

The Daily Calendar Supplying Bureau, ... vs The United Concern on 16 January, 1964

Equivalent citations: AIR1967MAD381

JUDGMENT

Ramakrishnan, J.

1. This appeal is filed under the Letters Patent against the judgment of Kunhamed Kutti J., in Civil Suit No 84 of 1958, by the first defendant. The suit was filed by the plaintiff seeking certain reliefs consequent upon the alleged infringement of copyright under Section 62 of the Copyright Act (Act XIV of 1957). The plaintiff, a firm called the United Concern represented by its partner, S. Muthuswami, alleged that in the year 1947, it had contacted one T. M. Subramaniam, an artist, P. W 2 in the case, and got him to execute an oil painting of Lord Subramania in the posture of Kumaraguruparan. After getting this picture painted, the plaintiff acquired from the artist, all the rights in the picture for valuable consideration. Then in 1948, the plaintiff got the painting printed by the off-set process with the help of the well-known firm Associated Printers in Madras and copies of the picture thus printed were widely sold. There were reprints in 1933 and again in 1956. One of the copies of the print thus made is M. O. 12. According to the plaintiff, in 1958, the first defendant, the Daily Calender Supplying Bureau, Sivakasi, represented by its proprietor K. Karunaiyanantham, copied the plaintiff's picture as per M. O. 2 with slight changes here and there. The picture was printed and also sold with the result that the sale of the plaintiff's picture went down considerably. The plaintiff has registered its picture with the Registrar of Trade Marks, and obtained a copyright certificate from the Delhi Office of the Registrar. On these allegations, the plaintiff sought for the following reliefs, namely, (i) an injunction restraining defendants 1 and 2 or their agents and servants from copying, reproducing and multiplying the plaintiff's picture; (ii) damages in a sum of rupees one thousand; (iii) account; and (iv) cancellation and withdrawal of all the publications and advertisements made by the defendants of the picture.

(2) The first defendant, the main contesting defendant, in its written statement urged that the picture of Lord Subramania in the posture of Kumaraguruparan reproduced only such characteristic as were described in the Agamas, that consequently the plaintiff's picture was not an original artistic work and that the plaintiff could get no protection under the Copyright Act. The first defendant is carrying on the business among others of printing and supplying calendars for over five years. In the course of that business, he engaged an artist Ravi by name and got him to draw the picture of Kumaraguruparan adopting the ideas commonly prevalent among the Hindus and in conformity with the conception well-known to all votaries of Lord Subramania. There are in circulation several other pictures of the deity in the aforesaid postures, besides that of the defendants. It was not true that the defendants copied from the plaintiff's picture. In fact, the differences between the plaintiff's picture and the defendant's picture were so material in nature, that no one was likely to be deceived

into buying the defendant's picture as if it was the plaintiff's. There was a further plea that the High Court of Madras had not jurisdiction to try the suit, because the defendants resided outside the territorial jurisdiction of the High Court, and also because no part of the cause of action had arisen within the limits of the jurisdiction of this court.

(3) The learned Judge held on the last mentioned point that the High Court has jurisdiction, because the plaintiff, who had complained of the infringement, resided and carried on his business within the local limits of the original jurisdiction of the High Court. The learned Judge found that the plaintiff was the owner of the picture M. O. 1, that he had copyright in that picture, that the defendant's picture M. O. 2 was a substantial reproduction of the plaintiff's picture and that, therefore, there was an infringement of the plaintiff's copyright. The learned Judge gave to the plaintiff reliefs of injunction, and damage in a sum of rupees one thousand but did not grant the other reliefs, holding them to be unnecessary.

(4) The first defendant has filed the present appeal, but there has been no cross-appeal by the plaintiff in regard to the reliefs disallowed.

(5) Sri. S. K. Sankara Iyer, learned Counsel appearing for the appellant before us urged in the first place that the High Court of Madras had no jurisdiction to try the suit. It is necessary to observe at the outset that the plea in the written statement regarding want of jurisdiction, was based only on the allegation that the defendants were residents of Sivakasi, outside the Madras City But both in the trial Court, and before us in the appeal that was not the ground on which the plea was, based, we will presently refer to the argument urged before us. Section 62 of the Copyright Act. 1957 under which the present suit was filed runs this.

"Jurisdiction of Court over matters arising under this Chapter--(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the District Court having jurisdiction.

