

K. and J. Cooper Vs. Macmillan and Co.

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Court : Mumbai

Decided On : Oct-13-1921

Reported in : AIR1921Bom463; (1921)23BOMLR1299

Judge : Norman Macleod, Kt., C.J. and ;Shah, J.

Appeal No. : O.C.J. Appeal No. 59 of 1921

Appellant : K. and J. Cooper

Respondent : Macmillan and Co.

Disposition : Appeal allowed

Judgement :

Norman Macleod, Kt., C.J.

1. This is an appeal from the decision of Fawcett J. decreeing the plaintiffs' claim.
2. The plaintiffs, a firm of publishers, had, in 1911, brought out in England an abridged edition of North's Translation of Plutarch's Life of Alexander edited by a Mr. Parr, for the use of Secondary Schools.
3. The abridgment was not effected by giving the substance of the original work in the language of the editor but by excising various portions of the original work which were not considered suitable for the purpose for which the book was published. The portions which were retained were divided into an introduction and

various Chapters, marginal notes were added and at places where original matter had been left out transitional notes were inserted so as to link up the thread of the narrative. At the end there were a few pages of notes.

4. On the 4th October 1917, the University of Bombay published a list of the Text Books in English prescribed for the Matriculation Examination of 1919. Amongst them was 'Plutarch's Life of Alexander' translated by North (Macmillan & Co.). The educational year would commence in March 1918 and any student who wished to enter for the examination would ordinarily seek to buy the plaintiffs' book.

5. Sometime in November, the defendants who are also educational publishers issued hand-bills containing a list of the books published or about to be published by them for the Bombay Matriculation 1919. Amongst them was the following, 'Plutarch's Life of Alexander (North's Translation abridged) edited with introduction, full notes, etc., by the Rev. A. Darby.' Beneath the list of books was this advertisement:-

In response to (illegible) (should bring out) reliable annotated edition of Maomiixah English texts prescribed for the Bombay Matriculation examination we have this time published such editions in the confident hope that they will prove equally useful to teachers and pupils.

These editions will be found more useful than any published in England as having been specially prepared for Indian pupils by those competent to understand their needs; and in every respect more reliable than similar editions brought out in this country by editors more or less incompetent for the tasks they undertake.

6. This was clearly an invitation to pupils and teachers to purchase the defendants' work instead of the plaintiffs.'

7. Mr. K.M. Cooper, a partner in the defendants' firm, described how he came to publish the defendants' book. He said that he came to know in October 1917 that the University had prescribed North's Translation of Plutarch's Life of Alexander as published by Macmillan & Co. He had a copy of plaintiffs' book and a copy of Rouse's edition. He thought plaintiffs' book had cut down the original too much,

thus omitting many interesting episodes, and passages which had particular reference to India. He asked Mr. Darby to help him by writing the notes. It is admitted that a copy of plaintiffs' book was sent to Mr. Darby and the first notes which Mr. Darby sent to the defendants referred to the pages in plaintiffs' book. After wards Mr. Darby sent additional notes on defendants' book but the defendants apparently being in a hurry to publish their book printed Mr. Darby's notes in two parts just as they received them. Owing to various circumstances beyond their control the plaintiffs were unable to get a sufficient number of copies of their book out to India in time for the commencement of the educational year, with the result that the defendants' book being then the only one available the first edition was sold out.

8. On the 20th June 1918, the plaintiffs wrote to the defendants complaining that the defendants had infringed the plaintiffs' copy-right in the plaintiffs' book by publishing their book and asked defendants to furnish them with certain particulars regarding defendants' book, to deliver to the plaintiffs all copies remaining unsold, to pay to the plaintiffs the profits made by the sale of defendants' book, to apologise for the infringement, and to undertake not to infringe thereafter the plaintiffs' rights.

9. The defendants replied that their, abridgment was independent. and was the result of skill and labour of the editor who made it There were material differences between the two abridgments.

