

ALLAHABAD HIGH COURT

Gopal Das

Vs.

Jagannath Prasad

(Ganga Nath, J.)

10.01.1938

JUDGMENT

Ganga Nath, J.

1. This is defendant 1's appeal and arises out of a suit brought against him and defendant 2 Sudarshan Lal, respondent, by the plaintiffs respondents for damages, recovery of infringing copies and an injunction to restrain the defendants from infringing the plaintiffs' copyright. The plaintiffs are the printers and publishers of a book, Ex. 1, entitled "Sachitra Bara Kok Shastra". It was printed for the first time in 1928 and has run into four editions since. Defendant 1 printed and published Ex. 2, called "Asli Sachitra Kok Shastra" in 1930. Defendant 2 is said to be the author of it. The plaintiffs' case is that Ex. 2 is a colourable imitation of their book Ex. 1 and has infringed the plaintiffs' copyright in Ex. 1. The defendants admitted the plaintiffs' copyright in Ex. 1, but not in the passages and ideas which they (plaintiffs) had borrowed from previous works. They contended that they had not infringed the plaintiffs' copyright. The trial Court found that the plaintiffs' copyright in Ex. 1 was infringed by the defendants, and it awarded damages and special costs under Section 35-A and ordered delivery of infringing copies. It also issued an injunction restraining the defendants from infringing the plaintiffs' copyright. Defendant 1 has come here in appeal.

2. Issues were framed on 11th May 1932. On 8th June 1932 an application was made by the plaintiffs for the appointment of a Commissioner to submit a report expressing his opinion on the matter in Issue 1, which was as follows : "is the publication of Ex. 2 an infringement of the plaintiffs' copyright in Ex. 1?" The Commissioner was required to examine and compare the two books and record the necessary evidence and hear the parties. On the same day Pt. Ranga Nath Sharma, who was nominated by both the parties, was appointed Commissioner by the Court. An objection has been taken to the legality of the appointment of the Commissioner on behalf of the appellant. As stated above, the Commissioner was appointed with the consent of the defendant, and consequently it does not lie in his mouth to object to the appointment after the Commissioner has submitted his report which has gone against him. In a case like this, which involves minute

scrutiny of alleged similarities and dissimilarities and extensive and lengthy comparison, it is not only proper but essential that the case should be tried with the aid of experts who might be appointed Commissioners to investigate and report similarities. In *Sita Nath Basak v. Mohini Mohan Singh*¹, in a similar case it was observed:

1 AIR 1924 Cal 595

Apart from this, we are of opinion that in this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence.

3. As would appear from the application of the plaintiffs for appointing the Commissioner, the Commissioner was to examine and compare the two books, record the necessary evidence which the parties wished to produce and to submit his report as to his opinion on the matter in issue No. 1. It may be stated at once here that the opinion of the Commissioner is no evidence. The Commissioner did not give evidence on oath and we have not considered and acted on it. As regards the recording of evidence, there was no illegality or irregularity. Section 75, Civil Procedure Code provides:

Subject to such conditions and limitations, as may be prescribed, the Court may issue a commission to examine any person....

4. The conditions and limitations referred to in Section 75 are prescribed by Order 26, Rule 1, Order 26, Rule 1 lays down:

Any Court may, in any suit, issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

5. Rule 8 lays down:

Evidence taken under a commission shall not be read as evidence in the suit, without the consent of the party against whom the same is offered, unless (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in Clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

6. It will appear from this Rule that with the consent of the parties, the evidence of a person in cases where the conditions and limitations laid down in Rule 1 or Clauses (a) and (b) do not exist, may be admissible in evidence. In the case of consent of the parties, it would not be necessary that the conditions and limitations prescribed in Rule 1 of Order 26 should exist. In this case, as stated above, the Commissioner was appointed to record evidence which the parties wished to produce before him, with the consent of the parties. Consequently there was no bar to the appointment of the Commissioner to record the evidence which the parties wished to produce before him, and to its admissibility. It may also be mentioned here that Section 75 and Order 26 deal with cases in which a Commissioner is appointed either by the Court suo motu or on the application by either party. These Rules do not apply to the cases in which the parties consent or agree to the appointment of a Commissioner for any particular purpose. The evidence recorded by the Commissioner is therefore admissible in evidence. As regards the report of the Commissioner about his opinion, we have already stated that it is no evidence and we have not taken it into consideration. We have ourselves compared and examined the alleged similarities and dissimilarities in the two books (Exs. 1 and 2) and arrived at our own conclusions quite independently of the Commissioner's report.