(2) For the purpose of sub-section (1), A 'District Court' having jurisdiction shall notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or where there are more than one such persons, any of the actually and voluntarily resides or carries on business or personally works for gain". The prior Act, which ACT XIV of 1957 superseded, was the Indian Copyright Act, 1914. Section 13 of which provided that the Court where a suit or other civil proceeding regarding infringement of copyright shall be instituted would be the High Court or the Court of the District Judge. The learned Counsel appearing for the appellant, urged that there was significance in the deletion of the words High Court in ACT XIV of 1957. He also referred to certain other enactments like the Indian Patents and Designs Act (Act 11 of 1911) and Guardian and Wards Act (Act VIII of 1890). In Section 2(6) of the Indian patents and Designs Act, District

Court has been defined as having the meaning assigned to that expression by the Code of Civil procedure, 1908 Section 4(4) of the Guardian and Wards Act defines District Court as having the meaning assigned to that expression in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. The learned Counsel also referred to the Indian Succession Act, which before its amendment in 1929, did not contain any definition of the term District Judge, and, therefore, urged that at that time one had to rely upon the definition of that form, given in the General Clauses Act. He quoted the judgment of a Bench of this Court in *In re Kuppaswami Nayagar*, ILR 53 Mad 237= (AIR 1930 Mad 779), in this connection. But in that case, before any decision could be given, the Indian Succession Act had been amended by ACT XVIII of 1929, by defining District Judge as the Judge of the principal Civil Court of original jurisdiction. The learned Counsel argued that in the absence of any reference in the definition in Act had been amended by ACT XVIII of 1957 to the Code of Civil Court Procedure, one has necessarily to fall back upon the definition of District Judge found in the General Clauses Act (Act X of 1987), wherein section 3(17) defined a District Judge as "the judge of a principal civil Court of original jurisdiction but did not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.: and consequently the jurisdiction of the High Court would be excluded for the trial of the present suit. So far as Madras City is concerned. the city civil jurisdiction of the High Court would be excluded for the trial of the present suit. So far as Madras City is concerned, the city Civil Court is not the principal Court of original jurisdiction. Its powers are limited to what have been conferred on it by Act VII of 1892, within the upper limits of valuation of suits specified by notifications issued thereunder. If the interpretation given by learned Counsel is accepted, the anomalous result would follow that when a case of infringement of copyright arises within the area of the original jurisdiction of the High Court, there will be no Tribunal competent to try the suit. No doubt it such an anomalous result ensues because of a real lacuna in the legislative provisions, the Court cannot step into fill up that lacuna. Therefore, it is necessary to consider whether such a lacuna really exists, or whether the existing provision is not sufficient to give jurisdiction to the High Court.

(6) The first point to be noted is that section 62(1) of the Copyright Act, 1957, extracted above gives jurisdiction to the District Court to deal with infringement of copyright. For finding out the meaning of the term 'District Court', it will not be property resort to the definition in the General Clauses Act of the term 'District Judge' because it may well happen that in certain cases, a District Judge may not be equivalent to the presiding officer of a District Court. The Civil Procedure Code, to which reference is made in the definition Clause in some of the other enactments like the Guardians and Wards Act and the Indian Patents and Designs Act already referred to, in Section 2(4) gives the definition of 'District' as meaning.

"The local limits of the jurisdiction of a principal civil Court of original jurisdiction (hereinafter called a District Court) and include the local limits of the ordinary

original civil jurisdiction of a High Court."

Clauses 11 and 12 of the Letters Patent confers ordinary original civil jurisdiction to the High Court, over the Presidency Town of Madras, Therefore, the area of the Presidency Town will be a District as defined in section 2(4) of the Civil Procedure Code, and when the High Court exercise its original civil jurisdiction over the city limits, it can be deemed to be a District Court, in those cases where resort to the definition in section 2(4) of the Civil Procedure Code, is permissible for the purpose of fixing jurisdiction Section 9 of the Civil Producer Code gives power to every civil Court to try all suits of a civil nature excepting suit of which their cognisance is either expressly or impliedly barred, and the explanation to that section, says that a suit in which the right to property, and therefore, a suit seeking reliefs for infringement arises within the area of the ordinary original civil jurisdiction of the High Court, that Court can be deemed to be a District Court as per definition in section 2(4) of the Civil Procedure Code and will have power to try the suit. Our attention was drawn to a case of the Calcutta High Court *Kedarnath Mondal v. Ganesh Chandra Adak*, (1908) 12 Cal W. N. 446, which arose under the Inventions and Designs Act, 1888. That Act contained a specific clause that a District Court had the meaning assigned to that expression by the Code of Civil Procedure. After construing. Clause 2(4) of the Civil Procedure Code, Fletcher J., came to the conclusion that when a High Court exercises its ordinary original civil jurisdiction it comes within the definition of District Court as contained in the Civil Procedure Code.

