

Associated Publishers (Madras) Ltd. vs K. Bashyam Alias 'Arya' And Anr. on 22 April, 1960

Equivalent citations: AIR1961MAD114

JUDGMENT

Rajamannar, C.J.

1. This is an appeal from the judgment of Balakrishna Aiyar, J. in a suit C. S. No. 19 of 1952, filed on the original side of this court by the first respondent (who will hereinafter be referred to as the plaintiff) against two defendants, namely, (1) The Associated Publishers (Madras) Ltd., being the proprietors of the Associated Printers, a company registered under the Indian Companies Act, and (2) K. S. Joseph, for the recovery of a sum of Rs. 10,000, being the estimated damages suffered by the plaintiff by reason of the infringement of his copyright in a portrait of Mahatma Gandhi painted by him.

The plaintiff also prayed for a decree directing the second defendant Joseph to render an account to him of all sums which he had made by the sale of the offending prints which he had printed with the aid of the first defendant, directing the defendants or either of them to deliver to the plaintiff the unsold copies of the offending prints, and for an injunction restraining the defendants from further selling any copy of the offending prints. The material allegations in the plaint are as follows; The plaintiff is an artist who carries on the business of painting, printing and publishing and selling portraits of national leaders. Among others he painted the picture of Mahatma Gandhi in a sitting posture after studying several photographs taken of the Mahatma when he was addressing his prayer meetings. This work was completed by him in or about June 1948. The plaintiff as the author of the portrait is the owner of the copyright in it. The plaintiff conceived the idea of having printed copies made of the portrait with a view to their sale. For this purpose he employed the services of the first defendant to make a block in the process department of their journal, the Madras Mail.

The original portrait painted by the plaintiff was handed over to the first defendant with a view to prepare the block. The first defendant first made a block which was not satisfactory and therefore not accepted by the plaintiff. The first defendant thereupon made a fresh block which was handed over to the plaintiff. The rejected block however was left with the first defendant who made improper use of it and the plaintiff had to file a suit C. S. No. 651 of 1948, on the file of the original side of this court, for damages for infringement of his copyright. That Suit was settled on the first defendant paying the plaintiff the suit claim and costs.

The first defendant had thus notice that the plaintiff was the author and owner of the copyright in the portrait of Mahatma Gandhi in the sitting posture. Finding that there was great demand for

prints of his portrait the plaintiff placed an order with the first defendant to print for him 5000 copies of the said portrait by photo offset process in a size larger than that of the block made by the Madras Mail Process Department. For this purpose the original portrait painted by the plaintiff along with a retouched photo enlargement of the same were handed over to the first defendant in or about the first week of April 1949.

On 11th June 1949, 4000 copies were handed over to the plaintiff and subsequently the balance was delivered. The original portrait and the photo enlargement were in the custody of the first defendant from April to June 1949. The first defendant had thus full notice of the fact that the plaintiff was the author of the portrait and had copy-right in it. The plaintiff found that by the time he took delivery of the copies of this portrait from the first defendant, the market was full of pictures in colour which were obviously colourable imitations in colour of the portrait painted by the plaintiff.

These coloured prints constitute a clear infringement of the plaintiff's copyright in the portrait painted by him. The infringing copies disclosed the name of the first defendant as their printer and that the copyright was vested in an institution called the Mahatma Gandhi Memorial Art House, Trivandrum, and the name of the artist was given as one K. R. K. Achari. After the termination of C. S. No. 651 of 1948, the plaintiff addressed a letter to the first defendant on 6th March 1951 calling upon them to explain the circumstances in which they came to print the infringing copies and demanding from them an account of the sales of the infringing copies and payment of the damages suffered by him.

There was no reply to this letter. So the plaintiff caused a fresh notice to be issued on 2nd July 1951 inter alia demanding a sum of Rs. 10,000/- as damages. To this a reply was received from the first defendant (Ex. D. 1 dated 30th July 1951) in which they stated that they printed the coloured prints from an original brought to them by their customer, one K. S. Joseph (the 2nd defendant) who had placed an order with them for printing ten thousand copies. The first defendant disclaimed liability and intimated that the matter may be taken up by the plaintiff with Joseph who had placed the order with them.

