R. G. Anand

Vs

M/S. Delux Films and Others

Civil Appeal No. 2030 of 1968

(Syed M. Fazal Ali, Jaswant Singh, R. S. Pathak JJ)

18.08.1978

JUDGMENT

FAZAL ALI, J. -

1. This appeal by special leave directed against the judgment of the Delhi High Court dated May 23, 1967 affirming the decree of the District Judge, Delhi and dismissing the plaintiff's suit for damages against the defendants on the ground that they had violated the copyrighted work of the plaintiff which was a drama called 'Hum Hindustani'.

2. The facts have been succinctly stated by the District Judge in his judgment and summarised by the High Court, and therefore, it is not necessary for us to repeat the same all over again. We would, however, like to give a brief resume of some of the striking facts in the case which may be germane for the purpose of deciding the important issues involved in this appeal. We might mention here that the High Court as also the District Judge negatived the plaintiff's claim and prima facie the appeal appears to be concluded by finding of fact, but it was rightly argued by Mr. Andley appearing for the appellant that the principles of violation of copyright in the instant appeal have to be applied on the facts found and the inferences from proved facts drawn by the High Court which is doubtless a question of law and more particularly as there is no clear authority of this Court on the subject, we should be persuaded to go into this question without entering into findings of facts. Having heard counsel for the parties, we felt that as the case is one of first impression and needs to be decided by this Court, we should enter into the merits on the basis of the facts found and inferences drawn by the High Court and the District Judge. It is true that both the District Judge and the High Court have relied upon some well-established principles to determine whether or not in a particular case a violation of copyright has taken place, but learned Counsel for the appellant has challenged the validity of the principles by the High Court.

3. The plaintiff is an architect by profession and is also a playwright, dramatist and producer of stage plays. Even before 'Hum Hindustani' the plaintiff had written and produced a number of other plays like 'Des Hamara', 'Azadi', and 'Election' which were staged in Delhi. The subject-matter of the appeal, however, is the play entitled 'Hum Hindustani'. According to the plaintiff, this play was written by him in Hindi in the year 1953 and was enacted by him for the first time on February 6, 7, 8 and 9, 1953, at Wavell Theatre, New Delhi under the auspices of the Indian National Theatre. The play proved to be very popular and received great approbation from the Press and public as a result of which the play was re-staged in February and September, 1954 and also in 1955 and 1956 at Calcutta. In support of his case the plaintiff has referred to a number of comments appearing in the Indian Express, Hindustan Times, Times of India and other papers.

4. Encouraged by the success and popularity of the aforesaid play the plaintiff tried to consider the possibility of filming it. In November, 1954 the plaintiff received a latter dated November 19, 1954 from the second defendant Mr. Mohan Sehgal wherein the defendant informed the plaintiff that he was supplied with a synopsis of the play by one Mr. Balwant Gargi, a common friend of the plaintiff and defendant. The defendant had requested the plaintiff to supply a copy of the play so that the defendant may consider the desirability of making a film on it. The plaintiff, however, by his letter dated November 30, 1954 informed the defendant that as the play had been selected out of 17 Hindi plays for National Drama Festival and would be staged on December 11, 1954, the defendant should take the trouble of visiting Delhi and seeing the play himself in order to examine the potentialities of making a film, and at that time the matter could be discussed by the defendant with the plaintiff.

5. The plaintiff's case, however, is that some time about January, 1955 the second and the third defendants came to Delhi, met the plaintiff in his office where the plaintiff read out and explained the entire play to the defendants and also discussed the possibility of filming it. The second defendants did not make any clear commitment but promised the plaintiff that he would inform him about his reaction after reaching Bombay. Thereafter the plaintiff heard nothing from the defendant. Sometime in May, 1955 the second defendant announced the production of a motion picture entitled 'New Delhi'. One Mr. Thapa who was one of the artists in the play produced by the plaintiff happened to be in Bombay at the time when the picture 'New Delhi' was being produced by the defendant and informed the plaintiff that the picture being produced by the defendant was really based on the plaintiff play 'Hum Hindustani'. The plaintiff thereupon by his letter dated May 30, 1955 wrote to the second defendant expressing serious concern over the adaptation of his play into a motion picture called 'New Delhi'. The defendant, however, by his letter dated June 9, 1955 informed the plaintiff that his doubts were without any foundation and assured the plaintiff that the story treatment, dramatic construction, characters etc. were quite different and bore not the remotest connection or resemblance with the play written by the plaintiff.

6. The picture released in Delhi in September, 1956 and the plaintiff read some comments in the papers which gave the impression that the picture was very much like the play 'Hum Hindustani' written by the plaintiff. The plaintiff himself saw the picture on September 9, 1956 and he found that the film was entirely based upon the said play and was, therefore, convinced that the defendant after having heard the play narrated to him by the plaintiff dishonestly imitated the same in his film and thus committed an act of piracy so as to result in violation of the copyright of the plaintiff. The plaintiff accordingly filed the suit for damages, for decree for accounts of the profits made by the defendants and a decree for permanent injunction against the defendants restraining them from exhibiting the film 'New Delhi'.

7. The suit was contested by defendants 1 and 2 as also by other defendants who adopted the pleas raised by defendants 1 and 2.

8. The defendants, inter alia, pleaded that they were not aware that the plaintiff was the author of the play, 'Hum Hindustani' nor were they aware that the play was very well received at Delhi. Defendant 2 is a film Director and is also the proprietor of defendant 1 Deluxe Films. The defendants averred that in November, 1954 the second defendant was discussing some ideas for his new picture with Mr. Balwant Gargi who is a playwright of some repute. In the course of the discussion, the second defendant informed Mr. Gargi that the second defendant was interested in producing a motion film based on 'provincialism' as its central theme. In the context of these discussion Mr. Gargi enquired of defendant 2 if the latter was interested in hearing the play called 'Hum Hindustani' produced by the plaintiff which also had the same theme of provincialism in

which the second defendant was interested. It was, therefore, at the instance of Mr. Gargi that the second defendant wrote to the plaintiff and requested him to send a copy of the script of the play. The defendant goes on to state that the plaintiff read out the play to the second defendant in the presence of Rajinder Bhatia and Mohan Kumar, Assistant Directors of the second defendant when they had come to Delhi in connection with the release of their film "Adhikar". The second defendant has taken a clear stand that after having heard the play he informed the plaintiff that though the play might have been all right for the amateur stage, it was too inadequate for the purpose of making a full length commercial motion picture. The defendants denied the allegation of the plaintiff that it was after hearing the play written by the plaintiff that the defendants decided to make a film based on the play and entitled it as 'New Delhi'.

9. The defendant thus submitted that there could be no copyright so far as the subject of provincialism is concerned which can be used or adopted by anybody in his own way. He further averred that the motion picture was quite different from the play 'Hum Hindustani' both in content, spirit and climax. The mere act that there were some similarities between the film and the play could be explained by the fact that the idea, viz, provincialism was the common source of the play as also of the film. The defendant thus denied that there was any violation of the copyright.

10. On the basis of the pleadings of the parties, the learned trial Judge framed the following issues :

1. Is the plaintiff owner of the copyright in the play 'Hum Hindustani' ?

2. Is the film 'New Delhi' an infringement of the plaintiff's copyright in the play 'Hum Hindustani' ?

3. Have defendants or any of them infringed the plaintiff's copyright by producing, or distributing or exhibiting the film 'New Delhi' ?