(7) No doubt, it would have been more precise if in Act XIV of 1957, for the purpose of defining a District Court, a cross-reference had been made to the Civil Procedure Code in the same manner as is found in the Guardian and Wards Act or in the Indian Patents and Designs Act. However, we find in section 62(2) of the Act, XIV of 1957, a cross-reference to the Code of Civil Procedure, which can very well imply that the term District Court in section 62(1) of the Act, should be given the same meaning as in section 2(4) of the Code of Civil Procedure. In section 62(2) of the Act it is stated that "for the purpose of sub-section (1), District Court having jurisdiction shall notwithstanding anything contained in the Code of Civil Procedure includes a District Court, etc."

This would show that the application of the definition of a District Court in the Code of Civil Procedure, should be excluded only for the limited purposes mentioned in section 62(2) but that definition will apply in all other respects. Under section 20 of the Civil procedure Code it is the place where the defendant resides that gives jurisdiction to the Court. But section 62(2) of the Copyright Act alters this principle, and defines the place where the plaintiff resides or carries on business as the place where the suit has to be filed. It is only for the purpose of making this alternation, that section 62(2) of the Copyright Act uses the non-obstinate clause: but in other respects the Code of Civil Procedure will apply. In view of the foregoing discussion it is not necessary to consider, how far for the purpose of interpretation of the term 'District Court', it will be advisable to adopt the definitions found in enactments in *pari materia*. that is other enactments.

"which relate to the same person or thing or to the same class of persons or things
(Vide Principles of Statute Law by Craies page 126-fifth edition)"

There is also the caution stressed in *L. A. Adamson v. Melbourne Board of Works*, AIR 1929 PC 181 that it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act in the definition clause of another statute dealing with matters more or less cognate. Summing up, it appears to us that in the present case there is no warrant for applying the definition of District Judge in the General Clauses Act, for finding out the jurisdiction of a District Court under section 62 of Act XIV of 1957 especially when it will lead to the anomalous result of a plaintiff aggrieved against the infringement of the copyright arising in the Madras City limits being left without a forum for obtaining his relief. Secondly the terms of section 62 especially sub-section (2) imply that the definitions of District and District Court in the Civil Procedure Code will apply for the purpose of determining the jurisdiction under the copyright Act. We hold that the High Court has jurisdiction to try this suit.

(8) Taking up next the facts of the case, the picture in which the plaintiff claims copyright is M. O. 1, M. O. 2. the reprint made by the first defendant, is alleged to infringe the plaintiff's copyright in M. O. 1. It is not in dispute that the plaintiff had registered his painting with the Registrar of Trade Marks with description, "religious theme, a young face up to waist, hairs flowing with hole behind head, one hand in blessing posture and a spear in the other hand."

