

Rupendra Kashyap vs Jiwan Publishing House on 1 July, 1996

Equivalent citations: 1996(38)DRJ81

Author: R.C. Lahoti

Bench: R.C. Lahoti

JUDGMENT

R.C. Lahoti, J.

(1) This is an application seeking grant of an ad interim injunction in a suit filed by the plaintiff seeking relief of permanent a junction restraining the defendants No. 1 and 2 from publishing, printing or selling 3pics of question papers and for rendition of account delivering up etc. complaining of infringement of plaintiffs copyright by defendants No. 1 and 2.

(2) The plaintiff Rupendra Kashyap is proprietor of M/S Som Sudha Prakashan dealing in publication of educational books. According to the plaintiff, he is an exclusive licensee of the Central Board of Secondary Education, defendant No.3 (hereinafter, Cbse for short) in respect of past year's question papers prescribed for class X and Xii examinations being conducted year tyear from 1990 onwards by defendant No.3 and therefore is the owner of the copyright under section 54 of the Copyright Act 1957. No one other than the plaintiff could publish, print, reprint, reproduce sell or offer for sell in any form the past years' question papers of the examinations conducted by defendant No.3. However, in breach of the rights of the plaintiff, defendants 1 and 2 are publishing question papers of the CBSE's examinations which is an infringement of the plaintiffs copyright.

(3) The Cbse defendant No.3 has supported the plaintiff. According to it no person other than the plaintiff could print, reprint, produce or reproduce, publish, distribute, circulate, sale or offer to sell, past years question papers of Cbse except the plaintiff in accordance with the terms of agreement entered into between the plaintiff and CBSE.

(4) The defendants No. 1 and 2 are contesting parties and have raised very many pleas to attack the relief sought for by the plaintiff. It is submitted that the suit is not maintainable as there is no assignment in favour of defendant No.3 from the authors of the examination papers. A form signed by the author accompanying the letter offering him to set the paper does not operate as an agreement to assign copyright. The author is not the sole author but examination papers are prepared by several persons and moderated by another person and so being a joint work of each of such persons they arc co- authors. It is incumbent in law for the plaintiff to trace the title to each of the persons who have contributed to the said examination paper.

4.1 Section 52(1)(a)(i) and Section 52(l(b)(iii) of the Copyright Act, 1957 confer upon the defendant a complete defense inasmuch as they have been using the Board examination papers as a part of their

several works and books in various forms in which they include answers to the said questions which are completely composed by them or persons on their behalf and in this view of the matter what they are doing is a fair dealing of the literary work for purposes of research and private study.

4.2 It is also submitted that the defendants have been printing and publishing questions papers for over 25 years and ever since the inception of the Board in the year 1952. The defendants are two out of 30-40 publishes over the country who are engaged in such activity for the past decades. Thus the suit suffers from laches, acquiescence and inordinate delay.

4.3 It is also submitted that the suit is against public interest, as a Government organisation having been given the responsibility to conduct examination cannot be permitted to monopolise publication of question papers which are required by students for the purpose of their study and research.

(5) The written statement Filed by defendant No.3 has been amended so as to introduce the additional pleas in defense by reference to Section 17(dd) of the Copyright Act. It is submitted that Cbse came into existence in its present form on 1.7.62. It is a society registered under the Societies Registration Act, 1960. It is controlled by the Secretary, Department of Education, Ministry of Human Resource Development. It was constituted to conduct examinations at secondary level of education. Defendant No.3 is a 'public undertaking' as contemplated by Section 17(dd) of the Copyright Act as it is owned and controlled by the Government and has been incorporated under a resolution of the Government of India. The defendant No.3 has the exclusive copyright in the question papers used by it in its various examinations. It has examination bye-laws, instructions to the paper-setters and instructions to the moderators. The rights of Cbse are not limited to use the papers in the examination only. It can assign and/or license its right for publication and get royalty.

