

HIGH COURT BOMBAY

BALAJI MOTION PICTURES LTD. V BSNL

914-NMSL1940-16.DOC

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SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 1940 OF 2016

IN

SUIT (L) NO. 694 OF 2016

Balaji Motion Pictures Ltd. & Anr. ...Plaintiffs

Versus

Bharat Sanchar Nigam Ltd. & Ors. ...Defendants

Mr. V. R. Dhond, Senior Advocate, with Mr. Shailesh Mandon, a/w
Mr. N. Rodriguse, i/b R. M. Partners, for the Plaintiffs.

CORAM: G.S. PATEL, J

DATED: 8th July 2016

PC:-

1. Mr. Dheond renews the application that he made yesterday. He tenders a further Affidavit dated 8th July 2016. This is taken on record. It is affirmed by Mr. Ayan Roy Chowdhury, the General Counsel of the Plaintiff. Paragraph 3 of this Affidavit says that one of the two agencies appointed by the Plaintiff, Markscan, forwarded to the Plaintiff a letter dated 7th July 2016. A copy is annexed as Exhibit "A" to the present Affidavit. In this, Markscan said that using their software, they found 110 websites that host or make available illicit, illegal and unauthorised copies of the film. Of these 110 websites, 66 are P2P torrents. 33 have recorded copies of the film and 11 permit streaming. The torrent sites provide trackers for downloading pirated content from seeders and leechers. Evidently,

the websites that have recorded the film have copies on their dedicated servers. This is probably also true of those sites that offer to stream the film.

2. Also annexed to this Affidavit is a sample take down notice that Markscan sent on behalf of the Plaintiff to all 10 websites. This demonstrates how the film is being made available for illicit downloads.

3. There is from pages 5 to 7 of this Affidavit a list of these 110 infringing websites.

4. I have no manner of doubt at all that access to all these 110 websites must be blocked. There will be an order in those terms effective today.

5. At this stage, I must address one other issue, and this touches upon the correspondence between the Plaintiff and Hathway to which I referred in the order passed yesterday. The named Defendants Nos. 1 to 36 are entirely incorrect in presuming that unless the Plaintiffs obtain an order of a Court, they have no obligation in law to act to prevent copyright infringement. Apart from the provisions in the Information Technology Act, the provisions of Section 52 of the Copyright Act, 1957 take care of this. Section 52(1) (c) of the Copyright Act, 1957 reads thus:

“52. Certain acts not to be infringement of copyright

(1)

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware of or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;"

6. This Section completely covers cases such as the one at hand. It makes it clear that where a person responsible for the 'storage' of a copy, a term that I will interpret shortly, receives a written complaint from the owner of copyright, which in this case would be the Plaintiffs, stating that the transient or incidental storage is an infringement, that person must refrain from — and these words are important — facilitating such access for a period of 21 days or till he

receives an order from a competent Court. If no order is received within that time, he may resume providing access.

7. What this means is that it is the Plaintiff who has a period of 21 days in which to obtain an injunction order that will last for longer. When the owner of copyright makes a complaint about infringing storage or transient use, the person responsible for this is required as a matter of law to prevent that access. This needs no order of a Court. In other words, an approach such as that adopted by Hathway in correspondence is completely incorrect. Hathway does not need an order of a Court. It must take down the infringing access. It must do so for a period of 21 days. The Plaintiffs have that period of time in which to approach this Court and make out a case for a permanent or a longer-lasting order of injunction.

8. This leaves the question of interpretation of the words "transient or incidental storage". This may be a somewhat inaccurate use of the word given the technology. For example, as the present Affidavit itself shows, P2P torrents do not actually provide any "storage" themselves. They nonetheless facilitate the access. In my view, the words 'transient' or 'incidental storage' must be read broadly to serve the purpose of the statutory intent, which is to prevent online piracy of copyright-protected works. If interpreted too narrowly, the statute would have the effect of remaining very far behind the present technology. It cannot possibly have been the statutory intent to limit the operation of Section 52(1)(c) only to those sites that offer downloads, but to allow illicit peer-to-peer or P2P and streaming sites to continue. Indeed, it is very likely that the P2P sites are by far the most frequent and notorious. This appears to

be so in the present case as well, for of the 110 websites mentioned in this Affidavit, 66 are P2P torrents.

