

E.M. Forster And Anr. vs A.N. Parasuram on 9 January, 1964

Equivalent citations: AIR1964MAD331, AIR 1964 MADRAS 331, ILR (1964) 2 MAD 258, (1964) 1 MADLJ431, 1977 MADLW 228

JUDGMENT

Anantanarayanan, J.

1. In 1924, Mr. E. M. Forster, the English Novelist, published "A Passage to India", a work of fiction which was also a penetrating study of the Indo-Anglian social climate; the work since became famous, and has recently been dramatised. Certain exclusive rights of publication in this work were assigned by Mr. Forster to Edward Arnold (Publishers) Ltd., by an indenture of Agreement in March 1924. In 1955-56, "the University of Madras prescribed "ft Passage to India", as a text book for the students taking the B. A. degree. Mr. A. N. Parasuram (respondent) published a guide-book for students to the novel "A passage to India" in or about December 1954. Two actions were instituted in the Original Civil Jurisdiction of this Court, respectively by Mr. A. N. Parasuraman, respondent, on the one hand, and Mr. E. M. Forster and Messrs. Edward Arnold (Publishers) Ltd. on the other, both relating to the alleged infringement of the copyright in the original work by the publication of the guide-book. They were tried together by Ganpatia Pillai J. and dealt with by moans of a common judgment, the learned judge held that there was no such infringement by substantial reproduction of the original novel and that the guide-book of Mr. Parasuram amounted to an "independent literary effort on his part". The suits were disposed of in the light of these and other findings, and (the present appeal is by Mr. Forster and Messrs. Edward Arnold (Publishers) Ltd., the plaintiffs in C. Section 15 of 1957, which was dismissed. The sole question that concerns us in the appeal is the alleged infringement of copyright in the original litatrary work of Mr. Forster; there were ancillary questions that arose for determination, but they do not now concern us.

2. There is a very extensive case-law available upon the subject, and we have also been referred to passages from the following works, namely, 8 Halsbury (Simonds Edn.) page 372 et seq; Copinger (9th Edn.); Russell-Clarke on Copyright and Industrial Design, 1951 Edn. and Corpus Juris Secundum, Vol. 18. In this context itself, it may be convenient to notice that several of the leading authorities were also reviewed by Rajagopala Aiyangar J. in Blackwood and Sons Ltd. v. Parasuraman, . Before proceeding to any discussion of the principles, as could be gleaned from the case law and standard treatises, we think, however, that it is of some importance first to set down the relevant part of the Copyright Act III of 1914, which admittedly governs the rights of parties, though subsequently repealed by Act XIV of 1957. Section 1(2) of the Act runs as follows:

"(2) For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part

thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right (a) to produce, reproduce, perform, or publish any translation of the work; (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work; (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise; (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art.....

2(1). 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; provided that the following acts shall not constitute an infringement of copyright - (i) Any fair dealing with any work for the purpose of private study, research, criticism, review, newspaper summary;"

3. We have set forth this part of the statute verbatim above, for an important reason. It will at once be obvious that where a person has copyright in a literary work, and any other person produces or reproduces the work, or any substantial part thereof, in any material form, he is committing an infringement of copyright. That is the intrinsic or essential test, and, if that test is not fulfilled, the cause of action does not lie. But there may be some other contingency, such as the conversion of a drama, which is an original literary work, into a novel or non-dramatic work, similarly, the original literary work might be a novel, and it might be converted into a drama which could be performed in public, in those instances, other tests might also be applicable. If the infringement is prima facie established, the party sued can rely upon any of the exceptions enacted in Section 2(1) of the Act, which will include "fair dealing" as specified' in Section 2(1)(i).

In this context, it may also be of some significance to note the interpretative definitions in Section 35 (1) of Act III of 1914; "Infringing" is interpreted as "any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act." The rationale of this statute was thus expressed by Lord Atkinson in *Macmillan and Co. Ltd., v. K. and J. Cooper*, 46 Mad LJ 637 : ILR 48 Bom 308 : (AIR 1924 PC 75) "Copyright is therefore a statutory right the moral basis on which the principle of these protective provisions rests is the eighth commandment, Thou shall not steal'. It is for this reason that Lord Halsbury begins his judgment in *Walter v. Lane*, 1900 AC 539, 545,. with the following words 'I should very much regret it if I were compelled to come to a conclusion that the state of the law permitted one man to make a profit and to appropriate to himself what has been produced by the labour, skill and capital of another.....' It will be

observed that it is product of the labour, skill and capital of one 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 capita! of the first have been expended."