5.1 In the examination bye laws paper setters/ moderators are appointed for a period of three years. The term can be renewed. In order to minimise any probability of leakage, the identity of paper-setters and moderators is kept anonymous and is not disclosed even after expiry of their term.

5.2 In the interest of maintaining confidentiality so as to have a fair examination, defendant No.4 has claimed privilege from producing the agreements with the paper setters and appraisal forms of the moderators and the original scripts of the question papers and its appraisal either by the defendant No.3 or other persons. It is submitted that anonymity in the particulars and names of paper setters and moderators is essential and in the interest of conduct of smooth and fair examinations and in public interest.

(6) In view of the submissions made by the learned counsel for the parties the following questions arise for determination at this stage :

(I) Whether a question paper set for the purpose of conducting an examination by Cbse can form subject matter of copyright ?

(II) Who would be the owner of the copyright ?

(III) Whether the plaintiff has the cause of action for bringing the suit ?

(IV) Whether the action brought by the plaintiff suffers from delay and laches and acquiescence ?

(7) Question NO.(i) The first question needs a short and summary disposal. In view of the law laid down in Jagdish Prasad Gupta v Panneshwar Prasad Singh 1966 Patna 33, Agarwala Pub House v Board of H.S. & I Education and University of London Press Ltd v. University Tutorial Press Ltd. (1916)-2 Ch. D. 601. It cannot be doubted that an examination question paper is a literary work' within the meaning of Section 13(1)(a) and Section 2(o) of the Copyright Act, 1957. In Agarwala Publishing House Khurja's case (supra) it has been held by W. Brown J: "Examination question papers are "original literary works" within the meaning of S. 13 of the Copyright Act and copyright can be claimed in respect of them.

The words "literary works" in S. 13 are not confined to works of literature in the commonly understood sense but include all works expressed in writing whether they have any literary merit or not. The word "original" in S. 13 does not imply any originality of ideas but merely means that the work in question should not be copied from some other work and should originate in the author being the product of his labour and skill. Thus question papers are "original literary works" within the meaning of Section 13 And copyright can be claimed in respect of them.", I am in respectful agreement with the view so taken. It was also not disputed at the hearing that the question papers on which examination is conducted by defendant No.3 constitute literary 'work' within the meaning of Clause (o) of Section 2 of the Copyright Act.

(8) Question NO.(ii) Section 17, the relevant part thereof, provides as under : "17. First owner of copyright-Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein : Provided that - Xxx xxxxxxxxxx (dd) in the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. Explanation - For the purposes of this clause and Section 28A, "public undertaking" means-

(I) an undertaking owned or controlled by Government; or (II) a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956); or (III) a body corporate established by or under any Central, Provincial or State Act;] (9) It cannot be doubted that the paper setter (one or more) is the author of the question paper. However, if it can be held that CBSE- defendant No. 1 is a public undertaking and the question paper has been brought into existence under its direction or control then the CBSE-and not the paper setter-would be the owner. It was also submitted that the names of the paper setters and moderators are kept anonymous and so also it is the Cbse, defendant No.3 who first publishes the question papers would be the owner of the copyright therein.

(10) An extract from the manual of rules and regulation of Cbse has been filed which contains the Government of India resolution dated 1.7.79 as amended thereafter from time to time. Therefrom the status and constitution of the Cbse can be spelled out.

10.1 The Board has been constituted to enable it to play a useful role in the Field of secondary education, to raise the standard of secondary education, to make the services of the Board available to various educational institutions in the country and to meet the educational needs of those students who have to move from State to State. The Board shall conduct examination at the secondary stage of education and such other examination as it may consider fit subject to the approval of the controlling authority or as it may be called upon to conduct by the Government of India, Ministry of Education. The Secretary to the Government of India Ministry of Education and Social Welfare is the controlling authority of the Board.

