

(1959) 02 MAD CK 0009
In the Madras High Court

C. Cunniah and Co. and Others		APPELLANT
	Vs	
Balraj and Co. and Another		RESPONDENT

Date of Decision : 04-02-1959

Acts Referred:

Citation : (1959) 72 LW 514 : (1960) 1 MLJ 53

Hon'ble Judges : Ganapatia Pillai, J

Bench : Single Bench

Judgement

Ganapatia Pillai, J.—This appeal against the judgment and decree of Ramaswami, J., in C.S. No. 127 of 1953 arises out of a suit instituted

by the appellants as plaintiffs for the reliefs of injunction, damages and accounts against the respondents. The appellants, Messrs. C. Cunniah and

Co., are a firm of merchants carrying on business in Madras City in pictures, picture frames, etc. In 1932, according to the case in the plaint, one

Sri T.M. Subramaniam drew a picture, M.O. 1 of Lord Balasubramanya and gave it the title of Mayura Priya. On 13th July, 1938, he assigned the

copyright in this picture to the appellant firm. From 1940 onwards, the appellant-firm were making and selling printed copies of this picture to the

public. There was, however, a temporary stoppage of the sale between 1946 and 1950 owing to scarcity of printing materials due to war

conditions. However, the printing and sale were resumed from 1950 onwards. The appellant-firm got this picture registered under the Trade

Marks Act of 1940 some time in 1952. Some time before October, 1952, it came to the knowledge of the appellant-firm that the respondent-firm

was printing and selling copies of a close and colourable imitation of the appellant's picture under the style of Bala Murugan. The appellants' case

is that the picture "Bala Murugan" printed and sold by the respondents is a colourable imitation of the picture. "Mayura Priya", in which the appellant-firm owns the copyright. Though called upon to cease the sale of the picture "Bala Murugan", the defendants-respondents refused to comply with this demand. The plaintiffs-appellants, therefore, came forward with the suit asking for an injunction prohibiting the respondent-firm from printing or selling the picture "Bala Murugan", and also for a decree for damages-in the sum of Rs. 2,000 for infringement of the copyright in their picture "Mayura Priya" and for an account of the profits made by the defendants-respondents by the sale of their picture (Bala Murugan), and for seizure of the unsold copies of that picture.

2. The respondents-defendants contended that their picture was an independent production by the artist D.W. 1 and was not a copy of the plaintiff's picture "Mayura Priya". They also contended that the appellants had not acquired copyright in the picture known as "Mayura Priya", because, the subject dealt with in that picture was a common subject, in which no copyright could be acquired by anyone.

3. The claim in the plaint was put forward both as an infringement of copyright and as an infringement of the registered trade mark right. However, during the trial, the case of infringement of trade mark was given up, as admittedly the picture "Mayura Priya" is not used as a trade mark in relation to any class of goods.

4. The learned Judge, Ramaswami, J., who tried the suit, came to the conclusion that the artist D.W. 1 had drawn the defendants' picture "Bala Murugan" from his own trained imagination having regard to the conventional ideas and without any help derived from or resort to the picture "Mayura Priya". On the question of the picture "Mayura Priya" being the subject of copyright, the learned Judge found in favour of the appellants.

However he dismissed the suit on his finding that the defendants had not infringed the copyright of the plaintiffs in their picture "Mayura Priya".

5. Mr. K.S. Ramamurthi, learned Counsel for the respondents, made a feeble attempt to contend that no copyright could be acquired in the picture, M.O. 1 styled "Mayura Priya", because, it was the representation of a common subject like a painting of the deity "Balasubramanya" made from conventional ideas as to his appearance in human form. It is well

established that, in order to obtain copyright protection for literary, dramatic, musical and artistic works, the subject dealt with need not be original, nor the ideas expressed be something novel. What is required is the expenditure of original skill or labour in execution and not originality of thought. Thus, though pictorial representation of Lord Subrahmanya in a human form is a subject which is common to everyone, still if a picture of Lord Balasubrahmanya drawn by an artist made up of conventional ideas as to his posture, his form, the ornaments he wears, the vahanam he uses and other matters, the picture produced is still the result of skill and labour of the artist; and it certainly entitled him to claim copyright in the product of his labour. No more need be said to reject the contention of Mr. K.S. Ramamurthi that the appellant-firm did not possess copyright in the picture "Mayura Priya".