In this very context, it is equally important to note that the countervailing consideration must be that, as copyright is a restraint upon human activity and enterprise the provisions must be generously construed. Under the guise of copyright, the plaintiffs cannot ask the court to close all the avenues of research, scholarship and the frontiers of human knowledge. *Kartar Singh v. Ladhasingh*, AIR 1934 Lah 777.

4. The refinements of the law may be set forth in the form of certain propositions. We shall then refer to certain leading decisions upon the subject, and analyse the incidence of the established principles upon the facts of the present case. There is wide authority for the proposition that, as far as the original literary work is concerned, ideas and opinions are not the subject-matter of copyright, but only the form, or the expression of such ideas or opinions. The principle has been expressed in *Copinger*, with lucidity, in the following passage (page 143) :-

"What is protected is not original thought or information but the original expression of thought or information in some concrete form. Consequently, it is only an infringement if the defendant has made an unlawful use of the form in which the thought or information is expressed. The defendant must, to be liable, have made a substantial use of this form; he is not liable if he has taken from the work the essential idea, however original, and expressed the idea in his own form or used the idea for his own purposes."

There is no copyright in the plot or theme, per se (*Copinger* pages 62 and 174; also see *Corelli v. Gray*, (1913) 30 TLR 116.) The other relevant citations, on this aspect, are *Donoghue v. Allied Newspapers Ltd.*, 1938 Ch 106; *Gopal Das v. Jagannath Prasad*, AIR 1938 All 266 and *Joy Music Ltd. v. Sunday Pictorial, Newspapers Ltd.*, (J960) 1 All ER 703 at p. 707. Originality, which is required, does not relate to ideas, but to the expression of the thought-*University of London Press Ltd. v. University Tutorial Press Ltd.*, (1916) 2 Ch 601 at p. 608. But certain distinctions do arise, with regard to this general doctrine, when we have to consider the special instance of infringement of copyright in a novel by dramatisation, or by the conversion of a dramatic work into a novel or other non-dramatic form (Section 1(2)(b) and (c) of the Act). In such cases, piracy may arise by copy of the situations themselves, even apart from the verbal expression (pages 170, 173 and 174 of *Copinger*). The point to note here is that, in the matter before us, we are not concerned with any alleged conversion of the novel of Mr. Forster into a dramatic form, but with the publication of a guidebook to the study of the novel, which had been prescribed as a text book for students taking the B. A. degree in the Madras University.

5. Copyright is thus a statutory claim, and the complaint must be established within the strict provisions of the Act. Questions have come up before courts whether .an abridgment of am original work would constitute an infringement of copyright; equally, whether such abridged work could upon its own status, claim the protection of . copyright. Questions have arisen whether there could

be copyright in a title to a work; and whether there could be copyright in a particular arrangement of a pre-existent non-copyright material, or the publication verbatim of speeches delivered by another. *Macmillan v. Suresh Chander Deb*, ILR 17 Cal 951 is of particular interest, since the point involved was whether the selection and arrangement of non-copyright poems in such a work as *palgrave's "Golden Treasury"* could claim protection. The principle was enunciated that protection could be claimed, for, as Lord Eldon laid down in *Longman v. Winchester*, (1809) 15 Ves 269 ".....a work consisting of a selection from various authors, two men might perhaps make the same selection; but that must be by resorting to the original authors, not by taking advantage of the selection already made, by another."

1900 AC 539 is also of interest, because It related to the publication of verbatim transcripts of the speeches of another; it was held that such a person was an "author" of the report within the meaning of the Copyright Act, and entitled to protection., It has been clearly laid down that there is no copyright in a 'title' as such, since this is not substantially enough to merit the claim to protection. It may be capable of protection only in a "passing off" actions: See *Dicks v. Yates*, (1881) 18 Ch D 76 and other authorities listed in *Halsbury (Simonds Edn.) Vol. 8, p. 377, under paragraph 691*. What is of more relevance to the present matter is that an abridgment is not an infringement of copyright, and, in itself, could be a source of copyright. Thus, there could be copyright in notes, even though the matter contained therein might be found In standard works; see 8 *Halsbury* page 375, paragraph 688; *Copinger*, pages 53 and 154, *Russell - Clarks*, page 23; 46 *Mad LJ* 637 ; (AIR 1924 PC 75). See also *Gyles v. Wilcox*, (1941) 2 *Atk.* 141.