10. The plaintiffs filed this suit on the 30th October 1918 claiming an injunction, an account of the copies sold of defendants' delivery of copies unsold, and the profit made by the defendants by way of damages.

11. In their written statement the defendants denied that they had copied the text of the plaintiffs' work. They denied that there had been anything original or peculiar in the method followed by the plaintiffs in abridging the various portions of the text. There was no other alternative left to anybody abridging the text and deleting unsuitable portions but to adopt the method followed in the two abridgments. They denied that the additional matter was included by the defendants to avoid if possible too close and direct an imitation of the plaintiffs work as alleged in the

plaint. The defendants' book was an independent abridgment and was the result of great skill and labour on their part and had the special features as detailed in para 11.

12. The following issues were raised at the trial:-

(1) Whether the plaintiffs publishers of an abridged edition of Plufcaroh's Life of Alexander were entitled to a copyright therein ?

(2) Whether the publication of the plaintiffs was such original literary work as was entitled to copy-right ?

(3) Whether the defendants by their publication had infringed the copy, right if any of the plaintiffs' publication?

13. The first issue was not pressed.

14. The second and third issues were found in the affirmative.

15. Evidence was taken at great length and in the most minute detail, much of which would have been found unnecessary if the question had first been considered how much of the plaintiffs' book was copyright. I think there can be no doubt that the defendants intended to publish a book which students should be encouraged to buy instead of the plaintiffs' book, and Mr. Cooper's denial of such an intention was obviously false. But the important point to notice was that North's Translation of Plutarch's Life of Alexander was available to any one who wished to reprint it. When the plaintiffs chose for their book about half of the original translation, they were not abridging it in the legal sense of the word, and looking at their text by itself, it could not, if published, have been considered an original literary work so as to be entitled to copyright. Skill and labour by themselves will not make up for the want of originality while there is nothing original in picking out for publication portions of a work which is not copyright.

16. Once this is recognised the case is very much simplified. The original portions of the plaintiffs' book are the marginal and transitional notes, and the notes at the end, while it may be said that the division of the text into an introduction and

various Chapters possesses some element of originality. There are also amongst the contents a map, an introduction, an analysis of contents. a chronological table, glossary and some test questions. Before us it was not contended that the defendants had been guilty of piracy with regard to these. Admitting that the plaintiffs were entitled to protection to this extent, in what respect can it be said that the defendants' book infringes the plaintiffs' rights? The defendants have not divided their text, their marginal notes are not the same as the plaintiffs', and they have omitted the transitional notes entirely. The annotations to the text at the end of the book remain. The defendants sent the plaintiffs' book with Blackies' book and their own, with no name on it, to Mr. Darby, so that he might write notes, but they did not tell him which book was to be annotated. So Mr. Darby at first annotated the plaintiffs' book as he knew that had been prescribed by the University, and his notes necessarily referred to the pages in the plaintiffs' book. When Mr. Darby was informed that the defendants' book was to be annotated he wrote out additional notes-for the additional passages which appeared in the defendants' text, but the defendants were so anxious to get their book published that they printed Mr. Darby's notes in two parts just as they were received. Now North's Translation uses mediseval English so that there are many expressions which would not be easily understood by Indian students and Mr. Darby's main object in writing his notes was to render these expressions into modern English, while the usual information regarding places, persons and peoples and technical terms mentioned in the text would necessarily have to be given. A minute comparison between Mr. Darby's notes and those in the plaintiffs' book resulted in the discovery that some of Mr. Darby's notes of the latter class coincided with the plaintiffs' notes. Undoubtedly Mr. Darby had the plaintiffs' notes before him. In some cases instead of going to a dictionary or other book of reference he may have saved himself the trouble by accepting the information given by the plaintiffs' notes, in other cases there might be a difficulty in using different language to explain the same term. But all the instances which could be collected appear in an appendix to the judgment and considering all the circumstances it would be difficult to say that a few instances of similarity in the explanation of classical names necessarily constituted an infringement of plaintiffs' copyright. Another of plaintiffs' complaints was that the defendants, where it was necessary owing to the

excision of a passage in the original text to transpose a word or two so that their text should run smoothly, have adopted the same method of transposition as the plaintiffs', but even if this were a legitimate cause of complaint it seems too trivial to be noticed. Admitting that the defendants were at liberty to excise a particular passage which the plaintiffs had excised, the alteration of a word or two in the passage immediately following the excised passage would often follow as a matter of course.

