

SUPREME COURT OF INDIA

Academy of general edu., manipal

Vs.

B. Malini Mallya

C.A.NO. 389 OF 2008 arising out of S.L.P (C) No. 15612 of 2008

(S.B. Sinha, Lokeshwar Singh Panta and B. Sudershan Reddy)

23/01/2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. 'Yakshagana' is a form of ballet dance. It has its own heritage. Indisputably, Dr. Kota Shivarama Karanth (for short, "Dr. Karanth"), a Jnanapeeth awardee, who was a Novelist, Play Writer, Essayist, Encyclopediationist, Cultural Anthropologist, Artist, Writer of Science, Environmentalist. He developed a new form of 'Yakshagana'. He was a Director of the appellant - institute. On or about 18.6.1994, he executed a Will in favour of the respondent. Dr. Karanth expired on 9.12.1997. Yakshagana Ballet dance as developed by Dr. Karanth was performed in New Delhi on or about 18.9.2001. Respondent filed a suit for declaration, injunction and damages alleging violation of the copyright in respect of the said dance vested in her in terms of the said Will stating that Dr. Karanth developed a new distinctive dance, drama troop or theatrical system which was named by him as 'Yaksha Ranga' which in his own words mean "creative extension of traditional Yakshagana" and,

thus, the appellants infringed the copyright thereof by performing the same at New Delhi without obtaining her prior permission. It was stated that Dr. Karanth had composed seven verses or prasangas for staging Yaksharanga Ballet apart from bringing in changes in the traditional form thereof on its relevant aspects, namely, Raga, Tala, Scenic arrangement, Costumes etc. These prasangas are: (i) Bhishma Vijaya; (ii) Nala Damayanthi; (iii) Kanakangi or Kanakangi Kalyana; (iv) Abhimanyu or Abhimanyu Vada; (v) Chitrangadha or Babruvahana Kalaga; (vi) Panchavati; and (vii) Ganga Charitha.

3. Plaintiff - respondent admittedly claimed copyright in respect of 'literary and artistic works' in her favour in terms of clauses 11 and 12 of the said Will dated 18.6.1994, which read as under:

"11. Since I left the house 'suhasa' I have been living in a specially built house "Manasa" of Smt. Malini Mallya, who has built it with borrowed money at her cost. She had joined my service as Copyist and later, she secured an employment in Life Insurance Corporation of India. Ever since 1974 till now in my old age she has been serving me with exemplary devotion and sincerity. And in this occasion I must also acknowledge with gratitude that she diligently cared and nursed my wife Leela Karanth during her prolonged illness till her last day. And she has cared and looked after me also during my illness which at times had been quite serious, enfeebling me for long period. In recognition of her devotion and sincere affection towards me in 1986 I have dedicated one of my novels namely, "Antida Aparanji" to her. I have also placed on record her invaluable services

to me in my Memoirs, "Hunchu Mansina Hathu Mukhagalu" 1991 Edition. In my opinion, very long enduring and a signal service she has done to me and to my literary works is, in writing a bibliography of all my books- a highly meritorious and scholarly work involving so much of pains taking research, that it has been acclaimed and rated as the first of its kind in Kannada and highly appreciated by Critics and Scholars. Apart from this, she has collected and edited all my stray writings from 1924 onwards upto date in eight Sumptuous volumes which are being published by Mangalore University. This work also has brought her deserving fame and appreciation of Scholars. Such painstaking service in this direction has brought to light several of my hitherto untraced, forgotten and unknown writings and thereby giving them extended or renewed lease of life. For all these services, I hereby declare that after my death copyrights in respect of all my literary works shall vest with Smt. Malini Mallya and she alone shall be entitled to receive royalties of all my books and she shall be entitled to print, publish and republish and market the same. Whatever she may earn thereby shall be her exclusive income and property. No one else shall have any right or claims for the same.

12. From time to time I have distributed among my children all gold and silver jewels and ornaments and other valuables, which were gifted to me by my friends and admirers. And I have distributed all copper and bronze vessels and utensils among my children while leaving my former home "Suhasa" keeping only bare essential and necessary things and articles. Whatever movable properties, books, fittings, furniture, utensils etc. belonging to me into this house Manasa' and my Car and cash money in hand after my death shall go to Smt. Malini Malya only. No one else shall have any claim or right over the same. Any outstanding due to me and Bank Deposits and whatever

assets or properties not mentioned above, that is, residuary after my death shall belong to Smt. Malini Mallya alone."