4. Is the suit bad for misjoinder of defendants and causes of action ?

5. To what relief is the plaintiff entitled and against whom ?

11. Issue I was decided against the defendants and it was help by the trial Judge that the plaintiff was the owner of the copyright in the play 'Hum Hindustani'. Issue 4 was not pressed by the defendants and was accordingly decided against them. The main case however turned upon the decision on issues 2 and 3 which were however decided against the plaintiff as the learned Judge help that there was no violation of the copyright of the plaintiff. The plaintiff then went up in appeal to the Delhi High Court where a Division Bench of that Court affirmed decision of the District Judge and upheld the decree dismissing the plaintiff's suit. The findings of fact arrived at by the learned trial Judge and the High Court have not been assailed before us. The only argument advanced by the appellant was that the principles enunciated and the legal inferences drawn by the courts below are against the settled legal principles laid down by the courts in England, America and India. It was also submitted by Mr. Andley that the two courts have not fully understood the import of the violation of copyright particularly when the similarities between the play and the film are so close and sundry that would lead to the irresistible inference and unmistakable impression that the film is nothing but an imitation of the play. On the other hand, it was argued by Mr. Hardy, counsel for the respondent that the two courts below have applied the law correctly and it is not necessary for this Court to enter into merits in view of the concurrent findings of fact given by the two courts. He further submitted that even on the facts found it is manifest that there is a vast

difference both in the spirit and the content between the play 'Hum Hindustani' and the film 'New Delhi' and no question of violation of the copyright arises.

12. In order to appreciate the argument of both the parties it may be necessary to discuss the law on the subject. To begin with there is no decided case of this Court on this point. Secondly, at the time when the cause of action arose Parliament had not made any law governing copyright violations and the courts in the absence of any law by our Parliament relied on the old law passed by the British Parliament, namely, the Copyright Act of 1911. Section I sub-section (2)(d) defines 'copyright' thus :

> (2) For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material from whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right,
>
> #* * *##
>
> (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.
>
> Section 2 provides the contingencies where a copyright could be infringed and runs thus :
>
> 2(1) Copyright in a work shall be deemed to be infringed by any person who, without the content of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.

It is, therefore, clear that the Act 1911 defines 'copyright' and also indicates the various contingencies where copyright cannot be infringed. The statute also provides exceptions which would not amount to violation of copyright.

13. In the instant case the play written by the appellant falls within Section 1(2)(d) because it is a dramatic work. The learned District Judge has rightly held that emotions like mere ideas are not subject to pre-emption because they are common property. Quoting from the law of copyright and movie-rights by Rustom R. Dadachanji the learned Judge observed as follows :

It is obvious that the underlying emotion reflected by the principal characters in a play or book may be similar and yet that the characters and expression of the same emotions be different. That the same emotions are found in plays would not alone be sufficient to prove infringement but if similar emotions are portrayed by a sequence of events presented in like manner expression and form then infringement would be apparent.

Similarly in the case of Hanfstaengl v. W. H. Smith and Sons ((1905) 1 Ch D 519 : 92 LT 351) it has been held by Bayley, J. that "a copy is that which comes so near to the original as to give every person seeing it the idea created by the original".

14. In Halsbury's Laws of England by Lord Hailsham Fourth Edition the following observations are made : (Vol. 9, paras 831, 840) :

Only original works are protected under Part I of the Copyright Act, 1956, but it is not requisite that the work should be the expression of original or inventive thought, for Copyright Acts are not concerned with the originality of ideas but with the expression of thought, and, in the case of a literary work, with the expression of thought in print or writing..... There is copyright in original dramatic works and adaptations thereof, and such copyright subsists not only in the actual words of the work but in the dramatic incidents created, so that if these are taken there may be an infringement although no words are actually copied. There cannot be copyright in mere scenic effects or stage situations which are not reduced into some permanent form.

Similarly, it was pointed out by Copinger in his book on copyright 11th Edition that what is protected is not the original thought but expression of thought in a concrete form. In this connection, the author makes the following observations based on the case law :

> What is protected is not original thought or information, but the original expression of thought or information in some concrete form. Consequently, it is only an infringement if the defendant has made an unlawful use of the form in which the thought or information is expressed. The defendant must, to be liable, have made a substantial use of this form; he is not liable if he has taken from the work the essential ideas, however original, and expressed the idea in his own form, or used the idea for his own purposes.

The author also points out that there is no infringement unless the plaintiff's play-wrighted work has been actually used, so that it may be said that the latter work reproduces the earlier one. In this connection, the author observes as follows :

> A further essential matter, and one which rather strangely is not anywhere precisely stated in the Act of 1956 is that there can be no infringement unless use has been made, directly, or indirectly of the plaintiff's work.

15. Moreover, it seems to us that the fundamental idea of violation of copyright or imitation is the violation of the Eighth Commandment : "Thou shall not steal" which forms the moral basis of the protective provisions of the Copyright Act of 1911. It is obvious that when a writer or a dramatist produces a drama it is a result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour. It is also clear that it is not necessary that the alleged infringement should be exact or verbatim copy of the original but its resemblance with the original in a large measure is sufficient to indicate that it is a copy. In Article 418 Copinger states thus :

> In many cases the alleged infringement does not consist of an exact, or verbatim copy, of the whole, or any part, of the earlier work, but merely resembles it in a greater or lesser degree.

In Article 420 the author lays down the various tests to determine whether an infringement has taken place and observes as follows :

> Various definitions of 'copy' have been suggested, but it is submitted that the true view of the matter is that, where the court satisfied that a defendant has, in producing the alleged infringement, made a substantial use of those features of the plaintiff's

> work in which copyright subsists, an infringement will be held to have been committed; if he has made such use, he has exercised unlawfully the sole right which is conferred upon the plaintiff.

16. Ball in Law of Copyright and Literary Property page 364 points out that where the defendant materially changes the story he cannot be said to have infringed the copyright. In this connection, the author observes as follows :

> In such composition the story is told by grouping and representing the important incidents in the particular sequence devised by the author whose claim to copyright must depend upon the particular story thus composed; and not upon the various incidents, which, if presented individually, without such unique sequential arrangement, would be common literary property. Consequently another dramatist who materially changes the story by materially varying the incidents should not be held to be an infringer.

It is also pointed out by Mr. Ball that sometimes even though there may be similarities between the copyrighted work of the defendant they may be too trivial to amount to appropriation of copyrighted material. The author observes thus :

> When two authors portray in literary or dramatic form the same occurrence, involving people reacting to the same emotions under the influence of an environment constructed of the same materials, similarities in incidental details necessary to the environment or setting are inevitable; but unless they are accompanied by similarities in the dramatic development of the plot or in the lines or action of the principal characters, they do not constitute evidence of copying. They are comparable to similarities in two works of art made by different artists from the same original subject, and in the usual case are too trivial and unimportant to amount to a substantial appropriation of copyrighted material.

The author further says that unless there is any substantial identity between the respective works in the scenes, incidents and treatment a case of infringement of copyright is not made and observes thus :

> But since there was no substantial identity between the respective works in the scenes, incidents, or treatment of the common theme, the court held that the plaintiff's copyrights were not infringed by the defendant's photoplays.

Dealing with the infringement of copyright of a play by a motion picture which appears to be an identical case in the present appeal, the author observes as follows :

> In an action for the alleged infringement of the copyright of a play by a motion picture, wherein it appeared that both authors had used life in a boys' reform school as background, but the only similarity between the two productions consisted of a few incidents and points in dialogue, such as one would expect to find in stories set against the same background, there was no infringement of copyright.

To the same effect are the following observations of the author :

> Where the only evidence of similarities between two plays was based upon the

> author's analysis and interpretation of an extensive list of "parallel", from which he inferred that many incidents, scenes and characters in the alleged infringing play were adapted from the plaintiff's copyrighted play, but no such resemblance would be apparent to an ordinary observer, it was held that the meaning or interpretation which the author gives to his literary work cannot be accepted as a deciding test of plagiarism; and that, in the absence of any material resemblance which could be recognised by an ordinary observation, each play must be regarded as the independent work of the named author.

17. Similar observations have been made in Corpus Juris Secundum, Vol. 18 at page 139 where it is observed as follows :

> An author has, at common law, a property in his intellectual production before it has been published, and may obtain redress against anyone who deprives him of it, or, by improperly obtaining a copy, endeavours to publish or to use it without his consent.

This right exists in the written scenario of a motion picture photoplay and in the photo play itself as recorded on the photographic film. There is, however, no common-law literary property right in the manner and postures of the actors used by them in performing the play.

Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright.

This view was taken by the U.S. Supreme Court in the case of Bobbs-Merrill Company v. Isidor Straus and Nathan Straus. (210 US 339 : 52 L Ed 1086 (1907))

18. In the American Jurisprudence also it is pointed out that the law does not recognize property rights in abstract ideas, nor is an idea protected by a copyright and it becomes a copyrighted work only when the idea is given embodiment in a tangible form. In this connection the following observations are made :

> Generally speaking, the law does not recognize property rights in abstract ideas and does not accord the author or proprietor, the protection, of his ideas, which the law does not accord to the proprietor of personal property.

In cases involving motion pictures or radio or television broadcasts, it is frequently stated that an idea is not protected by a copyright or under the common law, or that there is no property right in an idea, apart from the manner in which it is expressed.

When an idea is given embodiment in a tangible form, it becomes the subject of common-law property rights which are protected by the courts, at least when it can be said to be novel and new.

It was also pointed out in this book as to what constitutes colourable imitation. In this connection, the following observations have been made :

> Infringement involves a copying, in whole or in part, either in haec verba or by colourable variation....'copy' as used in copyright cases, signifies a tangible object

> which is a reproduction of the original work. The question is not whether the alleged infringer could have obtained the same information by going to the same source used by the plaintiff in his work, but whether he did in fact go to the same source and do his own independent research. In other words, the test is whether one charged with the infringement made an independent production, or made a substantial and unfair use of the plaintiff's work.

Intention to plagiarize is not essential to establish liability for infringement of a copyright or for plagiarism of literary property in unpublished books, manuscripts, or plays. One may be held liable for infringement which is unintentional or which was done unconsciously.

Similarity of the alleged infringing work to the author's or proprietor's copyrighted work does not of itself establish copyright infringement, if the similarity results from the fact that both works deal with the same subject or have the same common source..... Nevertheless, it is the unfair appropriation of the labour of the author whose work has been infringed that constitutes legal infringement, and while identity of language will often prove that the offence was committed, it is not necessarily the sole proof; on the other hand, relief will be afforded, irrespective of the existence or non-existence of any similarity of language, if infringement in fact can be proved.

The appropriation must be of a 'substantial' or 'material' part of the protected work..... The test is whether the one charged with the infringement has made a substantial and unfair use of the complainant's work. Infringement exists when a study of two writings indicates plainly that the defendant's work is a transparent rephrasing to produce essentially the story of the other writing, but where there is not textual copying and there are difference in literary style, the fact that there is a sameness in the tricks of spinning out the yarn so as to sustain the reader's suspense, and similarities of the same general nature in a narrative of a long, complicated search for a lost article of fabulous value, does not indicate infringement.

19. We shall now discuss some of the authorities that have been cited at the Bar as also some others with whom we have come across and which throw a flood of light on the point in issue. Dealing with the question of similarities Lord Kekewich, J. in Hanfstaengl case (supra) described various qualities of a copy and observed as follows :

> In West v. Francis ((1822) 5B & Ald. 737, 743 : 106 ER 1361) Bayley J. uses language coming, as Lord Watson says, nearer to a definition than anything which is to be found in the books. It runs thus : "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.... " If it were altered thus - "a copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it" - the substance of the definition would be preserved and Lord Watson's criticism would be avoided.

The learned Judge aptly pointed out that an imitation will be a copy which comes so near to the original as to suggest the original to the mind of every person seeing it. In other words, if after having seen the picture a person forms a definite opinion and gets a dominant impression that it has been based on or taken from the original play by the appellant that will be sufficient to constitute a violation of the copyright.

20. In the case of Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. ((1964) 1 All ER 465 : (1964) 1 WLR 273) Lord Reid made the following pertinent observations :

> But, in my view, that is only a short cut, and more correct approach is first to determine whether the plaintiff's work as a whole is 'original' and protected by copyright, and then to inquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could Section A be the subject of copyright if it stood by itself, could Section B be protected if it stood by itself, and so on. To my mind, it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be.

Lord Hodson expressed similar views at Page 475 in the following words :

> The appellants have sought to argue that the coupons can be dissected and that on analysis no copyright attaches to any of their component parts and accordingly no protection is available. In my opinion this approach is wrong and the coupons must be looked at as a whole. Copyright is a statutory right which by the terms of Section 2 of the Act of 1956 would appear to subsist, if at all, in the literary or other work as one entity.

This case clearly lays down that a similarity here or a similarity there is not sufficient to constitute a violation of the copyright unless the imitation made by the defendant is substantial.

21. In the case of Corelli v. Gray ((1913) 29 TLR 570) Sargeant, J, observed as follows :

> The plaintiff's case is entirely founded on coincidences of similarities between the novel and the sketch. Such coincidences or similarities may be due to any one of the four hypotheses - namely : (1) to mere chance, or (2) to both sketch and novel being taken from a common source; (3) to the novel being taken from the sketch, or (4) to the sketch being taken from the novel. Any of the first three hypotheses would result in the success of the defendant; it is the fourth hypothesis alone that will entitle the plaintiff to succeed.

Looking now at the aggregate of the similarities between the sketch and the novel, the case is essentially one in which the proof is cumulative. I am irresistibly forced to the conclusion that it is quite impossible they should be due to mere chance coincidence and accordingly that they must be due to a process of copying or appropriation by the defendant from the plaintiff's novel.

> Thus it was pointed out in this case where the aggregate of the similarities between the copyrighted work and the copy lead to the cumulative effect that the defendant had imitated the original and that the similarities between the two works are not coincidental, a reasonable inference of colourable imitation or of appropriation of the labour of the owner of the copyright by the defendant is proved. This case was followed by the Master of Rolls in the case of Corelli v. Gray ((1914) 30 TLR 116).

22. The case of Hawkes and Son (London) Limited v. Paramount Film Service Limited ((1934) 1 Ch 593 : 151 LT 294) was whether a musical composition made by the owner was sought to be imitated by producing a film containing the said composition. An action for violation of the copyright was filed by the owner. Lord Hansworth, M.R. found that the quantum taken was substantial and a substantial part of the musical copyright could be reproduced apart from the actual film. In this connection, Lord Hansworth observed as follows :

> Having considered and heard this film I am quite satisfied that the quantum that is taken is substantial, and although it might be difficult, and although it may be uncertain whether it will be ever used again, we must not neglect the evidence that a substantial part of the musical copyright could be reproduced apart from the actual picture film.

Similar observations were made by Lord Slesser which may be extracted thus :

> Any one hearing it would know that it was the march called "Colonel Bogey" and though it may be that it was not very prolonged in its reproduction, it is clearly, in my view, a substantial, a vital and an essential part which is there reproduced. That being so, it is clear to my mind that a fair use has not been made of it; that is to say, there has been appropriated and published in a form which will or may materially injure the copyright that in which the plaintiffs have a proprietary right.

23. In the case of Harman Pictures N.V. v. Osborne ((1967) 1 WLR 723 : (1967) 2 All ER 324) it was held that similarities of incidents and situation undoubtedly afforded prima facie evidence of copy and in the absence of any explanation by the defendant regarding the sources, the plaintiffs must succeed. It was however held that there was no copyright in ideas, schemes or systems or method and the copyright is confined only to the subject. In the connection Goff, J. observed as follows :

> There is no copyright in ideas or schemes or systems or methods; it is confined to their expression.... But there is a distinction between ideas (which are not copyright) and situations and incidents which may be.... One must, however, be careful not to jump to the conclusion that there has been copying merely because of similarity of stock incidents or of incidents which are to be found in historical, semi-historical and fictional literature about characters in history. In such cases the plaintiffs, and that includes the plaintiffs in the present case, are in an obvious difficulty because of the existence of common sources.

But I have read the whole of the script very carefully and compared it with the book and I find many similarities of detail there also.... Again it is prima facie not without significance that apart from the burial of Captain Nolan the play ends with the very quotation which Mrs. Woodham-Smith used to end her description of the battle.... As Sir Andrew Clark points out, some of these might well be accounted for as being similar to other events already in the script, and in any event abridgment was necessary, but that may not be a complete answer.