On receipt of the reply the plaintiff addressed a letter to K. S. Joseph at Trivandrum but the notice was returned unserved. The plaintiff stated that the portrait painted by him which he had handed over to the first defendant for printing copies is a work of art of which he was the author, and as such he had a subsisting copyright in the said work under Section 5 of the Copyright Act. The first defendant and its concerned employees had notice and knowledge of the plaintiff's rights of copyright and were aware that the coloured prints were an obvious and colourable imitation of the plaintiff's picture with inconsequential alterations in petty details.

The first defendant with knowledge of the plaintiff's rights to the copyright in the portrait knowingly and wilfully infringed the plaintiff's right by printing the offending pictures and is therefore bound along with the second defendant in damages by reason of the infringement of his copyright. The 2nd defendant is further liable to render an account of all the profits made by the sale of the offending copies and the plaintiff is entitled to delivery of all the unsold offending prints in the possession of the second defendant. By reason of the colourable imitations of the plaintiff's picture being placed

on the market the sales of his picture were seriously affected.

2. The first defendant denied all liability. They stated inter alia that the portrait of Mahatma Gandhi in a sitting posture is a most popular and common portrait of Mahatmaji and there were several portraits of the Mahatma in the sitting posture. Neither the plaintiff nor anybody else could claim a copyright of Mahatma Gandhi's portrait. The first defendant denied that the plaintiff was entitled to the copyright in the portrait of Mahatma Gandhi in a sitting posture. On 17th March 1949 the second defendant Joseph brought to the first defendant a portrait of Mahatma Gandhi drawn by K. R. K. Achari for reproduction.

On 6th April 1949 the plaintiff brought to the first defendant the concerned picture, a portrait of Mahatma Gandhi. The first defendant had no knowledge of any picture of Mahatma Gandhi drawn by the plaintiff though the Mail had made for the plaintiff a block of the picture sometime in 1948. The first defendant denied that the prior suit, C. S. No. 651 of 1948, has any relevancy to the claim now made by the plaintiff. The making of a block by the Process. Department of the Madras Mail is no notice to the Associated Printers that the plaintiff is the Owner and author of a copyright of a portrait of Mahatma Gandhi in the sitting posture.

The second defendant Joseph placed an order with them long before the date on which the plaintiff brought his portrait for reproduction by the first defendant. This defendant further stated that, the portrait painted by the plaintiff and the portrait painted by Acharya were entirely different one from the other and that the plaintiff knew of and saw the picture painted by Acharya. The first defendant denied notice of the plaintiff's portrait when they printed copies of the portrait made by Acharya.

In paragraph 13 of their written statement the plea was raised that the defendant as a professional printer owed no duty to the plaintiff or to any other artist and they were not expected to settle claims of different artists of alleged copyrights in portraits made by them and that the defendant committed no breach of duty even if the plaintiff had a copyright and, therefore, they were not liable for damages for alleged infringement of copyright. They pleaded in the alternative that the plaintiff had no copyright in the picture and that even if he had, there was no infringement by them, and even if there was an infringement, the plaintiff did not suffer any damages. In any event they pleaded that the damages claimed were excessive and fanciful. The second defendant filed a written statement but thereafter remained ex parte. The following issues were framed:

- (1) Has the plaintiff any copyright in the portrait of Mahatma Gandhi as prepared by him?
- (2) Is the suit bad for non-joinder of necessary parties for the reasons set out in paragraph 14 of the written statement of the first defendant?
- (3) Has the plaintiff any copyright in the original of which document No. 1 filed along with the plaint is a copy?

(4) Have the defendants or either of them committed an infringement of the plaintiff's copyright by printing and publishing document No. 2 filed along with the plaint?

(5) Is the plaintiff entitled to any damage and if so, to what extent?

