

(1933) 03 AHC CK 0032
In the Allahabad High Court

Educational Book Depot and Another	Vs	APPELLANT
Dr. Rabindra Nath Tagore		RESPONDENT

Date of Decision : 09-03-1933

Acts Referred:

Copyright Act, 1957 — Section 2(1)(4)

Citation : AIR 1933 All 474 : (1933) ILR (All) 564

Hon'ble Judges : Sulaiman, C.J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sulaiman, C.J.—This is a defendants' appeal arising out of a suit brought for an injunction and damages under the Copyright Act. The plaintiff is Dr. Rabindra Nath Tagore, who is the author of three books called "Gitaner," The "Gardener," and the "Crescent Moon". These books had been printed by Macmillan & Company limited. A selection of his poems styled "Poems From Tagore" has also been published. The defendant No. 1. is a firm owned "by Lala Ram Narain Lal who has brought out a book called "Intermediate Poems For Detailed Study, 1929" which contains one poem out of the first book, two out of the second book and one out of the third. Defendant 2 was the publisher of the last mentioned book. The case for the plaintiff was that the defendants in publishing their book had infringed the copy-right of the plaintiff. In the plaint the plaintiff claimed an injunction restraining the defendants from further infringement, for an account of the number of copies of the book sold and unsold and of all sums of money received by the defendants and for an order that the defendants do pay to the plaintiff either the net Profits arising from the sale or disposal of the said books or alternatively the amount of the damage occasioned to the plaintiff by reason of the defendants printing, publishing and distributing their books. The claim was resisted by the defendants on numerous grounds. They challenged the regularity of the presentation of the plaint; they denied knowledge of the plaintiff's copyright in the poems, pleaded good faith and protection u/s 2(1), proviso 4, Copyright Act, and denied that plaintiff had suffered any damages whatsoever.

Several issues were framed by the Court below. The learned District Judge came to the conclusion that the copyright in the poems in dispute subsisted and was owned by Dr. Rabindra Nath Tagore. He found that the plea of innocent infringement had not been taken in good faith and that there was no reasonable ground for the defendants to believe that the copyright did not subsist; and that the defendants were not entitled to the benefit of Section 2(1), proviso 4 of the Copyright Act, and had accordingly infringed the plaintiffs copyright. In conclusion he fixed Rs. 400 as the amount of damages to which the plaintiff was entitled and gave him all costs including Rs. 75 as the costs incurred to the production of the plaintiff's agent Mr. Parkhurst as a witness. The defendants have come up in appeal and the plaintiff has filed a cross-objection. In appeal the main points urged before us are: (1) That the suit was not maintainable inasmuch as the person who had originally verified the plaint had no authority to do so. (2) That the provisions of Section 2(1), proviso 4 of the Indian Copyright Act, protected the defendants. (3) That the plaintiff had acquiesced in the publication by the defendant; and (4) that the damages awarded are excessive. The allowance of Rs. 75 for the expenses incurred by the plaintiff's agent is also disputed. In the cross-objection the plaintiff claims that the amount of damages allowed is inadequate. We think that there is no force in the first contention. There is no doubt that the suit was instituted under the authority and with the consent of the plaintiff though there is also no doubt that Mr. Parkhurst who had first verified the plaint was not an authorised agent and therefore could not probably have verified it on behalf of the plaintiff. On the other hand, he might have done so with the express oral authority of the plaintiff. But this was a mere irregularity which did not altogether vitiate the plaint and was in no way fatal to the institution of the suit. As a matter of fact, in order to avoid all further difficulties the plaintiff got the plaint verified again by his own son who had full authority to do so. This verification was made before the limitation had expired and any irregularity that might have existed was perfectly cured. There was therefore no defect whatsoever in the suit.

2. In order to consider whether the defendants are protected under the 4th Proviso to Section 2(1) it is necessary to examine the nature of the alleged piracy. Dr. Tagore's books consist of separate works containing a large number of poems. Four poems out of these three books have been borrowed in extenso by the defendants. The defendants' book contains the poems prescribed by the Provincial Board of High School and Intermediate Education. There were 14 poems which were recommended for general study. Out of these, 4 are those of Dr. Tagore. The defendants' book contained all these 14 poems along with paraphrases and notes. It also contained other prescribed poems with notes. The proviso to Section 2(1) is in the following words:

The publication in a collection, mainly composed of non copyright matter, bona fide intended for the use of schools and so described in the title and in any advertisements issued by the publisher of short passages from published literary works not themselves published for the use of schools in which copyright subsists.

