

(1982) 02 CAL CK 0035
In the Calcutta High Court
Case No : C.R. No. 12253 (W) of 1981

Nag Book House and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 17-02-1982

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226

Copyright Act, 1957 — Section 13

West Bengal Board of Secondary Education Act, 1963 — Section 19A(3), 27(2)

Citation : AIR 1982 Cal 245 : 87 CWN 107

Hon'ble Judges : B.C. Ray, J

Bench : Single Bench

Advocate : R.N. Mitra, Moloy Bose, D.K. Halder and B.G. Chatterji, for the Appellant; A.P. Chatterjee, S.P. Banerjee, (for Nos. 3 and 4) and P.K. Basu, (for Nos. 1 and 2), for the Respondent

Judgement

1. The petitioner No. 1 is a registered partnership firm which has been carrying on the business of printing, publishing and selling of approved text books of different classes in the different schools recognised by the West Bengal Board of Secondary Education. This business is carried on under the name and style of "Nag Book House." The petitioner No. 2 is one of the partners of the said business. The West Bengal Board of Secondary Education issued guidelines for authors of text books on mathematics containing instructions regarding syllabus that has to be followed in respect of text books on Arithmetics and Geometry in classes VI and VII. The said guidelines describing the syllabus in respect of Arithmetics and Geometry to be followed by the writers on text books on the said subjects for being read by the pupils of the schools recognised under the Board. Thereafter a Circular No. Syll/79/9 dated 23rd Nov. 1979 was issued by the Secretary, Board of Secondary Education, West Bengal to the head's of all Junior and High Schools recognised by the Board notifying that the syllabi in Mathematics for Classes VI to X had been revised and the new syllabi for classes VI and VII would be introduced In place of the existing syllabi already published

in Board's Brouchure under reference from the academic sessions 1981 onwards. The syllabi for classes VIII and IX will be introduced in place of the existing syllabi already published in Board's brouchure under reference from the academic sessions 1982, 1983 respectively. Another circular being circular No. Syll/ 80/9 dated 12th Aug. 1980 was sent by the Secretary of the Board to the heads of all junior and High Schools recognised by the Board intimating that the new syllabus in mathematics will be introduced from the academic session 1981 only in class VI and not in class VII. The new syllabi for classes VIII, IX and X will be introduced in place of existing syllabi from the academic sessions of 1982, 1983 and 1984 and 1985 respectively.

2. Text books were prepared according to the syllabus prescribed from time to time by the authorities concerned and sent to the intending publishers and/or authors asking them to submit text books written and/or printed as per the said syllabus to the authorities for approval. The authorities used to fix up dates within which text books were to be submitted for approval as well as prescribed fees for the purpose. The authors and/or publishers after preparing the text books according to the syllabus and/or guidelines used to submit the same to the authorities concerned well in advance so that the text books could be put to market before the academic session concerned. After the submission of the text books so prepared by the authors and the publishers the same were to be scrutinised by experts appointed by the authorities to ascertain whether the same had been prepared strictly according to the syllabus and the guidelines prescribed by the authorities. The text books after being recommended by the experts were formally approved by the authorities and thereafter the names of the text books were sent to the Heads of the Institutions for circulation. Such approval was also to be notified in the official Gazette. In case any mistakes and/or defects noticed by the experts the Authors and/ or Publishers were to rectify the same after having followed the entire procedure and resubmit the same for its approval in the same manner and that too well in advance. The authorities have the absolute right either to reject any text book submitted for approval if the same were not up to the mark or to approve the same. This procedure was followed by the Government as well as University of Calcutta before the constitution of the Board of Secondary Education, West Bengal. After the constitution of the Board of Secondary Education similar procedure was followed until the issuance of new circular mentioned hereafter.

3. On 18th Nov., 1981, the Secretary, Board of Secondary Education, West Bengal issued a circular No. 95/81 intimating that the syllabi in Mathematics for Classes VI and VII has been prescribed by the Board by its circulars Nos. Syll/ 79/19 dated 23-11-1979 and Syll/80/9 dated 12-8-1980. It has been further stated in the said circular that the Education Department of the Government of West Bengal have undertaken the responsibility of publishing the mathematics text books for Class VI from the year 1981 and of distributing the same free of cost among the students all over the State of West Bengal. The West Bengal Board of Secondary Education have undertaken, with the approval of the

Government of West Bengal, the preparation, publication and sale of text books in Mathematics for Class VII for the Secondary Schools recognised by the Board from the academic session 1982. From the academic session 1982, no book in Mathematics for Classes VI and VII other than the text books published either by the Government of West Bengal or by the Board as aforesaid, shall be prescribed in any secondary schools recognised by the Board. It has also been mentioned therein: "And, that no individual publisher shall be entitled to publish text books in Mathematics in any form whatsoever, as per the said syllabi."