24. Similarly in the case of Donoghue v. Allied Newspapers Ltd. ((1937) 3 All ER 503 : 157 LT 186) it was pointed out that there was no copyright in an idea and in this connection Farwell, J. observed as follows :

> This, at any rate, is clear, and one can start with this beyond all question that there is no copyright in an idea, or in ideas..... If the idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture or a play, then there is no such thing as copyright at all. It is not until it is (if I may put it in that way) reduced into writing, or into some tangible form, that you get any right to copyright at all, and the copyright exists in the particular form of language in which, or, in the case of a

> picture, in the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or look at it.

25. Similarly in the case of Robl v. Palace Theatre (Limited) ((1911) 28 TLR 69, 72) Justice Hamilton observed as follows :

> If similarity between two works was sufficiently strong the evidence of copying would be so cogent that no one would believe any denial, but here the intrinsic evidence was really the other way.... The matter had been considered by Justice Scrutton in his book on Copyright, and the conclusion there come to (Note h p. 83 of fourth edition) was that to which his own reflection during the progress of this case would have led him. He considered, therefore, that where the similarity was a mere coincidence there was no breach of copyright.

26. In the case of Tate v. Fullbrook ((1908) 1 KB 821 : 77 Law Journal Reports 577) Lord Vaughan Williams observed as follows :

> I do not think that I need go at length through the similarities and dissimilarities of the two sketches. It is practically admitted that, so far as the words are concerned, the similarity is trifling.... All that we find here is a certain likeness of stage situation and scenic effect, which, in my opinion, ought not to be taken into consideration at all where there is appreciable likeness in the words.

27. In the case of Frederick B. Chatterton and Benjamin Webster v. Joseph Arnold Cave ((1878) 3 AC 483 : 38 LT 398) Lord Hatherley observed as follows :

> And if the quantity taken the neither substantial nor material, if, as it has been expressed by some Judges, "a fair use" only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the principle de minimis non cural lex applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book.

I think, My Lords, regard being had to the whole of this case to the finding of the Lord Chief Justice that the parts which were so taken were neither substantial nor material parts, and the impossibility of damage being held to have accrued to the Plaintiff from such taking, and the concurrence of the other Judges before whom the case was brought, that this appeal should be dismissed, and dismissed with costs.

28. In the case of Sheldon v. Metro-Goldwyn Pictures Corporation (81 F 2d 49 (1793)) Judge Learned Hand while considering a case which is very similar to the case in this appeal observed as follows :

> But it is convenient to define such a use by saying that other may "copy" the "theme" or "ideas", or the like, of a work, though not its "expression". At any rate so long as it is clear what is meant, no harm is done.... Finally, in concluding as we do that the defendants used the play pro tanto, we need not charge their witnesses with perjury. With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults.

> Yet unconscious plagiarism is actionable quite as much as deliberate.

The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us is exactly what the defendants have done here; the dramatic significance of the scenes we have recited is the same, almost to the letter.... It is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.

In the aforesaid case the Court held that there was no plagiarism or violation of the copyright.

29. In the case of Shipman v. R.K.O. Radio Pictures (100 F 2d 533 (1808)) while holding that an idea cannot be the subject of copyright great stress was laid on the impression which the audience forms after seeing the copy. In the connection, Manton, J. observed as follows :

> The Court concluded that it was the idea or impression conveyed to the audience which was the determining factor, and since the impressions were the same, held there was an infringement..... From this case stemmed the modern law of copyright cases, with the result that it is now held that ideas are not copyrightable but that sequence of events is; the identity of impression must be capable of sensory perception by the audience.

30. In the case of Michael V. Moretti v. People of the State of Illinois (248 F 2d 799 (1960) : Cert devied 356 US 947), it was held that law does not recognise property rights in ideas but only in the expression of the same in a particular manner adopted by the author. A writ of certiorari was taken against this judgment to the U.S. Supreme Court which was denied. To the same effect is an earlier decision in the case of Funkhouser v. Loew's (208 F 2d 185 (1920)) where the following relevant observations were made on the various aspects of the matter :

> We are also mindful that the test used to determine infringement in cases of this case is whether ordinary observation of the motion picture photoplay would cause it to be recognised as a picturization of the compositions alleged to have been copied, and not whether by some hypercritical dissection of sentences and incidents seeming similarities are shown to exist.... It recognised that there were similar incidents in the productions, but such similarities were due to the nature of the subject matter and not to copying. Both the motion picture and plaintiff's story "Old John Santa Fe" were set in the same geographical area and both had the typical western background.... Appellant's attempt to show similarities by comparing a word or phrase taken from his manuscript with the word or words appearing in the lyrics of a song in appellee's motion picture is not in conformity with the test used in infringement cases and to which we have referred to above. We find no merit in the contention that any of the songs in defendants' movie were taken from plaintiff's manuscripts.... Considering that both the movie and the manuscript presented activities of Harvey Girls, and information concerning them was received from the same source, we think it reasonable that some similarities in character portrayal could be discovered.

31. In view of the aforesaid observation too much stress cannot always be laid on similarities or similar situation. A writ of certiorari against the judgment of U.S. Courts Appeal to U.S. Supreme Court was taken but the certiorari was denied and the petition was rejected in limine as it appears

from 348 U.S. 843. This was also a case where a film was made on the basis of a play claimed to have been written by the plaintiff.

32. The case of Warner Bros. Pictures v. Columbia Broadcasting System (216 F 2d 945 (1928)) is another illustration of the manner in which a copyright can be violated. Dealing with this aspect of the matter Stephens, J. observed as follows :

> It is our conception of the area covered by the copyright statue that when a study of the two writings is made and it is plain the study that one of them is not in fact the creation of the putative authority, but instead has been copied in substantial part exactly or in transparent phrasing to produce essentially the story of the other writing, it infringes.

A writ of certiorari was taken against the decision to the U.S. Supreme Court but was denied as reported in 348 U.S. 971.

33. In the case of Otto Eisenchiml v. Fawcett Publications (246 F 2d 598 (1958)), Duffy, Chief Judge observed as follows :

> An infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy. Paraphrasing is copying and an infringement, if carried to a sufficient extent.... The question of infringement of copyright is not one of quantity but of quality and value.

A writ of certiorari against this decision was taken to the U.S. Supreme Court but was denied which was reported on 2 L Ed 2d 260 : 355 US 907.

34. In the case of Dorsey v. Old Surety Life Ins. Co. (98 F 2d 872 (1810)) Phillips, J. observed as follows :

> The right secured by a copyright is not the right to the use of certain words, nor the right to employ ideas expressed thereby. Rather it is the right to that arrangement of words which the author has selected to express his ideas.... To constitute infringement in such cases a showing of appropriation in the exact form or substantially so of the copyrighted material should be required.

Similar observations were made in the case of Twentieth Century Fox Film Corporation v. Stonesifer (140 F 2d 579 (1852)) which are as follows :

> In copyright infringement cases involving original dramatic compositions and motion picture productions, inasmuch as literal or complete appropriation of the protected property rarely occurs, the problem before the court is concrete and specific in each case to determine from all the facts and circumstances in evidence whether there has been a substantial taking from an original and copyrighted property, and therefore an unfair use of the protected work.... The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator.... We find and conclude, as did not court below, that the numerous striking similarities in

> the two works cannot in the light of all the evidence be said to constitute mere chance. The deduction of material and substantial unlawful copying of appellee's original play in appellant's motion picture is more in consonance with the record and with the probabilities of the situation therein disclosed.

This authority lays down in unmistakable terms the cases where an infringement of the copyright would take place and as pointed out that before the charge of plagiarism is levelled against the defendant it must be shown that the defendant has taken a substantial portion of the matter from the original and have made unfair use of the protective work. The two works involved must be considered and tested not hypercritically but with meticulous scrutiny.

