

Sita Nath Basak vs Mohini Mohan Singh And Ors. on 15 August, 1923

Equivalent citations: AIR1924CAL595, AIR 1924 CALCUTTA 595

JUDGMENT

Mookerjee, J.

1. This is an appeal by the plaintiff in a copyright suit.

2. The plaintiff is the author of a book entitled "Adarshalipi-o-Sharal Barna Parichay" which was first published on the 3rd November, 1902, and has since then passed through numerous editions. In 1919, the defendants published two books called respectively "Nutan Pathsala Adarshalipi" and "Nutan Maktab Adarshalipi." The present suit was instituted on the 12th May, 1920, for damages and injunction. The damages, claimed amounted to Rs. 400 and the injunction was valued at Rs. 9. On the 17th August, 1920, the first defendant alone filed a written statement. Thereupon seven issues were raised on the 4th September, 1920, in the following terms : (1) "Has the copyright of the plaintiff been duly registered? If not, is the suit maintainable? (2) Is the suit maintainable in its present form? (3) Is the suit bad for misjoinder of causes of action? (4) Is the suit against public policy? (5) Has the defendant infringed the copyright of the plaintiff? (6) Is the plaintiff entitled to any damages? If so, to what extent? and (7) What relief, if any, is the plaintiff entitled to? The plaintiff was examined in support of his case on the 16th December, 1921. At the conclusion of his examination-in-chief, the District Judge decided to hear the arguments, with the result that the plaintiff was not cross-examined on behalf of the defendants. The District Judge had evidently come to the conclusion that the plaintiff had no case upon the plaint and his oral testimony. The suit was ultimately dismissed with costs on the 23rd December, 1921. It may be noted at this stage that under Section 13 of the Indian Copyright Act, 1914, every suit or other civil proceeding regarding the infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge. This explains why the suit was tried by the District Judge though the claim was valued at Rs. 409. The necessary consequence is that every decision in a suit of this description by the District Judge has to be brought up to this Court on first appeal. We are of opinion that the suit has not been properly tried and that the relative situation of the contesting parties has not been clearly appreciated.

3. The Indian Copyright Act, 1914, shows in Section 3 that in the application to British India of the Copyright Act, 1911 (1 & 2 George V, Chap. 46), specific modifications have been made which, are enumerated in the five clauses of the section. Those clauses do not affect the question now raised before us for consideration. The position thus is that Section 6, Sub-section (3) of the Copyright Act, 1911, is applicable to this case. That sub-section is in the following terms : In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright

exists and the plaintiff shall be presumed to be the owner of the copyright unless the defendant puts in issue the existence of the copyright or, as the case may be, the title of the plaintiff. The sub-section then makes provision for other presumptions when such question is in issue. In this case, as already stated, the defendants did not put in issue the existence of the copyright. Consequently, there was an irrebuttable presumption that the alleged work was a work in which copyright subsisted and the plaintiff was the owner of the copyright. We start then with the statutory presumption, which cannot be rebutted, that the work put forward by the plaintiff is a work in which copyright subsists and he is the owner of the copyright.

4. This position is supported by two documents which were produced in the trial Court, but were not marked as exhibits. Those documents are the order sheet in a previous litigation between the parties and a consent decree made therein on the 12th August, 1916. It appears that the defendants had published a book called "Sachitra Saral Adarshalipi, first part." The plaintiff thereupon instituted a suit for damages and injunction on the ground that his copyright in the work now put forward namely 'Adarshalipi-o-Sharal Burna Parichay' had been infringed. The suit was compromised by a petition, dated the 12th August, 1916, and a decree was made accordingly. The petition of the compromise and the decree stated explicitly that the plaintiff's copyright to "Adarshalipi-o-Sharal Burna Parichay" written and published by him was established. The defendants were restrained from printing, publishing and selling their books, called "Sachitra Saral Adarshalipi Part I", and were also cast in damages. This explains why notwithstanding the assertion made in the fifth paragraph of the written statement of the first defendant, namely, that "there was no originality whatever on the part of the plaintiff relating to the book in suit so far as regards its method and principle, the arrangement of the contents, the selection of subjects and the headings of subjects and the block designs and the engravings," no issue was raised on the subject. The defendant clearly abandoned his allegation that the plaintiff had no copyright in respect of his books. There is consequently no escape from the position that the plaintiff has a copyright in the disputed book. This follows not merely from the statutory presumption, but also from the petition of compromise and the consent decree.

5. The question which thus requires adjudication is, whether that copyright has or has not been infringed by the publication of the books of the defendants. The suit cannot, in these circumstances, be-dismissed, as it has been dismissed by the District Judge, on the ground that there is no reliable evidence that the forms of the letters, which appear in all these books, are not in common use in printed Bengali; and in the absence of such evidence it is impossible to say that any of the forms is so peculiar as to suggest that the books, published by the defendants are copies of the plaintiff's book." The true aspect of the case was not considered by the District Judge, and there is no indication that regard was paid either to the provisions of the statute or to the contents of the consent decree.

