

(1944) 10 AHC CK 0012
In the Allahabad High Court

Om Prakash and Another

APPELLANT

Vs

Pt. Radhey Shyam Kathawachak and Others

RESPONDENT

Date of Decision : 11-10-1944

Acts Referred:

Citation : AIR 1945 All 55 : (1945) 15 AWR 57

Hon'ble Judges : Malik, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Malik, J.—These three appeals arise out of three suits which were filed in the Court of the District Judge of Bareilly. Pandit Badhey Shyam Kathawachak, plaintiff in all the three suits, is a Hindi author who has written several dramas. He was employed by the New Alfred Theatrical Company of Bombay to write certain plays for them. The plaintiff wrote nine dramas, the stage rights in which remained with the company while all other rights were vested in the plaintiff. There were twelve other dramas which had been written by other authors copyrights in which were purchased by the plaintiff from the New Alfred Theatrical Company. Suit No. 3 of 1938 out of which First Appeal No. 217 of 1941 has arisen was filed by the plaintiff against the Twin Record Co. Ltd., on the ground that they had without the plaintiff's consent made certain records of songs of a drama named "Ishwar Bhakti" and were offering the same for sale to the public. Defendant 1, the Twin Record Co. Ltd., had also been printing, publishing and distributing small booklets containing extracts from the said drama. The plaintiff alleged that the Twin Record Co. Ltd., had thus infringed the plaintiff's copyright and he, therefore, brought this suit for injunction, for accounts and for other reliefs. Defendants 2 to 4 to the action were two minor sons and the widow of Lala Mukundi Lal Agarwal of Delhi, but so far as we can see no relief was originally claimed against them and it was not mentioned why they had been impleaded. By an application for amendment filed on 24th September 1938 a further relief was added for a declaration of the plaintiff's

ownership of the copyright in the said drama "Ishwar Bhakti" along with other dramas mentioned in a schedule marked as No. 2 and it was said that defendants 2 and 3 had been circulating notices in Bareilly through newspapers and placards claiming copyright in the said dramas.

2. The other suit No. 4 of 1938 out of which First Appeal No. 218 of 1941 has arisen was filed by the plaintiff on the allegation that the Gramophone Co. Ltd., and the Twin Record Co. Ltd., Calcutta, had started manufacture and sale of certain records and songs and compositions out of certain dramas written by the plaintiff and had done so without the plaintiff's consent. Various reliefs on the ground of infringement of copyright were claimed against defendants 1 and 2 but no relief was claimed against defendants 3 and 4, the two sons of Lala Mukundi Lal of Delhi though they were impleaded as defendants to the action. Later on, on the same allegation as in the previous case set out above the plaintiff claimed a declaration that he was the owner of copyright of the dramas named in Schedule 3 attached to the plaint. The third suit, No. 5 of 1938, out of which First Appeal No. 219 of 1941 has arisen, was filed against the two sons of Lala Mukundi Lal, Om Prakash Agrawal and Jagdish Prasad Agrawal, for a declaration that the plaintiff was the owner of the copyright in certain dramas and defendants 1 and 2 had no right whatsoever in the said copyright. The allegation made in this plaint was that the defendants had circulated in Bareilly and other places copies of the "Hindusthan Times" and other newspapers and placards claiming the right to sell the copyright in the dramas named in schedule attached to the plaint on the ground that they held a possessory mortgage of the same from the New Alfred Theatrical Company Bombay.

3. The Gramophone Co. Ltd., and the Twin Becord Co. Ltd., Calcutta entered into a compromise with the plaintiff and suits Nos. 3 and 4 of 1938 between the plaintiff and these two companies were decided in terms of the compromise. We have nothing to do, therefore, with that part of the case. The two minor sons of Mukundi Lal and his widow, however, contested the suits and the suits were decreed against them and the Court below granted the plaintiff a declaration that the plaintiff was the owner of the copyright of the dramas mentioned in the schedule attached to each plaint. It is against those decrees that the sons of Mukundi Lal have filed these three appeals. Learned Counsel for the appellants has urged that the suit was not cognisable by the learned District Judge of Bareilly on two grounds. His first contention is that the suit did not relate to a case of an infringement of copyright and therefore it should have been filed in the ordinary civil Court and not in the Court of the learned District Judge of Bareilly. His second contention is that there was no cause of action within the territorial jurisdiction of the learned District Judge of Bareilly and the suit, if at all, could be filed in Delhi and not in the Bareilly Court.

