

# ALLAHABAD HIGH COURT

Agarwala Publishing House

Vs.

Board of High School

Civil Misc. Writ No. 2557 of 1959

(W. Broome, J.)

19.04.1966

## ORDER

### **W. Broome, J**

1. This writ petition filed by a firm of publishers challenges an amendment of the Regulations of the Board of High School and Intermediate Examination, U. P., introduced by a Gazette notification dated 9-6-1959 issued under Section 15 of the Intermediate Education Act, declaring that copyright of the question papers set at examinations conducted by the Board shall vest in the Board and forbidding the publication of such question papers without the Board's permission, which will be granted only if the publisher pays a fee of Rs. 5 for each paper and undertakes not to include in his publication any solutions of the questions.

2. Mr. S.C. Khare, who appears for the petitioner, has made the following submissions :

1. The new regulation introduced by means of the impugned notification is beyond the scope of the regulation-making power of the Board under Section 15 of the Intermediate Education Act.

2. No copyright can be claimed in question papers set for examinations because they are not original literary, dramatic, musical or artistic works, and therefore do not come within the purview of Section 13 of the Indian Copyright Act, 1957.

3. Even if there is any copyright in such a question paper, it belongs to the author (i.e. the person setting the paper) by virtue of Section 17 of the Indian Copyright Act,

1957, and does not belong to the Board.

3. I cannot agree that the impugned notification travels beyond the scope of Section 15 of the Intermediate Education Act. Under Section 7 of the Act the Board of High School and Intermediate Education has been given the power to conduct examinations at the end of High School and Intermediate courses, and this will necessarily include the power to arrange for the preparation and disposal of question papers. The Board is further empowered by the same section "to do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising High School and Intermediate Education." And under Section 15 of the Act "the Board may make regulations for the purpose of carrying into effect the provisions of this Act." The impugned regulation, which seeks to prevent unauthorized use of the question papers set for the Board's examinations, clearly deals with a matter ancillary to the conduct of examinations and the regulation and supervision of High School and Intermediate Education; and consequently it falls within the ambit of the powers conferred by Section 15 of the Act. Mr. Khare argues that it travels outside the scope of Section 15 and encroaches on other fields viz. the subject of copyright and the trade or business of publishers. But the primary object of the notification, as revealed by the counter-affidavit filed in this case, is to prevent the publication of question papers along with solutions, such publication being, according to the Board, "detrimental to the maintenance of proper standard of teaching and discipline"; and the circumstance that the notification incidentally happens to deal with the subject of copyright and to affect the business of publishers will not be sufficient to render it invalid. Mere incidental results of this nature cannot affect the validity of the notification when its main aim and object is covered by the provisions of the Act under which it has been issued. In my view therefore the impugned regulation cannot be held to fall outside the scope of Section 15 of the Intermediate Education Act.

4. A subsidiary argument advanced in this connection is that the notification is bad because it attempts to legislate on the subject of copyright, which is a Central subject (item 49 of the Union List in the Seventh Schedule of the Constitution). But the determination of this question depends on whether the notification purports to introduce any change in the existing law of copyright, as embodied in the Indian Copyright Act, 1957, or whether it merely acts within the framework of the existing law. If under the law as it stands the Board is not the owner of the copyright in

question papers set for its examinations - a point which will have to be considered in detail when dealing with the third submission of Mr. Khare - it can certainly be argued that the impugned notification changes the law by declaring that copyright vests in the Board. But assuming for the time being that under the existing law the Board is the owner of the copyright in such papers, the notification cannot be held to introduce any change; it merely makes a declaration of the Board's legal right and then goes on to make provision for assignment of the copyright, in conformity with the provisions of Section 18 of the Copyright Act.

5. The second contention of Mr. Khare, viz. that no copyright can exist in examination papers because they are not 'original literary works' is obviously untenable. The 'literary works' referred to in Section 13 of the Indian Copyright Act 1957, are not confined to works of literature in the commonly understood sense, but must be taken to include all works expressed in writing, whether they have any literary merit or not. This is clear from the definition given in Section 2(o) of the Act, which states that "literary work includes tables and compilations". And the word 'original' used in Section 13 does not imply any originality of ideas but merely means that the work in question should not be copied from some other work but should originate in the author, being the product of his labour and skill. In *University of London Press Ltd. v. University Tutorial Press Ltd.*,<sup>1</sup> it was held that question papers set for examinations were 'literary works because they were "work which is expressed in print or writing, irrespective of the question whether the quality or style is high"; and it was further pointed out that "the word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter". In the same ruling it was laid down that such question papers were to be counted as 'original' works as they were not copied from any book but originated from the author and the preparation of such papers involved selection, judgment and experience. My attention has also been drawn to a recent decision of the Patna High Court - *Jagdish Prasad Gupta v. Parmeshwar Prasad Singh*,<sup>2</sup> in which the same view has been expressed. There can be no doubt therefore that examination papers come within the category of 'original literary works' mentioned in Section 13 of the Indian Copyright Act, 1957, and that copyright can be claimed therein.

