
(1999) 09 BOM CK 0079

In the Bombay High Court

Case No : Criminal Application No. 367 of 1992

Bunny Reuben and others

APPELLANT

Vs

B.J. Panchal and another

RESPONDENT

Date of Decision : 18-09-1999

Acts Referred:

Copyright Act, 1957 — Section 17, 51, 63
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2000) 4 BomCR 680 : (2000) 1 BOMLR 512 : (2000) 2 MhLj 169

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : L.R. Chari, C. and A.B. Nagavkar, instructed by Soloman and Co.,
S.R. Shinde, app, for the Appellant; Kuldeep Patil, for the Respondent

Judgement

S.S. Parkar, J.—This petition has been filed u/s 482 of the Cr.P.C. for quashing the Criminal Case No. 57/S/91 pending in the 44th Court of Metropolitan Magistrate at Andheri, Bombay filed by the respondent No. 1 as a private complaint.

2. The respondent No. 1 filed the aforesaid private complaint for offence u/s 63 of the Copyright Act, 1957 against the petitioners on the allegation that about 75 photographs taken by him of the late Shri Raj Kapoor, a cine star and of the wedding of cine star Dimple Kapadia were published in the book under title "RAJ KAPOOR The Fabulous Showman" without his permission. The said complaint was filed on July 1, 1991 in which the process was issued against the petitioners by the learned Metropolitan Magistrate and, therefore, the present petition for quashing the said complaint.

3. The allegations made in the complaint are that the complainant was freelance press photographer and as a free-lance news photographer he was intimately connected with the film newspapers, film weeklies, magazines, periodicals. It is further stated that he was also a free-lance journalist and correspondent and in that capacity he used to attend various film functions connected with the film

industry and cinema such as Mahurats, film shooting of films in studios or otherwise, song recordings, premiers at cinema theatres, silver jubilee film functions. He also used to attend birth day celebrations, weddings of film stars and wedding anniversaries of film stars. He states that he used to attend the functions on invitations as well as on instructions from newspaper periodicals and film personalities and that he used to regularly attend the functions for the late Raj Kapoor held at R.K. Studios as well as other places and take various photographs of the late Raj Kapoor himself and of Raj Kapoor with others. It is also stated that in the course of his business as a photographer he had also attended the marriage of Dimple Kapadia with Rajesh Khanna and had taken several photographs of Dimple Kapadia's marriage for which he was invited by her father who is petitioner No. 3. According to him the late Raj Kapoor used to procure from him the photographs snapped by him as keepsake copies for his personal collections which were meant to be preserved by him as souvenirs and not meant to be printed and/or published without his express permission. However, without his permission the photographs taken by him and given as keepsake copies to late Shri Raj Kapoor and petitioner No. 3 have been published without his permission in the book titled "RAJ KAPOOR The Fabulous Showman" which was authored by the petitioner No. 1 and was published by National Film Development Corporation Ltd. and printed by Shri Bipin Tanna. According to the complaint in all 75 photographs pertaining to the late Shri Raj Kapoor snapped by him and which were given to Shri Raj Kapoor on his request as keepsake copies, had come into possession of the petitioner No. 2 i.e. wife of Raj Kapoor, which have been printed and published in the said book without obtaining his permission. Similarly the photographs taken at the wedding of Dimple Kapadia, copies whereof were given to petitioner No. 3 as keepsake copies on their request, have been published and printed without obtaining his permission. It is averred in para 7 of the complaint that it is the complainant who had taken the said photographs and he was the author of the same and as such he had exclusive copyright in the said photographs. He claimed to be in possession of the negatives of those photographs. Similarly the allegation is that petitioner No. 1, who is the author of the said book, had surreptitiously printed and published without permission the said photographs infringing and violating the copyright of the complainant-photographer.

