

M/S Pearson India Education Service Pvt ... vs M/S New Rubric Solutions Llp on 16 December, 2015

Equivalent citations: AIR 2016 KARNATAKA 25

Author: B.S.Patil

Bench: B.S.Patil

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF DECEMBER, 2015

BEFORE

THE HON'BLE MR.JUSTICE B.S.PATIL

M.F.A. No.6065/2015

C/w

M.F.A.No.6066/2015

®

BETWEEN

M/s PEARSON INDIA EDUCATION SERVICE PVT.LTD.,
A COMPANY INCORPORATED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956, HAVING ITS OFFICE
AT 10, 3RD MAIN, ASHWINI LAYOUT,
INTERMEDIATE RING ROAD, EJIPURA,
KORAMANGALA,
BANGALORE 560047

... APPELLANT
(COMMON)

(By Sri.UDAYA HOLLA, SR.COUNSEL FOR
Sri AMAR KUMAR T.S., ADV. FOR LAWYER INC.)

AND

M/s NEW RUBRIC SOLUTIONS LLP,
HAVING ITS CORPORATE OFFICE
AT NO.401, PLEASANTVILLE,
KARTIK NAGAR, DODDANAKUNDI,
BANGALORE 560037, REP BY ITS
AUTHORIZED SIGNATORY

... RESPONDENT
(COMMON)

(By Sri.PRAMOD NAIR, ADV.)

MFA NO.6065/2015 AND MFA NO.6066/2015 FILED U/O 43
RULE 1(r) OF CPC, AGAINST THE ORDER DATED:29.07.2015
PASSED ON IA NOS.3 & 4 RESPECTIVELY IN O.S NO.4899/2015 ON
THE FILE OF THE XVIII ADDITIONAL CITY CIVIL & SESSIONS

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JUDGE, AT BENGALURU CITY, ALLOWING IA NOS.3 & 4 FILED U/O
39 RULE 1 AND 2 R/W SEC.151 OF CPC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED
FOR JUDGMENT ON 26.11.2015, COMING ON FOR
PRONOUNCEMENT THIS DAY, THE COURT DELIVERED THE
FOLLOWING:

JUDGMENT

1. M.F.A.No.6065/2015 has been filed challenging the order dated 29.7.2015 passed in O.S.4899/2015 allowing I.A.No.3. M.F.A.No.6066/2015 has been filed challenging the order dated 29.7.2015 passed in O.S.4899/2015 allowing I.A.No.4.
2. Since common questions of law and facts are involved, both these appeals are clubbed, heard together and are disposed of by this common judgment.
3. These Appeals are filed by the defendant in O.S.No.4899/2015 challenging the order dated 29.07.2015 granting temporary injunction restraining it from using or referring in any manner, the test results of Kaleido in any press releases, public announcements, promotional or other materials for MyPedia and also restraining it from infringing the plaintiff's copy right in Kaleido and its results, until disposal of the suit.
4. Plaintiff-respondent herein has filed the suit seeking a decree of injunction directing the defendant to remove the test results of Kaleido from the MyPedia presentation and the YouTube Video titled "Pearsons MyPedia Launch" that was uploaded by the defendant on YouTube on 04.03.2015 and from any other marketing material where the results were used; to restrain the defendant from using or referring the test results of Kaleidio for MyPedia; and to restrain them from doing any act that amounts to infringement of the plaintiff's intellectual property rights in Kaleido, including copyright in the product and its results.
5. Plaintiff has expertise in personalizing education and delivering better results to students and learners in schools, colleges, companies and other centres. Plaintiff conducts several activities and assessments to determine learning goals, to analyze the performance of learners and to provide

specific recommendations for improvements.

6. Plaintiff developed a product called "Kaleido" for the aforesaid purpose. Plaintiff claims to have copyright of the test results of "Kaleido" and the defendant made verbatim copy of the slides from the plaintiff's presentation made to the defendant. It was urged that defendant made use of the said slides as their own thereby committing infringement of the copyright regarding plaintiff's literary work under the Copyright Act.