4. Plaintiff- Respondent, inter alia, prayed for passing a judgment and decree against the defendants - appellants granting the following reliefs:

"1. A declaration that the plaintiff is the exclusive copyright holder in respect of Yaksharanga ballets, namely, Bhishma Vijaya, Kanakangi, Nala Damayanthi, Panchavati, Gaya Charitha, Chitrangadha, Abhimanyu Vadha, and for consequential permanent injunction restraining the Defendants, their agents, employees etc. from staging or performing any of the above said 7 ballets or Prasangas or any parts thereof. 1,000-00

2. Directing the Defendants to pay to the plaintiff damages of Rs.15,000/- towards infringement of her copyright on account of

staging or performing Abhimanyu Vadha on 18-9-2001 at New Delhi. 15,000-00

3. Directing the Defendants to pay to the plaintiff interest on Rs.15,000/- at 15% p.a. from 18-9-2001 till now which is 95-00

4. Directing the Defendants to pay future interest on Rs.15,000/- at 15% p.a. till payment of the entire amount.

5.

6."

5. Appellants in their written statement, however, denied and disputed any copyright of the said dance in Dr. Karanth alleging that whatever work he had done was in the capacity of a Director of the Kendra with the assistance, finance and staff provided by the Organization of Mahatma Gandhi Memorial College Trust in respect whereof a Committee was formed under him by the Board of Trustees. It was furthermore contended that Dr. Karanth was appointed as the President of the Executive Committee of Yakshagana Kendra for a period of three years by the appellant and while holding the said post only he expired.

6. By reason of a judgment and decree dated 14.11.2003, the District Judge, Udupi decreed the said suit declaring the plaintiff - respondent as a person having the exclusive copyright in respect of seven Prasangas and that she had acquired the same by reason of a Will as a residuary legatee and the defendants - appellants or their employees or agents were restrained from performing the said seven ballets or Prasangas or any parts thereof in any manner as evolved distinctively by Dr. Karanth.

7. Appellants aggrieved thereby and dissatisfied therewith preferred an appeal before the Karnataka High Court which was marked as R.F.A. No. 271 of 2004. By reason of the impugned judgment and order dated 5.12.2007, the said appeal has been dismissed.

8. Appellants are, thus, before us.

9. Dr. Rajiv Dhavan, learned Senior Counsel appearing on behalf of appellants in his usual fairness conceded:

i. The copyright in the literary work has been assigned by reason of the said Will in favour of the respondent in terms of clause

12 of the Will.

ii. Dr. Karanth has made substantial changes in the original traditional form of the Yakshagana dance. Additions made in the form of the said dance including the Prasangas fell within the purview of 'originality' in respect whereof copyright could be claimed. It was, however, urged:

i. Keeping in view of the findings of the learned trial judge, it ought to have been held that no cause of action arose against the appellants in this case as the Institution had performed the said dance at New Delhi in the memory of Dr. Karanth without charging any fees.

ii. The form of copyright as regards dramatic work as has been held by the High Court stating the same to be a part of the literary work is not correct as they connote two different things.

iii. The form of injunction granted in favour of the plaintiff - respondent is not in terms of the

provisions of the Copyright Act, 1957 as the appellant as an institution or otherwise is entitled to use the same in terms of clauses (a), (i) and (l) of sub-Section (1) of Section 52 thereof.

10. Mr. G.V. Chandrashekhar, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment.

11. The Copyright Act, 1957 (for short, "the Act") was enacted to amend and consolidate the law relating to copyright. Section 2 is the interpretation section. Section 2(c) defines 'artistic work' to mean (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship. The word 'author' is defined in Section 2(d) to mean, (i) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer; (iii) in relation to an artistic work other than a photograph, the artist; (iv) in relation to a photograph, the person taking the photograph; (v) in relation to a cinematograph film or sound recording, the producer; and (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created. The term "communication to the public" as defined in Section 2(ff) reads as under:

"(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. Explanation.- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the

public"

Section 2 (ffa) defines the word "composer", in relation to a musical work, to mean the person who composes the music regardless of whether he records it in any form of graphical notation. Section 2(h) defines "dramatic work" to include any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film.

Section 2(o) defines "literary work" to include computer programmes, tables and compilations including computer databases. Section 2(qq) defines "performer" to include an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. Section 2(y) defines "work" to mean any of the following works, namely:- (i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording.

Section 13 which occurs in Chapter III of the Act provides that subject to the provisions thereof and the other provisions of the said Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording.