4. We do not think there is any force in these contentions. The argument advanced by the learned Counsel is that an advertisement in a paper that the defendants were going to sell the dramas did not mean that, they were selling

the copyright but it meant that they were only selling the particular copies of books in their possession and further that even if they purported to sell the copyright it could not be said that they had infringed the copyright and therefore it was not a suit for any relief under the Copyright Act (No. 3 of 1914). We have seen the various advertisements issued by the appellants and we are of opinion that what the appellants purported to sell was not the printed copies of the books in their possession but all the rights in the dramas in which the plaintiff claimed he had the copyright. We put it to the learned Counsel that if he did not dispute the plaintiff's claim to the copyright but wanted only to dispose of the copies of the books in their possession, then there was no reason why he should oppose the declaration, but learned Counsel was not prepared to concede the point though for purposes of his argument on the question of jurisdiction he alleged that the defendants had not done anything wrongful by issuing the advertisements. We have already said that we are of opinion that what the appellants purported to sell and what the appellants claimed in the written statement to have had a right to sell was the copyright in the dramas and not any specific books.

5. Learned Counsel's next contention is that an advertisement claiming a right to sell a copyright is not an infringement of the copyright as defined in the Act. u/s 13, Copyright Act, every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge. The Imperial Copyright Act of 1911 (I and 2 Geo. V, ch. 46) is applicable to this country under the Indian Copyright Act except in so far as it has been modified by the Indian Copyright Act and words and expressions defined in the said Act have the same meaning as in the Indian Copyright Act (see Section 2, Indian Copyright Act). u/s 1, Sub-section (2), Imperial Copyright Act, "copyright" means the sole right to produce or reproduce the work etc. u/s 2, Imperial Copyright Act, a

copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright....

6. The sole right to offer for sale the copyright in the dramas belonged to the owner of the copyright which the plaintiff claims himself to be. The advertisement by the defendants claiming that they had a right to sell the same, to our mind, clearly comes under the definition of the word "Infringement" of copyright. In Halsbury's Laws of England, Hailsham Edn. vol. 7, para. 891 at p. 575 it is said:

It is also an infringement of copyright to grant or purport to grant to a third person the right to do an act which, if done, would infringe copyright, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor. Thus it is an infringement of copyright to let the right of performing a cinematograph film in public, to advertise a proposed exhibition of a cinematograph film, to purport to sell the right to print and publish a

manuscript, or to sell a gramophone record with a view to its public performance, where the acts contemplated would, if done, constitute infringements of copyright.

7. In *Monckton v. Pathe Freres Pathephone Ltd.* (1914) 1 K.B. 395 Buckley L. J. at p. 403 stated:

...copyright includes the sole right to authorize the performance of the work. The seller of a record authorizes, I conceive, the use of the record, and such user will be a performance of the musical work. This consideration seems to show that Sub-section 2 itself is not confined to making but extends to sale.

8. In *Falcon v. Famous Players Film Co.* (1926) 2 K.B. 474 Atkin L.J. at p. 498 stated as follows:

There remains the question of infringement. Upon that I agree with the view expressed by my Lord. The plaintiff possessed the sole right to perform the play or to authorize its performances, and by the terms of Section 2 the defendants infringed that right if they either performed the play themselves or authorized its performance by others.

9. It is urged that if the appellants had sold the copyright that might amount to an infringement but a mere offer to sell as contained in the newspapers advertisements and in the placards would merely amount to an intention to sell and would, therefore, not amount to an infringement of the copyright. We think that the language of Section 2, Imperial Copyright Act, is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempted sale, and the plaintiff can in such a case claim a declaration and if necessary, an injunction. We are, therefore, of opinion that the case was rightly instituted in the Court of the learned District Judge. It is then urged that the cause of action, if any, arose in Delhi and not in Bareilly. Barring the fact that the newspapers in which the advertisements were published have their headoffices in Delhi, we do not see what took place in Delhi which did not take place in Bareilly. To our mind, wherever these newspapers circulated and wherever the advertisements appeared for the sale of the copyright which belonged to the plaintiff, there was a cause of action for a suit by the plaintiff. We are, therefore, of opinion that the Bareilly Court had jurisdiction to entertain the suits.