9. I may only add that the failure of intermediaries or service providers to comply with their statutory obligations under the Copyright Act, 1957 or the Information Technology Act, 2000 may will ultimately invite a claim in damages against them from the Plaintiffs.

10. I trust this is sufficiently clear to all the named Defendants Nos. 1 to 36. It will be no excuse for those Defendants to say that there was no order of a Court. They have a statutory obligation and a failure to discharge that obligation will be met with consequences.

11. As far as the present application is concerned, all the named Defendants are directed to forthwith restrict access to: all 110 websites mentioned in pages 5 to 7 of the present Affidavit. A list of these will be forwarded by the Advocates of the Plaintiffs or by their Agencies along with an authenticated copy of this order to each of the named Defendants within 24 hours from today. I expect compliance within 24 hours of receipt of that notice.

12. In future and for the duration of the injunction, the Plaintiffs will be at liberty either through their Advocates, directly or through either of the appointed Agencies to send to each of the named Defendants the details of any further infringing URLs. The named Defendants will then comply with the provisions of Section 52(1)(c) without protest but for the period specified in that Section.

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13. Mr. Dhond states that the appearance of Mr. Sushant Mohendru in the order dated 4th July 2016 is incorrect. He is a Technical Director of Markscan. That order is to be read accordingly.

14. In the order of 7th July 2016, the appearance of Mr. Sushant Mohendru is to be removed. That order is to be read accordingly.

15. Time to carry out amendment is extended till 22nd July 2016.

(G. S. PATEL, J.)

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Section Officer

High Court, Appellate Side
Bombay

SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
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Balaji Motion Pictures Ltd. & Anr. ...Plaintiffs
Versus
Bharat Sanchar Nigam Ltd. & Ors. ...Defendants

Mr. V. R. Dhond, Senior Advocate, with Mr. Shailesh Mandon, a/w
Mr. N. Rodriguse, i/b R. M. Partners, for the Plaintiffs.
Mr. Sushant Mohendru, Technical Director of Aiplex Software
Private Limited, present.

CORAM: G.S. PATEL, J
DATED: 7th July 2016

PC:-

1. Not on board. Mentioned. Taken on board.
2. Mr. Dhond seeks leave to mention this matter. I passed orders recently in this very matter on the 1st and 4th July 2016. These were in the nature of *John Doe* orders. However, the order of 4th July 2016 restricted the relief somewhat, for the reasons set out in that order.
3. Mr. Dhond tenders a further Affidavit dated 7th July 2016 (i.e., affirmed today). The Affidavit says that because film *Great Grand Masti* has been leaked, its scheduled release has been

advanced to 15th July 2016. This is to limit potential loss. Mr. Dhond says that this is not longer a question of a threat; copies of the film have already been leaked. Paragraph 5 of the present Affidavit says that despite take-down notices, the film is still available for download. Paragraphs 6 and 7 of this Affidavit between them claim that there are certain websites, described here as “rogue websites”, on which pirated or illegal content is habitually hosted and made available for download. Paragraph 6 says that this has happened in the past, and that it is now happening again. On 6th July 2016, the Plaintiffs wrote to various intermediaries and other named Defendants enclosing a list of the active URLs and websites and demanding that the offending links be taken down. In paragraph 7, the Plaintiffs say that there was and is only partial compliance. A list of these offending links is now annexed at Exhibit “C” to the present Affidavit. These have been verified by the Plaintiffs’ two Consulting Agencies. I have no manner of doubt in my mind that all 23 of these links must be removed immediately and access to these by Defendants Nos. 1 to 36 is to be prohibited with immediate effect, in addition to all previous blocks or access denials.