4. It has also been stated that the petitioners came to know from the notification dated 23-11-1981 this purported circular. It has been stated that this circular has completely frozen the text books on Mathematics for Classes VI and VII written by Sri Keshab Chandra Nag and published and printed by the petitioners thereby causing substantial loss to them. It has been stated that the petitioners have invested a huge sum of money for printing and publishing the text books on Mathematics for its use by the students of Secondary Schools under the Board and the impugned circular which purports to make total prohibition of the publishing and selling of these books published by the petitioner has caused serious prejudice as well as financial loss to the petitioner. It has further been stated that in view of the circular dated 23rd Nov., 1979 prescribing the syllabus for Mathematics the petitioners invested a huge sum of money in printing and publishing books on Mathematics for Classes VI and VII on the basis of the syllabus prescribed by the West Bengal Board of Secondary Education. It has, therefore, been submitted that the Board is estopped from acting contrary to the said circular by way of promissory estoppel. It has also been submitted that the impugned circular dated 18th Nov. 1981 is violative of Article 14 of the Constitution as it discriminates between one publisher and another publisher similarly placed inasmuch as the petitioners have come to learn that the Board is entering into trading activities through Messrs. MacMillan Company Ltd. who is another publisher for the books for Class VII and above. It has been further submitted that the impugned circular is illegal and ultra vires inasmuch as it purports to interfere with the fundamental rights of carrying on by the petitioners their occupation as well as in practising their profession of printing and publishing books guaranteed in Article 19(1)(g) of the Constitution of India. As such the said circular is liable to be quashed and set aside. It has been further submitted that the impugned notification is also violative of the principles of natural justice inasmuch as before the issuance of the said circular and notifying the same in the Gazette no opportunity of hearing was given to the petitioners whose fundamental rights have been seriously affected by the purported circular.

5. On these allegations and averments the instant Rule was issued on 9th Dec. 1981 and there was an interim order to the effect that the respondents were restrained from interfering with the rights of the petitioners to print, publish and sell books written by Keshab Chandra Nag in Mathematics during the disposal of the Rule.

6. An affidavit-in-opposition on behalf of respondents Nos. 3 and 4 sworn by Sri Jyotirbhusan Dutta, Deputy Secretary (Academic) West Bengal, Board of Secondary Education was filed on 7th Dec. 1981. In paragraph 4 of the said affidavit it has been stated that the West Bengal Board of Secondary Education constituted under the West Bengal Board of Secondary Education Act, 1963, has been empowered to provide for secondary education to the students and also it has been vested with the task of supervising the various institutions and schools recognised by the Board for imparting secondary education to the students reading in the schools under the Board. In the exercise of such powers of supervision and control over secondary education the Board have always the power to approve and select text books for the students and in fact text books in compulsory subjects could be used in any institution or school recognised by the Board only after being approved by the Board of Secondary Education. It has also been stated that after the amendment of the provisions of Section 27 of the said Act the Board has been conferred with greater powers in this respect. Clause (d) of Sub-section (2) of Section 27 confers in particular the power to undertake, if necessary, with the approval of the State Government, the preparation, publication, or sale of text books and other books for use in recognised institutions. This Act was further amended by West Bengal Act XXXII of 1979 and Section 19A was inserted in the parent Act by Section 8 of the said Amendment Act. Sub-section (3) of Section 19 which has specified the duty of the Executive Committee of the Board clearly provides in Clause (h) of the said subsection that the Executive Committee of the Board can undertake with the approval of the State Government the preparation, publication or selling of text books and other books for use in recognised institutions. It has been submitted that on the basis of this provision the Board has undertaken the monopoly publication of text books for different classes in Secondary Schools. For seven years past the Board has monopoly publication of text books in English for Classes VI to X and it has now decided to undertake, with the approval of the State Government, monopoly publication of text books in Mathematics for Classes VII as well as for class VI. It has been further stated that the action of the Board in undertaking monopoly publication of books on Mathematics for class VII is not in conflict with the petitioner's right enshrined in part III of the Constitution. It has been further stated that the last two riders of the circular dated Nov. 18, 1981, to the effect that no book in Mathematics for Classes VI and VII other than the text books published by the Government of West Bengal or by the Board shall be prescribed in any recognised school and no individual publisher shall publish any text books in Mathematics in any form are not wholly illegal nor these two instructions violate the petitioner's right to carry on trade. It has also been stated that in the facts of the case there is no principle of promissory estoppel because of publishing and printing of books in accordance with the syllabus circulated under the circular dated 23rd Nov. 1979 as text books in a secondary institution for classes VI and VII in Mathematics written according to the syllabus must have to get prior approval of the Board.

