

CALCUTTA HIGH COURT

Mohini Mohan Singh

Vs.

Sita Nath Basak

(Mukerji, J.)

22.01.1930

JUDGMENT

Mukerji, J.

1. The plaintiff is the author of a book entitled ' Adarshalipi-O-Saral-Barna-Parichay' which was first published in 1902 and has seen numerous editions since then. In 1919 the defendant published two books called "Nutan Patsala Adarshalipi Prathambhag" and "Nutan Maktab Adarshalipi Prathambhag" respectively. This suit was instituted for injunction and damages on the ground that the plaintiff's copyright in his book had been infringed by the defendants by the publications aforesaid. The suit was dismissed in the first instance, but on an appeal by the plaintiff to this Court that decree was set side and the suit ordered to be tried further, upon the ground that the relative situation of the parties had not been correctly appreciated by the trial Court. This Court held that upon statutory presumption as also on admission the plaintiff's copyright in his book had been established, and the question whether there was infringement thereof needed determination. Such further trial, it was directed, should be held in the light of opinion of experts who might be appointed commissioners to investigate and report on the matters in issue.

2. The further trial directed by this Court having been held, the Additional District Judge made a decree granting the plaintiff a perpetual injunction restraining the defendants their agents and servants from printing, publishing and selling their two books and further from doing any other act infringing the plaintiff's copyright, and also for destruction of all copies of the said books and the plates, etc., in respect thereof and has also given the plaintiff a decree for damages for a sum of ₹ 2,425. The defendants have then appealed to this Court and there is a cross-objection on behalf of the plaintiff.

3. On behalf of the appellants it has been contended that both as to form and substance the materials -in their books, just as much as the materials in the plaintiff's book, are matters of common knowledge, the books of both the parties merely embodying what is ordinarily taught to children and in the order in which it is taught, and that it is not possible to make any variation in respect of such materials either in their substance or in the manner of their presentation. It is said that both the parties thus derived their materials from non-copyright sources. It has been said that

the similarities that are noticeable in the rival books are inevitable and are not sufficiently indicative of a desire to make the defendant's two books, a colorable imitation of the plaintiff's book. It has further been urged that where the mode of presentation or illustrations admit of a variation, there is abundant evidence of such variation in defendant's books, which shows the independent exercise of industry, intelligence and skill on their part just as much as the plaintiff has done in his book.

4. The defendant's two books are Ex. 2 and Ex. 3 and the plaintiff's book Ex. 1. The first 15 pages of the books Ex. 2 and Ex. 3 are exactly the same and as regards the remaining pages, pp. 16 to 26 of Ex. 2 correspond to pp. 16 to 24 of Ex. 3; the manner of presentation is much the same, only the matter in the former is a little more, the difference in substance being such as would make the former suitable for Hindus and the latter for Mahomedans. In the remaining pages of the two books the matter is distinctly different both as to form and substance. Comparing the defendant's books, Ex. 2 and Ex. 3 taken together with the plaintiff's book Ex. 1, it appears that p. 1 of Ex. 1 contains the same matter as p. 1 of Exs. 2 and 3. They are the vowels in their proper order. In p. 2 of Exs. 2 and 3 the 'vowels are given promiscuously for which there is no corresponding matter in Ex. 1. The consonants in their proper order and the numerals from 1 to 10 are given in p. 2 of Ex. 1. These are given in p. 3 of Exs. 2 and 3. In p. 4 of Exs. 2 and 3 are given the consonants promiscuously for which there is nothing corresponding in Ex. 1. In pp. 3 to 8 of Ex. 1 are given spellings and the order followed is to give a list of the vowels and giving a combination of each consonant with the vowels taken seriatim. This is given in pp. 5 to 10 of Exs. 2 and 3 with the variation that at the beginning the two forms of alphabets as regards vowels are given in Ex. 2 and 3 whereas in Ex. 1 only one form of them is given. Then the forms of Reffala are shown in Ex. 1 at p. 9 and thereafter the seven kinds of Reffala, ja, ra, la, ba, na, ma and ref are taken one by one and are shown as applied to the consonants one after another from pp. 9 to 14. In Exs. 2 and 3 the order of the forms of Reffala is somewhat different it being ja, ra, ref, ba, na, ma, la, not the right order to follow and this goes on to p. 13. At pp. 14 and 15 of Ex. 1 are the Ankafalas which are given at p. 14 of Exs. 2 and 3. Then come Askafalas at p. 15 of Ex. 1 which are also given in p. 14 of Exs. 2 and 3. Some illustrations of compounds of consonants are next given in Ex. 1 at p. 16 while other and different illustrations thereof are given in Exs. 2 and 3 at p. 15. In Ex. 1 from pp. 17 to 24 are to be found vowels and consonants taken serially and a sentence beginning with each vowel or consonant is given but the sentences given are in prose.