7. The learned Counsel for the appellant has complained that the defendants were not allowed to produce further evidence in the case before the Court. As has been stated above, the Commissioner was appointed on the understanding that the parties shall produce all the necessary evidence relating to Issue 1 before him. The defendants did not take any objection 'to the plaintiffs' application. On the other hand, the Commissioner who was appointed had been nominated by both the parties and the defendants themselves produced before him such evidence as they wished to produce. All this shows that the defendants did agree to produce the evidence before the Commissioner as they did. Consequently there was no occasion for the defendants to produce any further evidence before the Court. On the submission of the report by the Commissioner, the defendants applied at first for the appointment of another Commissioner, which application was rightly rejected. In that application they made no mention of their producing any further evidence. After this application of theirs was rejected, they made another application for producing further evidence, which was rightly rejected as they had no right to produce any further evidence, having produced all the evidence that they wished to before the Commissioner. The defendants then applied to summon the Commissioner for his examination. They gave no reason for their summoning the Commissioner. Their application was rejected, and subsequently on the date of the hearing they put in another application giving reasons for their summoning the Commissioner. The reasons were not considered sufficient by the trial Court, and the application was rejected. The matters to elucidate which they wanted to summon the Commissioner were more or less points of law, and as the lower Court rightly observed, they were matters for arguments and not for evidence.

8. There is a great deal of similarity in both the books. The defendant attributes the similarity to common sources from which both the books have been compiled and common ideas dealt with

in them. It has been urged on behalf of the defendants that there can be no copyright in ideas, and the defendants are right in this. The laws of copyright do not protect ideas, but they deal with the particular expression of the ideas. The protection of ideas falls not within the laws as to copyright, but within the patent laws. Unlike the owner of a copyright, a patentee has the sole right to use his invention within certain limits, and if anybody uses that patent, although he has made independent investigations, he infringes the patent. But in the case of copyright that is not so. It is always possible to arrive at the same result from independent sources, and the fact that the defendant produces something like the plaintiff's earlier work does not necessarily create an infringement : it must be shown that the defendant has derived his work from the plaintiffs'. As Lord Atkinson pointed out in *Macmillan & Co. Ltd. v. Cooper*² the moral basis upon which the protective provisions of the Copyright Act of 1911 rests is the Eighth Commandment : "Thou shalt not steal."

9. Out of 360 pages of the defendant's book Ex. 2, about 160 pages contain matter similar
²(1924) W.N. 16

to the plaintiffs' book. The defendant concedes that he has looked into the plaintiffs' book, but contends that he has made a legitimate use of it in compiling his book. Published compilations are intended not merely to be read, but to be used; but the question is how far they may be used in the preparation of a subsequent compilation. The rule appears to be settled that the compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result" : vide *Spiers v. Brown*³ *Reade v. Lacy*⁴ and in the case of a catalogue, *Hotten v. Arthur*⁵ Now the question is, has the defendant done so Some of the similarities might be attributable to the defendant's own labour, but there are a good many similarities which have evidently been copied from the plaintiffs' work with but a slight colourable variation or addition of some new material. No less than nine chapters dealing with nine different subjects have been copied. The defendant has adopted the plaintiffs' arrangement and has put the plaintiffs' matter in his book in the same order and sequence. The following table will show these nine subjects and the different pages of the plaintiffs' book and the defendant's book dealing with. them:

