

Amrita Devi and ors. Vs. Sripat Rai and ors.

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SooperKanoon Citation : sooperkanoon.com/450718

Court : Allahabad

Decided On : Feb-03-1961

Reported in : AIR1962All111

Judge : J.D. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2 - Order 10, Rule 2 - Order 26, Rule 8; [Evidence Act, 1872](#); Uttar Pradesh Civil Laws (Reforms) (Amendment) Act, 1954 - Sections 90, 90A and 90A(1); Copyright Act, 1914

Appeal No. : First Appeal No. 424 of 1955

Appellant : Amrita Devi and ors.

Respondent : Sripat Rai and ors.

Advocate for Def. : Sachitanand Sahai, Adv.

Advocate for Pet/Ap. : N.D. Ojha, Adv.

Disposition : Appeal dismissed

Judgement :

J.D. Sharma, J.

1. This is a plaintiffs' appeal from the judgment and decree of the learned District Judge, Allahabad.

2. The plaintiffs, the proprietors of the Bhargava Pustakalaya, Gaighat, Varanasi, brought the suit on the allegations that a novel called Nirmala was written by the famous Hindi Writer, Sri Prem Chand; R. Sehgal (who was impleaded as defendant No. 4 but died during the pendency of the suit) had paid the writing charges of Nirmala inclusive of copyright to Sri Prem Chand, and as the owner of the copyright, R. Sehgal printed and published the said work in 1947. Raja Ram Kumar Bhargava brought to sale in execution of his decree No. 28 of 1929 of Civil Judge's Court, Lucknow, against R. Sehgal his copyrights in Nirmala and 131 other books. The plaintiff No. 2 purchased the copyrights in a public auction held by the court of Munsif, West, on the 1st December, 1944. A sale certificate, as provided by Order 21, Rule 81, C. P. C. was granted by the Munsif West, Allahabad, whereby the copyright in the book styled Nirmala along with 131 other books vested in the plaintiff No. 2 and the plaintiffs had the exclusive right of printing and publishing Nirmala. The defendants 1 and 2 sons of Sri Prem Chand had no right to interfere with the plaintiff's copyright in Nirmala, but they had infringed the plaintiff's copyright by printing, publishing and selling Nirmala on dates subsequent to the 1st December, 1944 and had not desisted from doing so in spite of the plaintiff's request.

3. The relief claimed by the plaintiffs were :

(a) a permanent injunction against defendants 1 and 2 restraining them from producing, reproducing, printing, publishing and selling the copies of the Hindi work Nirmala;

(b) directing the defendants 1 and 2 to render an account of the money earned by printing and publishing the Nirmala;

(c) directing the defendants 1 and 2 to deliver up to the plaintiffs all the unsold copies of the work Nirmala.

4. The defendants 1 and 2 contested the suit on the grounds that Sri Prem Chand, father of the defendants was the author and therefore the first owner of the copyright of the literary work and novel Nirmala and after his death the copyright vested in the defendants 1 and 2, his heirs and legal representatives; there was no

assignment of the copyright by Sri Prem Chand; the story appeared in the periodical known as Chand by way of contribution thereto and the first edition of Nirmala was printed and published by Chand Press Ltd., and any payment even if received by the author in respect thereof could not divest him of the copyright. Sri Prem Chand never transferred the copyright to Rule Sehgal or to anybody else and ever since the defendants 1 and 2 came of age they had brought out several editions of the work Nirmala. The suit was barred by waiver and acquiescence and by limitation. It was further pleaded that the entire proceedings relating to the sale certificate were collusive, fraudulent and ultra vires and the sale certificate conferred no right or title on the holder thereof and the suit was bad for misjoinder of parties.

5. The learned District Judge, Allahabad, to whose court the suit was transferred from the court of the District Judge, Varanasi, held that Sri Prem Chand was and remained the owner of the copyright in the work known as Nirmala and it was not proved that he was paid the writing charges by, or had made an assignment of the copyright to, Sri Rule Sehgal, and the plaintiffs had not acquired any right to the copyright in the Nirmala. It was further held that the sale in the decree of Raja Ram Kumar Bhargava was not collusive or fraudulent and the suit was not barred by waiver or acquiescence and limitation, but there was no infringement by the defendants 1 and 2 of any copyright. In the result the suit was dismissed.