This registration was obtained in 1958. P.W. 2, Subramaniam, an artist, stated that in 1947 he executed the picture M. O. 1 in oil colour for one Muthuswami Iyer, partner of the plaintiff's firm, and that he drew the details of the picture including the fact from inspiration. He denied strenuously the suggestion made to him in cross-examination that he drew his inspiration from a stone image in bust form kept in Thirumalai Hill next Courtallam in the Tirunelveli District. According to him the picture represents Lord Subramania the right hand lifted up in an attitude of abhaya or protection, and a velstick kept in the left hand. P.W. 1 partner of the plaintiff's firm, gave evidence that after getting the picture M. O. 1 painted by P.W. 2, he got the Associated Printers, Madras, to make a tricolour block by the off-set process and print a large number of copies. He produced necessary bills dated 30th November 1948, issued by the Associated Printers for printing by off-set process in six colours and supplying. Kumaraguruparan (Subramania) picture. The defendants relied upon an entry in the accounts of the Printers where the work has been referred to as Kumaraguruparan poster supplied, and argued that a poster was different from a picture. P.W. 1 in cross-examination explained that the Associated Printers were doing largely printing of posters and were not handling picture printing. The clerk of the printers hand, therefore inadvertently mentioned in the accounts the word poster. Posters are also pictures. There was no attempt made to challenge this statement of P.W. 1 in cross-examination. During the hearing of the appeal, a petition was filed by the respondent to admit one additional document, the copies of the picture of Kumaraguruparan in photo off-set printed by the Associated Printers in the year 1948, in pursuance of the orders placed by the plaintiff-firm. The respondent (plaintiff) also sought to summon an employee from the office of the Associated Printers to mark this picture as additional evidence and on the date of the hearing of the appeal, a representative of the Associated Printers actually turned up in Court with the necessary picture. The reception of this additional evidence was opposed by the appellant on the ground that it should have been produced at the trial stage, and that the requirements of Order XI. I. rule 27. Civil Procedure Code had not been satisfied, for admitting the additional evidence at the appeal stage. We are inclined to accept this legal objection to the reception of the additional evidence. However the

trial court has held relying on the evidence adduced before it that the plaintiff got the picture M. O. 1 printed by the artist P.W. 2 in 1957, and also got a large number of copies of it printed by off-set process by the Associated Printers, according to their bill, dated 30th November 1948. We have also gone through the evidence carefully and we see no reason to differ from the conclusion of the learned Judge in this respect.

(9) As regards the defendant's picture M. O. 2. the claim of first defendant in the written statement was that M. O. 2 embodied only certain characteristics of the deity Lord Subramania described in the Agamas. But he has not been able to supply us with any quotation from the religious books appertaining to that deity, which gives a description of the posture of the deity in the form found in M. O. 1 or M. O. 2. In the trial Court a reference was made to a Sanskrit verse quoted in Bhavan's Journal, D/- 11th January, 1959, in which on the cover page a picture, which the plaintiff claims to be modelled on his picture was also published. But this Sanskrit verse refers to a deity with four arms, while the deity in the two pictures, we have in this case has only two arms. There are also difference on the details given on the verse and those found in the picture. Some Tamil verses in Thirpugazh were also quoted before us by learned Counsel Sri. K. S. Sankara Ayyar, appearing for the appellant. But again those verses do not give a posture of the deity in the form found in the pictures in dispute. Next, the first defendant contended that he engaged the services of the artist known as Ravi and got him to draw up the picture of Kumaraguruparan, as avathara of Lord Subramania. the deity commonly worshipped in Tirunelveli and Ramanathapuram Districts and that the artist drew the picture according to the idea commonly prevalent amount the Hindus and in conformity with the conception well known to all votaries of Lord Subramania, but he has not produced the original painting by Ravi and he has also not examined the painter Ravi. Since he attributes the ideas for his painting to a particular artists mentioned by name, the non-examination of the artist is a serious weakness for the defendant's case. He admitted that this was the first and last picture that he got from Ravi D.W. 1 also admits that he published his picture only from 1958, onwards, and that the first sale of the picture was on 3rd October 1958 D.W. 1 stated that he got an artist of Chitrakala Studio of Madurai by name Ponnuswami, D.W. 2 in the case, to make a drawing, which is filed as M. O. 16 in the case. According to D.W. 1, M. O. 16 was supplied by him to Ravi for drawing the painting. But the evidence of P.W. 2 regarding his drawing of M. O. 16 is quite vague. He states that on a particular day D.W. 1 along with a person from Raja Publicity met him and asked him to give an old drawing and accordingly he supplied them with M. O. 16 which he had drawn in 1947. D.W. 2 was an employee in the Chitrakala Studio in 1947, when that film studio had produced a film known as Kumaraguru. The postures in respect of that film are M. O.s. 19 series. We have examined the painting in those postures. It is a picture of an adult with a crown and elaborate ornaments and cannot, by any stretch of imagination, be construed as supplying the original of the picture now is controversy which is the figure of a boy hardheaded with garlands, of Rudraksha beads and an upper cloth of ochre colour, vel in one hand and the other hand in the abhaya position. D.W. 2 is unable to give the date of the month when he made the sketch M. O. 16. All that he could say was that it was among his old pictures. There is nothing improbable in D.W. 2 drawing a black and white picture like M. O. 16, for the purpose of this suit just to oblige the defendants and we are not, therefore, impressed with the claim put forward that for drawing M. O. 2, M. O. 16 supplied by D.W. 2. was utilised by the artist Ravi. Further, there is no pleading to that effect in the written statement. Again the contention put forward that the stone image in the neighbourhood of