4. Mr. Dhond makes two more points. The first is with reference to an email dated 7th July 2016 from one Mr. Sudhir Shetye of Hathway, Defendant No. 5, an internet service provider. In this, writing to Mr. Sushant Mohendru of Markscan, one of the two Agencies appointed by the Plaintiffs. Mr. Shetye says that he is required only to deny access to the 482 links that were identified in the Affidavit filed at the time when I passed the order of 4th July 2016. This is a complete misreading of that order. I expressly made it clear that where the Plaintiffs pointed to any further verified

offending links, the named Defendants, viz., Defendants Nos. 1 to 36, including, therefore, Hathway, Defendant No. 5, are required to act and to remove all such offending links. The order is not limited to those 482 links as incorrectly interpreted by Hathway. A copy of the email is taken on record and marked "X1" for identification with today's date. In any case, to remove any ambiguity, I make it clear that the Plaintiffs are at liberty, during the subsistence of the ad-interim order, to identify additional offending links. These are to be verified by one or both of their appointed agencies. On that verification, any of the named Defendants Nos.1 to 36, can be asked to take down the offending link or to block access it. Defendants Nos. 1 to 36 are required to comply. The Plaintiffs will maintain a date-wise record or log of all such take-down requests with full particulars.

5. Should they believe that the link sought to be taken down is genuine and not an offending link, those Defendants can apply to Court with prior notice as already provided in my order of 4th July 2016. I make it clear that where the Plaintiffs make a legitimate, verified claim and demand for take-down, and the Defendants refuse or fail to comply, there will be consequences.

6. This is to be treated as a direct order to Hathway, Defendant No.5.

7. Mr. Dhond also refers to another list of 3 pages. It is taken on record and marked "X2" for identification with today's date. This is a list of 139 websites that are said to today host or offer downloads of

the film in question. They do so in a variety of forms. Some allow streaming. Others offer Peer-to-Peer (P2P) connections. Yet others, to my very great surprise, actually store illicit copies of the film and offer these for download. Mr. Dhond commits to putting this statement on an Affidavit by 5.00 p.m. today. Mr. Dhond says that the list has been verified by the two Investigating Agencies appointed by the Plaintiffs, namely, Aiplex Software Private Limited and Markscan. This will also be set out in that Affidavit.

8. On that basis, access to these 139 websites is also to be denied by all the named Defendants. I will grant an injunction in these terms till 5:00 pm tomorrow, 8th July 2016 to enable Mr. Dhond to put this on Affidavit.

9. The named Defendants Nos. 1 to 36 are to temporarily, i.e., till 5.00 p.m. tomorrow, 8th July 2016 deny access through their networks to all these 139 sites. This list and an ordinary copy of this order is to be communicated by the Plaintiffs or their agencies or their attorneys to all the named Defendants.

10. List the matter first on board tomorrow, 8th July 2016.

11. All concerned to act on an ordinary copy of this order.

(G. S. PATEL, J.)

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Section Officer
High Court, Appellate Side
Bombay

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SUIT (L) NO. 694 OF 2016

Balaji Motion Pictures Ltd. & Anr. ...Plaintiffs
Versus
Bharat Sanchar Nigam Ltd. & Ors. ...Defendants

**Mr. V. R. Dhond, Senior Advocate, with Mr. Shailesh Mandon, a/w
Mr. N. Rodriguse, i/b R. M. Partners, for the Plaintiffs.**
**Mr. Sushant Mohendru, Technical Director of Aiplex Software
Private Limited, present.**

CORAM: G.S. PATEL, J
DATED: 4th July 2016

PC:-

1. Not on board. Mentioned. Taken on board.
2. This matter was moved in urgency on Friday, 1st July 2016. On that day I passed an order setting out why I was unprepared to grant the injunction in the terms that were then placed before me. I found the reliefs to be overbroad. They were directed against to entire websites. I left it open to the Plaintiffs to renew that application after placing on an Affidavit additional and more precise information and data about offending links that point to illicit downloads of the film in question, *Great Grand Masti*. This film's scheduled release is 22nd July 2016.