4. Before filing the said complaint the complainant had issued notice dated 17th April 1989, copy whereof is annexed as Exhibit "B" to the petition, to the petitioner No. 1 who is the author of the book and to National Film Development Corporation Ltd. who are the publishers of the said book and to one Mr. Bipin Tanna, the printer of the said book alleging that the photographs were printed and published by the above three parties by infringing the copyright of the complainant in respect of the photographs. That notice was replied by the petitioner No. 1 through his Advocate's letter dated 15th May 1989 stating therein that the said photographs were taken after he was engaged by the late Mr. Raj Kapoor and Mr. Chunibhai Kapadia and others for which services

payments were made to him and that the complainant had collected payments from the persons who had commissioned the complainant's services for taking the photographs. In reply to the said letter complainant has denied by his Advocate's letter on 20th June 1989 that he had collected payments for services rendered by him and that he had taken those photographs of his own without anybody engaging his services and that he is having negatives of those photographs. Subsequently the complainant addressed a notice dated 27th December 1990, after a period of one and half year, to petitioner Nos. 2 and 3 stating therein that the complainant was a free-lance film press photographer and on having been informed and/or invited to the functions of film industry held by the R.K. Studios or late Raj Kapoor the complainant used to attend the same and take various photographs including those of late Raj Kapoor to whom he used to give on request the keepsake copies of the photographs. Similarly he has stated that he had attended the wedding of Dimple Kapadia who is daughter of petitioner No. 3 and took several photographs and gave some of the photographs as keepsake copies to petitioner No. 3. That notice was replied by the letter dated 25th January 1991 stating that the complainant's services were engaged on payment of charges and the payments were made to the complainant from time to time on the demands made by the complainant for which they have received acknowledgments and although the complainant had promised to return the negatives he had not done so. In para 12 of the petition it is specifically stated that the services of the complainant were commissioned by late. Shri Raj Kapoor to attend R.K. Studios for the purpose of taking photographs on the professional basis and the complainant used to send bills or memos for the photography work done by him to R.K. Studios for his professional services and the payments were made. In the said paragraph various copies of memos from 1974 onwards of bills sent by the complainant have been relied on and copies have been annexed to the petition. Similarly it is claimed that the payments were made to the complainant for his services as a photographer and copies of the payment vouchers have been annexed to the petition.

5. Though the petition was filed in the year 1992 and was admitted in the year 1992 and the proceedings in the case were stayed, no reply affidavit has been filed by or on behalf of the respondent No. 1 complainant denying the averments made in the petition. Mr. Patil, learned Advocate appearing for the complainant contended that in the correspondence the complainant has denied that any payments were made to the complainant. However, what is significant to note is that the complaint does not aver, allege or state that no payment was received by him for the photographs taken by him from late Raj Kapoor or petitioner No. 3. Mr. Patil relies on the wording used in the complaint, particularly in para 6 of the complaint where it is stated that the copies of those photographs were given as keepsake copies to late Shri Raj Kapoor and his wife petitioner No. 2. According to him the phrase "keepsake" denotes or cannot mean that the copies were given freely. In my view, the use of the phrase "keepsake" does not mean that the copies were given freely but would only mean that they were given to

them for the sake of keeping. Secondly, it is averred in the petition that payments were made to the complainant relying on the memos of bills and payment vouchers, copies of which are annexed to the petition, and there is no denial of the receipt of the payment by the complainant in this Court. In the absence of denial on oath in this Court or in the complaint, when the question was raised in the correspondence itself, it cannot be argued that payment is a matter of dispute which can be thrashed out at the trial by leading evidence in that behalf as argued on behalf of the complainant. When the question about payment has been raised right from the stage of correspondence it was expected that the complainant should have averred expressly in the complaint that he had not charged for the photographs. Mr. Patil's reliance on the averment in the complaint that complainant was a free-lance photographer would not mean, as argued by him, that the photographs were given free of charge. The meaning of the word "free-lance" as given in Webster's Dictionary is "an independent person, a knight or roving soldier available for hire, or that one who acts on his own responsibility without regard to authority or one who pursues a profession under no long term contractual commitment to any one employer". Similarly the meaning of the said phrase given in Concise Oxford Dictionary is as follows :

"a person, usually self-employed, offering services on a temporary basis, esp. to several businesses etc. for particular assignments".

6. The next question to be considered is whether on the face of the complaint any contravention of section 63 of the Copyright Act can be spelt out. Mr. Patil in this connection relied on section 17 of the Copyright Act, 1957 and in particular Clause (b) of that section which is worded as follows :

"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-

(a)... ..

