

## **Associated Electronic & Electrical ... vs M/S. Sharp Tools, Kalapatti on 31 January, 1991**

**Equivalent citations: AIR1991KANT406, ILR1991KAR1916, 1991(1)KARLJ482, AIR 1991 KARNATAKA 406, (1991) 1 KANT LJ 482 ILR (1991) KAR 1916, ILR (1991) KAR 1916**

ORDER

Kedambady Jagannatha Shetty, J.

1. This miscellaneous appeal is filed under S. 72(2) of the Copyright Act, 1957 ('Act' for short) against the order dt. 6-8-1981 made by the Copy Right Board, Bangalore, (to be hereinafter called the 'Board') in case No. 17 of 1980.

2. Briefly stated facts are: That the appellant viz., the Associated Electronic and Electrical Industries Pvt. Ltd., is a company registered under the Companies Act. It manufactures electrical goods. The respondent is a partnership firm by name Sharp Tools, carrying on its business of manufacture in engineering goods.

3. The appellant filed an application on May 28, 1980 before the Board under S. 50 of the Act, for cancellation of the copy right registration No. A-25165/79 of the respondent stating that it has been wrongly obtained or wrongly remained in the register of copy right. The case of the appellant is that they are manufacturers of electrical goods over long period. They have the trade mark of 'Sharp' with the formidable sale publicity all over India since 1959. The said trade mark was registered under the Trade and Merchandise Marks Act, 1958, with effect from 7-12-1961. It is currently valid against anybody according to the provisions of the Trade and Merchandise Marks Law. The said registered trade mark is numbered as No. 206181, which is annexed as 'B' & 'B-1'. In view of the vast reputation and extensive good-will built up in the 'Sharp' mark they claim a copy right interest in all their advertisement with the artist work of 'Sharp' registered as Trade Mark No. 206181, under the said Act.

4. It is averred that the appellant came across a copy right caution notice published in 'Indian Express' news paper on 15-10-1979 issued by the respondent, as to the copy right of 'Sharp Tool' registered as No. 251165/79 dt. 29-8-1979 annexed as 'C', under the Copyright Act, 1957. It is stated that the subject matter of registration of copyright under the Act by the respondent is colourable imitation of the appellant's work 'Sharp' which they had brought into existence since 1959, and amounts to infringement of their copy right.

5. The respondent filed his objection and resisted the claim of the appellant. The respondent has stated that it is carrying on the business from the year 1969 under the name and style of Messrs.

Sharp Tools at Coimbatore. They are manufacturing engineering goods such as Motors, Pump-sets, Jigs, Fixtures and other engineering items. The trade name 'Sharp Tools' used by the respondent is the firm name dealing with engineering goods and it in no way infringes or passes off as any electrical goods manufactured by the appellant. The respondent has further averred that the design namely 'Sharp Tools' is a special and distinct design which is registered under the Copyright Act, on 29-8-1979. There is no infringement or pass off action by using the firm name 'Sharp Tools'. It is a dictionary word. As such the question of rectification of the registration of the copy right 'Sharp Tools' does not arise.

6. On consideration of the respective contentions of the parties, the Board has held thus :

"The long and short of the whole controversy in the instant case is that the petitioner has an extensive business as a manufacture and dealer of electrical and electronic goods. It has its trade marks registered under the mark "Sharp". The respondent on the other hand is the manufacturer and dealer in Engineering goods such as motors, pump sets, jigs and fixtures etc. The word 'sharp tools' written in a distinctive manner is the trade name of the respondent firm. There is no doubt that the petitioner has a trade mark in the word 'Sharp'. The word 'Sharp' is in no way concerned with the name 'Sharp Tools' which is the firm name of the respondent. The business of the petitioner relates to electrical goods while the business of the respondent is in respect of engineering goods. The two businesses are entirely separate and distinct the word "Sharp" is a common dictionary word in which no one can claim a copy right. It is the manner in which the said word is written which gives it a distinctive meaning and in which a person may have a copy right. The petitioner secured copy right registrtrtion on 5th July 1980 in respect of the word 'Sharp' in semi-circular form, but the manner in which the respondent obtained registration of the words "Sharp Tools" on 29th Aug. 1979 is entirely different from the petitioner's copy right."