6. With the propositions relating to "Fair Dealing" we need not concern ourselves immediately, for that will arise only if it could be otherwise established for the appellants that there has been an infringement by substantial reproduction in the present case. If that is not made out, there is a failure at the threshold of the claim, and the question does not really arise whether Mr. Parasuram (respondent) could claim that he is protected by any of the objectives of "Fair Dealing." With regard to the test for determining whether infringement exists, the authorities are clear that it is not merely quantitative; it could well be qualitatives. Where the vital part of a work has been reproduced, though such part might constitute only some fraction of the entire text, the infringement has been made out. In this respect, the two works must be taken and considered as a whole. The relevant authorities on this point will be found set forth in 8 *Halsbury* page 427 para 777.

7. We are now in a position to consider the arguments upon which the alleged infringement is pressed, in the context of the present facts and the two works be fore court.

8. The learned judge has furnished a summary of the plot and an outline of the novel "A Passage to India" in his judgment. We shall not refer to that aspect further here, both for the sake of brevity, and as the novel has been widely read. In commenting upon the arguments, We shall assume some acquaintance with the theme and structure of the novel. Of more direct significance is the, character of Mr. Parasuram's publication. It is styled "E. M. Forster, A passage to India, Everyman's Guide". Sri Gopaldaswami Aiyangar for the appellants contends that this, in itself, is misleading and an invasion of the rights of his clients; unwary customers at book-shops might purchase this cheaper-priced book under the delusion that thereby they were acquiring the original work itself, in

a cheap edition. We do not think that this argument has any substance. As we have earlier affirmed, there is no copyright in the title and purchasers, whether of the original work or of the guide, are most unlikely to be illiterate, or unacquainted with English. It will be perfectly clear to them, from the words enclosed in brackets as a sub-title, that they were acquiring, not the original work, but a "Guide for University students". The introduction consists of 15 printed pages, and includes studies of the life and works of Forster, of Forster as a Novelist, of the story in outline, and of the plot, as analysed by the respondent. This is followed by the section headed "Textual Essays" from pages 16 to 57. These appear to us to be very skilfully arranged, in such manner that they contrive to present an abridgment of the novel itself, though the sequence is according to the incidents, and not as a chronological narrative. This part is followed by "Character Sketches" and "Character Contrasts" pages 61 to 88; they comprise all the main characters in the novel. Finally there are "General Essays", upon such subjects as Forster's conceptions and philosophy of life, the racial issue involved in the novel, the element of religious symbolism in it, and the significance of the "Title". This description of Mr. Parasuram's book will suffice to show that it is really some kind of commentary upon the original work, designed to enable University Students to give effective answers to questions that may be set in the University Examinations, upon their study of the novel. Actually, the respondent's work is neither an abridgment, nor a piece of literary criticism in itself. It is functional in character, and everything in it has been subordinated to the main functions,

9. There was some discussion before us of the degree to which the language of Mr. Forster had been copied by the respondent in his work, in the light of the established principle that the verbal expression is protected, and is the subject of copyright. The learned Judge has also discussed this aspect, particularly bearing in mind the qualitative test that we have earlier referred to if the vital part of the original work is abstracted, even if it may be a fragment, that would be piracy. But, upon this argument, the appellants can proceed very little further, and learned counsel has been compelled to concede this. Several phrases have been quoted from the original work, and there are a very few entire quotations. Upon the ipsissima verba thus reproduced, a statistical analysis has been made, including words in quotations, and the entire percentage, works out to 0.616 (six out of thousand). It may not be profitable to reproduce the particulars here. We do not think that it can be pretended, for a moment, that Mr. Parasuram's style has any affinity with that of Mr. Forster. It is true that the learned counsel for the appellants drew our attention to several passages in the guide-book, which had reproduced passages from the original work, with very slight modifications, such as a combination of clauses, or a change from the direct voice into indirect voice. But these are very isolated fragments, in a work, the texture of which is wholly distinct from that of the original novel. We do not think that this could be better illustrated than by a verbatim quotation from the guide upon the romance between Adella Quested and Ronny Heaslop :-

"As a lover Ronny comes out a somewhat better man. Even here he never seems to have touched the heights; indeed his love knows no heights. It is just a common place, plain affair, with animal thrills and mechanical embraces leading eventually to the altar. If Adela's love for Ronny is riddled with doubts, Ronny's love for Adela is a little weak. He seems inhibited and unable to let himself go. Adela's crisis merely whips him into a last blaze, but the end is near and when Adela goes over to the other camp, Ronny, like a spent swimmer, seizes the temporarily abandoned life-bolt of

safe bachelor-hood firmly....."