Pages of Exhibit 1. Pages of Exhibit 2. Headings. (1) 29-31 25-28 Bajaswala ka Dharma; 15 instructions. (2) 103-106 112-116 Ex. 1. Vivah men dhyan dene yoga aur baten. Seven paras. Ex. 2. Vivah men dhyan dene wali anya vishesh baten. (3) 118-19 126-28 Ex. 1. Stri ya Purush men Kam Cheshta kab jagriti hoti hai. Ex. 2. Stri men Kam Cheshta Jagriti ke karan. Purush men Kam Cheshta Jagriti ke karan. (4) 122-28 130-32 Ex. 1. Maithun ke liye Ayogya Striyan arthat kin striyon ke sath maithun karna sarvada varjit hai. Ex. 2. Sambhog karne men tyag karne yogya striyan. Seven paras. Paras 8, 9, 13 of Ex. 1 let out. Paras. 11, 12 included in seven. (5) 126-28 133-36 Ex. 1. Sanyog kis samay karna chahiye. Eight paras, Ex. 2. Sanyog samay. Seven paras. (6) 191 201-02 Ex. 1. Eitukal. 4 Sanskrit verses by different authors. Ex. 2. Yogya santan utpann karne ke liye upyogi

salah. (7) 250-58 234-41 Ex. 1. Patni kartavya 72. Ex. 2. Patni ke liye sadupadesh 39. (8) 26G-76 245-248 Ex. 1. Pati kartavya. Ex. 2. Pati ke liye sad- upadesh. (9) 313-15 245-258 Ex. 1. Striyan kaise nek chalan rah sakti hain. Ex. 2. Striyan ke nek chalan banane ke kuchh upaya.

10. The details and number of similarities are too many to be due to a mere chance. The defendant was asked to explain and show how and wherefrom he got these matters. He could not explain them. If these matters had been the product of his mental labour, he should have explained them. If he had got them from any other sources than the plaintiffs' book, he should have pointed them out. As regards item 2 mentioned above, the defendant said that he had copied it from "Kok Vigyan". He was evidently wrong because the "Kok Vigyan" which dealt with it was printed in 1932, after the printing and publication of the defendant's book Ex. 2. In the 1927 edition of the "Kok Vigyan" there is no chapter dealing with this subject. In item (4) there is a Sanskrit verse in paragraph 10, Ex. 1, page 124. The same couplet has been copied by the defendant in para. 27, Ex. 2 on page 132. The defendant stated at first that the whole matter was in "Bhav Prakash" from which he said he had taken it. He had to admit that the whole matter was not

³(1858) 6 W.R. 352

⁵(1863) 1 H & M 603

⁴(1861) 1 J & H 524

contained in any one book. It is therefore clear that the defendant had not looked into the "Bhav Prakash" when he stated that the whole matter was in it and he had taken it from it. There is no other book which contains the whole of the matter dealt with by the defendant under this heading in this book. In item 6 in the third verse there is a mistake in plaintiffs' book Ex. 1. The words "kujo yatha" should have been "bujo yatha". In copying this the defendant has committed the same mistake in his book. He has copied the words "kujo yatha." The defendant stated that he had copied the verses from the original author. If he had done so, the same mistake as is to be found in the plaintiffs' book should not have occurred in the defendant's book. As regards item 7 the defendant stated that he had taken the matter from "Kam Vigyan and Sachitra Kok Shastra" and "Adarsha Patni"; but these books do not contain the matter.

11. As regards item 9 the defendant stated that he had taken the matter from "Shahanshahi Kok Shastra". In reply to the plaintiffs' interrogatories he did not mention this book. In his reply to the interrogatories he named three books, "Kam Vigya," "Kam Sutra" and "Koksar Vigyan". In none of these books all these 17 instructions which are given in Exs. 1 and 2 are to be found. The defendant has taken all that is substantial and material in these chapters from the plaintiffs' book and has used it in his book in the same order and sequence. The defendant stated that he had prepared his book from the manuscript of an old Kok Shastra but that manuscript was never produced. The defendant also stated that he had got this manuscript from a library, but the name of that library too was never mentioned. The defendant further stated that he had prepared a manuscript from which Ex. 2 was printed. Although it is proved by the defendant's own evidence

that manuscripts are preserved by the defendant the manuscript prepared for Ex. 2 was never produced. If it had been produced, it might have shown how much matter was taken by the defendant from the plaintiffs' book and how much was his own. The wrong explanation given by the defendant for this similarity and his inability to name the correct books from which he stated, he had taken this material leave no room for doubt that the defendant imitated this matter from the plaintiffs' book.

