

A. L. Srinivasan and K. S. Gopalakrishnan Vs K. Jayalakshmi

Court: Madras High Court

Date of Decision: June 23, 1969

Acts Referred: Copyright Act, 1957 " Section 55

Citation: (1972) LW(Cri) 156

Hon'ble Judges: Veeraswami, C.J; K. N. Mudaliar, J

Bench: Division Bench

Advocate: N.C. Ragavachari and N.S. Varadachari, for the Appellant; K.V. Sankaran, for the Respondent

Final Decision: Allowed

Judgement

1. The Defendants appeal from a decree of Kailasam, J. granting the Respondent damages in a sum of Rs. 2500 for infringement by them of her

copyright in her article "'Gouravam'" by reproducing the story in their cinematograph film called "'Sarada'", Rs. 10,000 as profits and injunction

preventing further exhibition and distribution of the offending part of the film and directing delivery to her of that part. The 1st Appellant, a firm of

partnership, was the producer of a cinematograph film called "'Sarada'" and the 2nd Appellant was the author of the story. The picture was

completed and distributed for exhibition in about 1962.

2. The appeal turns on (i) whether the Respondent had a copyright in her article and if so, whether the Appellants infringed it, (2) whether the

Respondent is entitled to damages and/or profits and (3) whether there can be no infringement of the article of the Respondent by its reproduction

by means of the cinematograph film. Kailasam, J, has set out in detail each of the stories and we do not think it necessary to reiterate it in the same

way. Briefly "'Gauravam'", which was published in the Tamil Weekly "'Kalki'" on 11th January 1959, has, as its topic, the familiar social phenomenon

of a sister of a poor brother being married to a well-to-do husband, the brother receiving a letter intimating that the first birthday of his sister's child

was to be celebrated and that presents befitting her husband's status should be made by him on the occasion, the brother who was in straitened

circumstances getting annoyed at this request, but finding money by the sale of his wife's jewels to buy presents, his attending the familiar

celebration and being ill-treated and humiliated then not only by his brother-in-law but also by his own sister and other relations, the brother

returning home heart-broken and bursting out in disappointment and anger before his mother and at that very moment his flinging out a paper

packet, which had been handed to him by his sister at the function, sweets and currency notes and coins and a letter strewn out of the packet, the

letter proving to be from the sister and stating that she was aware of her brother's poverty, the likelihood of his being forced to borrow for the

purpose of buying presents for the child, the compelling circumstances in which she was placed in her husband's house to demand presents from

him and finally asking to be excused and requesting her brother to repay the debt with the money in the packet. The letter summed up that it would

be difficult for a male to understand the prestige which the womenfolk were particular about. The brother felt miserable and particularly when thus

compelled to accept money from his sister. That is the story of the Respondent. The story ""Sarada"", which had been filmed, had a different theme,

but the film had a side-hit which according to the Respondent, resembled her story ""Gouravam"". Except for the different names of the characters

used, the side plot, more or less, closely followed the main theme and pattern of the Respondent's story. In the side-plot, there was a brother and

a sister, the latter being married into a rich family. There was a function of Namakarnam instead of the birthday celebration. Having been requested

by his sister, to make presents, the brother, who attended the function, was ill-treated. He returned home, heart-broken and full of remorse and

exhibited his violent reaction before his mother; at that moment, he threw down the bag at his mother saying that it was from her daughter; from the

bag came out a few currency notes and a letter; the letter explained the circumstances in which the sister had to treat the brother in the way she had

done and how he was grief-stricken at the ill-treatment meted out by her husband's relations. In that letter, she also stated that she had to behave

in that way she did, because her parents-in-law were there, lest they should suspect that she might hand over something to him stealthily. This is the

gist of the side-plot which has gone of the cinematograph film.

3. It has been strenuously argued for the Appellants that the Respondent's article, as such, was not entitled to any copyright that, in any case, the

theme of the article was but of common place and an idea in which no copyright could exist. On the other hand, it is stated that apart from the

general scheme of the story in the Respondent's article, the particular incidents, situations and the dramatic effect produced by the throwing of a

paper cover and the currency notes and a letter coming out of it were really the result of the Respondent's labour, original representation and skill

in which she had a copyright.

4. It is not in controversy that no idea or thought of a common place theme by itself can be the subject matter of a copyright Donoghue v. Allied

Newspapers Limited (1938) 1 Ch. 106 and Chatterton v. Cave L.R. (1877) 78 : 3 A.C. 483. Copinger and Skones James on "Copyright" (tenth

edition) accurately sums up: See P. 46).

Copy right protection is given to literary dramatic, musical and artistic works and not to ideas, and, therefore, it is original skill or labour in

execution and not originality of thought which is required.

5. When an idea or thought is given physical shape by the skill and effort of the author, the material so produced is entitled to protection as a

copyright. Copyright, as the term itself implies, is a kind of negative right which enshrines a positive content. In other words by copyright is meant a

prohibition against reproduction of a certain original work of a literary value by any one but its author, and in its positive aspect, the right to the

work is exclusively vested in its author or producer so that he alone is entitled to permit its reproduction or user by another. The Respondent's

theme is a common place but she had undoubtedly brought out a certain sequence of events and situations of which one or two have a dramatic

value and the Respondent, in our opinion, is entitled to a copyright therein. We must, however, make it clear that the copyright in the article does

not extend to its entire field but should be confined to the peculiar dramatic situations and not to the theme of the article. That is because, the theme

deals only with the common place plight of a poor SAMBANDI not being treated properly by his rich counterpart at ceremonies, the resulting

insult to the former, the familiar vanity of the womenfolk in the rich family and the attempt of the less fortunate to keep appearances against odds.

