

## **V.T. Thomas Alias Toms And Ors. vs Malayala Manorama Company Limited, ... on 4 January, 1988**

**Equivalent citations: AIR1988KER291, AIR 1988 KERALA 291, ILR (1988) 2 KER 205 (1988) ILR(KER) 2 KER 205, (1988) ILR(KER) 2 KER 205**

### **JUDGMENT**

K. Sukumaran, J.

1. The appeal is directed against an order, an ad interim ex parte order, granting an injunction against the defendants, in relation to the publication of cartoons entitled "Boban and Molly". 1st defendant is the cartoonist, and defendants 2 to 4 are Printer and Publisher, Editor, and the Publication Company -- Kalakaumudi Publications Private Limited.

2. The appeal was filed on 2-12-1987. A caveat had been filed by the plaintiff-respondent. The petition for interim stay of the order of the court below, C.M.P. No. 31410 of 1987 came up for hearing on 3-12-1987. Both sides were heard and elaborately too. Orders in that C.M.P. were pronounced on 7-12-1987. An elaborate order was felt necessary. An interim stay was granted by this Court. The appeal itself was posted for final hearing on 14-12-1987.

3. There was no appearance on behalf of the respondent on that day. The appeal was partly heard on 15-12-1987. The hearing of the appeal was continued on 16-12-1987. It was represented by counsel appearing on behalf of the respondent that a Special Leave Petition had been filed before the Hon'ble Supreme Court against the interim order, and that it was being heard on 16-12-1987. The hearing of the appeal was, therefore, adjourned. On 18-12-1987, a petition C.M.P. No. 33052/1987 was filed by the respondent seeking an early posting of the appeal. The affidavit in support of the petition C.M.P. 33052/1987, mentioned about SLP(Civil) No. (S) 15366/1987 filed before the Hon'ble Supreme Court, about the notice having been taken on behalf of respondents 2, 3 and 4 herein and reproduced the order passed by the Hon'ble Supreme Court. The extract of the order as given therein reads :

"Issue notice to respondent No. 1, Mr. V.T. Thomas returnable on 5-1-1988. The petitioner shall deposit Rs. 2500/- towards the costs of respondent 1 in this Court within two weeks from today. In the meanwhile, we would like to have the views of the High Court on the appeal which is being heard. No orders on the application for stay. The matter will be listed on Jan., 5, 1988."

The Hon'ble Chief Justice directed the hearing of the appeal on 1-1-1988. Arguments were heard on the 1st and 2nd of January, 1988. The case was posted for pronouncing orders on 4-1-1988, the next working day.

4. The responsibility in relation to interlocutory orders is always there. Courts have experienced difficulty even in relation to the mode of interim relief sought for and even in cases where an infringement of copy right had been found. (See O'Sullivan v. Management Agency, (1985) 3 All ER 351.) The cardinal and crucial contentions have necessarily to be adverted to keeping in mind, and making it abundantly clear, that they are views expressed prima facie and at the interlocutory stage, and that the disposal of the suit is necessarily uninhibited by the observations or views indicated or expressed in those interlocutory matters.

5. The publication of the cartoons has appeared in the 4th defendant-publication from Nos. 636 onwards. The Hon'ble Supreme Court did not interfere with the interim order passed by this Court on 7-12-1987. That has, therefore, been in force thereafter. That means the cartoons of the 1st defendant entitled "Boban and Molly" have appeared in the publication of the 4th defendant from the issues dt. 22-11-1987 onwards without interruption.

6. Having heard all the arguments urged on either side very exhaustively, and even repetitively, I feel that interests of justice will be served by giving appropriate directions for an expeditious disposal of the suit itself continuing in the meanwhile the position as it obtains today. Taking into consideration the necessity to terminate the suspense of interlocutory exercises, the time for disposal of the suit will be reduced to the minimum consistent with practicalities.