17. It seems to me that the plaintiffs were exceedingly ill-advised in bringing this action unless they could satisfy the Court that in law a selection of passages from a non-copyright work was entitled to protection, since the main-stay of their case was the fact that the defendants included in their text the whole of the passages selected by the plaintiffs for their text. Publications of selections from the classical authors for the use of schools must be exceedingly numerous and if selection connoted originality the question would certainly be covered by authority. But it can easily be reduced to an absurdity, since if B is entitled to reprint the whole of a non copyright work it would be very strange if A, because he has printed one-half, could restrain B from printing three quarters.

18. In my opinion the appeal should be allowed and the plaintiffs' suit dismissed with costs in both Courts.

Shah, J.

19. The principal question in this appeal is whether the copy-right of the plaintiffs in their publication Ex. B is infringed by the defendants by their having published Ex. E.

20. Exhibit B is published by Macmillan & Co. Ltd., and edited by Mr. Parr. In the main it is an abridgment of North's Translation of Plutarch's Life of Alexander and is one of a series of books entitled 'English Literature for Secondary Schools.' The book contains (a) a map (b) an introduction as to the book and its translators and as to Alexander's place in history (c) an analysis of the contents (d) a chronological table giving the principal dates in Alexander's life (e) the text consisting of selected passages from North's Translation, with marginal notes and

a few short transitional notes, divided into a preface and six Chapters (f) notes on the text (g) glossary, and (h) a few test questions on each Chapter. This book was originally published in England in 1911, and it was prescribed by the University of Bombay In October 1917 as a text book for the Matriculation Examination of 1919.

21. The defendants published Ex. E in January 1918 which is another abridgment of the same original work. The book is styled Plutarch's Life of Alexander, North's Translation, with notes prepared by Mr. Darby. The book contains (a) a statement of the contents (b) an introduction divided into Sections as to the author, the translator, Phillip of Macedon, a sketch of Alexander's career, the character of Alexander (c) the text consisting of selected passages which in fact include all the passages selected by Mr. Parr for the plaintiffs publication and certain other passages from North's Translation with marginal notes (d) notes and additional notes (e) a summary, and (f) a map.

22. The defendants thought of having another abridgment like the plaintiffs' book of the same work in November 1917 after the University Notification was out, and they published Exhibit E with the notes by Mr. Darby.

23. I have given a brief description of the two books above but in order to have a clear idea thereof it is necessary to have the books before oneself.

24. In spite of the argument of the appellants to the contrary, I do not feel any doubt as to the fact that the defendants had used the plaintiffs' book along with the original book (North's Translation) in selecting the passages for their publication and it was a part of their idea, it seems to me, to have another abridgment which would include the whole of the text in Exhibit 6, The notes were undoubtedly prepared originally on the text as appearing in Exhibit B and supplemented with additional notes on the passages appearing in Ex. E but not in Exhibit B.

25. The object of the defendants in preparing and publishing this book is not very material; but I agree with the conclusion of the trial Court on this point that it was intended to serve as a substitute for the publication Ex. B. Whether it could have served as a substitute to the students is another matter; and had it not been for the accident that the copies of the plaintiffs' publication were not available to the

students at the commencement of the school year In or about March 1918 in the Indian market it is very doubtful whether the work could have been so easily sold as a substitute. In any case the notes and the text published by the defendants would undoubtedly enter into competition with the plaintiffs' publication so far as the sale among the students reading for the University examination is concerned. These are questions which really do not affect the decision on the principal point that arises for consideration in this appeal.