(6) Is the first defendant entitled to compensatory costs from the plaintiff?

(7) Is the portrait drawn by Ramakrishna Achari at, the request of the second defendant a colourable imitation of the portrait by the plaintiff and, if so, is the second defendant liable?

(8) To what reliefs are the parties entitled? Balakrishna Aiyar, J. tried the suit. He held that the plaintiff had copyright in the portrait of Mahatma Gandhi as prepared by him and that Ramakrishna Achari copied from the plaintiff's work at the instance of the second defendant, that there was, therefore, an infringement of the plaintiff's copyright, that the plaintiff was not estopped from putting forward the suit claim and that he was entitled to damages. He overruled the technical objection that the suit was bad for non-joinder of necessary parties.

He considered that the amount of Rs. 10,000 claimed by the plaintiff as damages was proper. On these findings he granted to the plaintiff the three reliefs prayed for by him in paragraph 14, clauses (1), (3) and (4), namely, payment of a sum of Rs. 10,000, direction to deliver to the plaintiff the unsold copies of the infringing prints and an Injunction restraining the defendants from selling any copy of the offending prints. The first defendant is the appellant before us.

3. Mr. Rajah Aiyar, learned counsel for the appellant, pressed upon us four main contentions;

1. The plaintiff had no copyright in the picture prepared by him (M. O. 3) because it was only a combination of portions of two existing pictures (M. Os. 17 and 20);

2. there was no infringement of the copyright by the printing and sale of the painting prepared by Acharya and published by Joseph, the second defendant;

3. the first defendant was in any event not liable as a printer without knowledge of the plaintiff's copyright; and

4. the damages claimed are excessive.

It will be useful to set out the material provisions of the Copyright Act. As the suit was filed in 1951, the Indian Copyright Act, 1914, will apply. That Act substantially embodied the provisions of the English Copyright Act, 1911, with certain modifications which are not material for the disposal of this appeal. Under Section 1 of the English Act, copyright subsists in every original literary, dramatic, musical, and artistic work. "Copyright" means the sole right to produce or reproduce the

work or any substantial part thereof in any material form whatsoever.

For the purpose of the Act "publication in relation to any work" means the issue of copies of the work to the public. Under Section 2 of the Act, copyright in a work shall be deemed to be infringed if any person without the consent of the owner of the copyright does anything the sole right to do which is conferred by the Act on the owner of the copyright. Under Sub-section (2) of the same section, copy-right in a work shall also be deemed to be infringed by any person who-

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; Or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright..... any work which to his knowledge infringes copyright. Section 8 sets out the civil remedies for infringement of copyright. Section 6(1) and (2) runs thus:

6(1): Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2): The costs of alt parties in any proceedings in respect of the infringement of copyright shall he in the absolute discretion of the Court Section 7 which is as follows gives a further right:

"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".

4. Section 8 exempts from liability to pay damages certain innocent infringements. As this was relied on by the appellant it is necessary to extract it in extenso:

"Where proceedings are taken in respect ot the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting, that copyright subsisted in the work." Mr. Rajah Aiyar first contended that the plaintiff cannot claim any copyright in his picture marked as M. O. 3. As the argument proceeded, however, he was unable to maintain his contention, though he never formally abandoned it. Now copyright subsists in every original artistic work. The question is whether the plaintiff's picture is an artistic work and whether it is original. The term "artistic work" would comprise paintings, sculptures, drawings,

engravings and photographs and works of architecture etc. As is pointed out in the well-known text book on Copyright by Copinger, it was generally considered that the word "artistic" "was merely used as a generic term to include the different processes of creating works set out in the definition section and that provided that a work was produced by one of such processes, and that its creation involved some skill or labour on the part of the artist, it was protected."

In the later English Copyright Act, 1956, this is recognised and the words "irrespective of artistic quality" have been added. Likewise in the later Indian Copyright Act, in the definition of "Artistic work" we find the clause "whether or not any such work possesses artistic quality." While we accept the opinion of Sri D. P. Roy Choudri that M. O. 3 has no claim to be called a work of art, nevertheless for the purpose of the Copyright Act it must be held that it is "an artistic work".