5. The same method is followed in Exs. 2 and 3 from p. 17 but in Ex. 3 it stops abruptly with the consonant la at p. 21 of Ex. 3 while it goes on to the end in Ex. 2 at p. 24, and these sentences are in verse in pairs, the difference between Ex. 2 and Ex. 3 in this respect being in the composition as being suitable to Hindus or Mahomedans. A short composition is to be found at p. 25 of Ex. 1 to which correspond a pair of lines in verse in the end of p. 23 in Ex. 2 the matter being entirely different. Then comes a list of persons as samples at p. 26 in Ex. 1 to which corresponds a list of some other names in Exs. 2 and 3, the matters in the said two exhibits being different from each other. At p. 27 of Ex. 1 is a sample of handwriting which does not appear in Ex. 2 or Ex. 3. At p. 28 of Ex. 1 is the 'Satakia which is to be found in p. 25 of Ex. 2 and in p. 23 of Ex. 3. The Karakea is at p. 29 and a-part of p. 30 of Ex. 1 and at pp. 26 and 24 of Exs. 2 and 3 respectively. The matter in the rest of the pages of Ex. 1 is-very different from that in the remaining pages of Exs. 2 and 3, there being considerable dissimilarity between Exs. 2 and Ex. 3 themselves in respect thereof.

6. There were two witnesses examined on behalf of the plaintiff as experts and two others on behalf of the defendants. It would be tedious to deal with their evidence in detail. The plaintiff's experts have sought to make out that there is similarity between some forms or combinations adopted by the plaintiff with those given in the defendant's books and that in certain cases in the form itself is a mistake or is an unusual one or is one that is obsolete or is one of several alternatives, while on the other hand in their cross-examination and upon the evidence of the defendant's experts it has been shown that mistaken forms are themselves in use or the unusual or obsolete forms are the really correct ones, and further there is evidence that if some one of several alternative forms has been adopted by the defendants, as the plaintiff has done, the defendants have in some cases also given another alternative form as well. Other publications against which similar complaints may be made have been put in on behalf of the defendants in order to show that there was no originality in the plaintiff's book in the adoption of those forms and that their origin may well be supposed to have lain in some non-copyright source.

7. Several cases have been brought to our notice to assist us in determining whether in the circumstances disclosed it should or should not be held that there was infringement. On behalf of the appellant the case of *Walter v. Lane*¹ on which the learned Judge has relied has been discussed and it has been shown that it is only such addition to materials derived from a non-copyright source which may be regarded as something "original" that is to be considered worthy of protection. Reliance has been placed on behalf of the appellants upon the proposition that their defense as to common source should prevail as the plaintiff had merely embodied in his work information which is a matter of common knowledge or common observation on selections from non-copyright sources. *Kelley v. Morris*² and *Leslie v. Young*³ have been placed before us as showing how far the compiler of information from sources common to all may be protected and what a subsequent compiler of such information which must be of necessity be identical in all cases if correctly given is expected to do and it has been argued. that where independent work was necessary that has been done. It has been argued that the defendants were at liberty to make some use of the plaintiff's hook if they so wished in order to explain the limits' of legitimate use and reliance has been placed upon *Wilkins v. Aikin*⁴ It has further been argued that on the principles enunciated in *Baily v. Taylor*⁵ that where the subject of the alleged piracy is an inconsiderable part of the book and contains merely the reproduction of some alphabets or combinations, no injunction should have been granted.

8. The principles enunciated in *Pike v. Nicholas*⁶ have been relied upon for the purpose of showing that a great deal of similarity must necessarily and naturally be found in compilations of this character and that similarity therefore is not a ground on which the plaintiff is entitled to relief. On behalf of the respondents the peculiar features of each of the above decisions have been pointed out and reference has also been made on their behalf to the cases of *Jarrold v. Heywood*⁷ and *Moffat and, Paige v. Gill*⁸ In the former of these cases it was said that if any part of a book is a transcript of another work or with only colorable additions and variations and prepared without any real independent literary labor such portion of the work complained of is piratical; hut it is impossible to establish a charge of piracy where it is necessary to track mere passages and lines through hundreds of pages