7. The disposal of the appeal should indicate, even if briefly, the reasons for the above conclusion. The most crucial question to be adverted to would be existence of an arguable case for the plaintiff. That is founded on Section 17(a) and (c) of the Copyright Act. An additional contention in relation to Section 17(c) was urged. The earlier contention of the plaintiff-Company about it being simultaneously the author and employer, was found to be unsustainable in the para 17 of the order dated 7-12-1987. There was no attempt to establish any infirmity in the discussion of the matter on that aspect in the earlier order.

8. A reading of the provisos to Section 17(a) and (c) would clearly bring out that proviso to Section 17(c) is applicable only where proviso to Section 17(a) and (b) are not attracted. It is expressly suited so. If, therefore, proviso (a) is applicable, proviso (c) is automatically excluded. Shorn of inapplicable words, the proviso (a) will read, as regards the parties in the present case as follows :

".....artistic work.....the author in the course of his employment by the proprietor.....periodical under a contract of service....for the purpose of publication..... newspaper.....periodical, the said proprietor shall.....the first owner of the copyright in the work.....so far as the copyright relates to the publication of the work in ...periodical, or to the reproduction of the work for the purpose of its being so published....."

Proviso (a) visualises (i) an author (ii) the employment of him (iii) by the proprietor of a periodical and (iv) the resultant position in relation to the proprietor being the first owner of the copyright for publication in the periodical or to the reproduction of the work for its being published in the newspaper. Proviso (a) to Section 17 is, therefore, the relevant proviso. Toms (the 1st defendant) is

the author; the Manorama Weekly is the periodical, and the plaintiff is the proprietor of the periodical Proviso(c) deals with other employers. It is not applicable, as proviso (a) is fully attracted.

9. The determination about the applicability of the proviso (a) obligates determination of the terminus a quo of the employment. The materials prima facie indicate that the employment started with an appointment in 1961 and ended in June, 1987. Works of the author during that period thus stand apart. I have declined to disturb that part of the order of injunction in relation to the cartoons drawn by the 1st defendant during the period of employment of the 1st defendant under the plaintiff-Company. I would confirm that part of the order.

10. In relation to cartoons created after the admitted termination of his employment, different considerations should apply. Plaintiff cannot claim any copyright in relation to those works. The provisions of Section 14 which give the meaning of copyright is very relevant. The cartoon would come within Clause (b) of that Section namely, an artistic work. Copyright consists in such a case :

(i) to reproduce the work in any material form:

(ii) to publish the work;

(iii) to include the work in any cinematograph film:

(iv) to make any adaptation of the work;

(v) to do in relation to an adaptation of the work any of the acts specified in relation to the work in Clauses (i) to (iii).

Work is defined in Section 2(y). It reads :

(y) "work" means any of the following works, namely --

(i) a literary, dramatic, musical or artistic work;

(ii) a cinematograph film:

(iii) a record:"

A cartoon would come within Clause (i) or even possibly in Clause (iii). An important point to be noted is that a work posits the existence of a tangible form (to borrow the words of Lord Hodson). No tangible form can be posited in relation to ideas, still to be formed in an itching brain of a creative artist. Even when an idea is formed, that does not generate a copyright, for, as is well established there is no copyright in ideas. The Privy Council speaking through Lord Wright stated"....the broad principle that in general a title is not by itself a proper subject matter of copyright. As a rule, a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection" (See Francis Davy and Hunter v. 20th Century Fox Corporation

(1939) 4 All ER 192 at 198.)

11. Counsel for the plaintiff submitted that the copyright was in relation to a title. About the existence of a copyright in a mere title, helpful judicial thought is available, as noted above. A mere title would not prima facie qualify itself for the prescription of a copyright. Moreover, the title itself is the creation of the 1st defendant, as it prima facie appears from the materials now available. (See para 5 of the plaint and para 2 of the Doc. No. 10).