10. We have already stated that the appellants were minors on the day when the suits were filed. They were impleaded in these suits under the guardianship of their mother, Mt. Chameli. She was a defendant to suit No. 3 of 1938 but she was not made a party in the other two suits, suits Nos. 4 and 5 of 1938. It is urged on behalf of the appellants that the learned District Judge should have granted the application of Mt. Chameli to withdraw from guardianship and that she was negligent in the prosecution of the defence and on that ground it is urged that the decrees should be set aside and the cases should be remanded for a fresh trial. Mt. Chameli was appointed guardian of the minor defendants and she continued to act as such. These suits were filed on 29th September 1938.

The written statements in the suits were filed under the guardianship of Mt. Chameli. She raised the plea of jurisdiction which was decided by the learned District Judge by an order dated 30th April 1940. She had engaged lawyers practising at Bareilly as well as at Delhi to represent the minors. There was one Manik Shah Balsara who had been the managing proprietor of the New Alfred Theatrical Co., Bombay and the plaintiff first applied for his examination on commission. The plaintiff, however, was not able to give his address and therefore Balsara could not be examined on commission. On 22nd August 1940 the Court fixed 8th and 9th November for the final hearing of the case. Failing to get Balsara's correct address the plaintiff on 2nd October 1940 filed an application that he did not want Balsara to be examined in Court. The appellants on 18th October 1940 applied that if the plaintiff was not going to examine Seth Manik Shah Balsara the appellants would examine him as their witness and they prayed that it was not possible to have his examination concluded before 8th and 9th November and so the case might be adjourned for one month. The Court granted this prayer on 19th October and fixed 16th and 17th December for the final hearing of the case. On 21st October 1940 the plaintiff applied that he had heard that Manik Shah Balsara was coming to Bareilly and some suitable date for his examination between 10th and 13th November 1940 in Court might be fixed and the defendant's counsel might be informed. Information of this was given to the appellants' counsel on 21st October 1940. On 28th October 1940 they objected to Balsara's evidence being recorded between 10th and 13th and suggested that the plaintiff be ordered to bind Balsara down for examination on 16th and 17th December, the dates fixed for the final hearing of the case.

11. The defendants, however, changed their mind and, on 4th November, they filed an application which is printed at p. 45 of the paper book in First Appeal No. 219 of 1941 in which they said that they had no objection to Manik Shah Balsara's examination on 8th November provided he was treated as plaintiff's witness and not as defendants' witness and that if for any reason Balsara was not examined on 8th November then plaintiff should be made liable to pay special costs. To both these terms plaintiff agreed and Balsara appeared in Court as a witness on 8th November for examination. On that date an application was made on behalf of the defendants that Mr. Jugal Kishore, an advocate of Dalhi, was suffering from malarial fever and dysentery and the examination of Mr. Balsara might, therefore, be postponed to 16th and 17th December. The learned District Judge however considered the application and passed an order which is at p. 52 of the same paper book. He was of opinion that local counsel of Bareilly were quite competent to cross-examine Mr. Balsara and put to him such questions as might be necessary on behalf of the defendants and there was no ground for the postponement of his examination. The learned District Judge further pointed out that no objection had been taken on behalf of the defendant to the examination of Mr. Balsara on 8th November. We think that the learned District Judge was perfectly right in the order that he passed. The defendants were represented by several counsel and there was no valid reason for the

postponement of the case. Manik Shah's evidence was recorded on 8th November and the learned District Judge noted that though the defendants' pleader was present he was not able to cross-examine the witness due to the absence of Mr. Jugal Kishore advocate of Delhi, and, because the necessary documents were not on the record. We asked learned Counsel for the appellants as to what necessary documents he required and he mentioned that it was the mortgage deed in his clients favour and certain letters which were in his client's custody. We do not know what prevented the defendants from filing those documents if they were really relevant to the case and what prevented them from instructing the local lawyer to cross-examine Mr. Balsara.