The more difficult question is whether it can be called a original artistic work. Here again the originality that is required is very limited in scope. Undoubtedly a portrait painting can be an original work of art. Some of the world's masterpieces in European painting are portraits. The famous "Mona Lisa" of Leonarda da Vinci for instance is a portrait. The plaintiff made extravagant claims to originality in drawing the picture M. O. 3. He deposed that he used to observe Gandhiji closely at his prayer meetings with a view to bring out in his picture his affinity to Buddha, Sankara and Ramanuja.

We have no hesitation in rejecting such claims. M. O. 3 was certainly not drawn from life. When he was asked as to the original features in his picture, the only definite answer he - could give was that in his picture he had shown Mahatmaji sitting with his right leg folded inside and the left leg outside. This posture, according to him, was not Mahatmaji's natural posture. The plaintiff deposed that he had never seen the left foot outside and the right leg inside even in any Other picture of Mahatmaji.

At the trial the first defendant led evidence to demonstrate that the plaintiff's picture M. O. 3 was a mere combination of two other pictures of Mahatma Gandhi, M. O. 17 and M. O. 20. The head was taken from M. O. 17 and the body from M. O. 20, but with this important difference, that it was laterally reversed. M. O. 21 shows M. O. 20 reversed. According to Sri Roy Chowdri, M. O. 3 is compounded of two photographs of Mahatma Gandhi, the body being taken from M. O. 21 and the head from M. O. 17. Naturally a certain amount of adjustment was required and made. Beyond that, virtually nothing new had been done by the plaintiff.

We have carefully examined M. O. 3 along with M. Os. 17, 20 and 21. We have no hesitation in holding that Sri Roy Choudri's opinion is well founded. The similarities in the minutest details are so telling that there is no room for doubt. But we are not prepared to hold on the evidence that all that the plaintiff did was -to mechanically compound the two pictures M. O. 17 and M. O. 20. It is not as if the head in M. O. 21. was cut away and the head from M. O. 17 was pasted instead and a photograph taken of the composite picture. We think that the plaintiff himself drew his picture M. O. 3 copying the head from M. O. 17 and the body from M. O. 20 (M. O. 21).

The result of the combination was certainly in one sense new because there was no exact prototype of M. O. 3. The plaintiffs skill and ingenuity lay in making the combination. Can the plaintiffs picture so produced be said to be original? There is a very illuminating discussion of the question as to when a work could be deemed to be a original literary work in *Macmillan and Co. Ltd. v. Cooper*, ILR 48 Bom 308: (AIR 1924 PC 75). Though the case related to a literary publication, the principles laid down by their Lordships of the Judicial Committee would govern the case of an original artistic work.

It was ruled that reprint of selected passages from a original work may be a original literary work within the meaning of the Copyright Act if there has been expended upon it sufficient knowledge, labour, judgment or literary taste to give it some quality or character which the complete work did not possess and which differentiates it therefrom. The following passage from *Story J's Judgment* in the case of *Emerson v. Davies*, 1848-3 Story U. S. Rep. 768, was quoted in extenso by Lord Atkinson who delivered the judgment of the Board:

"The book of the plaintiff is, in my opinion, new and original in the sense in which those words are to be understood in case of copyright. The question is not whether the materials which are used are entirely new and have never been used before, or even that they have never been used before for the same 'purpose'. The true question is whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have, gathered hints for his plan and arrangement or parts of his plan and arrangement for existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use beforehe is entitled to a copyrightIt is true that he does not. thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations or combinations for these are strictly his own.... .In truth, in literature, in science and in art there are and can be few, if any, things which, in an abstract sense, are strictly new and! original throughout."