Being aggrieved by the Order of the Board, the appellant has preferred this appeal.

7. Mr. K. G. Raghavan, learned counsel for the appellant has strenuously urged the following points. That the copyright Board on wrong assumption of facts and law erred in holding that the artistic work 'Sharp' of the appellant infringed by the respondent though he has made a colourable imitation and reproduction of the appellant's essential feature 'Sharp'. The Board should have held that the registration (of?) the words 'Sharp Tools' under the Act was erroneous and should have cancelled it as the manner of depiction of 'Sharp Tools' infringes the copy right of the appellant. He further submitted that the Board failed to appreciate that there is substantial identity and similarities in the style and manner of writing the words 'Sharp Tools' by the respondent, with the style and manner in which the appellant has been writing the word 'Sharp'. He further argued that the Board has failed to appreciate that even if the goods are not similar, there would still be an infringement of copy-right, the learned counsel in support of his contention has relied on the decisions of the Supreme Court (R. G. Anand v. Delux Films): (Parle Products Pvt. Ltd. v. J. P. & Co., Mysore); and (K Hoffmann-La Roche & Co., Ltd. v. Ceoffrey Manners & Co. Ltd.,).

8. The learned counsel for the respondent submitted that the dispute in the instant case that there was infringement of copyright of the appellant is unfounded. That the decision of the Copyright Board, that registration of the words 'Sharp Tools' is entirely different from the appellant's copyright for the word 'Sharp' is in no way connected with the name sharp tools, is just and valid. He further argued that if both the works are seen side by side one would get an unmistakable impression that the work 'Sharp Tools' of the respondent is not the copy of the work 'Sharp' of the appellant and as such there is no violation of copyright. The respondent is manufacturing engineering goods under the firm name 'Sharp Tools', Whereas the appellant is manufacturing electrical goods under the trade name 'Sharp', as such under no stretch of imagination it could be construed as an infringement of copy right of the petitioner's work 'Sharp'. The respondent's work (artistic work) word 'Sharp Tools' is neither reproduction or adoption of the appellant's work word 'Sharp' which is within the semi circular form and is distinctive and different from the work of 'Sharp Tools' of the respondent. As such the appellant cannot complain infringement of copy right.

9. The learned counsel for the respondent has relied upon the decisions ; ; and AIR 1978 SC 1624 (Sic).

10. Before we go into the question raised by the rival contentions of the parties as to the existence of the copyright and its infringement it is necessary to state as to what is copy right and the nature of the copy right. According to Sriyuths: Copinger and Skone James on Copy Right, the copy right law is in essence concerned with the negative right of preventing the copying of physical, material, existing in the field of literature and art. Its object is to protect the writer and artist from the unlawful reproduction of his material. It is concerned only with the copying of physical material and not with the reproduction of ideas and it does not give a monopoly to any particular form of words. If it could be shown that two precisely similar works were in fact produced wholly, independently from one another, the author of the work that was published first would have no right to restrain the publication of the other author's independent and original work.

11. For appreciation and determination of the contentions raised before us, it is necessary to notice certain relevant provisions of the Copyright Act, 1957.

Section 2(c) defines artistic works.

It means :

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

Section 2(d) defines "Author". It means :

- (i) in relation to a literary or dramatic work, the author of the work;
- (ii) in relation to a musical work, the composer; and
- (iii) in relation to an artistic work other than a photograph, the artist.

Section 2(m) defines infringing copy. It means :

- (i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of cinematograph film;
- (ii) in relation to a cinematograph film, a copy of the film or a record embodying the recording in any part of the sound track associated with the film;

If such reproduction copy or record is made or imparted in contravention of the provisions of this Act. Section 2(y) defines work, which means: any of the following works, viz.,

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film; and
- (iii) a record;

Section 13(1) states that copyright shall subsist throughout India in the classes of--

- (a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films, and
- (c) records.