Section 17 of the Act deals with "First owner of copyright", in terms whereof, subject to the provisions of the Act, the author of a work shall be the owner of the copyright therein. Proviso (d) appended thereto states that in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. Sections 22, 23 and 52(1)(a), (i) and (l) of the Act, which are relevant for our purpose read as under:

"22. Term of copyright in published literary, dramatic, musical and artistic works.- Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the life time of the author until fifty years from the beginning of the calendar year following the year in which the author dies. Explanation- In this section, the reference to the author shall in the case of a work of joint authorship, be construed as a reference to the author who dies last.

23 - Term of copyright in anonymous and pseudonymous works.-

(1) In the case of a literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published:

Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until sixty years from the beginning of the calendar year following the year in which the author dies.

(2) In sub-section (1), references to the author shall, in the case of an anonymous work of joint authorship, be construed,--

(a) where the identity of the authors is disclosed, as references to that author;

(b) where the identity of more authors than one is disclosed, as references to the author who dies last from amongst such authors.

(3) In sub-section (1), references to the author shall, in the case of a pseudonymous work of joint authorship, be construed,--

(a) where the names of one or more (but not all) of the authors are pseudonymous and his or their identity is not disclosed, as references to the author whose name is not a pseudonym, or, if the names of two or more of the authors are not pseudonyms, as references to such of those authors who dies last;

(b) where the names of one or more (but not all) of the authors are pseudonyms and the identity of one or more of them is disclosed, as references to the author who dies last from amongst the authors whose names are not pseudonyms and the authors whose names are pseudonyms and are disclosed; and

(c) where the names of all the authors are pseudonyms and the identity of one of them is disclosed, as references to the author whose identity is disclosed or if the identity of two or more of such authors is disclosed, as references to such of those authors who dies last.

Explanation.--For the purposes of this section, the identity of an author shall be deemed to have been disclosed, if either the identity of the author is disclosed publicly by both the author and the publisher or is otherwise established to the satisfaction of the Copyright Board by that author.

52. Certain acts not to be infringement of copyright.- (1) The following acts shall not constitute an infringement of copyright, namely:-

(a) a fair dealing with a literary, dramatic, musical or artistic work not being a computer programme

for the purpose of--

(i) Private use including research;

(ii) criticism or review, whether of that work or of any other work;

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(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and student of the institution, or of a cinematograph film or a sound recording, if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.

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(1) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution."

12. Before advertng to the submissions made by the learned counsel for the parties, we may notice the issues framed in the suit, which are:

"i. Does plaintiff prove that late Dr. Shivaramaji Karanth had acquired copyright in respect of seven Yakshagana Prasangas and also in respect of Yakshagana dramatic or theatrical form i.e., Bhishma Vijaya, Nala Damayanthi, Kanakaangti or Kanakangi Kalyana, Abhimanyu or Abhimanyu Vadha, Chitrangadha or Babruvahana Kalaga, Panchavati Chritha followed in the plaint?

ii. Has the plaintiff became entitled to the said right under the Registered Will dated 18.06.1994?

iii. Does the plaintiff prove that her right under the said Will was infringed by the defendants?"

13. Indisputably, in view of the submissions made at the bar, respondent had acquired copyright in respect of seven Yakshagana Prasangas as also in respect of Yakshagana dramatic or theatrical form as a residuary legatee in terms of clause 12 of the Will dated 18.6.1994.

However, we may notice that whereas the trial court has proceeded on the basis that clause 12 of the Will shall apply in the instant case, the High Court opined that clause 11 thereof is attracted, stating:

".....No doubt, by reading para-12 of the `Will' in isolation, one can certainly arrive at the conclusion that the bequest made in favour of the plaintiff is in the nature of residuary bequest. But, that is not all, in the `Will'-Ex. P-1. I have already referred to para No. 11 of the `Will' while dealing with the topic dramatic works vis-`-vis literary work and therefore if the `Will' is read in its entirety and if we take into account, the benefits that flow from the bequest made by Dr. Karanth in favour of the plaintiff, it is not as if the plaintiff received the bequest only in respect of the things which form the residuary as mentioned in para-12 of the `Will' but the plaintiff also was given the copyrights in respect of literary works and all books as well as the right to print, republished and mark the literary works as well as the books."