5. Certainly the plaintiff must have expended his skill and labour in producing his picture by a combination of parts of two other pictures, in a new way. As Copinger points out (9th Edn. p. 39), "neither original thought nor Original research is essential and the standard of originality required is a low one". "It is original skill or labour in execution, and not originality of thought which is required." Of course it is difficult to state any principle upon which the standard is based and to state the precise amount of the knowledge, labour, judgment or skill or taste which the artist must bestow upon his composition in order to acquire a copyright.

We are in entire agreement with Balakrishna Aiyar J. on this point that, "Even if it be that in the present case the plaintiff did nothing more than what Mr. Choudri thinks he did, viz., that he picked up one photograph of Mahatma Gandhi reversed it and then adapted the head he found in another

photograph and brought the two together, even so, he will be entitled to protection in his work because the result is something different and that something was the product of the labours and efforts of the plaintiff."

Mr. Rajah Aiyor was unable to seriously upset this finding.

6. The next question is whether there has been an infringement of the copyright which the plaintiff had in his picture M. O. 3. The answer to this question depends upon whether M. O. 15 is a copy or colourable imitation of M. O. 3. As was pointed out in the judgment of a Division Bench of this court to which one of us was a party in *Cunniah and Co. v. Balraj and Co.*, :

"It is impossible to lay down any rule which could serve as a test of what constitutes a copy or colourable imitation".

In order to constitute infringement there should be direct or indirect use of those features of the plaintiff in which copyright subsists.

It is unusual for an infringement to consist of an exact reproduction of the whole of the plaintiff's work. Consequently it is difficult to be precise as to the amount of copying or degree of resemblance necessary to constitute infringement. Our conclusion must depend, in the words of Lord Herschell, "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." We have carefully compared the two pictures. There are obviously differences. M. O. 3 is in monochrome but M. O. 15 is coloured.

In M. O. 3 Mahatma Gandhi holds a paper but in M. O. 15 he holds a book. In M. O. 15, before him are placed a watch and a newspaper or journal. In M. O. 3 only four fingers of Mahat-maji's left hand are clearly visible but in M. O. 15 all the five fingers are clearly visible. But these differences appear to us to have been deliberately introduced to avoid a possible charge of infringement. Some of the differences are evidently due to difference in the degree of skill of the plaintiff and Achari, D. W. 3. There can be no doubt that M. O. 3 is a far better picture than M. O. 15.

It is curious that the artist himself who drew M. O. 15, K. R. K. Achari, put forward in his evidence the case that he drew the original of M. O. 15 from M. O. 17 and M. O. 20. He took a tracing of M. O. 20 and reversed it and then adapted the body to the head in M. O. 17. Now this is exactly what the first defendant says the plaintiff did. Coincidences do occur in life but we are convinced that this is not such a case of accidental coincidence. It is impossible to believe that by sheer chance D. W. 3 adapted the same combination as the plaintiff adopted, when it is well known that the country was flooded with pictures of Mahatma Gandhi, especially after his tragic assassination in January 1948.

7. In the present case there is much more material than mere study and comparison of the two pictures. There is a definite admission by D. W. 3, the artist who is the author of M. O. 15, that he had the plaintiff's picture before he painted M. O. 15. On 15th February 1952, the plaintiff sent a registered notice to D. W. 3, Achari, calling upon him to explain why he should not be proceeded against for infringement of copyright. On 20th February 1952, D. W. 3 replied to this letter (Ex. P.

12). The material portion of this letter runs thus:

"One of the pictures for writing was a framed picture of yours. To write the face there was picture with Gandhi's autograph. I remember to have written with these two.... I think there will be some differences between your picture and Jose* ph's picture Besides please don't trouble me in my old age."

D. W. 3 wanted to get out of this letter by saying that he signed it without understanding it. The plaintiff produced another letter which one Jaya-raman wrote to him from Trivandnim after interviewing K. R. K. Achari on behalf of the plaintiff. This Jayaraman has given evidence that he was working with the plaintiff at the time and went to Trivandrum under his directions. In this letter Jayaraman says:

"I went and met Ramakrishna Achari. I asked him about our picture. He said that it was true that he wrote the Gandhi picture, that the person who gave the order for it was Sri K. S. Joseph, that he came with an Ex-Minister and gave some Gandhi pictures and our Gandhi picture to write the same. Besides he said that he told him to have our picture as the base and write."