12. There are other well-known propositions concerning copyright. Copyright is not concerned with the originality of the ideas but with the expression of thought. Even when the result of one's labour cannot be pirated, what is relevant is a substantial appropriation of such labour. Such appropriation depends on the quality, and not the quantity. There is a case closely parallel to the present one. *Fisher v. Star & Co.* 231 N.Y. 414 (in respect of which certiorari was denied by the American Supreme Court, vide (1921) 257 U S 654 = 66 Law Ed419) the principle of which is summarised at page 390 of *American Jurisprudence*, 2nd Ed. Vol, 18 :

"A newspaper publisher who employs a cartoonist to produce cartoons for him of characters created by the cartoonist does not acquire a property right in such characters even though he copyrights the cartoons published during the term of employment, and the publisher has no right to continue to use such characters after termination of the employment."

These and other principles available from the distilled dicta of the decisions presented in the context of the case, and available even otherwise, induce me to take the view that the existing situation needs no disturbance. Closer reasoning, or a prolix order may not be desirable in the present context and in the light of what is proposed to be done by this order. The position is indicated prima facie. noting the fact that no written statement or counter-affidavit had been filed and after adverting to documents already produced by the plaintiff.

13. Arguments on the injury to the plaintiff, balance of convenience, and modalities of securing the rights of respective parties, are necessarily subordinated to the prima facie finding indicated above.

14. The decision of the Calcutta High Court in *Eastern India Motion Pictures Association v. Indian Performing Right Society Ltd.* AIR 1974 Cal 257 and of the Supreme Court in *Indian Performing Right Society Ltd. v. Eastern India Motion Picture Association*. AIR 1977 SC 1443 referred to by counsel for the plaintiff, it may be noted, relate to an accomplished tangible project a cinema production, complete in all respects. That situation is entirely different from the cartoons and caricatures, which are yet to assume embryonic form in the intellectual recesses of the artist -- cartoonist.

15. There was a contention that the copyright was claimed in relation to a title 'Boban and Molly'. The observation of Lord Hodson in *Ladbroke Ltd. v. William Hill Ltd.*, (1964) 1 All ER 465 on the substance of copyright in titles would give a helpful clue in that connection :

"No doubt they (titles) will not as a rule be protected, since alone they would not be regarded as a sufficiently substantial part of the book or other copyright document to justify the preventing of copying by others." In the present case, it is also to be *prima facie* noted that the title was the result of the artistic creativity of the cartoonist and that too at a time long prior to his employment under the plaintiff.

16. Arguments were advanced about the intention of the plaintiff to have a book containing compilation of cartoons, and about the copyright in such a compilation. Such a compilation cannot extend beyond the cartoons drawn during the period of employment. Collocation and concatenation in a book of the cartoons drawn during the period of employment have, as noted earlier, not been disturbed by the interim injunction.

17. On the question of injury to the plaintiff by allowing the present situation to continue, the nature or the extent of such injury had not been indicated. The plaintiff is essentially engaged in a business publication. An injury arising out of a violation of the assumed rights of the plaintiff, could be ordinarily, only in the region of damages. There is a reference to the possible "crippling damage" that would be suffered by the plaintiff in the event of injunction being declined. To a query by the Court about the impact, if any, of the publication of the 1st defendant's cartoons the plaintiff's counsel preferred to offer an evasive reply. It is difficult to postulate an injury to the reputation of the plaintiff arising out of the publication of the cartoons drawn by the 1st defendant after the cessation of his employment with the plaintiff. The cartoons published by defendants 2 to 4 bear the distinct indication of the authorship of such cartoons, as is transparent from the inscription "Tom's Boban and Molly". It may be noted that the plaintiff cannot compel the 1st defendant to draw the cartoons for its publication. Literary or artistic productions do not yield to compulsive processes of specific performance. (See Section 14(b) of the Specific Relief Act and the illustrative cases).