3. Mr. Dhond renews the application today. He does so on the basis of an Additional Affidavit dated 4th July 2016 affirmed by one Mr. Ayan Roy Chowdhury, the Plaintiffs' general counsel. This Affidavit sets out considerably more detail. I propose to consider some of the material of this Affidavit. To begin with, the Affidavit points out that someone named of Wasim Akram Ansari posted a message to Twitter on 29th July 2016 reporting the leak of *Great Grand Masti*. A copy of this Twitter post is at page 6 to this Affidavit (it is also annexed to the Plaint). The post appears to have a screen shot of a scene from the film. In the bottom right hand corner of that screenshot is a clearly imprinted legend: "censor copy". On that very day, the Plaintiffs were also notified by the film's actors about a possible, and entirely illegal, leak of this film. As the present Affidavit itself says, there are two possibilities: either the entire film was leaked or someone obtained an image of that solitary scene. But even the second scenario posits that any person who took such a screen shot would, at a minimum, have have had to have access to the film. That access is clearly unauthorised. But this was all previously available material, and it did not, on its own, form a sufficient basis for the injunction.

4. Mr. Dhond then points out that there are now other screenshots at pages 60 to 62, Exhibit "C", to the present Affidavit of messages from other Twitter users. These Twitterati seem to have obtained multiple screenshots of the film. The second and third messages report a leak of the film. What is curious is the first message at page 60. This says that the second half of this film is "Supebb". Even allowing for the linguistic damage caused by this medium, there can be no mistake about what the message conveys.

It extols the films, and it extols a specific portion of it. That would be impossible without a viewing. Any such viewing outside the certification board is illicit.

5. It is in this context, and following my previous order, that the Plaintiffs have now over the weekend engaged the services of two professional anti-piracy agencies, viz., Aiplex Software Private Limited and Markscan, with a mandate to analyse potentially infringing web-based links to illicit downloads of the films. Both agencies deployed some software and web-based technology, including web crawlers. They identified a list of potential URLs on different web pages that, *prima facie*, point to specific illicit downloads of the film.
6. Paragraph 14 of the Affidavit makes an assertion on oath that the period between 29th June and 2nd July saw a sharp surge in number of infringing links and URLs. The Affidavit also says that clips of the film were uploaded to YouTube on 3rd July 2016. The Plaintiffs' complained and sent out take down notices through Markscan and Aiplex. Those clips have now been removed.
7. The Plaintiffs say that they have not been able to locate the culprits, but they have approached the Cyber Police Station, Bandra Kurla Complex, Mumbai. Paragraph 17 and 18 of this Affidavit set out the potential loss and damage likely to be caused to the Plaintiffs.

8. In fairness, when I pointed out that the cast of the prayers in the Motion is much too wide and relates to entire websites, Mr. Dhond agreed to amend these. He now places a draft amendment to the Motion. This is taken on record and marked "X" for identification. Leave to amend forthwith, without need of reverification. The amendment introduces prayer a(iv). The cast of this prayer is more accurate. It is directed to individual infringing URLs or weblinks. I will set out the wording of the prayer shortly.

9. At this stage, I must briefly note the reason for making these additional demands on the Plaintiffs, especially given that there is a long history of broad-based John Doe orders in the past. I myself have passed some of those orders. But this in itself is no reason to continue with a trend that seems to me if not downright dangerous, at least one that requires the introduction of some caution and circumspection. I have noticed some criticism of such orders on various legal sites and journals particularly as to their width, ambit and tendency to last for a long time without sufficient judicial oversight in the interregnum.¹ Criticism should always be welcome; studied and measured criticism set out with rancour or invective, even more so. This, after all, is the discourse of law, and I see no reason why orders and judgments should stand outside this discourse. The source of the criticism is surely immaterial, and the fact that the criticism is on a website or portal is not itself reason to view it with either suspicion or disdain. There is a vast body of sound academic writing online. If the law is to progress, an