6. It is urged in appeal that the Nirmala was written by Sri Prem Chand on a contract of service with Rule Sehgal who was the owner of the copyright and he had also obtained an assignment of the copyright from Sri Prem Chand and as auction purchasers the plaintiffs became the owners of the copyright in the Nirmala.

7. Paragraphs 2 and 3 of the plaint as originally filed stood as :

'(2) That the book (a novel) called 'Nirmala' was written by the famous Hindi writer Shree Premchandji who being the author thereof was the first owner of the copyright therein.

(3) That the said Shree Premchandji had assigned absolutely his copyright in the said work styled 'Nirmala' in writing signed by him to Mr. R. Saigal the defendant No. 4 of the Chand Karyalaya, Allahabad.'

On the application dated the 19th September, 1946 of the plaintiffs the plaint was amended and the words 'who being the author thereof was the first owner of the copyright therein' in paragraph 2 and the entire paragraph 3 were deleted, and paragraph 3 after the amendment stands as follows :

(3) That R. Saigal the defendant No. 4 paid the writing charges of 'Nirmala' inclusive of copyright to Mr. Premchandji."

8. On the 7th December, 1946 the plaintiffs' counsel made a statement under Order 10, Rule 2, C. P. C. to the effect that 'the book styled 'Nirmala' was written by the author Prem Chandji while he was in the employment of R. Saigal of the Chand Press, Allahabad, under a contract of service.' An admission made by a party under Order 10, Rule 2, C. P. C. is conclusive against him. A party cannot be allowed to deviate from his pleadings. The plaintiffs could not therefore be allowed to adduce evidence in support of the alleged assignment of copyright by Sri Prem Chand. All the same, the evidence as discussed by the learned District Judge was highly unsatisfactory and was rightly discarded.

9. The plaintiffs failed to prove that Sri Prem Chand was paid the writing charges for Nirmala by R. Saigal or that it was written by him during the course of his employment in the Chand Press. If Kailash Nath Bhargava is to be believed, Sri Prem Chand was the owner of the copyright and R. Saigal could not be the owner the copyright by an assignment. Sri Kailash Nath Bhargava clearly stated that the deed of assignment was the basis of R. Saigal's ownership of the copyright and he would not have been the owner of the copyright but for that deed of assignment. Again, he stated that the contents of paragraph 2 as originally written in the plaint were correct and it is wrong that Sri Prem Chand never held any copyright in the book; it is wrong that he was not the first owner of the copyright. This is absolutely inconsistent with the plaintiff's case that Sri Prem Chand was paid the writing charges of Nirmala.

10. There is no direct evidence in support of the payment of writing charges by R. Saigal. R. Saigal who died on the 1st February, 1952 was not examined as a witness although an application was made for his examination on commission. Obviously he was the best person to know if any writing charges for the Nirmala were paid to Sri Prem Chand.

N. G. Saigal, the younger brother of R. Saigal, was examined on commission on the 17th January, 1948. At the time of his examination-in-chief the defendants were absent. Defendant No. 1, as mentioned in the report of the Commissioner, came after the plaintiffs' counsel had closed the examination-in-chief of N. G. Saigal and he stated that he could not cross-examine the witness in such a short time. The witness was therefore discharged. The defendants made an application, 132/C, for recalling N. G. Saigal for cross-examination. The application was opposed by the plaintiffs and on hearing the parties' counsel it was rejected by the learned District Judge on the 30th November, 1951. On the same date the defendants applied that the witness be examined in court or the evidence be discarded. The matter came up for consideration before the court on the 10th July, 1952. The order of the court was that if the defendants paid to the plaintiffs Rs. 50/- as costs within fifteen days, N. G. Saigal's deposition recorded on commission shall be excluded from evidence. The costs were duly paid and the order excluding the deposition of N. G. Saigal from evidence became final.

It has been urged on behalf of the plaintiffs that as N. G. Saigal was examined on commission with the consent of, and at any rate without an objection by, the defendants, his deposition should have been read in evidence under Order 26, Rule 8, C. P. C. Order 26, Rule 7, C. P. C. provides that where a commission has been duly executed it shall be returned together with the evidence taken under it to the court from which it was issued and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit. Rule 8 says that-

'Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless-

(a) the person who gave the evidence is beyond the jurisdiction of the court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the service of the Government who cannot, in the opinion of the Court attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in Clause (a), and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same'.