26. The question is whether the copyright of the plaintiffs is in-fringed by the defendants. It may be stated at once that so far as the parts of the two publications other than the texts and a ' the notes are concerned, it is not suggested that there has been any infringement of the copyright. The map, which has been referred to in the judgment of the trial Court, was not relied upon before us on this point; and as I read the judgment of the trial Court the map forms no part of the subject-matter of the plaintiffs' copyright. The introductions are different in the two books. The marginal notes are different. The transitional notes in the plaintiffs' book are not reproduced in the defendants' book; nor is the division of the text into Chapters in the plaintiffs' book followed in the defendants' book. The plaintiffs' Case rests on the use said to have been made of the text and the notes in Ex. B by the defendants in preparing Ex. E.

27. I shall first deal with the notes. It is not disputed and cannot be disputed that it was open to the defendants to publish notes suited to the requirements of the Indian students on the text of Ex. B so long as no unfair use of the notes appearing in Ex. B was made. The notes were undoubtedly prepared by Mr. Darby and I do not feel any doubt that he had the plaintiffs' publication before him, which would necessarily include the notes prepared by Mr. Parr. The notes prepared by Mr. Darby are very copious and full and extend over more than sixty printed pages. The additional notes run over about eight pages. There is no complaint about the additional notes as they relate to matter not included in the text published by the plaintiffs.

28. The other notes include the points touched in the notes prepared by Mr. Parr. It must be remembered, however, that the notes by Mr. Parr are largely confined

to proper names; and any person writing fresh notes would necessarily have to include the best part of the points touched by Mr. Parr. Without having any means of knowing the personal equipment of the annotator and his aptitude for the task, it is not easy to say how far Mr. Darby made an unfair or improper use of Mr. Parr's notes. Any annotator having sufficient familiarity with the ancient history and mythology of Greece would be able to reproduce the substance of the notes by Mr. Parr. The notes are very elementary and without attributing undue ignorance of his subject to Mr. Darby, it is not reasonably possible to hold that he made what may be justly described as an unfair use of the notes by Mr. Parr. I do not see any good reason to doubt that Mr. Darby's notes were in the main prepared by means of his own knowledge and judgment of course referring to such materials as are open to all readers and writers, I do not doubt that he referred to Mr. Parr's notes. But any person writing notes on any text may fairly look at all the existing notes and so long as he does not make any use which may be called unfair, he can use them in preparing his own independent notes. It is difficult and not desirable to lay down any general rule on this point. It must be decided as a question of fact in each case. It seems to me that the learned trial Judge has gone too far in holding that the fact that Mr. Darby has added a lot of notes and certainly improved the annotations for the purpose of the use of the text by an Indian school boy is irrelevant. I think that we ought to consider the notes as a whole, and taking into consideration the nature and the extent of the use of the one in preparing the other as indicated by the materials on the record we have to see whether the use is unfair or not. In point of bulk and the nature of the notes; Mr. Darby's notes form an independent work, and simply because they include the best part of Mr. Parr's notes which are very short and elementary, I do not think that any unfair use of Mr. Parr's notes can be said to have been made by Mr. Darby. It is not without significance that the notes as such were not relied upon in the plaint as constituting an infringement; and though they were relied upon in the argument before us as in the trial Court, the learned Counsel for the plaintiffs-respondents principally relied upon the publication of the text as constituting the infringement of the copyright. After a careful consideration of the judgment of the trial Court as also of the arguments and the notes in question, I take the same view of the inclusion of Mr. Parr's notes in the defendants' publication as Wilson J. took in

Maamillan v. Suresh Ghunder Deb I.L.R (1890) Cal. 951 of Mr. Palgrave's notes in relation to the publication by the defendant in that case.