6. On these facts, the appellant has pressed? us to institute a minute comparison between his book and the books of the defendants, with a view to convince us that the copyright of the plaintiff has been infringed by the defendants. We have been told that the books contain Bengali alphabets, compound letters formed by the addition, of vowels to consonants and by combination of two or more consonants, short sentences illustrating the use of compound letters beginning with the words

arranged in alphabetical orders, names of persons containing compound letters, example of words formed of simple letters, specimens of handwriting, numerals up to 100, figures representing the fractions of an anna and other lessons fit for beginners. We have been asked to conclude that the contents and arrangement of the book produced by the plaintiff have been copied by the defendant; that the material portion of the title itself has been adopted by the defendant that the external shape and size of the books are similar and that even the size and shape of many of the letters have a close resemblance. We have finally been asked to decree the suit, on the materials on the record, without opportunity afforded to the defendants to meet the allegations of the plaintiff by the production of evidence. In our judgment, it would not be safe to decide the case merely on the materials on the record. It is plain that the nature and scope of the enquiry in suits of this description was not realised in the Court below, and it might lead to failure of justice if a decree were to be made in favour of or against the plaintiff till the facts had been explored.

7. Apart from this, we are of opinion that in this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. This view is supported by a long series of cases : In *Gyles v. Wilcox* (1740) 2 Atk. 144, decided by Lord Hardwick in 1740, he was asked either to form an opinion upon the question himself or to send the case below to be determined by a jury. The question in that case was, whether a book called the "New Common Law" was or was not a piracy of the History of the Pleas of the Crown, by Sir Matthew Hale. The matter obviously could not be decided without a close "examination and comparison of the contents of the two books. Lord Hardwick thought that it would be absurd to send the case to law to be examined by a jury, as the Chief Justice would be compelled to sit and hear both books read over, which was absolutely necessary to judge between them whether the one was only a copy of the other. The Lord Chancellor added that the Court is not under an indispensable obligation to send all facts to the jury, but may refer them to a Master to report, where it is a question of nicety and difficulty and more fit for men of learning to enquire into than a common jury. This, he remarked, is one of those cases where it would be much better for the parties to fix upon two persons of learning and abilities in the profession of law, who would, accurately and carefully, compare them and report their opinion to the Court; the House of Lords very often in matters of account, which are extremely perplexing and intricate, refer it to two merchants named by the parties to consider the case and report their opinion upon it rather than leave it to a jury; and a reference of the same kind, in some measure, would be the proper method. The opinion thus indicated as to the propriety of reference to experts, has been adopted in subsequent cases such as *Jeffrys v. Buweles* (1770) Dick 429, decided in 1770 : *Garnan v. Bowles* (1786) 1 Cox. 283, decided in 1786, - *v. Leadbetter* (1799) 4 Ves. 681, decided in 1799, *Vesey v. Sweet* (1823) 5 Ves. 709, n., decided in 1823, *Mawman v. Tegg* (1826) 2 Russ. 385, decided in 1826, and *Bell v. Whitehead* (1839) 3 Jur. 68, decided in 1839.

8. We are not unmindful that in *Sheriff v. Coates* (1830) 1 Russ. And My. 159 Lord Lyndhurst, L.C., observed that as the case then before him was a case capable of inspection, the Court would, exercise a prima facie judgment upon it, without referring the question, as was usually done, to a Master. In that case, the question was whether a pattern was a copy of another pattern which was put forward by the plaintiff. The result, however, was that the case was ultimately sent to law, in order that the question of the originality of the pattern, which was alleged to have been pirated, might be

investigated. In *Jarrold v. Houlston* (1857) 3 K. & J. 708, which was decided by Vice Chancellor Wood in 1857 it was stated that, if necessary, the Court would take pains to ascertain how far the piracy extended so as to enable it to determine how far the injunction should extend. The Vice-Chancellor added that he did not overlook the warning of Lord Cottenham in *Bell v. Whitehead* (1839) 3 Jur. 68, that this might throw upon the Court considerable labour in analysing minutely cases of description. Reference may also be made to *Lewis v. Fullarton* (1839) 2 Beav. 6, *Murray v. Bogue* (1852) 1 Dr. 353, which show that the Court will refuse to order a reference and will proceed to compare the works and to ascertain the details, only where it can safely do so without an excessive expenditure of time and labour. This view has been extensively adopted by the Courts of the United States, and it has been pointed out by the Supreme Court that the opinion and findings of the expert referee are not conclusive on the Court, but may be reviewed on exceptions : *Callaghan v. Myers* 128 U.S. 617.

9. We may take it, then, that the proper course, in ordinary circumstances in such cases, is to get the opinion of experts who might be appointed commissioners to investigate and report on the matters in issue. Such a course, it is not disputed, would have been inevitable, if this Bench had been so constituted that neither member was acquainted with the disputed alphabet. If, for instance, the controversy had related to two primers written in Chinese characters, a reference to experts would have been unavoidable. We must accordingly decline to take the responsibility of a minute scrutiny of the alleged similarities and dissimilarities between the contents of the books before us, and we must further add that even if we embarked upon such an enquiry, no final decision could be reached, without opportunity afforded to the defendant to meet such case as might be made out by the plaintiff.

10. The result is that this appeal is allowed, the decree of dismissal made by the District Judge set aside, and the case remanded to him in order that the questions in controversy may be investigated in accordance with law on such evidence as may be adduced by the parties. Costs of this appeal will abide the result. We assess the hearing fee at one gold mohur.