

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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CS(OS) 1274/2004

%15.01.2009

Date of decision : 15.01.2009

SYNDICATE OF THE PRESS ...Plaintiff
OF THE UNIVERSITY OF CAMBRIDGE
ON BEHALF OF THE CHANCELLOR,
MASTERS AND SCHOLARS OF
THE UNIVERSITY OF CAMBRIDGE & ANR

Through: Ms Jyoti Taneja and Mr Dhruva Bhagat,
Advocates

Versus

B.D. BHANDARI & ANR ...Defendants.

Through : Ex parte.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J (ORAL)

1. This suit was instituted to restrain the defendants from selling books published by them and titled MBD English Guide B.A./B.Sc./B.COM Part I (Guru Nanak Dev University), MBD English Guide B.A./B.Sc./B.COM Part II (Guru Nanak Dev University) and MBD English Guide B.A./B.Sc./B.COM Part III (Guru Nanak Dev University) for the reason that they contained illegal and

unauthorized reproduction of literary content of the plaintiffs' publication titled "Advance English Grammar by Martin Hewings". Vide ex parte order dated 10th November, 2004 the defendants were restrained from utilizing, incorporating the verbatim text taken from the plaintiff's publications. The defendants contested the suit. The application for interim relief was disposed of vide order dated 8th June, 2005 whereby the ex parte order dated 10th November, 2004 was confirmed during the pendency of the suit.

2. Issues as under were framed on the pleadings of the parties:

"1. Whether plaintiff No.1 is the owner of the copyright of the literary work titled "Advance English Grammar"?
OPP

2. Whether the defendants have reproduced verbatim plaintiffs' work titled "Advance English Grammar" in their three publications titled "MBD English Guide" one each for B.A., Part I, II and III? If yes, whether complete set of exercises and answer keys, scheme of exercises, answers and placement of topics have been all reproduced?

3. Whether reproduction of plaintiffs' work by the defendants amount to infringement of the plaintiff's copyright in the said work?

4. Whether plaintiffs are entitled to the relief of permanent injunction?

5. Whether plaintiffs are entitled to claim of damages against the defendants? If yes, to what amount of damages, the plaintiffs are entitled to?

6. Whether plaintiffs are entitled to rendition of accounts of profits?

7. Whether plaintiffs are entitled to delivery up of all infringing material including "plates"?

8. Whether the activities of the defendant fall under the concept of fair dealing under the Copyright Act, 1957?
OPD

9. Relief."

3. However, the defendants stopped appearing w.e.f. 1st March, 2007 and were on 29th April, 2008 proceeded against ex parte. The plaintiff had prior thereto filed affidavit by way of examination in chief of one witness and thereafter filed affidavits by way of examination in chief of two other witnesses. The witnesses of the plaintiff remain unchallenged by cross examination. The counsel for the plaintiff has been heard. He has relied upon **Time Incorporated v Lokesh Srivastava** 2005 (30) PTC (3) Delhi, **Hero Honda Motors Ltd. v Shree Assuramji Scotters** 2006(32) PTC 117 Delhi, **Microsoft Corporation v M/s K Mayuri** 2007 (35) PTC 415 Delhi and **Microsoft Corporation v Rajender Panwar** 2008 (36) PTC 697 (Delhi), all on the aspect of award of damages in cases of infringement of trademarks, copyright and patents even where the defendants remain ex parte, when the defendants are found to have indulged in infringement.

4. Though the defendants are ex parte, but a perusal of the written statement of the defendants and the issues framed would show that the defendants did not really contest the copyright of the plaintiff. The defendants claimed to be in the business, inter alia, of publishing guides or what is in this part of the country called *Kunji or Dukki*. It was the case of the defendants that the textbook of the plaintiff subject matter of the suit was prescribed by the Guru Nanak Dev University, Amritsar for the students of BA Part I, II and III; that they were merely for the facility of the students and for better understanding of the subject matter by the students publishing the guides; that the introduction before each exercise in

the two publications were different; that the illustrations in the textbook of the plaintiff were not existing in the publication of the defendants; that while the answers in the plaintiff's publication were at the end of the book, the questions and answers were together in the publication of the defendants; that while the plaintiff's publication contains two choice of answers for most of the questions, the defendants publication gave only one answer. It was thus the case of the defendants that the plaintiff's publication being a course book of the university and the defendants being engaged in publishing guides as aforesaid, had to naturally publish the answers as in the plaintiff's book and could not have published different answers. The defendants have gone to the extent of stating that they have also given credit to the plaintiff in their publication. It was, however, contended that the format of the two books was different. It was the case of the plaintiff's themselves that while the plaintiff's publication was for Rs 95 only, the defendants publications were for over Rs 600/-.