Thirumalai temple near Courtallam could have been the original of the picture in controversy appears to be far-fetched and untenable. The plea was also not specifically raised in the written statement. Photographs of a certain stone image in a human form up to bust level have been marked in evidence as M. Os. 20 and 5 and the photographer one Sanjeevi has also been examined as D.W. 4. It is admitted by the photographer that this stone image is not that of the Lord Subramania kept in the sanctum sanctorium at the top of the hill at Thirumalai. The photographs themselves show that the block of stone, in which this sculpture is chiselled in the bust form, has been moved from place to place. This stone bust no doubt shows a figure with the right hand upraised in the adhaya form and the left hand bearing a vel, with garlands round the neck. But there is no satisfactory evidence to show that it is of the deity Lord Subramania that is worshipped in the Thirumalai temple. The suggestions of the plaintiff in cross-examination is that it is the figure of Idumban, an attendant devata of Lord Subramania. But D.W. 4 could not deny the suggestion. The best evidence to prove the authenticity, the nature and the age of the stone figure this photographed would be that of the authorities of the Thirumalai temple or that to a regular worshipper at the temple or a respectable resident of that place. No such evidence is forthcoming. Here again, there was no pleading that the partner Ravi derived his ideas from this stone idol. The learned Judge has pointed out that an image like this could be placed on the slopes of the Tirumalai Hill at any time and moved from place to place as it undoubtedly had been done. A comparison of the photographs M. Os. 20 and 5 would show that this image has been moved about indiscriminately from place to place, and, therefore, it could not have been a consecrated idol of Lord Subramania. The learned Judge has suggested that there is nothing to exclude the possibility of stone image itself being shaped on the picture of M. O. 1. The way in which this stone image has been moved from place to place would not exclude the possibility of its being chiselled elsewhere and brought to the place where it is found now, by some person or other after the plaintiff's picture M. O. 1 had obtained vogue. P. Ws. 1 and 2 have stoutly denied that they ever went to Thirumalai temple and at any time saw this stone image.

(10) Taking these established facts into consideration, the plaintiff wants the Court to examine the substantial features of M. O. 1 and compare them with similar features found in M. O. 2 for supporting his case of M. O. 2 amounting to an infringement of plaintiff's copyright in M. O. 1, within the meaning of the Indian Copyright Act, 1957. Before doing this, it is necessary to refer briefly to the scope of the Indian Copyright Act of 1957, for finding out the essential elements of copyright in an artistic work, and what constitutes an infringement of it. In that Act, artistic work is defined in section 2(c) thus:

"artistic work" means (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), or engraving or a photograph, whether or not any such work possesses artistic quality; (ii) and architectural work of art; and (iii) any other work of artistic craftsmanship."

In section 14(1)(b) " 'copyright' means the exclusive right, by virtue of, and subject to the provisions of the Act in the case of an artistic work, to do or authorise the doing of any of the following acts, namely:--(i) to reproduce the work in any material form....."

Section 14(2) of the Act states that any reference in sub-section (1) to the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a substantial part thereof. Section 51(A)(i) lays down that copyright in a work shall be deemed to be infringed when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights, does anything, the exclusive right to do which is by the Act conferred upon the owner of the copyright. It is clear that the words material form in section 14(1)(b)(i) are used only to emphasize that reproduction of an artistic work should take a tangible form. Such material forms will be for example, the canvass on which a painting is painted, or marble or bronze or similar substance in three dimensions, when the artistic work is a sculpture. A similar provision is found in the previous Act (Indian Copyright Act) (Act III of 1914,) whose first schedule incorporated the English Copyright Act of 1911 Section 1(2) of that Act defines copyright as the sole right to produce or reproduce the work or any substantial part thereof in any material form. Learned Council Sri Sankara Ayyar, appearing for the appellant, drew our attention to a difference between the earlier Copyright Act and the Act of 1957 In section 35(1)(c) of the former Act infringing when applied to a copy of a work, in which copyright subsists, has been defined as any copy including any colourable imitation, made or imported in contravention of the provisions of this Act. It was urged before us that the new Act did not refer to colourable imitation as constituting an infringement. It was contended that any person could now make a colourable imitation of a painting or other artistic work without being held guilty of infringement of the copyright. The earlier Act had already defined what infringement of a copyright meant in section 2(1), but in another place of the same Act in section 35(1) the meaning of the word infringement was again explained. What Act XIV of 1957, did apparently was to bring together the definition of infringement in one place in section 14(1). The English Act of 1956 appears to have also left out the term colourable imitation of an artistic work as constituting an element of infringement. Adverting to this, Copinger observes in his law of Copyright--ninth edition at page 147:--