¹ *Udta Punjab*: Of Courts, Cuts, Copyrights and Conflicted Counsels; - by Prof. Shamnad Basheer, LiveLaw.in; <http://bit.ly/29kRyrj>; *Udta Punjab*: An IP Controversy [Part I], by Vasundhara Majithia, Spicy IP.com; <http://bit.ly/28NwcVJ>

engagement with such criticism is essential. I do not suggest, of course, that any court or decision-making authority or body should be over-sensitive; the nature of the task demands a thick hide. Nor do I suggest that every barb and jibe deserves a response or the indulgence of scarce time and resources. However, where there is a point well-taken, it surely at least merits some thought. We should, I believe, be remiss in the performance of our public duty if we were to ignore a valid critique. Every system must have a process of self-correction where one is needed; nothing is written in stone. In the present case, the point being made is that the entrenched format of the John Doe orders was far too broad and admitted of little or no scrutiny. They had the potential of shutting down entire websites and blocking all content, even legitimate content. As I said last Friday, such orders proceeded on the implicit assumption that the entirety of the content of all these cited websites was illicit; that no verification was necessary; that the illicit content had been established to the satisfaction of the Court; and possibly that the entirety of the content of these sites related only to the immediate complaint at hand. It is, on reflection, impossible to justify any of these. There are, I think, at play here far larger issues, including of an unattended and unsupervised and judicially mandated policing of the Internet.

10. These are among the reasons I asked the Plaintiffs in this case to give me more specifics on Affidavit, and to supply me with more cogent material as the basis of the order. The fact that this information has been obtained with such apparent ease leads me to believe that the criticism is in fact well-founded. We just never sought it earlier. I do so now.

11. Having read the new Affidavit, I am satisfied that the Plaintiffs have met the threshold criteria. I must also commend Mr. Dhond for so readily accepting that the frame of the prayers was much too wide and for suggesting a perfectly acceptable alternative by way of the present amendment.

12. Finally, I turn to Exhibit "D" to this Affidavit. This is a tabulation on a larger fold-out sheet of some 482 individual links. This analysis has been carried out by the two agencies mentioned earlier. The links are not to websites but point to individual download links of the film in question. Some of these links have the name of the film and the year (2016) as part of the URL. The statement on Affidavit is that these are suspected or potentially infringing links. Some of these have been checked. The last column of this chart has a column called 'status'. Some of the links have the status "approved". I am informed by Mr. Sushant on behalf of the Plaintiffs, who is present in Court, that this means that the Plaintiffs approached Google, which in turn has, after verification, removed all search results that display these links. Not all these links have been "approved". Many are yet pending review. The Affidavit itself in paragraph 13 references this chart and the fact that this has been prepared by these two agencies commissioned by the Plaintiffs.

13. As to the *prima facie* case, I believe Mr. Dhond has made this out sufficiently with references to the posts to which I have referred.

14. I am satisfied that this is sufficient material for the grant of the narrowed relief that Mr. Dhond now seeks. There will,

therefore, be an ad-interim injunction in terms of prayer clause a(iv), which reads as follows:

“(a)iv. Grant an order of temporary injunction directing the Defendants to take measures to block access to the 482 urls/web links at page 63 of the Additional Affidavit dated 4th July 2016 and/or other active urls/weblinks which contain or purport to contain, an infringing or illicit copy of the said Film **“Great Grand Masti”** or part thereof, upon the Plaintiffs or their authorised representatives, providing details of such infringing urls/ web links to the Defendants or upon the Senior Inspector of the Cyber Police Station, Bandra Kurla Complex notifying the Defendants about the same;”

15. I am making it clear that the Plaintiffs will be at liberty to move against all or any of those 482 URLs if they are found to be active. In other words, it is not expected that these links should be active today at the time when this order is passed.

16. In addition, the Plaintiffs will be at liberty, without further reference to Court, but only during the time when this order is operative, to approach the Cyber Crime Cell with any other weblink or URL pointing to an individual download. Before the Cyber Crime Cell the Plaintiffs will place such material as it has obtained verifying that download. Of course, the Cyber Crime Cell is also expected to carry out an independent assessment before acting further in the matter.