7. Defendant contested the suit. It contended that defendant had been engaged in the business of manufacturing, developing, advising in all or any of the activities of information technology including computer based education, education aids and was the Proprietor of Trade Mark known as "DigitALLY". It has further urged that, the defendant-Company had its own technical and academic research wing, wherein hardware and software solutions were developed for the above mentioned purpose. It is also urged that plaintiff was introduced to the defendant stating that it would help simplify the assessment and reporting process of the skill of the students; for the purpose of providing demo, the defendant allowed the plaintiff to collect the data from Shishya BEML School managed by the defendant; in fact, teachers of the defendant conducted the test and by using the test results, plaintiff generated the requisite data in the format and structure requested by the defendant; the contents of the format was also given by the defendants from its books.

8. The defendant further contended that its digital product "MyPedia" launched in January 2015 was a learning solution developed by the defendant for effective learning of the students which was not at all similar to the plaintiff's product and that defendant had partnered with M/s. Report Bee for analyzing the students' performance in the schools pursuant to an agreement with it. Hence, the defendant sought for rejection of the application.

9. The Trial Court after hearing has allowed I.A.Nos.3 & 4 and granted temporary injunction. Aggrieved by the same, defendant has preferred these appeals.

10. The main contention urged by the learned Senior Counsel Mr. Udaya Holla appearing for the appellant are:

i) looking at the plaint averments, plaintiffs themselves were doubtful about their claim regarding alleged infringement of the copyright. Therefore, as held by this Court in the case of K.L.NARAYAN MURTHY & ANOTHER VS RAJINI & ANOTHER

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2001(3) Kar.L.J. 84, injunction shall not be granted where such doubtful claim has been made.

ii) that the presentation chart produced by the plaintiff contained only the data of the students of the defendant which was prepared with the assistance of the teachers of the defendant with reference to their students and indeed the test results had been given by the teachers of the defendants themselves.

iii) that the contents of the chart in respect whereof copyright has been claimed were taken from the book published by the defendant;

iv) that the test conducted by the plaintiff was with the assistance of the teachers of the defendant and the results of the test are therefore, the result of the exercise undertaken at defendant's school conducted by its teachers on the students of the defendant which clearly established that the outcome of the test did not belong to the plaintiff, but indeed belonged to the defendant;

v) that the Trial Court seriously erred in inferring, on the basis of the presentation made in YouTube and the chart prepared by the plaintiff found at pages 37 & 38 of the plaint that defendant had infringed the copyright of the plaintiff ignoring the fact that the chart found at pages 37 & 38 contained only the data of the defendant-school;

vi) the data presented by the plaintiff was in the form of a marks sheet of a student which cannot be termed as literary creation by the plaintiff to clothe it with the characteristic of a copyright.

vii) in the alternative, it is contended by Mr. Udaya Holla that defendant was indeed a joint owner of the said presentation/chart and as per the judgment in the case of VADIVEL MUDALIAR & ANOTHER VS PACHIANNNA GOUNDER - AIR 1974 MADRAS 87, copyright cannot be claimed by one of the joint owners against others.

11. Reliance is also placed on judgment in the case of VIRUPAXAPPA VS REVANAPPA SIDDAPPA GANIGAR & OTHERS - 1975 (2) Kar.L.J. 96, to support the contention that appellant was indeed a contributor, and therefore, there cannot be allegation of infringement of copyright against them. Reliance is also placed on the judgment in the case of R.G.ANAND VS M/S. DELUX FILMS & OTHERS - AIR 1978 SC 1613 to urge that merely because plaintiff's work was seen or that plaintiff was invited to the college run by the defendant to interact with defendant's teachers and students, the same will not give rise to any copyright.

12. Counsel appearing for the respondent has urged that plaintiff and defendant are business rivals; it is the plaintiff who produced the presentation; the presentation of the plaintiff has created and invested a copyright in them and if the same was copied, it amounted to infringement. He has urged, taking me through the pleadings and the impugned order, that defendant has exactly lifted and used for commercial purposes, the form of chart designed and prepared by the plaintiff claiming that the same was the result of their test.

13. He has taken me through the provisions of the Copyright Act, particularly the definition clauses contained in Sections 2(o), 2(z), 2(m) and Sections 14, 17 & 51 of the Act. He has placed reliance on the following judgments:

(i) BURLINGTON HOME SHOPPING PVT. LTD. VS RAJNISH CHIBBER - 1995
IVAD DELHI 732;

(ii) EASTERN BOOK COMPANY & OTHERS VS D.B.MODAK & ANOTHER - (2008)

1 SCC 1;

(iii) R.G.ANAND VS DELUX FILMS & ORS. - AIR 1978 SC 1613;

(iv) AGARWALA PUBLISHING HOUSE, KHURJA, DISTRICT BULANDSHAHR, THROUGH ITS PROPRIETOR SRI ISHWAR LAL AGARWAL VS BOARD OF HIGH SCHOOL AND INTERMEDIATE EDUCATION U.P. ALLAHABAD, THROUGH ITS SECRETARY & ANOTHER - AIR 1967 ALL 91;

(v) RUPENDRA KASHYAP VS JIWAN PUBLISHING HOUSE -

1996(38) DRJ 81;

(vi) AUTODESK INC & ANR. VS MR. A.V.T.SHANKARDASS & ANR. - AIR 2008 DELHI 167.