10.2 The Board shall consist of the following: i) Chairman ii) Vice Chairman (Director of Education, Delhi ex-officio). iii) One representative each of the Education Departments of the Union Territories excepting Delhi which wish to avail of the services of the Board. iv) One representative each of the Territorial Councils of the Union Territories other than Delhi subject to their available of the services of the Board. v) Three representatives of the Education Department of Delhi Administration, one of whom shall be an Assistant Director Education (women) vi) One representative each of the Education Departments of the Delhi Municipal Corporation and the New Delhi Municipal Committee. vii) One representative of the Ministry of Scientific Research and Cultural affairs (now merged with the Ministry of Education & Social Welfare) conversant with the problems of Technical Education. viii) A representative of the Ministry of Health conversant with problems of Medical education and of Health Education in schools. ix) A representative each of such other Ministries and Departments of the Government of India as may be decided by the Controlling Authority. x) Two representatives of the University of Delhi to be elected by its Academic Council. xi) Three representatives of the Inter- University Board. xii) Two Headmasters of Public Schools to be nominated by the Indian Public Schools Conference. xiii) Two representatives each of the special category of schools designated as such by the Controlling Authority who may also prescribe the method of nomination or selection xiv) One Headmaster/Principal of High and Higher Secondary Schools (other than the special schools affiliated with the Board and located in the various States (other than the Union Territories) to be elected from amongst themselves. xv) Four Principals of Higher Secondary Schools in Delhi to be elected from amongst themselves by the Principals of Higher Secondary Schools affiliated with the Board, at least one of whom shall be the principal of a Girls School. xvi) One Headmaster/Principal of High/Higher Secondary School from each of the Union Territories (excepting Delhi) availing of the services of the Board to be nominated by the respective administrations. (xvii) Head of the Central Institute of Education Delhi (ex-officio) (xviii) One person each to represent the following professional bodies to be appointed by the Controlling Authority: (a) Engineering. (b) Agriculture (c) Medicine. (d) Industry and Commerce. (e) Fine Arts (f) Home Science. (xix) Not more than four persons to be nominated by the Controller Authority from amongst eminent educationists or teachers of the Institutions affiliated with the Board whose services it may be considered necessary or desirable to secure for the Board, keeping in view the composition of the Board. (xx) Not more than three persons to be co- opted members as per clause 6 (xx) shall function as the Governing Body of the Board."

10.3 The Board may acquire properties- moveable and immovable- and invest surplus funds of the Board in Government securities or in bank approved by the controlling authority. The Chairman and the Vice Chairman shall be appointed by the controlling authority on such terms and conditions

of service as the controlling authority may decide. Secretary shall be appointed by the controlling authority upon such condition and for such period as the controlling authority may think fit. The constitution of the Board may be altered and modified by the controlling authority.

10.4 It is thus clear that in the matter of composition of the Board and its functioning, it has a public structure and is controlled by the Secretary to the Govt of India. The Board is a society registered under the Societies Registration Act, 1860. It has been constituted for a public purpose and is controlled by the Central Government.

(11) The term 'public undertaking' is not defined anywhere in the Copyright. Act. In the context, the word 'public' means something belonging to the people, pertaining to a community or a nation in contradiction with something belonging to a private individual. The public undertaking would be an undertaking engaged in or concerned with the affairs of community, or the public and not owned or controlled by any individual or anyone having a private interest. The Cbse is discharging a public function in the field of imparting education. It has the governmental authority and privilege to conduct public examinations. The examinations conducted by it are universally recognised as having authority and sanction of the government behind. It is discharging one of the governmental functions. It has governmental supervision. It is clear that Cbse is a society which is functionally and structurally impregnated with the governmental character and discharging a public function. It is, therefore, a public undertaking.

(12) It was submitted on behalf of the defendants I and 2 that assuming Cbse to be a public undertaking, it cannot be said for the purpose of Section 17(dd) of the Copyright Act that the examination papers were prepared under the 'direction or control' of such public undertaking. It was submitted that the 'contract entered into between the paper-setters and the Cbse may be a 'contract for service' but certainly not a 'contract of service' and therefore, the job of paper setting performed by the paper setters cannot be said to be one performed under the 'direction or control' of CBSE. In my opinion, the distinction sought to be drawn between the 'contract of service' and 'contract for service' for the purpose of and in the context of the case at hand is merely a jugglery of words and without any meaningful substance.