Section 14, explains the meaning of 'Copyright' in relation to various works.

Sections 17 to 21, deal with the ownership of copyright and the rights of the owner. Sections 22 to 29 define terms of copyright.

Sections 30 to 32, with 'Licences' and S. 44 to 50 with 'Registration of Copyright'. Sections 51 to 53 deal with 'Infringement of Copyright.'

12. Section 51, envisages when copyright in work shall be deemed to be infringed. In particular Cl.(b) states that copy right shall be deemed to be infringed when any person.--

- (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work.

13. Section 52, enumerates the act, which shall not constitute an infringement of copyright. It is unnecessary to refer to the various instances enumerated in S. 52 of the Act. Enough, if we refer to S. 52(1)(a), which reads that, the following acts shall not constitute an infringement of copy-right namely a fair dealing with the literary, dramatic, musical or artistic work for the purposes of--

(i) research or private study;

(ii) criticism or review, whether of that work or of any other work.

14. We have given our earnest consideration to the submissions made by the learned counsel for the parties. The appellant did make an application to the Board under Sec. 50 of the Act, for rectification of registration (of?) copy right of respondent 'Sharp Tools' on the ground that the said work infringes his copy right 'Sharp' which was authorised and published by them much earlier to the registration of the copy right of the respondent. The appellant maintains that the copy right 'Sharp Tools' of the respondent registered under the Copy Right Act, is neither -- reproduction nor adaption, and there was no infringement in the copy right of the appellant.

15. Rival contentions of the parties give rise to the point for consideration by this Court is.--

Whether the appellant's copyright of the work (artistic work) 'Sharp' is infringed by the respondent's work 'Sharp Tools' which is registered under the Copyright Act.

Answer to the question depends upon whether the work of 'Sharp Tools' of the respondent is copy or colourable imitation or adoption or reproduction of the work "Sharp" of the appellant.

16. In the case of Mohini Mohan Singh v. Sitanath Basak, AIR 1931 Cal 233 the Division Bench of the Calcutta High Court while laying down the necessary concomitants of a colourable imitation observed as follows (at p. 236) :

"The question there is whether a colourable imitation has been made, whether a colourable imitation of another must necessarily be a question of fact. Similarity is a great point to be considered in this connection, but mere similarity is not enough, as it may be done to any one of four hypotheses as Copinger points out at page 134, Edn. 6 viz., (1) to mere chance; (2) to both work being taken from the common force; (3) to plaintiff's work being taken from the defendants; and (4) defendants work being taken from the plaintiffs and each case must depend upon its own circumstances."

17. The decision cited by the learned counsel for the appellant in *R. G. Anand v. Delux Films*, lays down the following general propositions (at p. 1627).

"1. There can be copyright in an idea, subject matter, themes, plots or historical or legendary facts, and violation of the copy right in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Whether the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where, however, apart from the similarities appearing in the two works there are also material and broad dissimilarities which negate the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above."

18. Similarly in the case of *Kenrick & Co., v. Lawrence and Co.*, (1890) 25 Q.B.D. 99, it was however, held that there was no copyright in ideas, schemes or systems. In that connection it has observed as follows :

"It must always be remembered that, ideas, however original are not protected under the Copyright Act. Consequently where a very simple diagram embodies an original idea, it is the diagram and not the idea which is protected. Thus a plaintiff conceived the idea of printing and publishing cards bearing a representation of a hand holding a pencil in the act of completing a cross within the square. With a view to such cards

being used at election by illiterate voters and procured an artist to make under his direction a drawing of the representation above described. Subsequently the defendant published similar cards with a hand holding pencil, in the act of completing a cross in a particular square, or a voting paper, but the hand in the defendant's card was in a slightly different position. Though the idea was clearly taken from the plaintiff's card, it was held that the defendant's had not infringed the plaintiff's copy right. There was no copyright in the idea. The defendant's work was not an exact reproduction of the plaintiff's and the plaintiff was not entitled to prevent any one from producing such a simple design as a hand in a square in any form. The case could probably have been put on the ground that there was no evidence of copying the actual drawing although the idea of making and using such drawing was no doubt copied."