18. There is yet another matter relevant on this aspect. The plaintiff and the defendants 2 to 4 have been continuing the cartoon serial in their respective periodicals. Subject to the result of the suit, that healthy competition can continue. That is not out of tune with the ethos of a Nation where many thousand flowers bloom and many thousand thoughts contend. Such temporary continuation of the present situation till the disposal of the suit would, I feel, be in consonance with legal principles, in the circumstances.

19. The plaintiff is a financially mighty, and organisationally well-established, institution. There is, as yet, no indication of a demonstrable injury either to the publication or to its circulation. There is no indication of any drop in the circulation and the damages arising therefrom, which is computable in terms of money. There is a rough assessment of such damages as Rs. 5,001/- in the plaint. It is not difficult to secure recovery of possible damages by appropriate directions. It will be open to the plaintiff to seek such orders, if it feels necessary to do so. Provisions enabling such variations of interlocutory orders depending upon the development of distinct contingencies are not unknown in copyright actions. One such was indicated by Lord Evershed in *Ladbroke Ltd. v. William Hill* (1964-1 All ER 465) *supra*.

20. Plaintiffs counsel submitted that if it were only a question of livelihood of the cartoonist -- the 1st defendant, it could deposit amounts or furnish security, reckoned for a reasonable period on the basis of his last drawn salary. Having regard to the circumstances, I am not satisfied that there should be a prohibition of artistic creation. It is better not to place such a premium on the intellectual activity of an artist. The creative faculties of an artist cannot be equated with vendible chattels reckonable only in terms of money. A situation where a noted Indian literary figure spurned money and sought to fight for his literary reputation is revealed in the decision in Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd., AIR 1987 Delhi 13. The court noted the approach of the author in not allowing anyone to play with his reputation as an author and observed :

"that no money compensation should restore the reputation."

I am unable to reckon a mere monetary repercussion where an artist is interdicted in the exercise of his imaginative and intellectual creations. A great literary genius -- Charles Dickens -- expressed his anguish, "from the small glimpse which he had of the working of the court." ("similar to the effect it has on the mind of Bentham") in strong words, after his legal fights in copyright matters :

"My feeling is the feeling common, I suppose, to three-fourths of the reflecting part of the community in our happiest of all possible countries, and that is, that it is better to suffer a great wrong than to have recourse to the much greater wrong of the law. I shall not easily forget the expense and anxiety, and horrible injustice of the Carol case, wherein, in asserting the plainest right on earth, I was really treated as if I were the robber, instead of the robbed. I know of nothing that could come, even of a successful action, which would be worth the mental trouble and disturbance it would cost." (See Holdsworth : Charles Dickens as a Legal Historian.) Let no author or artist feel the same way about the courts of India functioning a century and half after that painful experience of such a productive mind.

21. Again, at the risk of repetition, it has to be stated that "Boban and Molly" had been conceived by the 1st defendant cartoonist prior to his employment under the plaintiff.

22. It was contended by the plaintiff that the order of ex parte injunction had been violated by the defendants and consequently no interim order should be given in their favour. There are no materials before this Court to assess this contention. The Court below will certainly deal with that matter in the proceedings taken in that behalf before that court.

23. There is one contention about the court below having no jurisdiction at all to try the suit under S. 62 of the Act. The plaintiff is a Company with registered office at Kottayam; it therefore resides at Kottayam. The Manorama Weekly is printed and published exclusively from Kottayam; it therefore carries on business only at Kottayam. The court at Ernakulam has no jurisdiction to try the suit -- is the contentioa A pronouncement on this contention entails examination of evidence. This is not the appropriate stage for that exercise. I do not express any views on that situation. The court below will do it while trying the suit.

24. It only remains now to consider the contention about the maintainability of the appeal itself. I have relegated it to the latter part of the judgment taking into consideration some aspects which appeared to be relevant in that behalf. Unlike an intermediate appellate court, this court has jurisdiction (of course, if conditions in that behalf are satisfied) to examine the validity of the order of the court below, under Section 115, C.P.C., and Article 227 of the Constitution. Assuming that the appeal is not maintainable, it would not debar the court to treat it as a revision under Section 115, C.P.C. The considerations adverted to above, and those that may be indicated hereafter would justify invocation of that jurisdiction, and interference with the order of the court below in the manner proposed herein.