3. It may be assumed that the defendants' book is such a publication but the question is whether the defendants can bring themselves within the proviso under which not more than two of such passages from works by the same author can be published by the same publisher within five years. The learned advocate for the defendants contends that inasmuch as the defendants borrowed not more than two poems from each of the works of Dr. Tagore they came within the scope of this proviso. We are unable to accept this contention. The proviso does not say that not more than two of such passages from each work of the same author are published, but says "not more than two passages from works by the same author." It seems to us that inasmuch as the defendants have in their book published 4 passages from the works of the same author they cannot claim the protection of this proviso. Obviously, the proviso was not intended to protect a man who brings out an unauthorised edition of a poet's poems by taking out 2 poems out of each of the many works published by him separately. It is accordingly unnecessary to consider whether when a number of poems are brought out in one volume the whole volume is to be considered a literary work of the author or whether each separate poem in that volume is to be considered a separate literary work. There is no force whatsoever in the contention that there is some sort of estoppel against the plaintiff because he has acquiesced in a previous publication. The plea was based on the ground that other publishers have also borrowed these very poems. We however understand that suits have been instituted against some of those. In any case, that is not a matter which can be taken into account in order to create an estoppel against the plaintiff. He has his own remedy against the other people who may have infringed his right.

4. The only question which remains is. one of the amount of damages. The defendant is a big publishing firm carrying on business on a large scale-It is inconceivable that they would not. keep regular account books and sales books showing the number of books sold by them, the amount spent in printing and publishing the same and the income received by them. In spite of notices given by the plaintiff the defendants failed to produce their account-books on the futile plea that they did not keep any such books. There is no occasion for surprise that the learned Judge has rejected this plea and has declined to believe the story that no such books were maintained The defendant's son who went into the witness-box to depose that such books did not exist was considered by the Judge to be a very shifty person. We think the learned District Judge was perfectly justified in not believing this story and has therefore rightly declined to accept the statement that only 200 copies of the book containing the poems in dispute have been sold. Admittedly 1000 copies were printed. We agree with the Court below that there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits realised by the sale of the books. In these circumstances, every presumption must be made against the defendants. We are therefore entitled to assume that the entire stock of one thousand copies had been sold by the defendants and the sale-proceeds appropriated by them.

5. As pointed out above, the plaintiff claimed damages on two alternative bases. The first was the amount of the not profits made by the defendants and the second was an alternative claim for damages occasioned to the plaintiff. Although we presume against the defendants that all the books were sold and it is admitted that each book was priced at one rupee and therefore we presume that Rs. 1,000 must have been realised by the defendants, we are unable to say that the net profits made by the defendants were more than Rs. 400 which is the amount assessed by the Court below. In the case of their own books the agent of the plaintiff's publishers has admitted that much less than 40 per cent is the net profit of the company. We do not think that when the remuneration paid to the author who prepared the notes and the costs of printing and advertising the book and the costs of commission are all calculated, the net profits would in any way exceed 40 per cent. We are therefore unable to hold that if the net profits made by the defendants is to be the basis the amount of damages assessed by the Court below is inadequate. As regards the loss suffered by the plaintiff the difficulty is still greater. The plaintiff's case was that many other books of his were for sale in the market and during the year in dispute the sales had fallen. But it is to be admitted that five other firms have infringed the plaintiff's copyright and they also have incorporated these poems of the plaintiff in their own books. It is therefore very difficult to say that the decrease in the income received by the plaintiff on account of a fall in the sales of his bigger books is not the result of any depression in trade or not the result of any competition of the other firms but is solely due to the publication by the defendants. We find it very difficult to hold that Rs. 400 does not represent a fair amount of loss which the plaintiff has sustained on account of the publication of the defendants' books, excluding the loss occasioned by Other causes. The result therefore is that we cannot increase this amount.

6. As regards the objection to the award of Rs. 75 on account of the expenses of the plaintiff's agent in coming from Calcutta, we find that the learned Judge has given this amount to the plaintiff in express terms in addition to the taxable costs to which the plaintiff was entitled under the rules and which the learned District Judge did not specify. He therefore had this figure in his mind when he assessed Rs. 400 as the amount of damages to be awarded to the plaintiff. No doubt the plaintiff's agent was not summoned as a witness by the Court but it is also a fact that owing to the unnecessary denial of various matters the plaintiff was led to produce more evidence than he would otherwise have produced. The learned Judge thought that the plaintiff was entitled to the costs of this witness, and we cannot interfere with his discretion. It is not necessary for us to consider whether u/s 7 of the Copyright Act the plaintiff is entitled to the gross proceeds of the sales of all the books or only to the net proceeds because, in the plaint, as pointed out above, the claim was confined to the net profits arising from the sales. u/s 6(2) the costs of all parties in the proceedings in respect of infringement of copyright shall be in the absolute discretion of the Court. We think that we should not interfere with the award of these costs. The result,

therefore, it that the appeal and cross-objection are both dismissed with costs.