35. Similarly, in the case of Oliver Wendell Holmes v. George D. Hurst (174 US 82 : 43 L Ed 904 (1898)) Justice Brown speaking for the Court and describing the incidents of a violation of the copyright observed as follows :

> It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes.

The Judicial Committee in the case of Macmillan & Company Limited v. K. and J. Cooper (51 IA 109 : AIR 1924 PC 75) while pointing out the essential ingredients of the infringement of copyright Lord Atkinson observed as follows :

> Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright.

36. In the case of Florence A. Deeks v. H. G. Wells (60 IA 26 : AIR 1933 PC 26) Lord Atkin speaking for the Judicial Committee summarised the nature of the evidence required to prove a violation of copyright and observed as follows :

> Now their Lordships are not prepared to say that in the case of two literary works intrinsic evidence of that kind may not be sufficient to establish a case of copying, even if the direct evidence is all the other way and appears to be evidence that can be accepted; but such evidence must be of the most cogent force before it fan be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the Court.

37. In the case of N. T. Raghunathan v. All India Reporter Ltd., Bombay (AIR 1971 Bom 48) it was held that copyright law did not protect ideas but only the particular expression of ideas. In that case, the Bombay High Court however held that the defendant had copied not only the ideas but also the style of abridgment, the expression of ideas and the form in which they were expressed and thus held that a case for violation of copyright was made out.

38. K. R. Venugopala Sarma v. Sangu Ganesan (1972 Cri LJ 1098) was a case of infringement of copyright in picture and it was held that an infringement of the copyright was complete even though the reproduction was not exact, but the effect on the mind by study of the two pictures was that the respondent's picture was nothing but a copy of the plaintiff's picture. The Court while applying the various tests observed as follows :

> Applying this test, the degree of resemblance between the two pictures, which is to

> be judged by the eye, must be such that the person looking at all respondents' picture must get the suggestion that it is the appellant's picture..... One picture can be said to be a copy another picture only if a substantial part of the former picture finds place in the reproduction.

39. To the same effect is an earlier decision of the Division Bench of the Madras High Court in the case of The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern (AIR 1967 Mad 381) where the Court observed as follows :

> What is essential is to see whether there is a reproduction of substantial part of the picture. There can be no test to decide what a substantial part of a picture is. One useful test, which has been followed in several decisions of Courts, is the one laid down by Lord Herschel, L.C. in Hanfstaengl v. Bains & Co. (1895 AC 20, 25) :
>
> .... it depends really, on the effect produced upon the mind by a study of the picture and of that which is alleged to be a copy of it, or at least of its design.

40. In the case of C. Cunniah and Co. v. Balraj & Co. (AIR 1961 Mad 111) the Court applying the test of resemblance obversed as follows :

Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondents' picture must get the suggestion that it is the appellant's picture. In this sense, the points of similarity or dissimilarity in the picture assume some importance.... We agree that this could not be the sole test, though, incidentally, the points of resemblance and dissimilarity assume some importance in the case of finding out whether, taken as a whole, the respondents' picture produces the impression in the mind of any observer, which amounts to a suggestion of the appellant's picture.

One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction.

41. In the case of Mohendra Chundra Nath Ghosh v. Emperor (AIR 1928 Cal 359) the Court while defining what a copy is held that a copy is one which is so near the original as to suggest the original to the mind of the spectator and observed as follows :

> But the question is whether the offending pictures are copies of substantial portions of the copyright picture.... The figures may have been reduced in the offending pictures and slight modifications may have been introduced, or the clothes and colours may have been different, but there can be no doubt whatsoever that the main figures have an identical pose. These are not, in my opinion, coincidences due to the pictures being produced to represent common stock ideas.

42. Similarly in the case of S. K. Dutt v. Law Book Co. (AIR 1954 All 570) it was held that in order to be an infringement of a man's copyright there must be a substantial infringement of the work. A mere fair dealing with any works falls outside the mischief of the Copyright Act.

43. Similarly, in the case of Romesh Chowdhary v. Kh. Ali Mohammad Nowsheri (AIR 1965 J & K 101) a Division Bench of the Court to which one of us (Fazal Ali, J.) was a party and had written the leading judgment it was thus observed :

> It is well settled that in order to be actionable the infringement must be a colourable imitation of the originals with the purpose of deriving profit.

44. In the case of Mohini Mohan Singh v. Sita Nath Basak (AIR 1931 Cal 233), a Division Bench of the Calcutta High Court while laying down the necessary concomitants of a colourable imitation Mukherji, J. observed as follows :

> The question there is whether a colourable imitation has been made. Whether a work is a colourable imitation of another must necessarily be a question of fact. Similarity is a great point to be considered in this connection but mere similarity is not enough as it may be due to any one of four hypotheses as Copinger points out at p. 134, Edn. 6, viz., (1) to mere chance (2) to both works being taken from a common source (3), to plaintiff's work being taken from the defendant's and (4) defendant's work being taken from the plaintiff's and each case must depend upon its own circumstances.

Guha, J. observed as follows :

> It has to be determined whether in a particular case the work is a legitimate use of another man's publication in the fair exercise of a mental operation deserving the character of original work.

45. Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo and Juliet, Julius Ceasar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of his dramas constitute a masterpiece of English literature. It has been rightly said that "every drama of Shakespeare is an extended metaphor". Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.

46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge :

1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of the stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets atotality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

47. We would now endeavour to apply the principles enunciated above and the tests laid down by us to the facts of the present case in order to determine whether or not the plaintiff has been able to prove the charge of plagiarism and violation of copyright levelled against the defendant by the plaintiff. The learned trial Judge who had also had the advantage of seeing the picture was of the opinion that the film taken as a whole is quite different from the play written by the plaintiff. In

order to test the correctness of the finding of the trial Court we also got the play read to us by the plaintiff in the presence of counsel for the parties and have also seen the film which was screened at C.P.W.D. Auditorium, Mahadev Road, New Delhi. This was done merely to appreciate the judgment of the trial Court and the evidence led by the parties and was not at all meant to be just a substitute for the evidence led by the parties.

48. To begin with, we would like to give a summary of the play 'Hum Hindustani', which is supposed to have been plagiarized by the defendants. The script of the play Ex. P. 1 has been placed before us and we have gone through the same.

49. The main theme of the play is provincialism and the prejudice of persons belonging to one State against persons belonging to other States. In the play however the author chooses two families, viz., a Punjabi family and a Madrasi family to show what havoc can be caused by provincial parochialism possessed by the two families. The Punjabi family and the Madrasi family were living as close neighbours having good and cordial relations and are on visiting terms with each other. The Punjabi consists of Dewan Chand, contractor, his wife Krishna, their grown up daughter Chander and son Tinnu, aged about 8 or 10 years. The Madrasi family however consists of Subramaniam, a Government official, his wife Minakshi and grown up son Amni and daughter Pitto who is aged about 8 or 10 years. As a result of the close association between the two families it appears that Amni the son of Subramanim falls in love with Chander the daughter of Dewan Chand of the Punjabi family. When the parents are out Amni and Chander meet and talk. Unfortunately, however, the parents of both Amni and Chander are extremely adverse to the matrimonial union of Amni and Chander because the two families belong to two different provinces. When they get some scent of the love affair between Amni and Chander the parents of Chander make a serious attempt to find a suitable match for her amongst their own caste namely Punjabis. Similarly, the parents of Amni also try to arrange a match for him amongst Madrasis. For this purpose, the services of a marriage broker named Dhanwantri are enlisted by both the parties without knowing that Dhanwantri was trying to negotiate marriages for both the couples. Later on, when this fact is discovered the relations of the two families become strained. Amni and Chander also persuade Dhanwantri to assist them in bringing about their marriage by persuading their parents to agree. This gives a chance to Dhanwantri to make a lot of money out of the two couples. Dewan Chand and his wife Krishna in sheer desperation hurriedly arranged the marriage of their daughter Chander to Bansi, a simpleton, son of Murari Lal who is a friend of Dewan Chand. In fact, Dewan Chand is not very impressed with Bansi but in view of the critical situation arising out of the love affair between his daughter and Amni he prefers Bansi to the Madrasi boy. When Chander and Amni come to know of this Chander asked Amni to speak to his parents in a free and frank manner and express his strong desire to marry Chander. Amni who appears to be a cowardly fellow prefers to commit suicide rather than dare to talk out this matter with his parents. Realising that no hope is left for Chander and Amni to go through the marriage ceremony both of them entered into a suicidal pact and write letters to their parents indicating their intention to commit suicide because they are not prepared to marry anybody else. Dhanwantri, however, intervenes and persuades Chander and Amni not to commit suicide as according to him they were not destined to die unless they had been actually married. Meanwhile, the parents of Amni and Chander on getting the suicide note mourn the loss of their children and it now dawns upon them that they had committed the saddest mistake of their life in refusing to marry the couple and repent for their act. Just at that time Amni and Chander appear on the scene after having been married to each other. The marriage was performed by Dhanwantri himself. Thus ends the story with the realisation by both the families that provincialism helps nobody. This in short is the story of the play written by the appellant.