"Section 35(1) of the Act of 1911 in defining 'infringing copy' employed the expression 'colourable imitation' but this expression does not appear in the Act of 1956. The question therefore appears to turn solely upon the interpretation of the expression 'reproduction' and the definition of that word in section 48(1) of the Act of 1956 does not assist, as this definition merely includes certain special forms of reproduction. It is apprehended, however, that the word 'reproduction' in the Act of 1956 has the same sense as the word 'copy' has acquired in copyright law."

(11) After the deletion of the words colourable imitation in the Act of 1957, to find out the meaning of infringement one has, therefore, necessarily to interpret the words 'reproduce the work in any material form' Section 14(2) of the Act includes also the reproduction of a substantial part of the work, for the purposes of infringement of copyright. The word 'reproduce' is a word of ordinary popular usage. However, the Shorter Oxford English Dictionary refers to the progressive evolution of its meaning.

'The action or process of building again before the mind in the same form. The action or process of repeating in a copy. A copy to counterpart. A copy of a picture or other work of art by means of engraving or some other process and finally a representation in some form or by some meant of the

essential features of a thing.' It, therefore, appears quite likely that when Act XIV of 1957, repealed the earlier enactments and consolidated the law of copyright in India, it adopted the procedure followed in the English Act, XIX of 1956 of using the word 'reproduction' both of the work itself or a substantial part of it, as a sufficient indication of the scope of infringement, and dropped the term 'colourable imitation', as superfluous or redundant.

(12) The next argument addressed before us by the learned Counsel on the interpretation of the Act is with reference to section 52(t) of the Act XIV of 1957, which states that the making or publishing of a painting, drawing, engraving or photograph or a sculpture, or other artistic work falling under subclause (iii) of Clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access, will not constitute an infringement of copyright. Learned Counsel for the appellant argued that even according to the plaintiff's own case, he had installed copies of his picture in many temples in the south from 1948 onwards. Therefore, even if the defendants reproduced the picture they would be exempt under section 52(t). But this contention proceeds on a misapprehension. We have, for example, statues installed permanently in public squares or street. We have in the Marina at Madras the statue known as Triumph of Labour by the sculptor Roy Chaudhury. It is an artistic work installed permanently in a place where the public have access. The artist or the person to whom he transferred the sculpture or painting of it will constitute an infringement of his copyright. We have the instance of the original painting of Mona Lisa by Leonardo da Vinci installed in the Louvre Museum at Paris. It is open to any member of the public which the permission of the Museum authorities to make a reproduction of this painting and publish it. It is to exempt such cases from the scope of infringement of copyright that section 52(t) is enacted. But what happened in the case is that the artist or the owner while keeping the original painting in his own custody, has for commercial purposes printed a large number of copies of it and sold them to the public and probably has also given some free copies to temples for installation. That will not tantamount to his installing his original work in a public place on the analogy of a sculpture kept in a public square, or a painting hung up to a portrait gallery. Therefore, this objection appears to us to be groundless.

(13) Now we will take the elements of the plaintiff's picture in which he can be considered as having a copyright within the meaning of section 14(1) of Act XIV of 1957. It purports to be a representation of the deity Lord Subramania in human form Anthropomorphic representation of Hindu deities in two or three dimensional material is a normal feature of Hindu art. It is done not merely for an artistic objective but also for a religious purpose to help the devout in meditating on their favorite God or deity. The three dimensional representations in the form of idols are installed in temples while the two dimensional pictures are kept in houses. The pictures are often used for daily worship. In recent times there has been a vogue to print these pictures on calendars, as a form of advertisement. The characteristic feature of those representations is to impress the well-known attributes of a deity such as conferment of boon (vara) which is shown by one hand with palm down and protection (abhaya) by another hand with the palm and fingers upwards. To show the attributes of great power, additional arms are often provided, equipped with weapons like discus or mace or sword. Additional heads are provided to indicate omniscience. It cannot be considered that there could be copyright for these ideas of the deity which find expression in the agamas, as and the silpa sastras. As observed by Copinger in his law of Copyright (ninth edition) at page 39.