12.1 Mr S.C. Gupta Secretary Cbse has, in his affidavit dated 1.7.1994, stated vide para 2 that the paper setters are employed by the Cbse for consideration and all the rights in the question papers set by the paper setters vest in the CBSE. Cbse prescribes syllabus from which the paper setter has to set the questions. While setting the question paper, the paper setter has to ensure the preparation of questions as indicated by the CBSE. The Cbse also prescribes difficulty level and gives guidelines to ensure that the question paper set by the paper sellers can be solved by the candidates within the time specified. It is followed by appraisal by the moderator. If any change is required then it is carried out in the question paper. It is thus clear that the paper setters do set the question paper under the direction or control of the CBSE.

12.2 To be under direction or control of an employer, it is not necessary that the employee must have had entered into a 'contract of service' with the employer. Even a 'contract for service', if accompanied by appropriate terms and conditions, may vest the employer with requisite direction

or control so as to attract the applicability of Clause (dd) of Section 17 of the Act.

12.3 Looking at the terms and conditions on which the papers are set by the paper setters as disclosed by the agreement entered into between the paper setters and the Board and the contents of the affidavit of Shri S.C. Gupta, I am satisfied that the papers are set by the paper setters under the 'direction or control' of Cbse which is a 'public undertaking'.

(13) On the original manuscripts of question papers, appraisal forms by moderators and the agreements- as entered into between the paper setters and Cbse, the defendant No.3 has claimed privilege from production on the affidavit of Shri S.C. Gupta the Secretary to the Board, stating that it will not be in public interest to disclose the contents of the original documents. In my opinion, the claim for privilege is justified under Section 123 read with Section 162 of the Indian Evidence Act, 1872. Reference may be had to the law laid down by the Supreme Court in State of Punjab vs Sukhdev Singh, and State of U.P. vs Raj Narain and others, and by High Court of Patna in State of Bihar vs Kastur Bhai Lal Bhai . Objectivity of standards and fairness and impartiality in holding the examinations cannot be maintained without the names of paper setters, moderators, printers, examiners, valuers and even tabulators- all those associated with the process right from preparing for examinations to the stage of declaring the results- being kept a guarded secret. The disclosure of such vital information, whether before, after or during the examinations, is bound to cause irreparable injury to public interest. The claim of privilege is sustained. However, the relevant documents have been produced by the Cbse in a sealed cover and the court has perused those documents.

(14) On behalf of the plaintiff some documents secured by him from the defendant No.3 have been filed.

14.1 One is detailed instructions to be followed by the paper setters before and while setting the papers apart from the guidelines to be kept in view. Relevant part of the Board's rules and regulations has been extracted in the said instructions. One of them is that the question paper shall be the exclusive property of the Board and its copyright shall also vest in the Board.

14.2 Every paper setter has to sign a certificate of acceptance to this effect and submit it to the Board along with the office copy of the question paper. Therein it is stated :- "The question paper if accepted shall be exclusive property of the Board and copyright thereof shall vest in it and I hereby assign to the said Board the copyright and all other rights in the said paper including those of the copyright in such a manner as the Board may think fit."

14.3 The terms and conditions on which papers are set by the paper setters go to show that such job is performed by the paper setters under the direction and control of the CBSE.

(15) I have perused (i) the original manuscripts of question papers, (ii) the appraisal form by moderator, and (iii) the 77 agreements between the paper setters and the Board, filed on behalf of the board and contained in a sealed envelope. The proforma referred to hereinabove having been duly signed by paper setters leaves no manner of doubt that the applicability of S. 17(dd) is clearly

attracted to the facts of the case and Cbse defendant No.3 would be the First owner of the copyright in the examination papers. Even if the ownership had vested in the paper setter than it has stood assigned to the Board. It may be noted that there is no particular form prescribed for assignment and it may be effected by any document in writing, even by a letter. The only requisites of assignment are that it must be in writing and it must be signed by the assignor or his duly authorised agent. The twin requirements are satisfied in the present case. (See Sections 18 and 19 of the Copyright Act).

