
(2014) 02 KL CK 0146
In the High Court Of Kerala
Case No : Crl. M.C. No. 324 of 2010

George Jacob and Others

APPELLANT

Vs

Nandakumar Moodadi and Another

RESPONDENT

Date of Decision : 13-02-2014

Acts Referred:

Copyright Act, 1957 — Section 13, 13(1), 13(1)(a), 13(2)(ii), 14
Criminal Procedure Code, 1973 (CrPC) — Section 482
Press and Registration of Books Act, 1867 — Section 7

Citation : (2014) CriLJ 3421 : (2014) 1 ILR 1035 : (2014) 1 KHC 772 : (2014) 2 KLJ 36 : (2014) 2 KLT 180 : (2014) 2 RCR(Criminal) 786

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : K.P. Dandapani, Senior Advocate and Millu Dandapani, Advocate for the Appellant; Reji Joseph, Public Prosecutor, B. Krishnan and R. Parthasarathy, Advocate for the Respondent

Judgement

A. Hariprasad, J.—The legal conundrums under the Copyright Act, 1957 (in short "the Act") raised in this petition filed u/s 482 Cr.P.C. are as follows:

- (i) Can a person claim copyright over an unpublished artistic work under the provisions of the Act?
- (ii) Can a Chief Editor, Executive Editor, Managing Editor et. al. of a publication be prosecuted for the alleged infringement of copyright under the Act?

Relevant facts are thus:

The complainant approached the learned Magistrate with a grievance that the petitioners/accused infringed his copyright and thereby committed an offence u/s 63 of the Act. And therefore he requested the Magistrate to take cognizance of the offence u/s 70 of the Act.

2. Complainant is a freelance professional photographer. He claimed to have earned national as well as international reputation as a photographer.

Complainant is the author of a photograph of Sri. M.T. Vasudevan Nair, a renowned malayalam litterateur. Complainant had taken a photograph of Sri. M.T. Vasudevan Nair in the year 1996. Complainant used his intellectual skill in photography to make the photograph a unique artistic work. Accused are persons connected with "Bashaposhini", a publication under the aegis of Malayala Manorama. Complainant came to know that in the cover page of Bashaposhini, printed and published by the accused, published during the month of October, 2008, the photograph of Sri. M.T. Vasudevan Nair taken by the petitioner appeared. It was published without obtaining complainant's consent, permission or license. In fact in the year 2004, the complainant had delivered a copy of the said photograph of Sri. M.T. Vasudevan Nair to the authorised representative of Malayala Manorama for incorporating it in the interactive encyclopedia entitled as "MT CD Rom" on Sri. M.T. Vasudevan Nair. At the time of delivering the copy of the photograph, there was an assurance to the complainant from the side of the accused that the photograph will not be used for any purpose, other than the CD Rom. Annexure-R1(a) is the letter issued by the Editor, by which Malayala Manorama agreed to the complainant that they will use the photograph for incorporating in the respective section in the M.T. - CD Rom and further agreed that they will not use the photograph for any other purpose. According to the complainant, this undertaking made through Annexure-R1(a) was violated by the accused, thereby infringing his copyright. The complainant caused to issue Annexure-R1(b) lawyer notice dated 08/11/2008 setting out the facts. The accused through their lawyer issued a reply notice (Annexure-R1(c)). Annexure-R1(d) would show that an amount of Rs. 1,500/- was sent by the accused to the complainant as remuneration for the photo published on the cover page of Bashaposhini. Annexure-R1(f) reply was sent by the lawyer of the complainant to the accused stating that he was not prepared to receive any amount as remuneration for the photograph and there was no settlement of issues as stated in the lawyer notice. Finally, the complaint was filed.

3. Heard the learned counsel for the petitioners/accused and the learned counsel for the complainant.

4. Learned counsel for the accused submitted that the complaint is not legally maintainable. What is discernible from the complaint is that the complainant had not published the photograph at any time. So, the first ground of attack is that the complainant cannot initiate any legal action for the alleged infringement of copyright on the basis of an unpublished work. It is contended that going by Section 25 of the Act, the complainant cannot claim a copyright so long as he has no case that it was published at any point of time. In other words, it is contended that without effecting publication of the photograph by the author himself, he cannot set up any legal right in respect of the photograph. Section 25 of the Act deals with the term of copyright in photographs, it reads as follows:

25. Term of copyright in photographs.--In the case of a photograph, copyright shall subsist until sixty years from the beginning of the calendar year next

following the year in which the photograph is published.

5. In order to appreciate this contention, we will have to refer to various other provisions of the Act. Section 2(c) in the interpretation clause of the Act defines "artistic work". It shows that a photograph also comes within the definition of "artistic work". Section 2(d) of the Act makes it clear that in relation to a photograph, the person taking the photograph is the "author". So, it is evident that the claims of the complainant that he is the "author" of the photograph and the photograph is an "artistic work" are indisputable.

6. Section 2(s) of the Act defines "photograph" which includes photo-lithograph and any work produced by any process analogous to photography, but does not include cinematograph film. Section 2(m) of the Act defines "infringing copy" in relation to an artistic work as a reproduction thereof otherwise than in the form of cinematographic film. In this case, the allegation is that the complainant authorised the accused to include the photograph in a CD Rom and for no other purpose. They reproduced the same as a print matter on the cover page of a periodical. This is the reason for the allegation that there is an infringement of the legal right of the complainant.