5. This is a striking point in the present case. Normally, the purpose of infringers of trademark, copyright and patent is to sell and/or use counterfeit or pirated goods at a price much lower than that of the owner of the trademark or copyright. The infringers are able to sell at a much lower price, having not incurred the expense which the owner has incurred in creation of work etc. However, in the present case the plaintiff themselves claims that the book / publication of the defendants is of a value several time more than that of the plaintiff.

6. As aforesaid, the ex parte order was confirmed during the pendency of the suit. The defendants had then relying upon Section 52 of the Copyright Act and **Romesh Chaudhary v Ali Mohamad Nowsheri** AIR 1965 J&K 101, **Mohammad Jalil v Ram Dayal** AIR 1916 All 216, **V Ramaiah v K Lakshmaiah** 1989 PTC 137, **E.M. Forster v A.N. Parsuram** AIR 1964 Madras 331(DB)and **Mc Millan & Co. Ltd. v K&J Cooper** AIR 1924 PC 75 contended that its business of publication of guides amounted to a fair dealing with the works which were prescribed by the universities and thus fall in public domain. However, this court at that interim stage did not find merit in the aforesaid submissions of the counsel for the defendants and the judgments aforesaid were distinguished and this court held that while the universal nature of knowledge and its dissemination freely is a laudatory concept but it must not transgress rights of an author guaranteed by Copyright Act. This court further felt that the defendants had not been restrained from publishing their guides but had only been restrained from incorporating therein verbatim text from the plaintiff's publication.

7. The witnesses of the plaintiff have merely reiterated the position as existing earlier and nothing has changed from the position as found by this court to be existing at the time of interim order aforesaid. However, at that time only the extracts of the two publications were before the court. The plaintiff has thereafter under cover of list of documents dated 28th February, 2007 filed the

original books. I have thus had the benefit of glancing through them. While the plaintiff's publication is in one volume, the defendants' is in three volumes. The plaintiff's publication comprises of 340 pages while the defendants' publication comprises of much more pages in each volume. The format of the two books is also entirely different.

8. Though in the absence of the defendants and anything further coming to light in cases such as the present one, I would have been inclined to decree the suit in terms of the interim order as well as award damages against the defendants for infringing action but owing to the large scale use of such guide books and dependence thereon by students in this country, I was a little reluctant. Injunction such as in the present case would have had the effect of severely affecting the very existence of such guide books, kunjies and dukkies.

9. The said guide books, kunjies and dukkies are basically tools not for study or understanding but for undertaking an examination at a short notice. The market/patronage for the two are also entirely different. The purchasers of such guide books may also possess the textbook but would not have normally even opened the same. What such guides do for such students is to, purely from the point of view of an examination extract some contents only of the textbooks which can be used by the students for answering the questions. The publisher of such guidebooks, while doing so, certainly cannot be

expected to alter/vary the contents of such extracts. It has to be remembered that the students using the said guidebooks are not the top students in each class/course or the students with high intellect. Such students can be totally unnerved and shaken by the difference in contents. In any case the purpose of prescribing a textbook in the school/university is that the students would master the said text and the examiners are also to judge / mark the students on the basis of the said text. Thus tinkering with the said text is not possible. The defendants in the present case have in their book aforesaid given the Punjabi translation/meaning of different words as well as a summary in Hindi. A bare perusal of the books of plaintiffs and defendants shows that the publication of the defendants is entirely different than that of the plaintiff.

10. In this light, it is also found that this court recently in **The Chancellor Masters and Scholars of the University of Oxford v Narendera Publishing House** Manu/DE/1377/2008 while considering an application for interim relief against another publisher of such guidebooks has refused to grant any interim injunction at the instance of a another well known publisher of academic books. The judgments cited by the defendants in the arguments during the adjudication of the application for interim relief as noticed above as well as the interim order in the present suit were before that court also. It was held by this court that the content of what is meant by originality has under gone a paradigm shift from the days of sweat of the brow doctrine to the modicum of creativity standard and which has been recognized by the Apex

Court in **Eastern Book Company v DB Modak** 2008(1) SCC 1.

This Court held that the plaintiff in that case which had published mathematical questions/answers could not, prima facie, claim copyright. This court thereafter proceeded to deal with the plea of fair use taken by the publisher of the guides in that case also. It was held that the doctrine of fair use legitimizes the reproduction of a copyrightable work. Similarly, the test of transformative character of the use and basic character were applied. This court in that case found that the defendants in that case had not copied the theory portion of the book of the plaintiff; that the plaintiff's book did not contain the steps or process aiding the solutions to the questions as in the defendants' book; the defendants copies did not contain analysis of the problems and, in fact, provided a step by step method to proceeding at the answer. In these circumstances, the application for interim relief was declined.