"Copyright protection is given to literary dramatic, musical and artistic works and not to ideas, and therefore it is original skill or labour in execution, and not originality of thought which is required is a low one. But it is difficult to state any principles upon which the standard is based."

When an artist has decided to transfer the ideal conception of a particular God like Lord Subramania to a painting, then commences the occasion for him to bring into operation his originality and skill. Examining the painting in the present case of the plaintiff, we find that it is of a young boy who has passed infancy and probably is in early adolescence, with flowing black hair one curl invading the forehead, the right arm with a conch engraved in the palm which is uplifted in the abhaya pose, while a Vel or spate stick is kept in the left hand at a particular angle to the body. There is a garland of rudraksha beads round the neck and also round arms. There is an ochre coloured upper cloth flung in toga fashion sloping from left top to right bottom. The body is limited to the bust and there are few ornaments. As far as we have been able to gather for the purpose of this form of the deity Lord Subramania, has been shown to exist before the date of the plaintiff's painting in 1948. We have held above that all attempts made by the defendants to derive this form of expression of the conception of Lord Subramania, either from the firm called Kumaraguruparan of the year 1947, or from a stone image on the slopes of Tirumalai Hill have been unsuccessful. The mode of drawing the picture with the substantial details above mentioned, in our opinion, constitutes the essential elements of originality and the application of skill and labour in its execution, and they constitute the elements of copyright, acquired by the plaintiff in this artistic work.

(14) An examination of the defendant's painting M. O. 2 shows that it reproduces these particulars, which constitute a substantial part of the plaintiff's work. The second to be noted in this case is that the reproduction of these substantial parts in the defendant's picture is not by way of approximation but is mathematically exact in regard to certain important measurements which also give a clue as to the mode of reproduction adopted. The plaintiff by a well-known photographic process, reduced, both his painting M. O. 1 and the defendant's painting M. O. 2 to exactly similar dimensions. Thereafter with the application of a pair of dividers, the distances were measured between crucial points in the two pictures and the measurements were found to tally. The plaintiff deposed that the measurements of the mouth, the nose, the ear and the palm are equal in both the figures. The distance between the tip of the forehead to the second mark between the forehead where the hair begins and up to the eve-brow where there is a rectangular mark is the same. From the one ear joint to the other ear joint, the jaw measures exactly the same. There was no cross-examination of the plaintiff on this. The first defendant in his evidence swore that the measurements were different at certain places, for example, from the hair point to the top line of the Vibuthi, from the left and of the left eye to the right end of the right eye, from the starting point of the nostrils up to the end, from the end of the nose to the end of the chin, from the end of the chin to the top of the Rudraksha bead round the neck. Though the first defendant said that the above mentioned distances are not the same, he admitted that he did not actually measure the distance. The actual measurement with a pair of dividers which was made by us at the hearing of the appeal showed that the distance mentioned by the plaintiff are identical in the two pictures after photographic reduction to the same size. The learned Judge observed:

"The plaintiff was able to demonstrate in Court by measuring various parts of the figure in the two pictures, that the figure in both are of equal, if not exact, in size.... The first defendant as D.W. 1 is no doubt prepared to say that the measurements shown by P.W. 1 do not tally. He did not choose to check up these measurements and his denial based on his impression is not entitled in weight"

This aspect of the similarity in the details of the two pictures would show that the defendants must have taken a photograph of the plaintiff's picture and from that photograph fixed the relative position of the various substantial features like the position of the hands, the position of the vel, and the dimension and relative position of various parts of the body and used them thereafter for completing his painting.