12. The whole of this matter about whose similarity there is no dispute forms a substantial part of the book. When it is established that the defendant copied this matter from the plaintiffs' book, it would not be unsafe to presume that the other matter in defendant's book which bears similarity to the matter in the plaintiffs' book was also taken from the plaintiffs' book. The plaintiffs compiled their book with considerable labour from various sources and digested and arranged the matter taken by them from other authors. The defendant instead of taking the pains of searching into all the common sources; and obtaining his subject-matter from them availed himself of the labour of the plaintiffs and adopted their arrangement and subject-matter. Such a use by the defendant of the plaintiffs' book cannot be regarded as legitimate. In *Jarrold v. Houlston*⁶ the publishers of Dr. Brewer's "Guide to Science" obtained an injunction against the publication of the "Reason Why". The works in controversy were written on the same plan, and presented in the form of question and answer, popular information on a variety of scientific subjects. The earlier book, Dr. Brewer's "Guide to " Science" had evidently been used to a considerable extent in the preparation of the later one although copying was denied. The

⁶(1857) 3 K & J 708

Judge said:

I take the illegitimate use, as opposed to the legitimate use of another man's works on subject' matters of this description to be this : if knowing that a person whose work is protected by copyright has with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of like description, instead of taking the pains of searching into all the common sources and obtaining your subject, matter from them avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use.

13. It has been urged on behalf of the appellant that he has added additional matter and his book with this additional matter does not amount to piracy of the plaintiffs' work. No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. "Copyright" as defined in Section 1, Clause (2), Copyright Act, 1911, means:

The sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever....

14. Under Section 2 of the same Act, "Copyright" in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by the Act conferred on the owner of the copy right. The plaintiffs had the sole right to produce or reproduce their work or any substantial part thereof in any material form. The defendant by reproducing the substantial part of the plaintiffs' book has committed infringement of the plaintiffs'. ₹ 2284/- have been awarded to the plaintiffs for the price of 1142 infringing copies. The appellant contends that it is excessive and that the plaintiffs ought to hand over to him 1142 copies of their own which they would have sold in place of his books. His argument is that the plaintiffs are getting this sum as damages for the diminution in the sale of their books and they cannot get damages and keep their books also with them which they would have sold if there was no diminution in their sale. The appellant further contends that in any case the plaintiffs are entitled only to the net profit which they might have made by selling 1142 copies of their own, that is, the price minus the cost of production. This argument and contention of the appellant is based on a misconception of Section 7, Copyright Act. Section 7 provides:

All infringing copies of any work in which copyright subsists or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

15. Under the statutory provision of this section, all infringing copies of any work in which copyright subsists, or of any substantial part thereof, became the property of the owner of the copyright. He has therefore a right to recover the possession of the infringing copies unsold and the price of the copies sold. The infringing copies which have been sold being regarded as the property of the plaintiffs, they are entitled to the money for which they were actually sold. The lower Court has also misunderstood the reliefs claimed by the plaintiffs under Clauses (c) and (e) in para. 12 of the plaint. These are the reliefs to which the plaintiffs are entitled under Section 7 of the Copyright Act, 1911. The evidence of the defendant which has not been rebutted shows that he sold these copies at the rate of Re. 1 per copy. The plaintiffs themselves admit that they were sold at this rate. The plaintiffs themselves have claimed only the sale proceeds of the books sold by the defendant. They were-therefore entitled to only. ₹ 1142/- for which the defendant sold these copies. We therefore reduce the amount from ₹ 2284/- to ₹ 1142/-.

16. The plaintiffs have been awarded ₹ 500/- as special compensatory costs under Section 35-A, Civil Procedure Code The appellant objected to it on the ground that the plaintiffs did not take an

objection at the earliest opportunity. The plaintiffs did take an objection at the earliest opportunity. They filed an application on the date on which the issues were framed claiming special costs under Section 35-A. But in view of the fact that the plaintiffs have been awarded ₹ 2275/- for the counsel's fee we do not think they are justified in claiming any compensatory special costs under Section 35-A, Civil Procedure Code. The valuation of the suit was only ₹ 1300/- and ordinarily they would have been entitled to ₹ 65/- for the counsel's fee. But in this case they had to pay very heavy fees to the counsel who appeared in Court and before the Commissioner. The counsel had to attend no less than 65 sittings before the Commissioner. Plaintiffs had to pay ₹ 2275/- to their counsel. In view of the large sum that the defendant will have to pay to the plaintiffs on account of plaintiffs' counsel's fee, we do not think it proper to award special costs under Section 35-A, Civil Procedure Code, to the plaintiffs and we disallow this item of ₹ 500/-.

