

(1944) 03 CAL CK 0004
In the Calcutta High Court
Case No : Suit No. 1658 of 1941

Macmillan and Co., Ltd.

APPELLANT

Vs

All India Publishing Co., Ltd.

RESPONDENT

Date of Decision : 16-03-1944

Acts Referred:

Citation : (1944) 03 CAL CK 0004

Judgement

Ameer Ali, J.—I am glad to have had the assistance of Mr. Meyer on behalf of the Defendants because I know that everything that might have persuaded me to assist his clients in the matter of costs has been said. The action is one for infringement of two copyrights. The action I may say at once is brought by one of the biggest publishers in the world against, possibly, one of the smallest. It is in connection with one of the most famous of modern writers. The infringement alleged was of the original work of Thomas Hardy "Far From the Madding Crowd" and principally of an edition of that book with notes by a gentleman called Mr. Cyril Aldred; of course by arrangement, an edition apparently produced also for educational purposes. The infringing work is one stated to be that of "an experienced professor" and is published by the Defendants, the said "experienced" professor not being impleaded.

2. Had it been necessary to decide whether the bulk of the Defendants' book is or is not in itself an infringement on the principle of re-production or, as I have expressed it, "potting," it would have been necessary for me to consider further the construction which I have not fully appreciated, and the substance of the bulk of the book published by the Defendants. As far as I can at present see, it contains, especially in the matter of discussing or anatomising characters, much ingenious or original labour and ingenuity.

3. Bulk-potting or reproduction, however, is not the gravamen of the offence pleaded. It is not stated either in the correspondence or in the pleadings, or indeed in such limited opening by Counsel as opportunity allowed. It was really put by me as a possibility, and one of which Mr. Meyer for the Defendants fully

realised the dangers. Mr. Meyer however is quite justified in asking me to eliminate it entirely from my consideration, so far as damages are concerned, and I do. Indeed, I have not been able to form the particulars (it may be for want of perseverance) to appreciate how the original text is said to be infringed. Bulk-potting or substitution by inferior reproduction, therefore, may be eliminated, and the matter will then rest upon "lifting" of the notes contained in Mr. Aldred's edition and their reproduction into the infringing book.

4. Mr. Meyer, if I may say so, with a wise discretion, has not dealt with the matter except for the purposes of a plea in respect of damages. He has not protracted the trial by arguing or supporting a substantive defence that the notes did not contain original matter. It would have involved additional expense, with little possibility of success. It follows, therefore, and I may say this would have been my decision from my comparison of the two, however far the argument might be pressed, that the infringement has taken place. It follows, again, that a decree must be passed in favour of the Plaintiff.

5. Three questions only remain--the form of the decree, the measure of damages and the question of costs, the latter question being as a matter of course the most important.

6. Counsel for the Plaintiffs is perfectly correct when he says that the Plaintiffs are entitled to the right to come here and claim adjudication of their rights. The anomaly arises, because we have fixed for what is considered a necessity or right, the price of luxuries. The costs must now, even in this case, far exceed any damages which are likely to be recovered.

7. The last observation of Counsel for the Plaintiffs reminds me of another fact, which, again, I am not entitled to take into account, namely, that even if the Plaintiffs claim a decree, the costs to them of this suit will be more, whatever my order, than what they may recover against the Defendants. That is a consideration which, except in the rarest of cases, and even then not without some risk, I am unable to take into account.

8. With regard to the decree, I was under the impression that the law as it stood in the last edition of Coppinger held good namely, that the reliefs to the person complaining of infringement were alternative. Counsel for the Plaintiffs has persuaded me of my error. There is a case [Caxton Publishing Co. v. Sutherland Publishing Company [1939] A. C. 1788(house of Lords)] which now lays down to the contrary, and it appears that in addition to damages by way of loss of profit or loss of dignity to the original volume the Plaintiffs may recover not only the infringing article but the value however assessed of the infringing articles that have been disposed of. I do not agree that that value is to be taken as the sale price. It has to be assessed by the methods or principles laid down in that authority. The decree will therefore go in the form there indicated, and there will be an enquiry as to damages under both branches, unless the parties either agree to damages or persuade the Court to make a rough and ready assessment.

9. There remains the matter of costs. [His Lordship after considering the question of costs concluded as follow:]

Without therefore going to the length of the cases which Counsel was (sic) to show me to establish how rare it is and under what stringent conditions a Defendant in this class of case can avoid paying costs. I am forced to the conclusion that there is not here sufficient to permit me to exercise my discretion in a manner other than that indicated by the general rule, that costs will follow the event. The decree therefore is in the cumulative form, with liberty to Counsel to ask me to assess the damages, which I will do in chambers. The decree will include the reliefs asked for in the prayer by way of delivery and injunction.