14. On consideration of the respective contentions, the only point that arises for consideration is, "whether the Court below has committed any illegality in granting an order of temporary injunction by holding that the presentation designed by the plaintiff was a literary work clothing them with copyright and that plaintiff had prima facie shown that there was infringement of the same by the defendant?"

15. It is the specific case of the plaintiff that it has developed a product called 'Kaleido' for assessing and analyzing performance of learners. The same was launched in 2013. It is not in dispute that plaintiff and defendant had entered into discussions regarding the assessment of the skills of the students in the schools and colleges belonging to the defendant. As per the case of the plaintiff, they have conducted a pilot test of their product Kaleido in the school identified for the said purpose by the defendant during August-September, 2014 and the said exercise was successful resulting in appreciation by the defendant for the results of Kaleido. Thereafter, plaintiff claims to have prepared a presentation outlining the results of the analysis from the pilot test and circulated it to the defendant. This presentation, according to the plaintiff, identified lessons under each subject in which students have shown relative signs of weakness, for which further training could be imparted. The presentation included a comprehensive analysis of the results of the assessments and indicated measures that could be adopted to improve learning. As the plaintiff and defendant were unable to agree on the pricing for Kaleido, defendant is alleged to have opted for license to avail Kaleido from the plaintiff for a period of two years. Here again price offered by the defendant was allegedly significantly below the expectation of the plaintiff. Therefore, the parties continued to negotiate and there was no agreement reached. However, parallel to the discussion regarding introduction of Kaleido in the defendant's school, the school initiated discussions for entering into a larger marketing alliance with the plaintiff, whereby they would license Kaleido initially to include it as a part of new product that they were planning to launch.

16. During the course of negotiation, plaintiff was requested to make presentations to several employees and executives of the defendant. Plaintiff claims to have requested the defendant to sign

a standard form non-disclosure agreement, but the agreement was never signed despite several requests by the plaintiff.

17. On or about 28.05.2015, plaintiff claims to have discovered a video titled "Pearson MyPedia" launched and uploaded by the defendant on YouTube on 04.03.2015. The features offered by MyPedia are allegedly similar to what was offered by Kaleido; verbatim slides depicted from Kaleido pilot test at the defendant school which the plaintiff had shared in its presentation were allegedly copied and verbatim copy of slides from the plaintiff's presentation were resorted to resulting injury to the interest of the plaintiff.

18. A perusal of the pleadings, order under challenge and the documents, particularly, the document allegedly described by the plaintiff titled "Pearsons MyPedia Launch" uploaded by the defendant on YouTube wherein one Mr. Ujjwal Singh is seen making a presentation to potential customers about the different features of the defendant's new product MyPedia (MyPedia Presentation) disclose that it is functionality exactly similar to what was offered by Kaleido (presentation of the plaintiff). It prima facie discloses that in the presentation of the defendant slides depicting analysis from the Kaleido pilot at the defendant's school which the plaintiff had shared with defendant clearly stating that "said information was confidential and not for circulation" had been made use of by adding defendant's logo to the slides.

19. It appears from the two presentations which are placed on record that the analysis being presented by the defendant was same and quite similar to the output of the pilot test of MyPedia. Indeed, the Court below has arrived at such a finding after referring to the e-mails exchanged between the plaintiff and defendant which prima facie probablised that the presentation created by the work of the plaintiff in the defendant's school was meant to be used periodically for testing the skills of students and for improving the same.