50. We might mention the before the play starts the author shows some voices reciting various persons proclaiming that they come from different States like the slogan that they belong to a particular State rather than that they belong to India.

51. Analysing therefore the essential features of the play the position is as follows :

1. That the central idea of the play is based on provincialism and parochialism.

2. The evils of provincialism are illustrated by the cordial relations of the two families being marred because of an apprehended marriage time which according to both the families was not possible where they belonged to different States.

3. That the Madrasi boy Amni is a coward and in spite of his profound love for Chander he does not muster sufficient courage to talk the matter out with his parents.

4. That in sheer desperation while the parents of the families are trying to arrange a match for the couple belonging to the same State Amni and Chander enter into a suicidal pact and write letters to their parents intimating their intention.

5. It was only after the letters are perused by the parents that they realise the horror of parochialism and are repentant for having acted so foolishly.

6. That after this realisation comes the married couple Amni and Chander appear before the parents and thus all is well that ends well.

52. As the play was read to us by the appellant we find that it was very exquisitely presented and the plot was developed with very great skill. It must be noted however that the author in writing out the play has concentrated only on one aspect of provincialism namely whether there can be a marriage between the persons belonging to one State with those belonging to other States. This is the only aspect of provincialism which has been stressed in the play. The play does not touch any other aspect nor does it contain anything to throw light on the evils of society or that of dowry etc. We have mentioned these facts particularly because the film revolves around not only the aspect of marriage but other aspects also which are given the same importance as the problem of marriage.

53. We shall now give the summary of the film. The script of which is Ex. D-2. The film starts showing Anand, a young graduate from Punjab who comes to New Delhi for a course in Radio Engineering. At the Railway Station Anand meets a Madrasi girl Janki and due to some misunderstanding an altercation between the two takes place, as a result of which Janki feels that Anand was trying to tease her. Thereafter Anand comes and stays in a Sarai opposite the Railway Station, but he is allowed to stay there only for three days after which he was expected to find accommodation elsewhere. Thereafter Anand runs from house to house trying to get some accommodation but is sadly disappointed because wherever he goes he finds that in every case the landlord is not prepared to give the house to any person who does not belong to his province. We might mention here that this is one of the very important aspects of provincialism which pervades through the entire film, viz., that so parochial are the landlords that they were not even prepared to let out their houses or rooms to any person coming from outside their State. This particular aspect is completely absent from the story revealed in the play written by the appellant. One Kumarswamy, a South Indian attendant at the Sarai comes to the rescue of Anand and suggests to him that he should attire as a South Indian and then go to any South Indian landlord to get the house. Thereafter Anand disguised as a South Indian approaches one Iyer for giving him accommodation and Iyer is only too

glad to accommodate Anand on the ground that Anand is also a South Indian. Anand then meets Subramaniam, father of Janki, the girl with whom he had an altercation at the station. The film then proceeds involving several sequences of the meeting between Anand and Janki. Murli Dhar, the Principal of a Dancing School takes Anand as his student and there he is introduced to Janki who is a Professor of Dance and Music in that Institute. Janki then discovers that Anand is a good singer and is slowly and gradually attracted towards him. Janki invites him to her house for the celebration of Pongal festival and Anand goes there as usual attired as South Indian and witnesses the dance performance of Janki. He also comes to know that Janki's father Subramaniam does not hold any good opinion about Punjabis. Thereafter Anand leaves the place after making on appointment with Janki to meet near Rashtrapati Bhawan the following day. When Anand returns to his house he comes to know that his father Daulat Ram had been transferred to New Delhi and was expected any moment. Daulat Ram was posted as Manager in the same commercial company in which Subramaniam was employed in a subordinate position. Anand receives his parents and his grown up sister Nikki at the railway station and takes them to his house. He also brings Kumarswamy, the attendant, at the Sarai to his own house as a cook. Thereafter Anand goes out on the pretext of taking his sister Nikki around the city. When they reach the Red Fort he meets Ashok Banerjee, a young Bengali painter whom he had met earlier in connection with the search for accommodation of the house but was refused accommodation because Anand did not happen to be a Bengali. Ashok Banerjee is impressed by Nikki and requests her to allow him to make Nikki's portrait. Leaving his sister there Anand meets Janki and both of them come to the Red Fort. When Anand and Janki meet Nikki and Ashok, Anand in order to conceal his real identity tells Janki that Nikki is the daughter of his father's friend, which naturally angers Nikki but later Anand apologies to her and explains that he did not want Janki or her father to know that he was not a Madrasi and thus upset the love affair between Anand and Janki. Subramaniam, father of Janki takes a fancy for Anand and asks Janki to invite Anand's father to the house so that he could negotiate Janki's marriage with Anand. This puts Anand in most awkward position. In order to save the situation Anand hits upon an idea by introducing his cook Kumarswamy to Subramaniam as his father. Just at that time Daulat Ram happens to pass through Subramaniam's house and is called in by Subramaniam, but the situation is saved by Kumarswamy feigning illness as a result of which he is taken to a room where he hides his face in a blanket. Anand leaves the house and returns with a false beard posing as a Doctor. Similarly, Ashok and Nikki get attached to each other and Ashok receives a telegram from his father summoning him to Calcutta. Before he leaves Ashok frankly declares his love to Nikki and gets her consent to marry him. The love affair of Nikki however is not in the knowledge of her parents. Murli Dhar, Principal of the Institution of Dance and Music arranges a performance in which the principal role is played by Anand and Janki. Up to this time neither Janki nor her father Subramaniam had ever known the real identity of Anand but both of them had taken him to be a South Indian. We might like to add that here the picture makes a completely new departure from the story contained in the play where both the parents of the couple knew the identity of each other. Before the performance starts Anand tries to disclose his identity to Janki but is unable to do so because Janki is in a hurry. The performance is applauded by the audience which includes Subramaniam, Daulat Ram and Kumarswamy. In the theatre hall where the performance is staged Kumarswamy is given a prominent place as he is taken to be the father of Anand. Daulat Ram resents this fact because Kumarswamy was his servant. After the performance Murli Dhar introduces Subramaniam, Janki's father to the audience. Murli Dhar then calls Kumarswamy and introduces him to the audience as the father of Anand. This infuriates Daulat Ram who comes to the stage and gives a thrashing to Kumarswamy. It is at this stage that the entire truth is revealed and both Subramaniam and Janki come to know that Anand was not a South Indian but a Punjabi and his father was Daulat Ram. Daulat Ram also does not like the relations of his son with Janki because