¹[1900] A.C. 539

³[1894] A.C. 335

⁵[1829] 1 Russ. & M. 73

²[1866] 1 Eq. 697

⁴[1810] 17 Ves 422

⁶[1870] 5 Ch. A. 251

⁷[1870] 18 W.R. 279

⁸[1902] 50 W.R. 528

or where the authors of a work challenged as piratical have honestly applied their labours to

various sources of information. It has been argued relying upon this case that the evidence that has been adduced on behalf of the defendants to show how the book was composed is wholly untrustworthy and that on their own showing they wanted to injure the plaintiff's book. The second case laid down on a consideration of the more accepted decisions that an author may avail himself of common sources of information on a subject but he is not entitled to "save himself pain and labour by adopting a predecessor's work with colourable variations even though such predecessor's work is based on materials which are common property. In this case the Lord Justice quoted with approval what was said by Wilson, J., in *Macmillan v. Suresh Chunder Deb*⁹ Reference has also been made on behalf of the respondent to the decision of the Judicial Committee in the case of *Mac-niillan & Co. v. Cooper*¹⁰

9. The question in the present case is not whether the plaintiff had a copyright in his book but whether there has been infringement of that copyright. That being the question we have first to see what is the meaning of infringing. Infringing is defined in Section 35 of the Act as meaning the making of a copy including any colorable imitation of the work. The question therefore is whether a colorable imitation has been made. Whether a work is a colorable imitation of another must necessarily be a question of fact. Similarity is a great point to be considered in this connexion 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 force (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. In the present case hypothesis (3) has to be excluded. Now as regards the first 16 pages of Ex. 1 the arrangement followed in Exs. 2 and 3 is almost exactly the same as that followed in Ex. 1, but mere similarity of arrangement is not conclusive, and it is possible that both parties have followed the order in which language is taught in the elementary schools. On the question of similarity of arrangement in the matter appearing in pp. 17 to 24 also not much stress can be laid as the arrangement merely reproduces a recognized mode of teaching children to learn sentences beginning with vowels and consonants in their order. But what is significant, in our opinion, is that while after the sentences so framed, the plaintiff at p. 25 has chosen to devote a page for a composition, the defendants have done exactly the similar thing in a verse of two lines at p. 23 of Ex. 2. Then follows a list of names in Ex. 1 at p. 24 and a similar thing also appears at p. 24 Ex. 2 and p. 22 of Ex. 3. Immediately at this point, after the sample in handwriting in Ex. 1 which the defendants would not give on account of the decree in a previous case, is given Satakia at p. 24 in Ex. 1 and the same thing in very similar style is reproduced at p. 25, Ex. 2 and p. 23 of Ex. 3.

10. Next follow the Karakia at p. 29, Ex. 1 and so in Exs. 2 and 3 at pp. 26 and 24. As regards the order of Satakia and Karakia no objection may be taken, but the singularity in both the productions is that the Karakia runs up to 100 instead of 80 which is the point up to which it is ordinarily taught. The form of production too as regards Karakia is much the same, the only difference being in the space which it occupies in the two sets of books. As regards individual letters or combinations of letters we are not prepared to place any reliance on some of those that have been put forward to show the imitation, but

⁹[1890] 17 Cal. 951

¹⁰ A.I.R. 1924 P.C. 75

those that strike us most as being against the defendants are ru, su, soo, sree, jba, iba, swa, shoa, stha, hla; and the most remarkable of the whole lot is the extraordinary combination of una and sha and ta and ra. Though similarity is to a large extent inevitable and each one of the points

of similarity may not be worth anything, a conglomeration of so many points of similarity which, in the opinion of the defendant's own expert, constitutes a strange coincidence, points to the defendants having copied from the plaintiff's book. So far as these pages are concerned we think that whoever may have prepared the materials in Ex. 2 and Ex. 3 for printing, must in our opinion, have had Ex. 1 before him which he wanted closely to follow so that Ex. 2 or Ex. 3 might resemble Ex. 1 to the utmost extent consistent with safety, and departing from it only where such departure would be an obvious improvement. The difference or dissimilarity that exists is, in our opinion to borrow the words of; James, V. C, in the case of *Jarrold v. Heywood*, "part of the defendants- authors' fraud and artful disguise of what they had done." Then again the portion of the defendants' book in which] original labor is found is not quite in keeping with the title they have given to their books but seems to have been the result of an effort to imitate the plaintiffs' book in its form of presentation. By itself it is nothing, but it affords evidence of a design on the part of the defendants.

11. Appellants' next objection is as regards the damages that have been awarded. The learned Judge has assessed damages on the footing of what he considered to be the loss which the plaintiff has sustained. The appellants' contention is that according to the learned Judge himself the evidence as to such loss is scanty and they therefore contend that the materials on which the damages have been assessed are wholly insufficient. The respondent on the other hand, in his cross-objection alleges that the damages have been assessed on an erroneous principle, and that the true measure of damages in such a case is as contemplated in Section 7 of the Act, that is to say that the offending copies should be deemed to be the plaintiff's property and the plaintiff should be held entitled to the full value of the work converted.