10. It may certainly be a matter for grievance to a creative-writer, like Mr. Forster, that the people in his novel and what happens to them are not accepted in the simple communion of understanding in, which people and events in real life are accepted by us; that may very well be what he desires from his readers, and not this dissection, with its heavy analysis and accumulated metaphor. But, equally, we have (to be fair to Mr. Parasuram (Respondent)). His objective was not to express his appreciation of the novel, or his enjoyment of it, or even to make a contribution towards literary criticism. He was concerned to aid students taking the B. A. degree, in answering the several questions that would no doubt be set for them, upon the novel, in the examination papers for that Degree. He might well have been guided by considerable experience, in framing his studies in the manner that he has done, and even in the language he has employed. If the entire result is unfortunate; from the point of view of Mr. Forster or his Publishers, the misfortune! springs from a fact unrelated to the present legal proceedings, the fact that students taking the B. A. Degree were compelled to study the novel, and constrained to answer questions upon its plot, theme, personalities and incidents. It is abundantly clear that, either upon the principle of substantial reproduction, or even qualitative reproduction, as far as the verbal expression of the, original work goes, there has been no infringement. It is well known that, in literary reviews, a: very small proportion of verbatim quotations from an original work is always permitted, in the interests of fair criticism. Even taking the guide-book of the respondent in its entirety, it can by no means be said that such a proportion has been exceeded.

11. Mr. Gopalaswami Aiyangar has sought to base his main argument, not on this aspect, but upon a contention that substantial reproduction has occurred, or at least that the guide-book is a colourable imitation of the original which amounts to such infringement by reproduction, because the Copyright law, cannot be narrowly construed as to exclude the theme, incidents and personalities of the novel altogether from its scope. This is an interesting argument which deserves scrutiny, and we shall deal with it immediately.

12. In other words, assuming that there is no copyright in the plot, theme and incidents of an original literary work, and that, intrinsically, copyright concerns the form or verbal expression, nevertheless is there a tertium quid, a component of a creative work which is between the plot or theme and the words clothing it, which can also claim protection under Copyright law? Learned counsel relies upon a passage in Corpus Juris Secundum, Vol. 18 page 217, for the view that, "an infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred or reproduced, with more or less colourable alterations to disguise the piracy. Paraphrasing is copying and an infringement if carried to a sufficient extent. Complete or substantial identity between, the original and the copy is not required,"

13. We have scrutinised this argument with the care which it certainly deserves, but find that it is not tenable in relation to the established facts of the record. No doubt, such characters as Fielding, Aziz, Adela Quested, Ronny Heaslop or Mr. Turton are creatures wholly of Mr. Forster's imagination as are, equally, the events that occurred to them and their reactions, as described in the novel. Mr.

Parsuram (respondent) was not dealing with some other novel, nor did he set forth the events of the story, and give character sketches of the personalities; borrowing from any other source; his material was bodily taken from the original literary work. But the precise point is that it is this material which cannot claim protection, in its own right; the verbal expression of it is protected, and even the material may be protected as such, but only in the special case of a conversion of the novel into dramatic form. An abridgment does not infringe copyright, and the very idea implies that the incidents and personalities in the two works are identical.

Learned counsel contends that the title "A passage to India" is itself symbolic; much more is meant than the mere ship's passage which enabled Fielding to come and stay in India for sometime, and what the author had in mind! was the passage to the heart of the people of the vast country, India, and the impossibility of achieving this, so long as the power relationship of the ruler and the ruled subsisted; see the last chapter. But we very much doubt if any creative writer first formulates an idea, in this form, in his mind, and then proceeds to write a work of fiction round it. Certainly, the literary work does not exist, before its expression. The idea could well be taken up by others, and treated in their own way. But even after the work has found its verbal form, it is the form which is protected, and not the theme, plot and characters. The argument could be sustained if Mr. Parasuram (respondent) had, in effect, reproduced the original work, though deviously. Certainly, he cannot be convicted of this, and his guide-book remains distinctly his creation, even if it be regarded as an abridgment of the novel, in part, and, in part, a running commentary upon it. Our study of the several authorities cited before us, does not reveal any room for this perspective of approach, as valid within the ambit of Copyright law.

14. No other matter arises for our determination in this appeal. The question: of "fair-dealing" does not arise, because of the failure of the appellants to make out a case of infringement prima facie.

15. The appeal fails and is dismissed. Under the particular circumstances, we direct that the parties will bear their own costs.