19. The judicial committee in the case of Macmillan and Company Ltd. v. K and J Cooper, AIR 1924 PC 75 while pointing out the essential ingredients of the infringement of copy right Lord Atkinson, observed as follows :--

"Third, that to constitute piracy of a copy right, it must be shown that the original has been either substantially copied or to be so imitated, as to be a mere evasion of the copy right."

20. The Division Bench of the Madras High Court in the case of the Daily Calendar Supplying Bureau, Sivakasi v. The United Concern, the Court has held that "What is essential is to see whether there is reproduction of substantial part of picture. There can be no test to decide what a substantial part of picture is. One useful test which has been followed in several decisions of Courts, is the one laid down by Lord Harsetal L.C. in Hanfstaeng v. Baines & Co. 1895 AC 20, 25 thus :

"....It all depends really on the effect produced upon the mind by a study of a picture and of that which is alleged to be a copy, or at least of its design."

21. In the decision relied upon by the respondent (C. Cunniah & Co. v. Balraj) the Madras High Court applying the test of resemblances, Ganapati Pillai, J, observed :

"A copy is that which comes near to the mind of every person seeing it. Applying this test, where the question is whether the defendant's picture is a copy of colourable imitation of the plaintiff's picture the design of resemblance between the two pictures which is to be judged by the eye, must get the suggestion that it is the plaintiff's picture. One picture said to be a copy of another picture finds a place in the reproduction."

22. On a conspectus of the scheme of the Act, as disclosed in the provisions reproduced above and the conspectus of facts given by the parties and the various decisions quoted and referred to in support of the rival contentions of the parties as to the infringement of the copy right, it takes us to the core of question whether there was infringement of copy right of the appellant's work (artistic

work) 'Sharp' by the respondent's work 'Sharp Tools'. In otherwords, whether the respondent's registration of 'Sharp Tools' under the Act, really reproduced the work 'Sharp' of the appellant and, therefore, there is infringement of his right.

23. One of the surest test to determine whether or not there has been a violation of copy right is to see if the reader, spectator, or the viewer after having read or seen both the works would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. In otherwords, dealing with the question of infringement of copy right of the applicant's work by the respondent's work, the court is to test on the visual appearance of the object and drawing, design, or artistic work in question and by applying the test viz., 'lay observer test' whether to persons who are not experts in relation to objects of that description, the object appears to be a reproduction. If to the 'lay observer', it would not appear to be reproduction, there is no infringement of the artistic copy right in the work.

24. We have looked at the two works, the appellant's artistic work 'Sharp' and the respondent's work 'Sharp Tools', which have been produced and marked as Annexures 'B' and 'C' respectively by the parties. A bare look at these two artistic works 'Sharp' and 'Sharp Tools' at once shows that there is least resemblance between the two. The work of the appellant reads and looks as 'Sharp', whereas that of the respondent reads and looks as 'sharp tools'. Moreover the word 'sharp' in the work of the appellant is embedded in a semi-circle design with rays emitting from it as if it were a rising Sun; whereas in the respondent's work it is plainly 'Sharp Tools' with no design super imposing it.

25. Judging by the eye alone, they appear to us to be totally different. We do not think that any one looking at these two works would say that they are similar in any manner nor do we think that any one would say the design, the lay-out and the manner in which the words written in the works of the respondent was an obvious imitation, much less an imitation of the appellant's work.

26. Applying the various tests set out above, we are unable to agree that the respondent had committed an act of piracy by way of copying the copyright of the appellant. As rightly pointed out by the Copyright Board that there can be no copyright in the word or words, but the right can only be in the artistic manner in which the same is written, and in this case the works were totally dissimilar. Having considered the circumstances and materials before it the Board has recorded a finding of fact that the work of the respondent was not in any way a copy of the work of the appellant. We are of the view that the judgment of the Copyright Board, is absolutely correct and unassailable.

27. In the result, the appeal fails and is accordingly dismissed. There will be no order as to costs.

28. Appeal dismissed.