29. This brings me to the question whether there has been any infringement of the right in respect of the text. The few facts about the text are that both purport to be abridgments of North's Translation of Plutarch's Life of Alexander the Great, It has been stated by the counsel for the parties before us that roughly the plaintiffs' text contains about twenty thousand words, that the defendants' text contains about twenty-seven thousand words and that the original translation by North (Exh. F) contains about forty thousand words. The learned trial Judge makes the following observations as regards the OrB additional passages in the defendants' book:-

Then no doubt it is the fact that in Exh. E there are some additional passages. These are mostly short passages, for out of twenty-seven in all, fifteen are under ten lines; seven are between eleven and twenty lines; four between twenty-one and forty lines, while one is of sixty-five lines.

30. Thus the defendants' publication contains all the passages in the plaintiffs' text and some more. They are taken word for word from the original translation by North of Plutarch's Life of Alexander the Great. In neither case is there any attempt at real abridgment in the language of the abridger, but the texts are practically quotations from the original work. As regards the text published by the plaintiffs there can be no doubt that there has been an infringement of the copyright, if there could be any copyright in respect of the text. I am, however, not satisfied that there could be any copyright in respect of the text published by the plaintiffs which contains selected passages word for word from North's Translation. I need not refer to the very few expressions used by way of introducing some passages in the text (Exh. B) as they form no material part of the text, which consists of certain passages copied from North's Translation. It is common ground that there is no copyright in North's Translation of Plutarch's Life of Alexander and that it is open to any one to reproduce the whole of the translation. The question then is whether there can be any copy-right in respect of matter which is word for word part of a non-copy right work. North's Translation in question is open to any one to copy in part or in whole as he pleases. The plaintiffs have copied it in part and the

defendants have copied it in part which includes the part copied by the plaintiffs.

31. The section defining 'copyright' requires, so far as the point Under consideration is concerned, that it must be 'original literary work'. It is not a matter of any moment in this case whether the use of the word 'original' in the Statute of 1911 has made any alteration in the law as it existed before. But it has to be determined whether the passages selected from one book like North's Translation of Plutarch's Life of Alexander can be treated as 'original literary work', I do not deny that some mental labour, skill, and judgment are needed to select passages for the use of school boys. But at the same time it must be remembered that that by itself is not necessarily sufficient to constitute what one may call original work. The matter for all practical purposes remains the matter contained in North's Translation, There is no decided case which can be said to cover a case like the one before us. The cases which Coltman has referred to and relied upon do not help us in deciding the present case. I fully recognise that the word 'original' should be so construed as to give to the person who has used his brain the benefit of that use as far as possible; but unless the word is to be completely divested of its plain and natural meaning I find it difficult to hold that the matter, which is word for word taken from North's Translation, though only partially, constitutes an original work.

32. There have been decisions to the effect that selections made by an author from different authors may well form the subject-matter of copy-right. Palgrave's Golden Treasury affords an instance in point. But such works stand on a different footing. In the case of an abridgment it seems to me that the following observations at pp. 64 and 158 of Coppinger's Law of Copy-right (5th edition) are in point:-

Independent labour must be apparent and the reduction of the size of a work by copying some of its parts and omitting others, confers no title by authorship; and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose; language substantially different from that of

the original, of like such an abridgment requires the exercise of the mind; labour, skill Judgment are brought into play and the result is not merely copying.

To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, are expressed in language not copied, but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author.

33. Applying this test, and I think that is the test which ought to be applied, to the text in question, it is clear that the text in Exh. B cannot be treated as being entitled to any protection.

34. It is true that the defendants have not accepted this position with reference to their own abridgment. But that can make no difference in the case. It may be that their own abridgment, such as it is, is not an 'original literary work' within the meaning of the Copyright Act. That, however, does not prevent them from showing that they have not infringed any copyright by copying either from North's Translation or from the text of the plaintiffs' publication. I do not say that the plaintiffs' book as a whole is not entitled to protection against any infringement of the copyright. But in the present case as the infringement complained of, apart from the notes with which I have already dealt, is the unfair use made of the text of Exh. B and as that text is not protected under the Statute there is no infringement of the copyright.

35. I, therefore, concur in the order proposed by my Lord the Chief Justice.