17. As regards intermediaries and cable/DTH operators, there will be an injunction restraining them from making any broadcast or making available any form of download of this film without a specific written authorisation from the Plaintiffs.
18. The Plaintiffs will comply with the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 in respect of the named Defendants within a period of one week from today. The Plaintiffs will also be at liberty to issue a public notice setting out the substance of this order. This will be a sufficient service on the John Doe Defendants.
19. Liberty to any of the named Defendants to apply for a variation, modification or recall of this order after four clear working days' notice to the Advocates for the Plaintiffs.
20. This injunction will operate till 4th October 2016.
21. List the Notice of Motion on the supplementary board for further ad-interim reliefs on 3rd October 2016.
22. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)

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[Signature] 5/7/16
Section Officer

High Court, Appellate Side
Bombay

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Bharat Sanchar Nigam Ltd. & Ors. ...Defendants

Mr. V. R. Dhond, Senior Advocate, a/w Mr. Shailesh Mandon, Mr.
N. Rodriguse, i/b R. M. Partners, for the Plaintiffs.

CORAM: G.S. PATEL, J
DATED: 1st July 2016

PC:-

1. Not on board. Mentioned. Taken on board.
2. The matter is moved on production at 3.00 p.m. It seeks a "John Doe/Ashok Kumar" order in the now common form in respect of a film *Great Grand Masti*. The release date of the film is 22nd July 2016.
3. The Plaint has the usual array of the Defendants: some cable operators, some intermediaries and, of course, the usual John Doe / Ashok Kumar generic Defendants. It also has a list of some 800

websites (not individual download links) against which sweeping reliefs are sought. This list of website URLs runs from pages 14 to 29 of the *Plaint*. The list does not include one single link to a specific digital file for download. These URLs all point to, and only to, entire websites.

4. I am not prepared to give a general direction against any of these websites. Such an order assumes, *ex hypothesi*, that every single bit of digital matter on every single one of these websites is not just illicit, but that all of this matter on all these websites relates to, and only to, illicit downloads of the *Plaintiffs'* film. There is absolutely nothing to support this.

5. I am now informed that the immediate concern is the *Torrent* link at page 61 of the *Plaint*. There is also a screenshot of a *Twitter* post that apparently reports a leak of the censor copy of the film. I do not know what to make of this *Twitter* post for the simple reason — and this is not disputed today — that the *Torrent* link at page 61 is admittedly defunct and no longer active. In other words, there is nothing in the *Plaint* beyond the *Twitter* post to point to any active illicit download link. There is no demonstrable basis for the relief sought.

6. Given this, I do not see at this stage what relief can legitimately be sought against a raft of websites on a pleading as sketchy and formless as this. Some of those websites may indeed have legitimate content. An order like the one the *Plaintiffs* seek would result in a large-scale blocking of all these websites, and a

denial of access to all their content, even legitimate content; and that, too, without any assessment of what that content actually is.

7. While this Plaint does refer to a previous order I passed recently, it is equally true that in that very order, a copy of which is at page 65, I even then expressed a reservation about such unrestricted widespread orders. In that matter, I required the Plaintiffs to produce a list of individual links to downloads. I have no such list before me today.

8. Thus, the only order I can possibly make today is to grant the Plaintiffs liberty to renew their application on more appropriate and cogent material. To leave no room for controversy as to what I mean by this, the Plaintiffs must ensure that they place on Affidavit a list (the length does not matter) of individual links that point to illicit downloads of the film. That list on Affidavit must be verified by some responsible, technically qualified person; and the Affidavit must state that a technically competent officer of the Plaintiffs has checked, if not all, at least a sufficient sampling of these links so as to warrant the grant of an injunction.

9. I am also making it clear that any such injunction may be subjected to further terms, and, specifically that I propose to time-limit the order to some reasonable period and not to allow it to continue indefinitely.

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(G. S. PATEL, J.)