They are all so common that we do not think that the Respondent can claim a copyright in respect of them or even their representation in the

article. But, in our view, the particular situation, in which the cover or bag is thrown out from which currency notes and letter flow out, has a

dramatic affect which is an original product of the Respondent's skill and labour. This incident, to our minds, had been without the Respondent's

consent reproduced by the 2nd Appellant in his story and cinematographed by the 1st Appellant which is an infringement of her copyright. Not

only is the test of resemblance satisfied but there is every indication in the record of the Appellants having committed piracy in respect of the

particular dramatic situation. Kailasam. J., who had the benefit of seeing the film exhibited, attached specific importance to the reproduction in the

film of that incident as violating the copyright. We accept that finding.

6. The question then is whether the Respondent is entitled to any damages. She has been granted Rs. 2500 on that score. But, so far as we can

gather from the judgment under appeal, we can find no basis for it. All that has been said by the learned Judge is that taking the standing of the

Respondent as a writer and an author and the other circumstances into consideration, the damages should be fixed at Rs. 2500. We are not able to

share this view. The measure of damage, says Copinger and Skone Jones on "Copyright", is the depreciation caused by the infringement to the

value of the copyright as a chose in action. In assessing damages, one should, therefore, keep in view the loss, which the copyright owner has

suffered, by reason of such diminution or depreciation. As pointed out by Braithwaite & v. Co. Trustees Port Trust (1956) II M.L.J. 486 it is

necessary that the claimant precisely sets out the basis of the claim in the pleading. The Respondent in her plaint has done no such thing. Instead,

her only averment on the basis of which damages have been claimed, is "the Plaintiff by reason thereof infringement of the copyright has sustained a

set back both mentally and otherwise which she estimates at Rs. 5000/-. That surely cannot justify the claim for damages for infringement of the

Respondent's copyright in her article. She has failed to allege and show that, by reason of the infringement, she had suffered any loss or

depreciation in the value of her copyright in the article. Not only no actual damage has been proved, but there has not even been a suggestion in the

evidence as to how to evaluate it. In the circumstances, therefore, we consider that the Respondent cannot recover any damage. We cannot

assume that she suffered a loss and estimate the damages without any basis whatever therefore.

7. Nor are we satisfied that we can sustain the decree for profits estimated at Rs. 10,000. In the body of the plaint, the Respondent has not stated

the basis for the prayer for accounting. We have already mentioned that the main story "Sarada" was something different and it is only the side plot

in the cinematograph film which was claimed to have infringed the Respondent's literary work. In such cases, it is for the Plaintiff to allege and

prove what proportion of the profits made by the film would be attributable to profits made through infringement of her copyright. Actually, there is

neither any allegation in that regard, nor is there any attempt to place before Court any evidence to enable it to ascertain the proportionate profits.

There is no evidence also to show that the side plot did at all account for any part of the profits the Appellants had made and whether it was a

substantial or material part of the film so that, notionally, at least, a certain proportion of the profits could be attributed to the infringement. It must

be noted that the Respondent is not entitled to both damages and profits. They are not cumulative but can be asked for only in the alternative. S.

55 of the Copyright Act does not justify the grant of both damages and profits. Vide also Sutherland Publishing Company, Ltd. v. Caxton

Publishing Company, (1936) All. E.R. 177. We are of opinion, therefore, that the decree for profits cannot be sustained either.

8. Lastly, it has been contended for the Appellants that there can be no infringement of a literary work by means of a cinematograph film. S. 2 (m)

of the Act defines an "infringing copy" to mean in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in

the form of a cinematograph film. The clause also shows that 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 will be the infringing copy. S. 58 says that all infringing copies of any work in which

copyright subsists, and all plates used or intended to be used for the production of such infringing copies should be deemed to be the property of

the owner of the copyright who accordingly may take proceedings for recovery of possession thereof or in respect of the conversion thereof. The

argument is that in view of these provisions, that offending part of the cinematograph film cannot be treated as an infringing copy and the

Respondent is not entitled with reference to S. 58 to a return of the offending part of the film. But our attention is invited for the Respondent to S.

14 (1) (a) (v) according to which, for the purpose of the Act, copyright means the exclusive right in the case of a literary, dramatic or musical

work, to do and authorise the making of any cinematograph film or recording in respect of the work. It is stated, therefore, that there can be an

infringement of a copyright in the literary work by reproduction by means of a cinematograph film. That may be so, but the question is whether, it

can be regarded as an infringing copy within the meaning of the Act. In our view, it cannot be because expressly S. 2 (m) excludes such a case

from the scope of an infringing copy. The result is that while the Respondent's copyright in her article has been infringed by the reproduction, as we

have earlier mentioned, of the incidents by means of the cinematograph film, it cannot be regarded as a case of infringing copy. It follows that the

Respondent's prayer for the return of the offending portion of the film cannot be granted.

9. The Respondent is, however, in view of the infringement found, entitled to the preventive injunction which the learned Judge has given in Clauses

(i) and (2) of his decree. That is sustained. The rest of the decree is set aside and the appeal is allowed to that extent. The parties will bear their

own costs throughout.