6. The more important argument advanced by Mr. K.S. Ramamurthi was that, granting that the artist employed by the respondents had the picture "Mayura Priya" before him and drew inspiration from that picture for drawing his own picture "Bala Murugan", still, the question would be whether the respondents' picture was a mechanical copy of the appellants' picture, or, whether it was an independent production of the artist, employing his own skill and labour. Before discussing this question, we would briefly notice the statutory provision that touches upon this matter. The provisions of the Indian Copyright Act, 1957, do not apply to this case, and we have to look to the provisions of Indian Copyright Act, 1914. This Act made the English law of copyright in Sections 1 and 2 Geo-V., Chapter 46, applicable to India with certain modifications. The definition of infringement of copyright given in Section 35 of the last-mentioned Act runs thus: Infringing when applied to a copy of a work in which copyright exists means any copy, including any colourable imitation made or incorporated or imported in contravention of the provision of this. Act.

Though there are other modes of infringement of a copyright even in regard to an artistic work, in this case, we are only concerned with infringement by making a copy or a colourable imitation of the appellants' picture "Mayura Priya"

7. The sole question for our consideration, therefore, is whether the respondents' picture is a copy or a colourable imitation of the appellants'

picture. In *Hansfaenzl v. Smith* (1905) 1 Ch. 519, Kekewich, J., defined the copy thus:

A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it.

Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at

the respondents' picture must get the suggestion that it is the appellants' picture. In this sense, the points of similarity or dissimilarity in the picture

assume some importance, and, therefore, Mr. R. Gopalaswami Ayyangar's criticism of the approach to the case by the learned Judge may not be

entirely justified. Mr. Gopalaswami Ayyangar for the appellants contended that the learned Judge had approached the case from the standpoint of

a passing-off action and employed the test whether any person looking at the respondents' picture "Bala Murugan" would mistake it for the

appellants' picture "Mayura Priya". We agree that this could not be the sole test, though incidentally, the points, of resemblance and dissimilarity

assume some importance in the case in finding out whether, taken as a whole, the respondents' picture produces the impression in the mind of any

observer, which amounts to a suggestion of the appellants' picture.

8. Mr. K.S. Ramamurthi stressed upon the points of dissimilarity to contend that the respondents' picture was an independent production. For

instance, he pointed out to us that the colour scheme of the respondents' picture was different from that of the appellant's picture. Next, he said

that the appellants' picture was on a large scale, while the respondents' picture was on a small scale. As further instances, he pointed out that the

peacock in the respondents' picture faces left, while the same bird in the appellants' picture faces right. Again, in the appellants' picture,

"Balasubrahmanya" is shown as having one hand round the neck of the peacock, while in the respondents' picture his right hand is shown in the

raised posture blessing the world. The background of the pictures was also said to be different, because in "Mayura Priya", there is a fort-like

building in the background, while in "Bala Murugan" a representation of the Palani temple appears in the background. The rest of the background

in both the pictures is identical, consisting of hills, meadows and wild flowers. In our view, nothing turns upon the names of the publishers in the two

pictures being different. Coming to the figure of "Bala Murugan" he is said to be slighter in build and his looks are said to be more adolescent,

whereas the figure in "Mayura Priya" is that of a brown-eyed boy stout in build with chubby cheeks. The result of the comparison is thus expressed

by Ramaswami, J.:

I have therefore inspected for myself the faces on both these pictures and cannot say that, beyond the general resemblance, the faces are of the

same young boy-God. There can be no comparison between the dreamy and rather simple looking face of Mayura Priya with the sharp-looking

clever and more adolescent attractive face of Bala Muruga. In short, one appears to be a dreamer and the other appears to be a matter-of-fact

God interested in the worldly affairs of his bakthas and blessing them.