17. An objection was taken by the appellant to the amount of ₹ 2275/- allowed by the lower Court to the plaintiffs for their counsel's fee. Under Rule 39 Ch. 21, of the, General Rules, a Court may, in any case for special reason to be recorded in the judgment, award a higher or a lower fee than that prescribed in Rule 22 to 26. Under Rule 30 in cases in which the subject-matter of the claim does not admit of valuation, the Court shall fix a reasonable fee, regard being had to the time occupied in the decision of the case and the nature of the questions raised therein. Under Section 6, Copyright Act, 1911 the costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court. The fact that the plaintiffs had to pay ₹ 2275/- to their counsel is not denied. The defendant himself had to pay a much larger fee to his counsel than he would have paid in an ordinary suit. Consequently it cannot be said that the lower Court has not exercised the discretion properly. The plaintiffs have been awarded only those costs which were actually incurred by them in vindication of their right. We therefore see no reason to interfere with this item of ₹ 2275/-.

18. ₹ 1500/- were paid to the Commissioner for his fee. An objection has been taken to this item as well by the appellant. The Commissioner had to work for a considerable length of time. There were 65 sittings at his house and he had to devote a number of days in reading the books of reference relied on by the parties and the two books in question and finding out similarities and dissimilarities therein and preparing his report. The Commissioner made an application to the Court and claimed ₹ 1860/- for his remuneration. The lower Court after considering the amount of the work that the Commissioner had to do awarded him only ₹ 1500/-. No objection was taken by the defendant in the lower Court. If the defendant had taken any objection to the claim of the

Commissioner, the lower Court would have considered it and the Commissioner also would have had an opportunity of meeting it and explaining as to why he demanded and was entitled to such a large sum. The defendant himself is to blame for his not having taken any objection in the lower Court. It is not open to him to take objection here for the first time. We therefore do not interfere with this item also.

19. An objection was taken also to the award of ₹ 100/- for damages for vulgarizing the plaintiffs' book. But no objection has been taken to this item in the grounds of appeal and we therefore do not interfere with this item. The plaintiffs have filed a cross-objection against the lower Court's not allowing them to amend their relief. The plaintiffs applied on 4th March 1933 for adding a relief for damages under Section 7, Copyright Act. This application was rejected. There was no need for any such application because the reliefs claimed in the plaint included the item of damages under Section 7. In Clause (c) the plaintiffs asked for handing over to the plaintiffs the sale proceeds of the books sold and under Clause (e) for the recovery of the remaining unsold copies. These two reliefs come under Section 7, Copyright Act, 1911 and they have been given to the plaintiffs. There is no force in the cross-objection and it is dismissed. The appeal should have been valued as follows:

₹ 4918-12-0/- costs of suit. ₹ 2284-0-0/- price of books sold. ₹ 716-0-0/- value of the remaining unsold 358 copies. ----- Total ₹ 7918-12-0/-.

20. The appeal has been valued at ₹ 1300/- for which a court-fee of ₹ 90/- has been paid. The defendant is liable to make good the deficiency. It is therefore ordered that the defendant's appeal be partly allowed and the amount of damages be reduced by ₹ 1142/- and the order for awarding ₹ 500/- as compensatory costs under Section 35-A, Civil Procedure Code be set aside on the condition that he will make good the deficit court-fee on the valuation of ₹ 7918-12-0/- within three months; the rest of the appeal is dismissed. In case of his default to make good the deficiency within three months, the appeal for these two items (₹ 1142 and ₹ 500/-) will also stand dismissed. As the appeal has substantially failed the appellant will bear his own costs in this appeal and the respondents will get their costs from appellant. The objection of the plaintiffs respondents is dismissed with costs.