(16) I am therefore very clear in my mind and unhesitatingly hold that Cbse is a 'public undertaking'; examination papers are 'literary work' made under the direction and control of Cbse and applicability of S. 17(dd) of Copyright Act is squarely attracted to the facts of the case . Cbse is the first owner of the copyright in the examination papers on which examinations are conducted by it.

(17) It was submitted by the learned counsel for the plaintiff that the paper setters cannot and do not disclose their identity to the public. So is with the moderators. It was also submitted that every question paper is the outcome of a joint effort of more setters than one and the moderator, every one of whom remains anonymous and hence the ownership would vest with the Board who first publishes the question paper in view of S.54(b) of the Act. Reliance was placed on a Division Bench Decision of Madras High Court in Brooke Bond India Ltd Calcutta vs. Balaji Tea(India) Pvt Ltd 1993 Pct 40. It is not necessary to enter into this aspect in view of the finding already recorded hereinabove that under Section 17(dd) of the Copyright Act it is the Board who will be the owner of the copyright in the question papers. Question NO. (iii) (18) Copy of the agreement dated 2.7.91 entered into between the Board defendant No.3 and the plaintiff has been filed. It would be useful to notice the relevant clauses thereof.

18.1 The preliminary part of the agreement states the Board (first party) having decided to appoint a sole licensee -the plaintiff (second party)- to print, publish and sell the yearly question papers in consideration of the licence fee to be paid by the plaintiff. Clause (2) provides the copyright in the question paper to remain always with the Board. Clauses (3), (9), (12) and (13) are relevant and are extracted and reproduced hereunder :- "3. That the first party hereby grants the second party the sole licence to print, publish and sell the past question papers for classes X and XII from 1990 examinations onwards at a price to be decided and approved by the first party in writing each year before its publication, in consideration of a fee @ 25% of the printed price of the question papers to be paid by the second party to the first party. 9. That the second party will be responsible to ensure that no other firm uses the prescribed question papers of the Board illegally and in case of violations of the rights of the First party the second party on behalf of the first party shall take such steps and legal actions as may be deemed appropriate. 12. That the first party shall issue a notification/circular to all the concerned registered publishers and institutions affiliated with the first party by way of issue of notification in three National Daily Newspapers and Board's quarterly journal with respect to the licence being granted to the second party to print and sell the past years question papers. 13. That the second party will be solely responsible for the correct printing and publishing of the past question papers of the first party from 1990 onwards examination during the subsistence of this agreement.

18.2 Clause (4) obliges the plaintiff to sell a minimum of 50,000 copies of question papers each for class X and XII in a year or else to pay licence fee on such minimum guarantee figure of sale. In case of infringement of copyright the plaintiff has been allowed to issue legal notice.

18.3 The agreement is in writing, signed by both the parties and attested by two witnesses.

18.4 Pursuant to clause 12 of the agreement referred to in para (18.1) above, the CBSE has published notifications in the newspapers, publicly notifying the plaintiff having been appointed an exclusive licensee for publication of examination papers for the previous years commencing 1990 onwards. All such notification published in Jansatta, Delhi dated 13.9.91, Nav Bharat Times, New Delhi dated 4.8.91, Times Of India New Delhi dated 4.8.91 have been filed.

(19) Under Section 2(j) of Copyright Act 'exclusive licence' means licence which confers on the licensee or persons authorised by him to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work, and "exclusive licensee" shall be construed accordingly. Under Section 14, copyright means exclusive right in case of literary work to do the following acts (amongst others):

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

(ii) to publish the work.