6. We are now left with the third submission of learned counsel for the petitioner, namely that the copyright in the examination papers belongs to the paper-setters and not to the Board. This argument is based on Section 17 of the Copyright Act which states that "subject to the provisions of this Act, the author of a work shall be the first

owner of the copyright therein". Admittedly there has been no assignment of the copyright by the paper-setters to the Board, under Section 18 of the Act; nor is there any suggestion that under the terms of the contract between the Board and the paper-setters, the latter have given up their claim to the copyright. Learned counsel for the respondents argues, however that the case is covered by Proviso (d) to Section 17 of the Act, which runs as follows :-

"(d) 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."

'Government work' is defined in Section 2(k) of the Act in the following manner :-

"(k) 'Government work' means a work which is made or published by or under the direction or control of

(i) the Government or any department of the Government

(ii) any Legislature in India

(iii) any court, tribunal or other judicial authority in India.

The contention of the respondents (Board of High School and Intermediate Education, U. P. and the State of Uttar Pradesh) is that the examination papers are prepared under the direction of the Board, which is merely a department of the Government and consequently they are 'government work' and the copyright therein belongs to the Government.

7. Two questions here arise for determination :

"(a) Whether the Board of High School and Intermediate Education is a department of the State Government;

(b) Whether the examination papers are made or published under the direction or control of the Board."

The latter question may be dealt with first. It is obvious that the Board exercises no control, in the true sense of the term, over the actual preparation of the question papers set for its examinations. It engages persons who have specialized knowledge of the subjects prescribed for the examinations and asks them to set papers on those subjects, within the prescribed curriculum; but having entrusted the work to those persons, the Board leaves them to carry it out by using their own skill and discretion, without any further interference or guidance from the Board. Paper-setters are thus not in the

position of servants, acting under a contract of service and subject to the commands of the master as to the manner in which they shall work, but are to be considered rather as independent contractors, acting under a contract for services and not subject to direct control in the performance of those services - as has been held in the University of London Press case, 1916-2 Ch. 601, already referred to above.

It is quite clear, therefore, that the examination papers are not made or published under the control of the Board. Nor do I think that it can be said that they are made or published under the direction of the Board. The word 'direction', used here in close conjunction with the word 'control' (in the phrase 'under the direction or control of the Board'), takes its precise significance from the context and must mean 'guidance' or 'instructions'. The Board no doubt asks the paper-setters to prepare the question papers; and learned counsel for the respondents argues that this amounts to giving a 'direction' for the preparation of the papers. But the phrase 'under the direction or control of the Board' obviously suggests something more than a mere initial impetus of this kind and implies that the whole process of preparation must be directed by the Board. I am satisfied therefore, that the examination papers cannot be deemed to be made or published either under the direction or under the control of the Board.

8. It follows from this that the examination papers are not 'Government Work' as defined in Section 2(k) of the Copyright Act, 1957, even if it be assumed that the Board is a department of Government; and consequently Proviso (d) to Section 17 cannot operate to confer ownership of the copyright in those papers on the Board or on the Government.

9. In this view of the matter, it is unnecessary for me to enter into the vexed question of whether the Board is or is not a department of the Government. The petition must succeed on the ground that the copyright in the question papers set for the High School and Intermediate examinations belongs to the paper-setters; and since this copyright neither belonged to nor has been assigned to the Board, the impugned notification which declares that 'copyright of the question papers set at the examinations conducted by Board shall vest in the Board' is clearly bad. Simply by issuing a notification under the Intermediate Education Act, the State Government could not arrogate to itself or to the Board a right which neither of them possessed under the law relating to copyright, embodied in the Copyright Act of 1957.

10. This petition is accordingly allowed with costs and the new regulation 6 introduced by the notification of 9-6-1959 is quashed.

Petition allowed.

Cases Referred.

1. 1916-2 Ch 601
2. AIR 1966 Pat 33