On this conclusion of mine on the general resemblance of the two pictures, it does not seem to me that any average person would be misled or

confused into buying one picture for the other by reason of any close imitation.

With all respect to Ramaswami, J., we are unable to agree that he applied the correct test in finding out whether the respondents' picture was a

copy of the appellants' picture. One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in

the reproduction. In finding out what is substantial part of the appellants' picture, the most prominent part, in our opinion, would be the features of

the deity represented as a boy. These features are most prominently displayed in the lineaments of the face, which alone can be said to be the

characteristics constituting the personality of the boy. Looking at the faces in both the pictures, there is no room in our minds for any doubt that the

face of "Bala Murugan" in respondents' picture is an exact copy of the face of "Mayura Priya" in the appellants' picture. Evidence of P.Ws. 2 to 4

goes to show that the picture "Bala Murugan" could be produced by the process of what is called reversed copy, which consists in a photograph

of the figure in "Mayura Priya" first taken without the head, and, after reversing the position of the trunk, to fix the head to that reversed trunk of

"Mayura Priya". This reversed process is illustrated in M.Os. 6, 6(a), 7 and 7(a) and explained by the evidence of P.W. 4, the photographer who

took these copies. Ramaswami, J., has dismissed this evidence with the remark that the few superficial similarities were only coincidences due to

the picture being produced to represent the common stock ideas. He further observed:

This is not also a case where the main figure of Mayura Priya has been reduced in size into the offending picture with slight variations in clothes and

colour. This is not also a case where we can reduce copying from the fact that the offending picture reproduces also the deviation and mistakes of

the picture in which the copyright is claimed.

With all respect to Ramaswami, J., we are unable to agree that, if the picture of the respondents, "Bala Murugan", was produced as a result of an

independent effort by the artist D.W. 1, there would be such striking similarity between the two pictures, especially in the facial lineaments of the

boy-God and in the ornaments worn by him and in the features of the peacock and also in the particular manner in which a bunch of hair is curled

on the forehead of the face. D.W. 1, the artist said to be responsible for drawing the respondents' picture was questioned in cross-examination

upon many points of resemblance, a few of which we will notice below. He was shown the representation of the common elements in all pictures of

Balasubrahmanya, namely, the trident, the peacock, the cobra and the adolescent figure of the God in six other pictures exhibited in the case, and

was asked to state whether these representations were similar to these items found in the picture in "Mayura Priya" and whether the representation

of these common subjects in M.Os. 1 and 2, the pictures of the appellant and the respondent, were not common. He gave an evasive reply by

stating that the difference between M.Os. 1 and 2 was that, while in Mayura Priya the Lord is shown embracing the peacock and having the Vel in

his right hand, in "Bala Murugan", he is having the Vel in his left hand. As regards the trident, the peacock and the cobra in M.O. 2, "Bala

Murugan", being a reproduction of the corresponding object in "Mayura Priya", the witness admitted that, if the picture is reversed, that inference

would be correct. As regards the number of features of the peacock in both the pictures, the witness admitted that they were identical, namely, 19.

Even as regards the number of eyes in the feathers in both the pictures, the witness admitted that they were identical, namely, 22. Concerning the

jewels worn round the neck of Bala Murugan both in regard to their pattern and to the number, the witness admitted that there was similarity,

though he pointed out there was some difference in the pattern. The thilakams on the forehead in both the pictures are identical. Though the colour of the dress worn by the deity is different in both pictures the pattern is the same. We need not add any more points of resemblance, because, on the subject of ornaments, we find the ornaments worn by "Bala Murugan" are an exact copy of the ornaments worn by "Mayura Priya" and every detail including the number of beads, the arrangement of the harams and the marking of the red stones in some of them are identical. Indeed, it cannot be an accident that the same number of features and the same number of eyes in the feathers of the peacock could occur in two independent pictures. Above all, the general impression left on our mind on looking at "Bala Murugan" is that it is the figure of the Lord depicted in "Mayura Priya". It follows that "Bala Murugan" reproduces in substantial part the special features of the picture of the God in "Mayura Priya", including his vahanam, the background and the jewels he wears and the features of the face of the figure.