20. The contention of the defendant - appellant has been that plaintiff themselves were doubtful about the infringement of the copyright and therefore, in such circumstances, injunction would not be granted. The case of the plaintiff, taken as a whole, particularly, in the contest of the verbatim reproduction of the presentation of the plaintiff by the defendant claiming that it was the defendant's own creation disclosed that there has been no such doubtful claim and indeed the plaintiff has been very specific in making the allegation regarding infringement. Insofar as the other contention urged stating that presentation contained only the data of the students of the defendant and it was prepared with the assistance of teachers of defendant, therefore, no copyright could be claimed in respect of such contents of the chart which were indeed taken from the very book published by the defendant as a result of joint efforts of the teachers and defendant, it has to be stated that the analysis and the test conducted by the plaintiff identified lessons under each subject in which students have showed relative sings of weakness for which further training could be imparted. It prima facie appears that the presentation included a comprehensive analysis of the results of the assessments and indicated measures that could be adopted to improve learning. The question is whether this presentation prepared by the plaintiff and shared by it with the defendant on condition that it shall be strictly confidential and shall not be circulated, prima facie constituted literary work and whether there has been an infringement of the same.

21. Section 2(o) of the Copyright Act defines the term "Literary work" as under:

"literary work" includes computer programmes, tables and compilations including computer databases.

22. It is thus clear that even a computer work or chart or tables and compilations can constitute literary work. In the instant case, the chart prepared and the presentation made as referred to in the body of the order under challenge prima facie shows that it falls within the definition of the term "literary work".

23. The next question is whether the analysis carried out and the chart prepared is a case of joint authorship. The presentation is the creation of the plaintiff. They might have tested it on the students of the defendant and the teachers might have assisted the plaintiff in carrying out the analysis on the students. That does not make the teachers or the students joint authors of the presentation, far from making the defendant a contributor or joint holder.

24. Section 2(m) of the Copyright Act defines the expression "infringing copy" which states as under:

"infringing copy means -

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(ii) in relation to a cinematographic film, a copy of the film made on any medium by any means;

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act.

25. There cannot be any doubt that the comparison of the presentation of the plaintiff and the presentation of the defendant would clearly disclose that plaintiff's presentation has been reproduced by the defendant. The Apex Court in the case of R.G.ANAND VS. DELUXE FILMS AND ORS. - AIR 1978 SC 1613 has held that, one of the surest and the safest test to determine whether or not there has been a 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. In the case of THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA VS. SHAUNAK H. SATYA AND ORS. - AIR 2011 SC 3336

the Apex Court has held in paragraph 10 that question papers, instructions regarding evaluation and solutions to questions (or model answers) which are furnished to examiners and moderators in connection with evaluation of answer scripts, are literary works which are products of human intellect and therefore subject to a copyright.

26. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make profit out of the skill and labour of the original author and it is for this reason, the Copyright Act gives to the authors certain exclusive rights in relation to the literary work. The Apex Court in the case of *EASTERN BOOK COMPANY AND OTHERS VS. D.B. MODAK AND ANOTHER* - (2008) 1 SCC Page 1 has held in paragraph 46 that the work that has been originated from an author and is more than a mere copy of the original work, would be sufficient to generate copyright. The creation of the work which has resulted from little bit of skill, labour and capital are held to be sufficient for a copyright in derivative work of an author. Catena of decisions have propounded a theory that an author deserves to have his or her efforts in producing a work, rewarded. The work of an author need not be in an original form or novel form but it should not be copied from another's work, that is, it should originate from the author.

27. In the instant case, prima facie it is seen that plaintiff has created the chart with his inputs. The chart is the result of his investigation and analysis involving students which is prima facie a literary work. Though it is in the form of a presentation involving the chart and analysis of the skills of students in different steps, merely because the topics are taken out from the books supplied by the defendant and that the test was conducted on the students of defendant involving the teachers, it cannot be said that the work created did not exclusively belong to plaintiff but was jointly authored by the plaintiff, the teachers and the students. Such a contention is prima facie untenable.

28. In the facts and circumstances of the case, for the aforementioned reasons, I answer the point raised for consideration holding that no illegality has been committed by the Court below in granting the order of temporary injunction and that plaintiff had prima facie established that he had designed the literary work in the form of presentation and chart which clothed him with copyright. This right was sought to be infringed by the defendant. Therefore, the judgments on which the counsel for the appellant has placed reliance are inapplicable to the facts of the present case. The order granting temporary injunction passed by the court below is right and justified.

29. Hence, these appeals being devoid of merit are dismissed. It is made clear that the observations made in this order or for that matter, in the order passed by the Court below are confined to the consideration of the interim relief and shall not affect the adjudication of the main dispute on merit.

Sd/-

JUDGE KK/VP