7. Section 13 of the Act deals with the works in which copyrights subsists. Section 13(1)(a) shows that artistic work, in which a photograph is also included, is a matter in which copyright subsists throughout India. Section 13(2)(ii) of the Act shows that copyright will subsist in any work specified in Section 13(1) even if it is an unpublished artistic work, if the author, at the date of making the work, a citizen of India or domiciled in India. Section 14 gives the meaning of copyright. The relevant portion of the section reads as follows:

14. Meaning of copyright.--For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:--

[(a) and (b) xxxx xxxx xxxx]

(c) in the case of an artistic work,--

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in

relation to the work in sub-clauses (i) to (iv).

8. Owner of the copyright in an existing work may assign to any person the copyright either wholly or partially and either generally or subject to limitations as per Section 18 of the Act. Section 19 of the Act shows that no assignment of copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.

9. Above mentioned provisions of the Act will make it clear that the complainant is the author of the photograph and the photograph falls within the definition of an artistic work. The author of an artistic work, even if it is unpublished, can claim copyright. Further, the assignment made by the complainant to the accused in this case is limited to the extent specified in Annexure-R1(a). Terms and conditions in Annexure-R1(a) did not permit publication of the photograph in any medium other than (sic) in a CD Rom. Therefore, the final result of the discussion is that for claiming copyright over an artistic work it is not necessary that the work should be a published one. If the conditions in Section 13(2)(ii) of the Act are satisfied, copyright can be claimed by the another in respect of an unpublished artistic work also.

10. Next contention raised by the accused is that accused 3 to 6 are not responsible for the selection of items to be printed and published in the magazine "Bashaposhini". Hence they are not liable to be proceeded against pursuant to the complaint. As per the provisions of the Press and Registration of Books Act, 1867, the accused have an immunity from prosecution for the said reason.

11. Learned counsel for the accused contended that the accused persons are holding the posts of Chief Editor, Managing Editor, Executive Editor etc. and as they are not involved in the selection of matter to be printed and published in each issue of the periodical, they cannot be prosecuted. If at all any prosecution is to be maintained, only those who directly involved in the publication of the periodical can alone be booked. This contention of the accused cannot be accepted for the reason that in paragraph 5 of the complaint, it is specifically alleged that the disputed photograph was published as cover page of the periodical with the knowledge and consent of all the accused. Furthermore, it is averred in the complaint that all the accused were in-charge of and responsible for the conduct of the business of the company at the time when the offence was committed. It is therefore contended by the complainant that having raised such an allegation in the complaint, it is for the accused persons to show at the time of trial that they were not directly involved in the publication of the photograph in the cover page of the periodical. It is also contended that jurisdiction u/s 482 Cr.P.C. cannot be invoked to quash a complaint when complicated questions of fact are involved.

12. Learned counsel for the complainant heavily relied on a decision in K.M. Mathew Vs. K.A. Abraham and Others, to argue that the said claim of the petitioners/accused raised in the petition is not allowable. Apex Court considered

the question whether there is any statutory immunity claimable by Managing Editor, Resident Editor or Chief Editor against any prosecution for the alleged publication of any matter in a newspaper over which such persons exercise control. Section 7 and other provisions of the Press and Registration of Books Act, 1867 were considered and it is held thus:

15. There is no statutory immunity against Managing Editor, Resident Editor or Chief Editor against any prosecution for the alleged publication of any matter in the newspaper over which these persons exercise control. In all these cases, the complainants have specifically alleged that these appellants had knowledge of the publication of the alleged defamatory matter and they were responsible for such publication, and the Magistrates who had taken cognizance of the offence held that there was prima facie case against the appellants.

19. The provisions contained in the Act clearly go to show that there could be a presumption against the editor whose name is printed in the newspaper to the effect that he is the editor of such publication and that he is responsible for selecting the matter for publication. Though, a similar presumption cannot be drawn against the Chief Editor, Resident Editor or Managing Editor, nevertheless, the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption u/s 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than editor can also be held responsible for selecting the matter for publication in a newspaper.

13. Complainant contended that the claim made by the accused that they were not responsible for selecting the matter to be printed and published in the periodical is a fact to be established at the time of trial. Considering the allegations in the complaint coupled with the principles of law stated by the Supreme Court in Mathew's case (supra), I find that the contention of the petitioners/accused cannot be accepted.

14. Learned counsel for the complainant further contended that the test for determination as to whether there is any infringement or not is to see whether the reader, spectator or the viewer after having read or seen both the works would be clearly of the opinion and would get an unmistakable impression that the subsequent work appears to be a copy of the first one. It is also contended that it should be viewed from an angle of a "lay observer". To support this contention, Division Bench decision of Karnataka High Court in Associated Electronic and Electrical Industries (Bangalore) Pvt. Ltd. Vs. M/s. Sharp Tools, Kalapatti, is cited. On going through the decision, I am of opinion that the view expressed by the Karnataka High Court in this context reflects the correct position of law. Considering the facts and circumstances of the case and the legal principles, I am of definite view that the petitioners/accused are not entitled to get any relief claimed in the petition. It cannot be held that the complaint is an abuse of the process of the Court. At any rate, this is not a fit case in which jurisdiction u/s 482 Cr.P.C. can be involved to quash Annexure-A complaint. The

petition is dismissed as it is found to be devoid of any merit.

All pending interlocutory applications will stand dismissed.