12. On 16th December the date fixed for the hearing of the case, an application was filed on behalf of Mt. Chameli, the guardian of the minors, praying for permission to withdraw from guardianship. The learned District Judge rejected that application. The application and the order are printed at pp. 81 and 82 of our paper book. The plaintiff thereupon produced his witnesses who were not cross-examined by the defendants' counsel and the learned District Judge pronounced his judgment on the same date. The case had been pending in the Court of the learned District Judge from 29th September 1938 and the guardian had continued to act right up to 16th December 1940, the final adjourned date of hearing when the plaintiff was ready with his witnesses. The learned District Judge was of the opinion that it was a mere trick to get an adjournment and to further delay the proceedings. We have no materials on the record on which we can say that the learned District Judge was wrong. Under Order 32, Rule 11, Civil P.C. no guardian of a minor appointed by Court who has accepted the guardianship has a right to withdraw from guardianship at his sweet will and pleasure without the permission of the Court and the Court may permit such guardian to retire if it so pleases, or if a guardian does not do his duty the Court may remove him from such guardianship. It is true that minors are under the special protection of the Court and the Court has to safeguard their interest and if the Court is satisfied that the guardian is not doing his duty the Court may remove such guardian and appoint another." In this particular case, we have no material on which to base a conclusion that the guardian must be deemed to have been negligent in her duty. She was the mother of the minors and she may have been doing what she may have considered to be in the best interest of the minors as the minors may not have had any defence on the merits. In case she has been grossly negligent and on that account the minors' interest has suffered the minors have a remedy by way of suit and they can have the decrees set aside on the ground of gross negligence or fraud of the guardian.

13. In cases against minors, the Courts are placed in a certain amount of difficulty; if merely because a guardian says he is not ready to go on with the case and wants to retire and the Court has to adjourn the case, the Courts will be entirely at the mercy of the guardian and a dishonest guardian may delay an effective trial for an indefinite period. On the other hand, the Courts cannot so identify the interest of the minor with the conduct of the guardian as to disregard

the interest of the minor because of the obstructive attitude that may have been adopted by the guardian. We therefore carefully considered this matter as to whether there were materials on the record which would justify us to hold that the mother of the minor-appellants was negligent. As we have already said, we are not sure whether the mortgage deed and the letters, if proved, would have really helped the appellants. It is difficult to conceive of a mortgage of a copyright. We need not express any final opinion on the point, but we do not see how a mortgage of a copyright is at all possible under the law. However, as we are in agreement with the order passed by the learned District Judge in refusing to discharge the guardian and to postpone the case, we think it is not possible for us to remand the cases to the Court below for a fresh hearing. We may mention that these appeals have not been filed by the minors under the guardianship of their mother but were filed through one Baehchu Lal who acted as the next friend of the minors with the permission of this Court. This disposes of all the points that were raised in the grounds of appeal. At the hearing of the appeals we noticed that the learned District Judge of Bareilly had made the following order as regards costs:

Having regard to the fact that this case has been dragging on for nearly eighteen months after issues were framed, the defendants will pay Rs. 275 costs plus Rs. 25 to Mr. Nag who was appointed commissioner to go to Bombay.

Under the rules framed by this Court a successful party is entitled to certain taxable costs from the other party if so ordered by the Court. u/s 35A, Civil P.C. a party may be given compensatory costs if the defence set up by the other party is false or vexatious to the knowledge of the party by whom it has been put forward and such claim for compensatory costs is to be made at the earliest opportunity. In this particular case the defence put forward was on behalf of the minors, and we do not think that the defence can be said to be false or vexatious nor can it be said that it was false or vexatious to the knowledge of the defendants. If a guardian adopts dilatory or other improper tactics there is a provision in the Code for making him or her personally liable for costs. For what Mt. Chameli may or may not have done the learned District Judge has made the minors pay Rs. 275 as costs in the suits which were valued at much less. There was however some difficulty in our modifying this part of the learned District Judge's order as the appellants had not taken any ground in the memorandum of appeal and had not paid the proper court-fees though in the relief they had prayed that the entire decree be set aside. Learned Counsel for the appellants prayed for two weeks time to file the necessary application for amendment of the memorandum of appeal and for payment of the requisite additional court-fees. Sir Tej Bahadur Sapru, learned Counsel for the respondent, stated before us that he was taking notice of this application for amendment and that he left the question of costs entirely to the discretion of the Court and his client would not ask for any further notice of the application for amendment of the memorandum of appeal nor would he ask for any opportunity to further agitate this matter before us. We, therefore, gave the learned Counsel for the appellants two weeks

time to make the necessary application for amendment and to pay the requisite court-fees. The application has been filed and court-fees paid within the time allowed by us. We therefore hold that the order and decree of the learned District Judge as regards costs be amended and the plaintiff be given only the costs taxable under the rules. With this modification the appeal will stand dismissed with costs in this Court.