(b) subject to the provisions of Clause (a), in the case of photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein."

A perusal of the said provision would show that it does not help the complainant at all in the sense that under the said clause if the photographs are taken for valuable consideration at the instance of any person and not the photographer like the complainant, in the absence of any agreement to the contrary, would be the first owner of the copyright in the photographs. The petition as well as the correspondence does show that the complainant had received the payments from the petitioner No. 2 and in the absence of any agreement between the parties, undoubtedly the person who had engaged the services of the complainant was

the first owner of the copyright. It is not the case of the complainant in the complaint that he had taken those photographs for any other purpose. Admittedly the complainant is a professional photographer and, therefore, it cannot be said nor is it the case of the complainant that he was an amateur photographer and had taken the photographs for any other purpose or for his own use.

7. Section 51 of the Copyright Act, 1957 provides when copyright can be deemed to be infringed. Under the said section a copyright is said to be infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyrights or in contravention of condition of licence imposed by a competent authority does anything, there will be infringement of the copyright. Averments made in the complaint do not demonstrate how the complainant became the owner of the copyright in respect of the photographs taken by him at the R.K. studios where members of the public at large would not be allowed and the person would be given access only on the invitation extended by the owner of the studio. Similarly the members of the public at large are not and cannot attend the wedding unless invited.

8. Mr. Chari, the learned Counsel appearing on behalf of the petitioners contended that even assuming that the complainant was the owner of the copyright, in order to attract the provisions of section 63, which is punishing section the infringement must be made knowingly that is to say it must be firstly shown that the petitioners had the knowledge that the complainant had the copyright in respect of the photographs and secondly the infringement was done with the knowledge that those photographs could not have been given for publication in the said book by the petitioners without the permission of the complainant. In this respect he relied on the decision of the Allahabad High Court in the case of Sheo Ratan Upadhyaya Vs. Gopal Chandra Nepali and Another, . In that case the distinction was made between knowingly infringing the copyright from knowingly publishing or printing of a work in which there is copyright. The same view is taken by the Kerala High Court in the case of Cherian P. Joseph v. K. Prabhakaran Nair, reported in AIR 1967 Ker 234. In the instant case it is not alleged that the petitioners had the knowledge of the alleged copyrights of the complainant and, therefore, there is no question of prosecuting the petitioners for the offence of which knowledge is an ingredient.

9. In my view merely because the complainant alleges that he had the copyright in respect of the photographs without prima facie establishing that he had the copyright in respect of the photographs, the petitioners cannot be prosecuted for the alleged offence. It is significant to mention that initially the notice was addressed to the author of the book, publishers and the printer on 17th April 1989. However, it was only after a period of about 1 and 1/2 years i.e. on 27th December 1990 for the first time similar notice was addressed to the petitioner Nos. 2 and 3. If the case of complainant, as appears from the complaint, is that he had taken those photographs of his own will and free copies were given to the

late Shri Raj Kapoor and petitioner No. 3, the said case is completely belied and stands destroyed by the reliance by the petitioners on the copies of the memos/bills sent by the complainant and the payment vouchers signed by him acknowledging the payments made to him for the photographs, copies of which are annexed to the petition. Merely because the negatives are retained by him would not make the complainant owner of the copyright. Clause (b) of section 17 in respect of the ownership of the photographs taken for valuable consideration, in the absence of any agreement to the contrary, puts the complainant out of Court.

10. It is well settled that in exercise of the inherent powers of this Court u/s 482 of Cr.P.C. this Court can and should quash the complaint and the process issued thereon if the complaint and the material brought on record shows that the complaint is devoid of substance. The aforesaid facts, no doubt, go a long way to negative the case of the complainant. The complaint, on the face of it, does not make out a prima facie case to proceed against any of the petitioners. In such circumstances, it would be travesty of justice to allow the complainant to proceed with the complaint which would only have the value of creating nuisance and harassment to the petitioners.

11. In the result the petition is allowed and the rule is made absolute in terms of prayer Clause (a) of the petition.

12. Petition allowed.