Referring to the new Encyclopaedia Britannica and Halsbury's Laws of England, that a literary work with dramatic elements in it would also be literary work, the High Court observed:

"Dramatic works also could contain in its, passages of great literary taste, as in the case of great plays of William Shakespear. Therefore, the main classification as literary work and dramatic work cannot be construed to mean that dramatic work has nothing to do with literary work. The only difference I see in them is that the dramatic work (Plays) forms the text upon which the performance of the plays rests whereas a `literary work' enables one to read the printed words. Neither of the two can be produced without the imaginative skill of the author."

It was furthermore held:

"I am of the considered opinion that all the above changes brought about by Dr. Karanth in respect of Yakshagana Ballet leads to the inference that the imaginative faculties of Dr. Karanth permeated the entire Yakshagana Prasangas and thus a new look was given to the Yakshagana Ballets. I, therefore, hold that the bequest of copyright in literary works and books in favour of the plaintiff by Dr. Karanth, will have to be treated as the bequest covering the dramatic works also since I have also drawn the conclusion that the dramatic works is also a form of literature. Therefore, necessity of mentioning copyright separately in respect of dramatic works does not arise. The plaintiff,

therefore, is entitled to copyright even in respect of the dramatic works namely the seven prasangas, by virtue of bequest made in her favour in respect of copyrights and books."

14. Broadly speaking, a dramatic work may also come within the purview of literary work being a part of dramatic literature. The new Encyclopaedia Britannica (Vol-IV) 15th Edition, provides the following information about "Dramatic Literature.

"Dramatic Literature: the texts of plays that can be read, as distinct from being seen and heard in performance."

We must, however, notice that the provisions the Act make a distinction between the 'literary work' and 'dramatic work'. Keeping in view the statutory provisions, there cannot be any doubt whatsoever that copyright in respect of performance of 'dance' would not come within the purview of the literary work but would come within the purview of the definition of 'dramatic work'. We, however, do not mean to suggest that any act of literary work will be outside the purview of the Will dated 18.6.1994. Our exercise in this behalf was only for the purpose of clarifying the provisions of the Act with reference to the findings arrived at by the High Court.

15. For the aforementioned reasons, we agree with Dr. Dhavan that paragraph 12 of the Will, namely, residuary clause shall apply in the instant case apart from the areas which are otherwise covered by paragraph 11 of the Will. The residuary clause will apply because it is well settled that no part of the stay lies in limbo. It was also not a case where respondent in any manner whatsoever waived her right.

16. The learned trial judge on issue No. 4 opined that plaintiff had not been able to prove actual loss or damage particularly having regard to the fact that Dr. Karanth had associated himself with the appellants for a long time. The learned trial judge recognized the equitable interest vested in the plaintiff - respondent. A declaratory decree, therefore, was passed.

17. We may notice at this stage that the form of injunction granted both by the learned trial judge as also by the High Court in favour of the plaintiff-respondent. The operative part of the judgment of the trial court reads as under:

"Defendants or their employees or agents are restrained from performing the above said 7 ballets or Prasangas or in parts thereof in any manner as evolved distinctively by Dr. Karanth by way of permanent injunction."

The High Court, however, directed:

"(iii) As far as the restraint order passed by the Trial Court by granting permanent injunction to the plaintiff is concerned, the same is modified by ordering that if the appellants desire to stage any of the seven Yakshagana prasangas in the manner and form as conceived in all respects viz., costumes, choreography and direction by Dr. Karanth, the appellants can do so only in

accordance with the provisions of the Copyrights Act, 1957 in view of copyright in seven prasangas vesting with the plaintiff."

18. Decree for injunction is an equitable relief. The courts while passing a decree for permanent injunction would avoid multiplicity of proceedings. The court while passing such a decree, is obligated to consider the statutory provisions governing the same. For the said purpose, it must be noticed as to what is a copyright and in respect of the matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation.

19. In R.G. Anand vs. M/s Delux Films & ors. [(1978) 4 SCC 118], this Court held:

"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 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 a totality 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."

Yet again in *Eastern Book Company & ors. vs. D.B. Modak & Anr.* [(2008) 1 SCC 1], this Court held:

"57. The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court. We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious,

but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author."

20. The High Court, in our opinion, should have clarified that the appellants can also take the statutory benefit of the provisions contained in clauses (a), (i) and (l) of sub-section (1) of Section 52 of the Act. Section 52 of the Act provides for certain acts which would not constitute an infringement of copyright. When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable. Similarly, appellant being an educational institution, if the dance is performed within the meaning of provisions of clause (i) of sub-section (1) of Section 52 of the Act strictly, the order of injunction shall not apply thereto also. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation of the said order of injunction.

21. With the aforementioned modification in the order of injunction, this appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.