7. An affidavit-in-reply has been filed reiterating the statements and submissions made in the writ petition.

8. Mr. R.N. Mitra, learned Advocate appearing on behalf of the petitioners has contended that the impugned circular dated 18th Nov. 1981 issued by the Secretary, West Bengal Board of Secondary Education is wholly illegal, unwarranted and bad inasmuch as the purported circular totally prohibits the publication of text books in Mathematics in accordance with the syllabus prescribed for classes VI and VII in any form. It has been submitted that the Secretary has not been conferred by the provision of the West Bengal Board of Secondary Education Act, 1963 as amended by the West Bengal Board of Secondary Education (Amendment) Act, 1979 and the Rules framed thereunder the power to exercise any such power of the Board. It has been next submitted by Mr. Mitra that the impugned circular is ultra vires as it Purports to create unreasonable restrictions on the petitioner's fundamental right guaranteed under Article 19(1)(g) of the Constitution. It has further been submitted that the Board cannot issue the impugned circular prohibiting the petitioner from printing and publishing text books in Mathematics according to the syllabi prescribed by the Board though the same may not be approved by the Board as text books for students reading in secondary schools.

9. Mr. A.P. Chatterjee, learned Standing Counsel, has, on the other hand, submitted that the Board can issue the impugned circular in exercise of the powers conferred by Section 27 of the Act and the impugned circular cannot be attacked as being illegal or unwarranted. It has been further submitted that the Board has in accordance with the provisions of Section 27 of the Act made regulations prescribing the syllabus. The impugned circular which empowers the Board to publish text books in Mathematics for Class VI and VII in secondary schools recognised by the Board and prohibiting publication of any text books in Mathematics according to the said syllabi is in accordance with the provisions of the Act and the regulations framed by the Board. It has been further submitted that this circular cannot be challenged as arbitrary, illegal and violative of the fundamental right guaranteed by the Constitution under Article 19(1)(g) of the Constitution of India. It has been lastly submitted by the learned Standing Counsel with great vehemence that the Board has a copyright to the syllabi made by it and the petitioner by writing text books in Mathematics in accordance with the said syllabus for classes VI and VII has infringed the copyright. For this infringement of the copyright the redress cannot be sought in this jurisdiction but to any other forum. It has also been submitted in this connection that the instant application at the instance of the petitioner is not maintainable inasmuch as the petitioner's statutory or constitutional rights have not been affected or infringed by the impugned circular. Section 27 of the West Bengal Board of Secondary Education Act, 1963 which deals with the powers and functions of the Board have been amended by Section 15 of West Bengal Board of Secondary Education (Amendment) Act, 1979 (West Bengal Act XXXII of 1979) and it substitutes Clauses (a) to (m) under Sub-section (2) of that Section. The relevant provisions

which are quoted hereinbelow :--

"27 (2). Subject to any general or special orders of the State Government, the provisions of this Act and any rules made thereunder, the Board shall have generally the power to direct, supervise and control Secondary Education, and in particular the power -- (c): to make regulations in respect of matters referred to in Clauses (c), (d), (e) and (g) of Sub-section (2) of Section 19A. Section 19A (3) (g) which was inserted by Section 8 of the amended Act runs as follows :--

"it shall be the duty of the Executive Committee to provide by bye-laws after considering the recommendations, if any of the Syllabus Committee, the Syllabus, the courses of studies to be followed and books to be studied in recognised institutions and for examinations instituted by the Board in accordance with such regulations as may be made by the Board. In this case the Board has framed certain regulations prescribing the syllabi for Mathematics in respect of Classes VI and VII of Secondary Schools recognised by the Board. The Executive Committee as well as the Board has got power to make bye-laws and regulations respectively in the manner laid down in the statute providing for the syllabus, the courses of studies to be followed by the students and books to be studied in recognised institutions. In this case the syllabi that has been prescribed by the Board by making regulations is, therefore, not illegal and bad. There is also no dispute nor it has been questioned on behalf of the petitioner that the Board cannot issue circular notifying that it will print and publish text books for students reading in secondary schools recognised by the Board and for sale of those books to the students. In other words, the Board can take up upon itself the entire responsibility of preparing, printing, publishing and selling of text books on Mathematics according to the syllabi prescribed by it to the exclusion of any other author, printer and publisher. This cannot be questioned and/or challenged by any other printer or author.