(iii) to produce/reproduce or perform or publish any translation of the work and

(iv) to make any adaptation of the work. The above said insignia of the copyright are found to have been licensed to the plaintiff to the exclusion of all other persons and therefore, the plaintiff is an 'exclusive licensee' entitled to maintain an action for infringement of copyright.

(20) The agreement dated 2.7.91 leaves no manner of doubt in the plaintiff having been appointed an 'exclusive licensee' within the meaning of Section 2(j) and hence entitled to bring an action for infringement of copyright being the owner of the copyright within the meaning of Section 54(a).

(21) In the written statement of defendants 1 and 2 vide para 4 of the preliminary objections, as also in the reply to the application, reference has been made to Section 52(1)(a)(i) and S 52(1)(b)(iii) of the Copyright Act as providing the defenses available to defendants 1 and 2. In the Copyright Act, there is nothing like sub clause (iii) to be found under clause (b) of sub-section (1) of Section 52 of the Act. That reference appears to be mistaken. It would, therefore, suffice to deal with the plea raised by reference to S. 52(1)(a)(i) of the Act, which provides inter alia, that a fair dealing with the literary work for the purpose of research or private study does not constitute infringement of copyright. The words 'research or private study' have been substituted by the words 'private use including research' by the Copyright

(Amendment) Act, 1994 (Act 381 of 1994). What is contemplated is a defense to the person conducting research or private study who while doing so, if dealing fairly with a literary work, may not incur wrath of the copyright having been infringed. But, if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defense under section 52(1)(a)(i) would not be available to such a publisher though the book published by him may be used or be meant for use in research or private study. The defense raised by defendants 1 and 2 based on Section 52(1)(a)(i) is not available to them and the plea so raised has to be rejected.

(22) The works published by defendants No.1 and 2 and brought on record are a clear infringement of copyright vesting in defendant No.3 and licensed exclusively to plaintiff. The plaintiff does have a cause of action.

(23) Question No, (iv) There is no question of delay, laches or acquiescence. The agreement was entered into with the plaintiff on 2.7.1991. Every year's question papers and each question paper would be subject matter of a copyright. Infringement of copyright as regards each of the papers would constitute an independent and fresh cause of action. The suit has been filed on 22.7.93 after giving notices. The action cannot be said to be delayed or suffering from vice or laches or acquiescence.

(24) It was also submitted on behalf of defendants 1 and 2 that it would not be in public interest and also not in the interest of the students if right of publication in the examination papers was permitted to remain in the monopoly of the plaintiff. This argument bears a fallacy. Knowledge of the questions appearing in the examination papers conducted for the previous years is certainly of immense use to the students and scholars but that information is available in the publication made by the plaintiff. It is not the case of defendants 1 and 2 that the plaintiff is making any misuse of the exclusive licence given to him by withholding publication of the examination papers. On the contrary, the Cbse has taken care to see in its agreement entered into with the plaintiff that a minimum number of copies of examination papers is published. The plaintiff publishing examination papers under the licence given by the Cbse subject to payment of royalty accompanied by a minimum guarantee is not going to gain by withholding publication either wholly or partially, if there be a demand of such question papers in the market. Moreover, the law as to copyright in India is governed by a statute which does not provide for defense in the name of public interest. An infringement of copyright cannot be permitted merely because it is claimed to be in public interest to infringe a copyright.

(25) The plaintiff has made out a strong prima facie case in his favour. Irreparable injury is likely to be caused to the plaintiff by infringement of copyright. The quantum of damages suffered by the plaintiff on account of illegal act of defendants 1 and 2 would be incapable of being estimated in terms of money. The plaintiff is, therefore, entitled to the grant of injunction as prayed for.

(26) I.A. 1656/93 for the grant of ad interim injunction is allowed. The defendants 1 and 2 are restrained from causing infringement of the plaintiffs copyright in all the past years question papers of examination conducted by defendant No.3 from 1990 onwards by publishing, printing, selling and offering to sell the infringing copies of the said question papers.