11. Similarly, in the present case also I find that though the defendants have reproduced questions and answers from the plaintiffs' book but the purpose thereof is different. The plaintiffs' book is divided into 120 units, each one looking at a particular area of grammar and focusing on the use of grammatical pattern, exploring grammatical contrasts. Each unit consists of two pages. On the left hand page are explanations and examples, on the right are practice exercises. The answers are given at the end of the book under the title "key to exercises". Per contra, each volume of defendants books deals besides with grammar, also with the texts prescribed for each year, English prose, comprehensions, poem,

paragraph writing, plays, essays writing etc. The said books are structured on the pattern of question paper of English for each year. The books at the beginning contain syllabus for each year and also contain translation from English to Hindi and Punjabi. The said books in the grammar portion do not reproduce the left hand page of each unit of plaintiffs' book. Though the right hand page of plaintiffs' book is copied in toto, save for changing the numbering of exercises from 1.1, 1.2, 1.3 and so on in plaintiffs' books to 1,2,3 and so on in defendants'. However, before reproducing the exercises, the defendants have given their own introduction to some of the units. The defendants have given the same answers as in the key at the end of plaintiffs books, at the end of each exercise itself (perhaps realizing that patrons of their books will have difficulty in finding answers, if printed elsewhere).

12. From the said pattern it appears that the pattern and use of the two books are different. While the plaintiffs' book is meant for a student to educate himself and understand the nuances of English grammar first by reading the text on the left hand page and then practice with exercise on the right hand page, the defendants have given only the exercises along with answers. Once the exercises are given in a text book prescribed by the university, the same could not be changed by defendant. Had the intent of the defendants been to merely copy the book of the plaintiff, the defendants would have also copied the theoretical portion on the left hand page and the appendices and additional exercises also in the plaintiffs' book. The defendants only wanted to provide to the student one single book for

cracking the English paper instead of separate books for text, poetry, essay writing, grammar etc. The defendants in the grammar section of such book have to naturally give the same exercises as prescribed by the university and cannot be expected to give a different exercise.

13. The exercises and answers thereto, which have been copied are to teach grammatical use of words, tense etc. Sentences, sometimes with blanks have been framed for the said purposes. The same, in my opinion also do not constitute original literary, dramatic or artistic works. No originality or invention is displayed in composing the said exercises based on day to day use of simple English language and meant for learning thereof. The plaintiffs' cannot claim any monopoly in the same. The Apex court in *Eastern Book Company (supra)* (though confining to the decision to judgment of courts only) has held that collection of material and addition of inputs in the raw text does not give work a flavor of minimal requirement of creativity, as skill and judgment required to produce the work are trivial. To establish copyright, the creativity standard applied is not that something must be novel or non obvious, but some amount of creativity in the work to claim copyright is required. In that case selection and arrangement was viewed as typical and at best result of labour, skill and investment of capital, lacking even minimal creativity, which did not as a whole display sufficient originality so as to amount to an original work of the author. It was further held, to claim copyright there must be some substantive variation and not just a trivial variation, not the

variation of the type where limited ways of expression available and author selects one of them. The court held the inputs by publishers of Supreme Court cases in copy edited judgments to be minimal. The Apex court in that case also applied the principle/test of public domain and reiterated that once the work is in public domain, its reproduction or publication would not constitute infringement of copyright.

14. The High Court of Calcutta in **Nag Book House Vs. State of West Bengal** AIR 1982 Calcutta 245 held that the guidelines for the authors & publishers of text books issued by Board of Education, prescribing the syllabus cannot be taken as original work being the product of labour, skill & capital.

15. Section 52 (1) (h) also provides that reproduction of even literary work as part of questions to be answered in an examination or in answers to such question shall not constitute infringement of copyright.

16. In my view, once the book of the plaintiffs was prescribed by the university, the questions and answers given in the exercises and key therein, became questions to be answered in an examination and fall in Section 52(1)(h) foresaid. They thus, fell in public domain.

17. I also find that the books of the defendants won't be a substitute for the book of the plaintiff, for a serious student as is the intent of infringers. The defendants have also compiled their books with sufficient labour. It cannot be said that the defendants, without any effort or input of skill merely copied the books of the plaintiff and marketing the same to the detriment of the plaintiff.

18. I, therefore, find the plaintiffs' not entitled to any of the reliefs claimed. The suit is dismissed; the defendants being ex parte, with no order as to costs.

RAJIV SAHAI ENDLAW, J.

January 15, 2009.
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This print replica of the raw text of the judgment is as appearing on court website (authoritative source)

Publisher has only added the Page para for convenience in referencing.