In this connection there are certain significant omissions to which we should refer. One is the non-production of the original of M. O. 15. Joseph did not care to give evidence. He was the person who placed the order with D. W. 3 and it was his duty to give the correct version as to the material which lie placed with the artist for producing M. O. 15. An ex-Minister is said to have accompanied Joseph when he went to Trivandrum to place an order with D. W. 3. He was also not called. Mr. Rajah Aiyar, learned counsel for the appellant, relied on some of the statements made by the plaintiff in his evidence which were intended to demonstrate that M. O. 15 was far inferior to M. O. 3 in its artistic quality.

The plaintiff commented on several features in M. O. 15. He says that there was no perspective in it, no rhythm. He called it daubing. Even accepting the plaintiff's views in the matter, we fail to see how it would follow that the original of M. O. 15 is not an infringement of M. O. 3. A bad copy does not cease to be a copy. On a consideration of all the relevant circumstances and a comparison of the plaintiff's picture and M. O. 15, we have come to the same conclusion as the learned trial Judge, namely, that the original of M- O. 15 was consciously copied from the work of the plaintiff.

8. The next contention of Mr. Rajah Aiyar has given us a little difficulty, particularly because of the pleadings in the written statement. The first defendant is the printer of the infringing copies. It is not its publisher. It is not alleged that it has sold the pictures or distributed them. Joseph placed an order with them and they executed it and delivered the copies to Joseph. Mr. Rajah Aiyar did not contend before us that as the first defendant company was only a printer, it could not be made liable for infringement of copyright by merely printing M. O. 15.

His argument was based on the appellant's ignorance or the subsistence of copyright in the plaintiff. So we are not called upon to discuss the large question whether a mere printer of infringing copies

of a work in which copyright subsists will be liable in damages for infringement of copyright, Mr. Rajah Aiyar referred us to paragraphs 6, 7 and 13 of the written statement as containing the appellant's plea on this point.

Paragraphs 6 and 7 refer to the making of a block of the plaintiffs picture by the Process Department of the Mail which was being published by the appellant company and to the prior suit (C. S. No. 651 of 1948) which ended in as a settlement of the plaintiff's claim. The first defendant stated that the making of a block by the Mail is 110 notice to the Associated Printers that the plaintiff is the owner and author of a copyright in a portrait of Mahatma Gandhi in a sitting posture. Paragraph 13 contains the following plea:

"This defendant states that the plaintiff's letter dated 6th March 1951 was mislaid in the office of the first defendant but even if it was not mislaid, there was no need to reply to a claim, which was so frivolous. This defendant, who is a professional printer, owes no duty to the plaintiff or to any other artist and he is not expected to settle claims of different artists for alleged copyrights on portraits made by (them. This defendant committed no breach of duty and the plaintiff even if he has got a copyright, has no claim whatsoever on this defendant for damages for alleged infringement of copyright."

Mr. Rajah Aiyar submitted that in effect the plea of the appellant was based on the provisions of Section 8 of the Copyright Act. Though this section was expressly mentioned in the written statement, the learned Judge, Balakrishna Aiyar J. found that a plea under Section 8 of the Copyright Act was not specifically taken in the written statement. He pointed out that even no specific issue was taken on the plea. The learned Judge, however, was prepared to hold that the plea, even if allowed to be raised, must fail. He was inclined to agree with the suggestion made "by learned counsel for the plaintiff that in this matter certain employees of the first defendant and Joseph were acting in concert, fully aware of the rights of the plaintiff.