he thinks that if the son marries outside the caste that will create difficulties for the marriage of his daughter Nikki. Subramaniam then starts negotiation for Janki's marriage with a South Indian boy. Anand goes to Janki and asks her to delay the negotiations for about a month or two till Nikki's marriage is over after which he would marry Janki. Janki feels completely let down and when she goes home she is given a serious rebuke by her father. In utter frustration Janki decides to commit suicide and leaves a suicide note. She proceeds to Jamuna river. Before she is able to jump into the river she is saved by Sadhu Ram, a Punjabi Ghee Marchant, and a friend of Subramaniam. Sadhu Ram scoffs at the peoples' preference for provincialism and their lack of appreciation of intrinsic human values. He takes Janki to his own house and tells Daulat Ram that she is her niece and on that basis negotiates for the marriage of Janki with Anand. Daulat Ram accepts the proposal because Janki appears as a Punjabi girl. On receiving the suicide note Subramaniam feels extremely sorry and realises his mistake. In the meanwhile when Daulat Ram returns to his house he finds Ashok Banerjee on very intimate terms with Nikki. Daulat Ram gets furious and turns out Ashok from his house. Thereafter Daulat Ram arrange the marriage of his daughter Nikki with the son of one Girdhari Lal. After the marriage party comes to the house of Daulat Ram, Girdhari Lal insists upon Rs. 15,000 as dowry from Daulat Ram. Daulat Ram does not have such a large sum of money and implores Girdhari Lal not to insist and to save his honour but Girdhari Lal is adamant. Daulat Ram tries to enlist the support of his caste-men but no one is prepared to oblige him. At this juncture Ashok Banerjee appears on the scene and offers his mother's jewellery to Daulat Ram to be given in dowry to Girdhari Lal and thus seeks to save the honour of Daulat Ram. This act of Ashok Banerjee brings about a great mental change in the attitude of Daulat Ram, who stops Nikki's marriage with Girdhari Lal's son and turns them out along with the men of his brotherhood. Daulat Ram declares his happiness that he has found a bigger brotherhood, namely the Indian brotherhood and asks Ashok to marry Nikki at the same marriage Pandal. At that time Sadhu Ram requests Daulat Ram that Mohini who is none other than Janki should also be married to Anand. Sadhu Ram discloses the true identity of Janki and then Daulat Ram realises his shortsightedness and welcomes the idea of the marriage of Anand with Janki. Subramaniam who is present there feels extremely happy and blesses the proposed marriage. Ashok and Nikki as also Anand as also Anand and Janki are then married and thus the film ends.

54. Analysing the story of the film it would appear that it portrays three main themes : (1) Two aspects of provincialism viz. the role of provincialism in regard to marriage and in regard to renting out accommodation (2) evils of caste-ridden society, and (3) the evils of dowry. So far as the last two aspects are concerned they do not figure at all in the play written by the plaintiff/appellant. A close perusal of the script of the film clearly shows that all the three aspects mentioned above are integral parts of the story and it is very difficult to divorce one from the other without affecting the beauty and the continuity of the script of the film. Further, it would appear that the treatment of the story of the film is in many respects different from the story contained in the play.

55. Learned Counsel for the appellant however drew our attention to para 9 of the plaint at pages 18-19 of the paper book wherein as many as 18 similarities have been detailed. The similarities may be quoted thus :

> (i) Before the actual stage play, the producer gives a narrative. He states that although we describe ourselves as Hindustanis we are not really Hindustanis. He questions the audience as to what they are and various vices are heard. To say in their own provincial language that they are Punjabis, Bengalis, Gujratis, Marathas, Madrasis, Sindhis, etc. In the said film the same idea is conveyed and the hero of the picture is shown searching for a house in New Delhi and wherever he goes he is confronted by

a landlord who describes himself not as a Hindustani but as a Punjabi, Bengali, Gujrati, Maratha, Madrasi or Sindhi.

(ii) Both the said play and the said film deal with the subject of provincialism.

(iii) Both the said play and the said film evolve a drama around the lives of two families, one a Punjabi and the other a Madrasi family.

(iv) In both the said play and the said film the name of the Madrasi father is Subramaniam.

(v) Both the said play and the said film have their locale in New Delhi.

(vi) Both the said play and the said film show cordiality of relations between the two families.

(vii) Both the said play and the said film show the disruptions of cordial relations as soon as the heads of the families discover the existence of a love affair between their children.

(viii) In both the said play and the said film, both the parents warn their respective children not to have anything to do with each other on pain of corporal punishment.

(ix) The entire dialogue in both the said play and the film before and after the disruption is based upon the superiority of the inhabitants of one province over the inhabitants of the others.

(x) In both the said play and the said film the girl is shown to be fond of music and dancing.

(xi) In both the said play and the said film the hero is shown as a coward to the extent that he has not the courage to go to his parents and persuade them to permit him to marry a girl hailing from another province.

(xii) Both in the said play and in the said film, when the parents of the girl are discussing marrying her off to somebody the girl is listening to the dialogue from behind a curtain. Thereafter the girl runs to the boy and explains the situation to him.

(xiii) In both the said play and the said film, the girl writes a letter of suicide.

(xiv) In the said play reconciliation takes place when the children of the two families, who were in love, go out to commit suicide by drowning etc., whereas in the said film, it is only the daughter who goes out to commit suicide by drowning herself in the Jamuna.

(xv) In the said play the children are stopped from committing suicide by an Astrologer whereas in the said film the girl is stopped from committing suicide by a friend of the family.

(xvi) In the said play reconciliation between the two families takes place only after

they have experienced the shock of their children committing suicide on account of their provincial feelings whereas in the film, the father of the girl realised his mistake after experiencing the shock of his daughter committing suicide.

(xvii) In both the said play and the said film, stress is laid on the fact that although India is one country. yet there is acute feeling of provincialism between persons hailing from its various States even though they work together and live as neighbours.

(xviii) Both in the said play and in the said film, even the dialogue centers around the same subject of provincialism.

56. In the course of the argument also our attention was drawn to a comparative compilation of the similarities in the film and the play. The learned trial Judge after considering the similarities was of the opinion that the similarities are on trivial points and do not have the effect of making the film a substantial and material imitation of the play. Moreover apart from the fact that the similarities and coincidences mentioned above are rather insignificant as pointed out by the trial Judge and the High Court. In our opinion, they are clearly explainable by and referable to only the central idea, namely, evils of provincialism and parochialism which is common to both the play and the film. Nothing therefore turns upon the similarities categorised by the plaintiff (in para 9 of the plaint), in the peculiar facts and circumstances of this case.

57. After having gone through the script of the play and the film we are inclined to agree with the opinion of the courts below. We have already pointed out that mere similarities by themselves are not sufficient to raise an inference of colourable imitation. On the other hand, there are quit a number of dissimilarities also, for instance :

(i) In the play-provincialism comes on the surface only when the question of marriage of Amni with Chander crops up but in the picture it is the starting point of the story when Anand goes around from door to door in search of accommodation but is refused the same because he does not belong to the State from which the landlord hails, as a result thereof Anand has to masquerade himself as a Madrasi. This would, therefore, show that the treatment of the subject of provincialism in the film is quit different from that in the play and is actually a new theme which is not developed or stressed in the play.

(ii) Similarly, in the play the two families are fully aware of the identity of each other whereas in the film they are not and in fact it is only when the dance performance of Janki and Anand is staged that the identity of the two families is disclosed which forms one of the important climaxes of the film. Thus, the idea of provincialism itself is presented in a manner or form quite different from that adopted in the play.

(iii) In the film there is no suicidal pact between the lovers but only a suicide note is left by Janki whereas in the play both the lovers decide to end their lives and enter into a suicidal pact and leave suicide note to this effect. Furthermore, while in the play Amni and Chander get married and then appear before the parents, in the picture the story takes a completely different turn with the intervention of Sadhu Ram who does not allow Janki to commit suicide but keeps her with him disguised as his niece and the final climax is reached in the last scene when Janki's real identity is disclosed

and Subramaniam also finds out that his daughter is alive.

(iv) The story in the play revolves around only two families, namely, the Punjabi and the Madrasi families, but in the film there are three important families, namely, the Punjabi family, the Madrasi family and the Bengali family and very great stress is laid down in the film on the role played by Ashok Banerjee of the Bengali family who makes a supreme sacrifice at the end which turns the tide and brings about a complete revolution in the mind and ideology of Daulat Ram.