10. The next question that comes up for consideration is whether in exercise of this power the Board is competent to issue the impugned circular dated Now, 18, 1981 preventing any individual publishers from publishing text books in Mathematics in any form whatsoever as per the syllabi prescribed by the Board. In my opinion, the Board is not empowered to publish a circular totally prohibiting other publishers from printing and publishing text books on Mathematics according to the prescribed syllabi for students for Classes VI and VII reading in secondary schools recognised by the Board. The impugned circular which purports to prohibit printing and publishing text books in Mathematics in any form whatsoever according to the prescribed syllabi is, in my opinion, violative of the fundamental right guaranteed under Article 19(1)(g) of the Constitution which guarantees the right of the citizen to practice any profession or to carry on any trade or business. This impugned circular purports to create an unreasonable restriction on this fundamental right and as such it is void and so it is liable to be quashed and set aside. The Board themselves undoubtedly can monopolise the trade of printing and publishing text books to be read by the

pupils in secondary schools under the Board according to the syllabi prescribed by it. But this does not either expressly or impliedly confer upon the Board power to forbid printing and publication of text books by any other publisher or author according to the prescribed syllabi for students reading in secondary schools. These books if written cannot be treated as text books nor the printers or publishers thereof can claim any right to have them treated as text books and to allow them to be read by the pupils of the secondary schools as text books. Nevertheless, if students or schools are desirous of keeping these books or buying these books and reading them it cannot be prevented. Therefore, this circular is liable to be quashed and set aside.

11. The learned Standing Counsel has submitted with great persuasiveness that the Board has a copyright to the syllabus made by it and the petitioners have no right to write text books on Mathematics for students of class VI and VII following the syllabus. It has been contended in this connection that the preparation and publication of the syllabus requires skill, capital and labour, it is the product of all these and as such no publisher including the petitioner have any right to write, print and publish text books following the said syllabus. Reference has been made in this connection to the decision of Lord Atkinson in *Lord Atkinson in Macmillan and Co. v. Cooper*, AIR 1924 PC 75 where it has been observed that "It is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material if one may use the expression, upon which the labour and skill and capital of the first have been expended, to secure copyright for this product. It is necessary that the labour, skill and capital expended should be sufficient to import to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material". In *Agarwala Publishing House Vs. Board of High School and Intermediate Education and Another*, it has been observed that examination papers are within the category of original works within the meaning of Section 13 of the Indian Copyright Act, 1957 and copyright can be claimed therein. Section 2(m) of the Copyright Act, 1957 defines "Infringing copy" as meaning :--

"(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of cinematograph film." Section 13 provides that "copyright shall subsist in the following classes of works, that is to say,--

"(a) original literary, dramatic, musical and artistic works."

Chap. X deals with registration of copyright. Section 51 provides that "copyright in a work shall be deemed to be infringed

"(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act -

(i) does anything, the exclusive right to do which is by this Act conferred upon

the owner of the copyright." In the case of Mohini Mohan Singh and Others Vs. Sita Nath Basak, it has been held that an author may avail himself of common sources of information on a subject but he is not entitled to save himself pain and labour by adopting a predecessor's work with colourable variations even though such predecessor's work is based on materials which are common property. In Mishra Bandhu Karyalaya and Others Vs. Shivratanlal Koshal, , Mishra Bandhu Karyalaya v. Shivaratanlal Koshal it has been held "Neither original thought nor original record is essential for a literary work to be original u/s 1. Schedule I of the 1914 Act. The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of author. The originality in writing of a successful text book in a subject like arithmetic lies upon the skill of the author. The amount of originality may be small, but the extent of his thought, skill and labour may be tremendous and it is that which is protected by law."

12. The guidelines for the authors and publishers of text books issued by the Board of Secondary Education, West Bengal annexed as annexure "A" to the petition prescribing the syllabus cannot be taken as original work being the product of labour, skill and capital of some men engaged by the Board. The syllabi merely prescribing the guidelines which are to be followed by the text books writers cannot be termed as an original work having some quality or character of its own different from the raw material used. Therefore, in my opinion, the syllabi that has been prescribed by the Board being not a product of labour, skill and capital and not having an independent character and quality of its own the question of any copyright does not arise from this. The submission of the learned Standing Counsel that in accordance with the syllabi the text books prepared by the petitioners is an infringement of the copyright is without any merit and hence the same is overruled.

13. The impugned circular dated 18th Nov, 1981 as mentioned in annexure "D" to the petition undoubtedly affects and infringes upon the petitioner's fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. Therefore the petitioner's being aggrieved persons are competent to maintain this application in this jurisdiction. The submission of the Standing Counsel on this score is totally devoid of merit and hence the same is rejected.

14. For the reasons aforesaid the contentions raised on behalf of the petitioner having succeeded the Rule succeeds and it is made absolute. Let a writ of Mandamus be issued commanding the respondents to forbear from giving effect to the impugned circular in so far as it purports to prohibit individual publisher from publishing text books in Mathematics in any form whatsoever as per the syllabi of the Board. Let a writ of certiorari be also issued commanding the respondents to quash and set aside that portion of the circular which purports to prohibit individual publisher from publishing text books in Mathematics in any form whatsoever according to the syllabi of the Board.

15. In the facts and circumstances of the case there will, however, be no order as

to costs.