9. As we have already said' above, Mr. Rajah Aiyar did not contend before us that ft mere printer as such can never be made liable for infringement of copyright by printing the infringing copies. As regards the limited plea under Section 8 which is not confined to printers, Mr. Gopala-ratnam, learned counsel for the plaintiff-respondent brought to our notice the decision in John Lane, the Bodley Head Ltd. v. Associated Newspapers Ltd., 1936-1 KB 715. In that case the defendants, the Associated Newspaper? Ltd., published in a newspaper of which they were the proprietors and publishers, a short story called "The Gods Decide" which had been submitted to them by one S as his own original work. "The Gods Decide" was In fact a colourable imitation of a short story entitled "The Interlopers", copyright in which was claimed, owned by the plaintiffs or one of them.

The defendants did not know of the existence of "The Interlopers" nor that it was a subject of copyright, and sought to rely on Section 8 of the Copyright Act, 1911, as a defence to the plaintiffs, claim for damages under Sections 6 and 7. It was held by Du Parcq J. that Section 8 afforded no defence in the circumstances. The learned Judge was prepared to accept the evidence adduced on behalf of the defendant company that the literary editor of the journal in which the infringing short

Story appeared and his assistants did not know of the existence of the original story.

He was also satisfied that they had no reasonable grounds for suspecting that the publication of the 'Gods Decide' would constitute an infringement of copyright. Notwithstanding these findings of fact favourable to the defendants, the learned Judge was of opinion that Section 8 afforded them no defence. The ground of the decision was that the defendants in order to take advantage of Section 8 would have had to prove that they did not know that the work which originally existed as "The Interlopers" and was presented to them in the guise of "The Gods Decide" was the subject of copyright.

The principle of this decision applies to the present case. The utmost that the appellants say is that they were not aware that M. O. 15 constituted an infringement of M. O. 3. Indeed their case is that when they accepted the order from Joseph for M. O. 15, they were not aware of the plaintiffs picture M. O. 3. It is not as if they knew of the picture of the plaintiff and they also knew that M. O. 15 was a colourable imitation of M. O. 8 but thought that M. O. 3 itself was not the subject of copyright. Even if the appellant company were to be allowed to raise a plea under Section 8 of the Copyright Act, on the strength of this decision that plea must be overruled.

10. Another plea which was pressed upon us by Mr. Rajah Iyer was estoppel. Here again there was nothing in the written statement of the appellant to found such a plea. A question of estoppel is a mixed question of fact and law, and without definite allegations in the pleadings a party should not be permitted to resort to the plea of estoppel. Even otherwise, we think there is no substance in this plea. There is no representation on the part of the plaintiff to the appellant on the faith of which they suffered any detriment or changed their position. Nor was there any duty on the part of the plaintiff to warn them that they were infringing his copyright by publishing M. O. 15. The learned trial Judge rightly rejected this plea.

11. The only question which remains is, what are the reliefs which the plaintiff is entitled to. As already mentioned, the plaintiff claimed four substantial reliefs besides costs, namely (1) the recovery of a sum of Rs. 10,000, as damages, (2) an account from the second defendant of all sums which he had made by the sale of the offending prints and a direction that both defendants do pay to him the sums so found, (3) delivery of unsold copies of the offending prints, and (4) an injunction restraining the defendants from further selling any copy of the offending prints. The learned Judge Balakrishna Aiyar J-granted to the plaintiff reliefs (1), (3) and (4) and refused to grant him the relief No. (2).

The plaintiff has not filed any appeal seeking this relief. Mr. Rajah Aiyar conceded that if We find that the plaintiff had a copyright in M. O. 3 and that M. O. 15 constituted an infringement of such copyright and the appellant had no valid defence, the plaintiff would undoubtedly be entitled to the reliefs of damages, delivery of the remaining copies of the infringing picture and an injunction. His only complaint was as regards the quantum of damages. The plaintiff claimed a sum of Rs. 10,000, and the learned Judge has awarded that sum as damages.

12. In view of the fact that the only claim for damages now subsisting is for an infringement of copyright, we do not think it necessary to deal at any length with much learning which was exhibited at the Bar on the construction of Sections 6 and "7 of the Copyright Act. Section 6(1) in general terms confers on the owner of the copyright the remedy by way of damages as may be conferred by the law for the infringement of a right. Copyright is a right of property and any injury caused to such right will give rise to a claim for damages. Section 7 deals with the remedies based on detinue and conversion.