(v) The film depicts the evil of caste ridden-society and exposes the hollowness of such a society when in spite of repeated requests no member of the brotherhood of Daulat Ram comes to his rescue and ultimately it is left to Ashok Banerjee to retrieve the situation. This aspect of the matter is completely absent in the play.

(vi) The film depicts another important social evil, namely, the evil of dowry which also appears to be the climax of the story of the film and the horrors of dowry are exhibited and demonstrated in a very practical and forceful fashion. The play however does not deal with this aspect at all. The aspects mentioned above which are absent from the play are not mere surplusage or embellishments in the story of the film but are important and substantial parts of the story.

58. The effect of the dissimilarities pointed out above clearly go to show that they far outweigh the effect of the similarities mentioned in para 9 of the plaint set out above. Moreover, even if we examine the similarities mentioned by the plaintiff they are trifling and trivial and touch insignificant points and do not appear to be of a substantial nature. The mere fact that the name of the Madrasi father was Subramaniam in both the film and the play, is hardly of any significance because the name of a particular person cannot be the subject-matter of copyright because these are common names.

59. After careful consideration of the essential features of the film and the play we are clearly of the opinion that the plaintiff has not proved by clear and cogent evidence that the defendants committed colourable imitation of the play and have thus violated the copyright of the plaintiff.

60. It was lastly contended by counsel for the appellant that the correspondence between the plaintiff and the defendant would show that defendant 2 himself was aware of the story contained in the play even before he proceeded to make the film 'New Delhi'. This is undoubtedly so because defendant 2 admits in his evidence that he had come to Delhi and the entire play was narrated to him by the plaintiff. There is however, a serious controversy on the question as to whether the defendant after hearing play said that the play was not suitable for being filmed as alleged. The plaintiff however seems to suggest that defendant 2 was undoubtedly attracted by the play and it was on the basis of this play that he decided to make the film. However, there is no reliable evidence to show that defendant 2 at any time expressed his intention to film the play written by the plaintiff. There can be no doubt that defendant 2 was aware of the story contained in the play and a part of the film was undoubtedly to some extent inspired by the play written by the plaintiff. But the definite case of defendant 2 also is that he was in search of a story based on provincialism and the play written by the plaintiff may have provided the opportunity for defendant 2 to produce his film though with a different story, different theme, different characterisation and different climaxes.

61. Thus, applying the principles enunciated above and the various tests laid down to determine

whether in a particular case there has been a violation of the copyright we are of the opinion that the film produced by the defendants cannot be said to be a substantial or material copy of the play written by the plaintiff. We also find that the treatment of the film and the manner of its presentation on the screen is quit different from the one written by the plaintiff at the stage. We are also satisfied that after seeing the play and the film no prudent person can get an impression that the film appears to be a copy of the original play nor is there anything to show that the film is a substantial and material copy of the play. At the most central idea of the play, namely, provincialism is undoubtedly the subject-matter of the film along with other ideas also but it is well settled that a mere idea cannot be the subject-matter of copyright. Thus, the present case does not fulfil the conditions laid down for holding that the defendants have made a colourable imitation of the play.

62. On a close and careful comparison of the play and the picture but for the central idea (provincialism which is not protected by copyright), from scene to scene, situation to situation, in climax to anti-climax, pathos, bathos, in texture and treatment and purport and presentation, the picture is materially different from the play. As already indicated above, applying the various tests outlined above we are unable to hold that the defendants have committed an act of piracy in violating the copyright of the play.

63. Apart from this the two courts of fact, having considered the entire evidence, circumstances and materials before them have come to a finding of fact that the defendants committed no violation of the copyright. This Court would be slow to disturb the findings of fact arrived at by the courts below particularly when after having gone through the entire evidence, we feel that the judgment of the courts below are absolutely correct.

64. The result is that the appeal fails and is accordingly dismissed. But in the circumstances there will be order as to costs in this court only.

JASWANT SINGH, J. (concurring).

Bearing in mind the well-recognised principles and tests to determine whether there has been an infringement of the law relating to copyright in a particular case which were brought to our notice by the counsel on both sides and which have been elaborately considered and discussed by my learned brother Murtaza Fazal Ali in the course of the judgment prepared by him, we proceeded at the request of the counsel to hear the script of the play "Hum Hindustani" which was read out to us by the plaintiff in a dramatic style and to see the film "New Delhi" produced by defendants 1 and 2, the exhibition of which was arranged by the defendants themselves. On a careful comparison of the script of the plaintiff's copyrighted play with the aforesaid film, although one does not fail to discern a few resemblances and similarities between the play and the film, the said resemblances are not material or substantial and the degree of similarities is not such as to lead one to think that the film taken as a whole constitutes an unfair appropriation of the plaintiff's copyrighted work. In fact, a large majority of material incidents, episodes and situations portrayed by defendants 1 and 2 in their aforesaid film are substantially different from the plaintiff's protected work and the two social evils viz. caste system and dowry system sought to be exposed and eradicated by defendants 1 and 2 by means of their aforesaid film do not figure at all in the plaintiffs play. As such I am in complete agreement with the conclusions arrived at by my learned brother Murtaza Fazal Ali that there has been no breach on the part of the defendants of the plaintiffs copyright and concur with the judgment proposed to be delivered by him.

PATHAK, J. (concurring). - It appears from a comparison of the script of the stage play "Hum

Hindustani" and the script of the film "New Delhi" that the authors of the film script have been influenced to a degree by the salient features of the plot set forth in the play script. There can be little doubt from the evidence that the authors of the film script were aware of the scheme of the play. But on the other hand, the story portrayed by the film travels beyond the plot delineated in the play. In the play, the theme of provincial parochialism is illustrated only in the opposition to a relationship by marriage between two families hailing from different parts of the country. In the film the theme is also illustrated by the hostile attitude of proprietors of lodging accommodation towards prospective lodgers who do not belong to the same provincial community. The plot then extends to the evils of the dowry system, which is a theme independent of provincial parochialism. There are still other themes embraced within the plot of the film. Nonetheless, the question can arise whether there is an infringement of copyright even though the essential features of the play can be said to correspond to a part only of the plot of the film. This can arise even where changes are effected while planning the film so that certain immaterial features in the film differ from what is seen in the stage play. The relative position in which the principal actors stand may be exchanged or extended, and embellishments may be introduced in the attempt to show that the plot in the film is entirely original and bears no resemblance whatever to the stage play. All such matters fall for consideration in relation to the question whether the relevant part of the plot in the film is merely a colourable imitation of the essential structure of the stage play. If the treatment of the theme in the stage play has been made the basis of one of the themes in the film story and the essential structure of that treatment is clearly and distinctly identifiable in the film story, it is not necessary, it seems to me, for the Court to examine all the several themes embraced within the plot of the film in order to decide whether infringement has been established. In the attempt to show that he is not guilty of infringement of copyright, it is always possible for a person intending to take advantage of the intellectual effort and labours of another to so develop his own product that it covers a wider field than the area included within the scope of the earlier product, and in the common area covered by the two productions to introduce changes in order to disguise the attempt at plagiarism. If a reappraisal of the facts in the present case had been open in this Court, I am not sure that I would not have differed from the view taken on the facts by the High Court, but as the matter stands, the trial Court as well as the High Court have concurred in the finding that such similarities as exist between the stage play "Hum Hindustani" and the film "New Delhi" do not make out a case infringement. The dissimilarities, in their opinion, are so material that it is not possible to say that the appellant's copyright has been infringed. This court is extremely reluctant to interfere with concurrent findings of fact reached by the courts below and for that reason I would allow the judgment under appeal to stand. In another, and perhaps a clearer case, it may be necessary for this court to interfere and remove the impression which may have gained ground that the copyright belonging to an author can be readily infringed by making immaterial changes, introducing insubstantial differences and enlarging the scope of the original theme so that a veil of apparent dissimilarity is thrown around the work now produced. The court will look strictly at not only blatant examples of copying but also at reprehensible attempts at colourable imitation.

67. The appeal is dismissed, but without any order as to costs.

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