(15) It will be necessary at this point to refer to what are apparently difference between the two painting and on which the learned Counsel for the appellant laid stress before us. They are according to the learned Counsel :---(i) colour scheme in the two pictures is different; the size of the two pictures is different; the shape of the fact is not a copy; the hair in the defendant's painting is more curly; the nose in the plaintiff's picture is more snubby; the lips in the defendant's pictures are better proportioned: the ornaments in the ears are different; in the defendants' picture the eyes have a dreamer expression than in the plaintiff's picture; the ornaments in the defendant's picture are brighter; the fingers in the defendant's picture are better proportioned and are closer; the vel in the defendant's picture is ornamented. The learned Judge has also observed that the figure in the defendant's picture is smaller, looks brighter, is younger and more beautiful (due perhaps to colour effect) and is set against a colourful ornate and ample background. It appears to us that these variations should have been made by the defendants only after they had incorporated in their picture the substantial features of the plaintiff's painting, already referred to, most probably by using a photographic process. For the purpose of infringement of copyright, an exact reproduction or copy is not necessary. What is essential is to see whether there is reproduction of substantial part of the picture. There can be no test to decide what a substantial part of a picture. One useful test, which has been followed in several decisions of Courts, is the one laid down by Lord Herschel L. C. in *Hanfstaengl v. Baines & Co.* 1895 AC 20(25):

".... it depends 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."

Though this decision was given at a time when the earlier Copyright Act was in force, the test is valid even after the new Act. In *Cunniah & Co. v. Balraj and Co.*, Bench of this Court observed:

"One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction."

In that case the Court had to consider two representations of the deity Lord Subramania in one picture described as Bala Murugan and in another picture described as Mayura Priya, and this Court found that Bala Murgan Picture reproduced in substantial parts of the special features in Mayura Priya, including his vaganam the background, and the jewels he wore and the features of the face of

the figure. In *Associated Publishers v. Bashyam*, again a case which arose under Copyright Act of 1911, it was observed quoting Lord Herschel.

"(The real test is to find out) really 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."

There might be and there will be obvious differences deliberately introduced to avoid a possible change of infringement. A bad copy does not cease to be a copy. If the court, on a consideration of all the relevant circumstances and a comparison of the plaintiff's picture and the infringing picture comes to the conclusion that the defendant's picture was consciously copied from the work of the plaintiff, that would be sufficient to hold that copyright is infringed.

In the last mentioned decision, this court quoted Lord Atkinson's judgment in *Emerson v. Davies*, 1848-3 Story U. S. Rep. 768.

"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."

The matter is put effectively by Copinger in his *Law of Copyright* at page 148 thus:

"For example, assume two cases in which advertising posts resemble the plaintiff's original and that, in the one case in which the resemblance is less, close, it is provided aligned that the defendant's artist had the plaintiff's work in front of him and slavishly imitated certain specific features of the design, but in the other, though the general appearance is closer, the artist is able to establish that, though he made use of the plaintiff's basic idea, his execution was quite independent; it is submitted that the former and not the latter would be an infringement"

(16) We are satisfied, upon a careful perusal of the two pictures and the surrounding circumstances, that the defendant's picture reproduces substantial parts of the plaintiff's picture, its plan, its design, its arrangement of all the important component parts, which help an artist to obtain a representation of the idea of a deity on plastic material. It is in these substantial elements in the representation in pictorial form of the conception of Lord Subramania, that the plaintiff's copyright essentially consisted. The reproducer after incorporating these elements in his painting could add a deeper colour to the lips. He could give a darker shade to the hair or make it more curly. He could add to the vel a few ornaments or even lengthen the Vel by a few inches. But the essential reproduction of the substantial features of the plaintiff's picture has already been effected and that constitutes the infringement of the copyright. The further modifications or variations will not alter the effect of such infringement, as long as the mind is able to form on an examination of the two pictures that basically and in substance one is a reproduction of the other.

(17) It may be possible that two different artists might have independently of each other, got similar ideas which they may transfer to their artistic work without one being held to be a copy or reproduction of the other. But that would be an extremely rare case of coincidence. It can be

repelled by the probabilities and surrounding circumstances. The facts of this case, especially the measurements effected after the photographic reduction of the two pictures to the same size, show that the defendant, who brought out his picture for the first time in 1958. should have utilised one of the several copies of the plaintiff's original from which he made a reproduction. We are, therefore, satisfied that the defendants have been guilty of infringement of the plaintiff's copyright.

(18) There was no attack on the quantum of damages awarded by the trial court. The appeal is, therefore, dismissed with costs.

(19) Appeal dismissed.