12. The respondents' argument overlooks the distinction between Sections 6 and 7 of the Act and his own prayers in the plaint which are in the alternative, i.e., prayers 2 and 3 the damages claimed in prayer 2 being under Section 6 and those claimed in the alternative in prayer 3 being meant to be under Section 7 of the Act. The distinction between the two sections has been pointed out by Peterson, J., in *Bim Bros. Ltd. v. Keene & Co. Ltd.* and it has been observed that the rights conferred upon the owner of copyright by Sections 6 and 7, Copyright Act, 1911, are based on different grounds, that under Section 6 he has the usual remedies available where a similar right of property is infringed and can recover damages for the loss sustained by infringement or if he prefers, payment of the profits resulting from piracy; and that under Section 7 he has an action of detinue in respect of unsold infringing copies and plates which by virtue of the section are deemed to be his own property and an action for conversion in respect of such infringing copies and plates as may have been sold; and further that the measure of damages for conversion under Section 7 is not limited to profits but extends to the full value of the work converted. In this case the plaintiff asked for damages, i.e., under Section 6 and from the evidence that he adduced he appears to have elected to proceed on the footing of the loss sustained by the infringement and not on the footing of the profits resulting from piracy, and in the alternative under Section 7 for the delivery of the unsold infringing copies and plates and damages on the footing of conversion in respect of infringing copies sold. He has been given damages under Section 6 on the basis of his election, and has also been given delivery of the unsold infringing copies and plates. Whether he should have both in view of the alternative prayers in his plaint may be a question, but the order for delivery has not been challenged on behalf of the defendants as being in excess and we need not disturb it. But the respondents' contention that he should now be given damages under Section 7 cannot be entertained because

his prayers 2 and 3 were only in the alternative. As regards the appellant's contention that the decree for damages, such as has been passed, is unsupportable, we are not prepared to hold in his favor. In our opinion the assessment made by the Judge is not an unreasonable one.

13. The appeal and the cross-objection are both dismissed. The respondent will get his costs in the appeal; hearing fee, five gold mohurs.

Guha, J.

14. The substantial question at issue between the parties to this appeal is the question of infringement of copyright by imitation. The principles underlying the provisions of Section 35, Copyright Act, 1914, which have to be considered in the present case have been discussed and defined in numerous cases, the most important of which have been placed before us in the course of the argument by the learned advocates appearing for the parties. The question whether a particular work is an imitation or a colourable imitation of another, must necessarily be a question of fact, and difficulty arises in the application of the principles to the facts and circumstances of a particular case. As has been observed by Wilson, J., in the case of *Macmillan v. Suresh Chunder Deb* in the case of works not original in the proper sense of the term, but compiled or prepared from materials which are open to all as in the case before us, the principle is that a person is not at liberty to use or avail himself of the labour which another has bestowed for the purpose of producing his works, that is in fact merely to take away the result of another man's labour, or in other words, " his property "-the last passage being a quotation by the learned Judge from a statement of the law by Hall, V.C. in *Hogg v. Scott*¹¹

15. The rule thus stated was again laid down by their Lordships of the Judicial Committee of the Privy Council in the case of *Macmillan & Co. v. Cooper* in this form : the question is whether there has been expended upon the work charged with infringement, sufficient knowledge, labor or judgment, to give it a quality or character which the work infringed did not possess, and which differentiates it there from. This rule has been amplified from time to time and it has been said that it was settled that the compiler of a work in which absolute originality is of necessity excluded, is entitled to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken and subjects it to such revision and correction as to produce an original work. It has fro 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 (Copinger on Copyright, Edn. 6, pp. 129-130). Keeping these principles in view, I have given my earnest consideration to the materials placed on record in the case before us and it appears to me, on the whole, that (in the words used by the experts examined in the case) there are strange coincidences, series of coincident reproductions, and although it cannot be said for certain that the defendants' work was a mere imitation of the

¹¹[1874] 18 Eq. 444

plaintiff's work, as there were differences and improvements in the later publication, the impression is left that the defendant in his work has largely copied the plaintiff's book. Although there may have been some exercise of individual choice and some judgment also in adding some new features which might be considered improvements on the plaintiff's books, the defendant's book appears to me to be a colorable imitation of the plaintiff's Shook a copy which comes so near to the plaintiff's work to the mind of every person seeing both the productions. On an examination of Exs. 1, 2 and 3, in the case before us, I am unable to say that the defendant has merely applied his labor to various sources of information before him, in the production of his

work; and, in my judgment, the defense of a common source, which was strenuously urged by Dr. Bijan Kumar Mukherjee on behalf of the appellant is unsustainable.

16. In the above view of the case, I agree with the decision arrived at by my learned brother, dismissing the appeal, and have nothing to add to what has been said by him in regard to the question of damages awarded by the lower Court, as raised in the appeal and in the memo of cross-objections preferred by the respondent in the appeal before us.

.