It is two fold in its scope. It gives the right to the owner of the copyright to take proceedings for the recovery of the possession of all the infringing copies. It also confers on him a right to take proceedings in respect of the conversion of such copies. The foundation of the claim under Sections 9 and 7 respectively are fundamentally different Damages under Section 6 are claimed for infringement of copyright which is an incorporeal right in property. If damages are claimed under Section 7, it is on the basis of conversion of goods, which are deemed to be the property of the plaintiff.

In the assessment of damages there should not be overlapping. The claims under Section 6 and Section 7 must be distinctly put forward in the plaint. Now it is obvious that the learned Judge has not awarded to the plaintiff any damages on the basis of conversion. There was a prayer for the delivery to the plaintiff of the unsold copies of the offending print and that was granted; but that could only be against the second defendant and Mr. Rajah Iyer does not object to it. It is nowhere alleged in the plaint that the first defendant was guilty of conversion.

If anyone was guilty, it was the second defendant. Having regard to the reliefs claimed by the plaintiff and the decree granted by the learned trial Judge, it becomes irrelevant whether the remedies under Sections 6 and 7 of the Copyright Act are cumulative, or alternative remedies. The House of Lords in Caxton Publishing Co v. Sutherland Publishing Co, 1939 AC 178 confirming the decision in Sutherland Publishing Co. v. Caxton Publishing Co, 1936-1 Ch. 323, held that the remedies were cumulative. But it will be equally obvious that there should be no overlapping of the reliefs granted under each of these two sections.

13. The plaintiffs claim for Rs. 10,000, as damages is thus set out in the plaint:

"The plaintiff states that by reason of these spurious and colourable imitations of the plaintiff's picture being placed in the market, the sales by him of the pictures printed by him have been seriously affected with the result that he has still in his hands over 2,000 copies though in the normal course he would have been able to sell out not merely the 5000 copies originally printed but also further copies to an equal number."

It is true that the calculation of the figure is not in this paragraph but the basis of the figure is there. The learned Judge considered this amount, of Rs. 10,000 was legitimate. He was aware that the quantum must remain a matter of estimate. The learned Judge took into consideration the fact that 10,000 copies of M. O. 15 were printed by the appellant and given to Joseph and that if each picture

had been sold at Rs. 2, Joseph would have made a profit of Rs. 15,000 if all the copies had been sold and a profit of Rs. 10,000 if he had sold two thirds.

He was also of the opinion that if Joseph had not put his counterfeit copies in the market, the plaintiff would have been able to sell 10,000 copies and he could have made a profit of at least as many rupees. With respect to the learned Judge, we think that for the loss suffered by the plaintiff on account of the copies of his picture remaining unsold, he would not be entitled to the profit to which Joseph might have made if he had sold all the ten thousand copies or two thirds of them. The following details were elicited from the plaintiff in his examination;

"Q. How many copies did you take delivery of?' 'A. 5000 Q. How many were you able to sell?

A. I was able to sell 2500. Because of their bad printing I had to print again.

Q. Were you able to sell the whole of the 3000?

A. I was able to sell 3000. But it took me five years. It ought to have been sold within two. months.

Q. Even these 3000 were printed badly? you took delivery of It?

A. Not so satisfactory, but still I have to sell.

Q. You got a reduction for 3,000?

A. Yes."

If this is so, the plaintiff would not have suffered great loss. He had sold all the copies though it took him a long time. There is however, the other circumstances that the flooding of the market by the second defendant's pictures must have prevented the plaintiff from printing further copies of his picture and soiling them. Taking all these facts and circumstances into consideration, we think that a sura of Rs. 5000 would be proper and reasonable damages. We therefore allow the appeal to this extent and modify the decree of the learned trial Judge. The plaintiff will however be entitled to his costs of the suit on the amount claimed by him. He will also be entitled to the costs of this appeal but only calculated on a sum of Rs. 5000/-.