25. On the question whether the appeal is maintainable, I am unable to endorse the view of the Madras and Karnataka High Courts.\* As far as this Court is concerned, for about four decades, it has been an accepted legal position that an appeal would lie in a similar situation. The first of the decisions was in C.R.P. No. 223 of 1125 (1125 ME corresponds to 1949-50). P.K. Subramonia Iyer J. followed that view in C.R.P. No. 974 of 1951. Balagangadhara Menon J. adopted the view of Subramonia Iyer, J. in the reported decision in Anthonimuthu v. Oalayan Nadar, 1953 Ker LT 334 : (AIR 1953 Trav-Co 240). The view taken by Balagangadharan Nair J. Bhaskaran v. Ambika, 1977 Ker LT 476 and Kader J. in Alice v. Thommen, 1983 KLT 97 followed the same strain. The Calcutta High Court has considered the Madras High Court's view, but has chosen to dissent from it (In Re : Sankar Kumar Ghosh, AIR 1983 Cal 250). The views of Allahabad, Assam, Bombay, Hyderabad, and Patna High Courts are that the appeal is maintainable.

26. It is not as though this view was hot unknown to the Parliament from early times. The fact that the Parliament has not chosen to disturb the view for the last four decades and over, is also not without significance.

27. On its literary and plain reading, there could not be any doubt that the appeal is maintainable. No circumstances exist, justifying the court to digress from that plain position to a strained reasoning.

28. Under the amended Rule 4 of Order 39, a failure to specify the requirements (such as giving the reasons justifying an order without, service of notice on the defendant) should ordinarily clothe the aggrieved party with a remedy. If the views of the Madras and Karnataka High Courts are taken and no appeal is permissible, it may result in the negation of a remedy even when rights are impaired. (If a scrutiny is permissible only after the pronouncement of the detailed order after the appearance of respondents, the remedy against a violation of the statutory requirements under the proviso would be rendered infructuous by the passage of time and events.) Such Anomalous results have to be avoided. That also is an added ground for affirming the view that appeal in such situations would be maintainable.

29. In the present case, no satisfactory reasons are given for dispensing with the notice. A mere repetition of the phraseology of the proviso will not do duty for sound and valid reasons for a harsh and unusual step like the ex pane order of injunction.

30. It was agreed that the scope of the suit and of the interim petition is substantially the same. And the controversy is in a narrow compass. It is better that the substantial issue is tackled in the suit with exhaustive evidence than a chasing of the shadows as seen in the interlocutory exercises. This consideration too impels me to direct maintenance of the status quo us on today and order an expeditious disposal of the suit.

31. In the light of the above discussion, I would dispose of the above with the following directions :

(1) Defendants should file written statement on or before 11-1-1988 along with the list of documents and witnesses. Documents in their possession should also be filed within that time. Proceedings by way of interrogatories, discovery or inspection and the like should be served and necessary steps should be taken by that day.

(2) Plaintiff should file all documents on which they rely before 19-1-1988. Steps regarding interrogatories, and discovery and inspection and other steps should be taken by or on 19-1-1988.

(3) Oral evidence should commence on 25-1-1988. The trial should be conducted from day to day.

(4) The suit shall be disposed of on or before 1-2-1988.

(5) It will be open to the plaintiff to renew the application for injunction, if the defendants are adopting any obstructionist attitude. If the Court is satisfied about such complaint and about any lack of good faith on the part of the defendants, it will be entitled to consider anew the petition for grant of injunction, and (6) The plaintiff can move for any security from defendants 2 to 4. by giving figures of losses suffered, as indicated in para 19 supra.

The appeal (or the matter) is disposed of as above. There shall not be any order as to costs, though the 1st defendant would have ordinarily deserved it.