9. In *Corelli v. Gray* (1913) 29 T.L.R. 570, Serjeant, J., pointed out the four hypotheses, under which similarities between two works could exist;

(i) mere chance, (2) both works being taken from a common source, (3) the plaintiff's work being taken from the defendant's and (4) the defendant's work being taken from the plaintiff's. It is well-settled that an infringement could only come into existence where the defendant's work was taken from the plaintiff's work. In deciding this question, there need not be an exact reproduction to support the inference that the defendant's work was taken from the plaintiff's work. Indeed, every intelligent copying must introduce a few changes; and we find evidence of such intelligent copying in the few changes introduced in the shape of the trident, in the posture of the arms, in the position occupied by the face of the peacock and the cobra and in the pictorial representation of the building in the background. These do not constitute, in our opinion, the criteria of an independent work by the artist employed by the respondents.

10. It is impossible to lay down any rule which could serve as a useful test of what constitutes a copy or colourable imitation. As was observed by the House of Lords in *Hanfstaengl v. Baines & Co.* L.R. (1895) A.C. 20:

At all events, it is much easier to arrive at what does not than to define what does constitute the proper test.

Of copying or colourable imitation of one work in another. In that case the question arose whether sketches published by the "Daily Graphic" as

being the Work of their artists were imitations or copies of a picture painted by the plaintiff representing courtship. Lord Herschell, L.C., in

delivering his speech in that case, after referring to the similarities and dissimilarities which led him to conclude that the defendants' sketches were

not copies of the plaintiff's printing, concluded thus:

My Lords, it is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now

before your Lordships. I have tried to indicate some of those which have led me to my conclusion; but it depends really on the effect produced

upon the mind by a study of the picture, and of that which is alleged to be a copy of it or at least of its design.

In arriving at a conclusion different from that, to which Ramaswami, J., came we find ourselves in a similar predicament being unable to put into

words all the reasons for our conclusion, though we are certain that the effect produced upon our minds by a study of the two pictures is that the

defendants' picture is a copy of the plaintiffs'. It follows that the appellants are entitled to the injunction asked for.

11. On the question of damages, the appellants claimed Rs. 2,000 on the basis that prior to the introduction into the market of the defendants'

picture, they were selling about 2,000 copies of their picture every year, though they did not indicate the margin of profit on the sale of each

picture. However, the documents produced by them show that the sale fell down to 216 copies a year in 1952-53 after the defendants had

introduced their picture in 1952. In the view he took on the main question of infringement of copyright, the learned Judge Ramaswami did not

consider it necessary to discuss the evidence on the question of damages because he concluded that the plaintiffs-appellants were not entitled to

any damages. It is unnecessary to call for a finding on this question because at the conclusion of the hearing of the appeal both sides agreed that in

case we found for the plaintiffs on the question of infringement of copyright the damages to which the plaintiffs would be entitled should be Rs. 500.

Accordingly we hold the plaintiffs are entitled to recover damages Rs. 500 from the defendants. It is not permissible for the plaintiffs-appellants to

ask for an account of the profits made by the respondents, in addition to damages for infringement of copyright. In the result the appeal is allowed,

the decree and judgment of Ramaswami, J., are set aside and the appellants are given a decree for injunction in terms of Clause (a) of paragraph 15

of the plaint, and also a decree for damages in the sum of Rs. 500 with interest at 6 per cent, per annum payable from this date till recovery. All

other claims made in the plaint are refused.

12. The appellants will be entitled to get their costs incurred during the trial before Ramaswami, J., from the respondents. But there will be no

order as to costs in the appeal.