Court on the finding that there is *prima facie* copyright violation, stands vacated. *Prima facie* the opinion collected by the Investigating Officer is to the effect that there is similarity between 'VARAHAROOPAM' and 'NAVARASAM'. In addition to that the Investigating Officer, on gathering opinion from expert, reported that 'VARAHAROOPAM' is, the plagiarized and pirated version of 'NAVARASAM'. If so, the violation of copyright alleged by the defacto complainant could be discernible from the prosecution

materials, *prima facie*. Thus detailed and fair investigation is absolutely necessary in this regard. Therefore, at the initial stage of investigation, this Court could not hold that there are no *prima facie* materials and the petitioners herein are innocent and they did not commit offence punishable under Section 63 of the Copyright Act.

10. As I have already pointed out, right of a person or a firm, who obtained copyright in respect of a particular subject is a protected right and any infringement thereof is a serious offence punishable under Section 63 of the Copyright Act. The legislative intent behind the Copyright Act is to protect the Copyright, which one obtained after huge investment and tedious efforts to get the subject as one with high fame. If someone enjoys or uses the same either by plagiarization or by making the same deceptively similar and getting benefit out of them, either monetary or otherwise by infringing the said right, allowing infringement to continue and to

facilitate the infringer to use or exhibit a cinema with the said plagiarized version, ultimately after the expiration of the vital part of the period of use or exhibition and collection of huge amount by the Director and Producer of the cinema, in fact, the same will be detrimental to the interest of the persons who obtained copyright.

11. That apart, releasing the accused on anticipatory bail and allowing the infringement to continue so as to permit the infringer of the copyright to take benefit out of the same, could not be done. If so, ultimately the infringer would get benefit out of the plagiarized and pirated version after infringing the copyright of another person which he obtained after long cherished hard work and intellectual application of mind. Resultantly, the copyright holder's right to enjoy benefit out of the copyright protected subject matter practically will be taken away. Therefore, while considering grant of anticipatory bail in cases of such nature, the courts should be very vigilant foreseeing all the above aspects. In the case at

hand, admittedly civil litigations have been initiated, but further proceedings stand stalled because of the jurisdictional issue which will be addressed by this Court in F.A.O No.147/2022. Therefore, grant of anticipatory bail shall be on imposing a condition, restraining the petitioners from exhibiting the cinema 'KANTARA' along with the music 'VARAHAROOPAM' for a reasonable period till an interim order or final order in this regard will be passed by the competent civil court. By imposing such a condition, I am inclined to allow this petition.

12. Accordingly the petition stands allowed on the following conditions:

(i) The petitioner shall surrender before the Investigating Officer for 2 days, ie. on 12.02.2023 and 13.02.2023, in between 10 a.m and 1 p.m, for interrogation. The Investigating Officer can interrogate them and on completion of interrogation within the above time specified, if they will be arrested, they shall be produced before the jurisdictional court. On such production, the

jurisdictional court shall release the petitioners on bail on their executing bonds for Rs.50,000/- (Rupees Fifty Thousand Only) each with two solvent sureties each for the like amount to the satisfaction of the jurisdictional court concerned.

(ii) Accused/petitioners shall not intimidate the witnesses or tamper with evidence. They shall co-operate with the investigation and shall be available for trial. They shall appear before the Investigating Officer, as and when directed.

(iii) Accused/petitioners shall not leave India without prior permission of the jurisdictional court.

(iv) Accused/petitioners shall not involve in any other offence during the currency of bail and any such event, if reported or came to the notice of this Court, the same shall be a reason to cancel the bail hereby granted.

(v) The specific condition further is that the petitioners shall not exhibit the film 'KANTARA' along with the music 'VARAHAROOPAM' in the film till an interim order or final order after addressing infringement of copyright in this matter will be passed by a competent civil court. It is made specifically clear that the petitioners also can move before the competent civil court at their instance at the earliest in this regard to have a meritorious

decision as regards to the allegation of infringement of copyright,  
as per law.

*Sd/-*

**(A. BADHARUDEEN, JUDGE)**

*rtr/*

**APPENDIX OF BAIL APPL. 759/2023**

PETITIONERS' ANNEXURES

Annexure I	TRUE COPY OF THE FIR IN CRIME NO. 703/2022 ON THE FILE OF KOZHIKODE TOWN POLICE STATION, KOZHIKODE DISTRICT.
Annexure II	TRUE COPY OF THE PLAINT IN O.S. NO. 4/2022 FILED BY MATHRUBHUMI PRINTING PRESS LTD BEFORE THE HON'BLE DISTRICT COURT, PALAKKAD.
Annexure III	TRUE COPY OF THE COUNTER AFFIDAVIT IN I.A. NO. 3/2022 IN O.S. NO. 4/2022 FILED BY THE 1ST PETITIONER BEFORE THE HON'BLE DISTRICT COURT, PALAKKAD.