11. The statement recorded on commission can be read in evidence only if the conditions mentioned in Order 26, Rule 8, C. P. C. are satisfied. N. G. Saigal was a resident of Allahabad. The order for his examination on commission, was made by the District Judge, Varanasi. N. G. Saigal was beyond the jurisdiction of that court but was within 200 miles and was not entitled to be examined on commission as of right.

It was held in *Mahi Tosh v. Molin Behari* 0043/1936 : AIR1937 Cal163 , that the words 'beyond the jurisdiction of the Court' have reference to the question whether the witness is within reach of the compelling or disciplinary jurisdiction of the Court. A witness who lives outside the limit of the territorial jurisdiction! but within 200 miles of the Court is not beyond the jurisdiction of the Court. It is however unnecessary to go into that question as the admissibility of the evidence is to be judged with regard to the point of time when it was sought to be read in evidence. At that time N. G. Saigal was within the jurisdiction of the District Judge, Allahabad. Therefore none of the conditions mentioned in Order 26, Rule 8, C. P. C. were satisfied and) the statement could not be read in evidence without the consent of the defendant which was not given. As rightly observed by the court below, consent of the defendants could not be inferred from the mere fact that they did not oppose the application for examination of N. G. Saigal on commission. The learned District Judge was therefore right in not allowing the statement of N. G. Saigal to be read in evidence.

12. After excluding the statement of N. G. Saigal from evidence there remains nothing on the record to prove that Sri Prem Chand wrote 'Nirmala' during his employment by R. Saigal or received Rs. 325/8/- as writing charges. Narendra Singh Saigal, P.W. 2, was only 25 years old on the 26th February, 1953 when he was examined. He was not even born when Sri Prem Chand wrote the 'Nirmala'. He could therefore have no personal knowledge of the conditions under which Sri Prem Chand wrote the Nirmala. His evidence is therefore of no help to the plaintiffs.

13. Reliance has been placed by the plaintiffs on the copies marked Exs. J. and K. by the commissioner who recorded the statement of N. G. Saigal. They purport to be the copies of the accounts relating to the payment of Rs. 325/8/- to Sri Prem Chand. No evidence was adduced to prove the contents of Exs. J. and K. Also no case was made out for giving secondary evidence. It appears that the original accounts were on the record of another case

According to Sri G. P. Bhargava, Advocate, P.W. 1, the original ledger of 1926-27 was in a very tottering condition and had been worm-eaten. Even so, the original accounts only could be given as evidence and secondary evidence was not admissible under Section 65, Evidence Act. There is also no satisfactory evidence to prove that the accounts were maintained in the regular course of business.

Reliance was placed upon Section 90-A (1) as introduced by the U. P. Civil Laws (Reforms and Amendment) Act (34 of 1954). It says :

'(1) Where any registered document or a duly certified copy of any document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to Sub-section (1) of Section 90 will also apply to this section.'

The question is if the accounts of which Exs. J and K are copies were part of the record of a court of justice. The learned District Judge was of the opinion that they were not part of the record of a court of justice as they had not been exhibited.

It is not necessary for the purpose of this appeal to get into this question as on another ground also the copies do not fall within the purview of Section 90-A. The presumption under Section 90-A, Evidence Act, may be made only if the original shows on the face of it the name of the person by whom it purports to have been executed. Where a document does not purport to show who prepared and signed it, the mere fact that it is 20 or 30 years old does not make it admissible without proof--vide *Chandukutty Nambiar v. Rama Varma Raja*, AIR 1939 Mad 926. Exs. J and K do not mention the name of the person by whom they were written.

The presumption under Section 90-A is with regard to the execution of a document and in that respect Section 90-A is narrower in scope than Section 90, Evidence Act, under which a presumption may be made that a document is in the handwriting of a person by whom it purports to have been written. It is not without reason that the legislature while amending Section 90, Evidence Act, confined the scope of Section 90-A to raising a presumption regarding the execution only, as it has within its purview not only a registered document but also a certified copy of a document forming part of the record of a court of justice. Exs. J and K did not, therefore, attract the provisions of Section 90-A, Evidence Act.

14. A court has discretion under Section 90 or 90-A, Evidence Act, and if in the exercise of discretion a court does not raise a presumption no interference will be justified in appeal.

15. In the result the copies Exs. J and K remained unproved and were rightly discarded from consideration.

16. It appears that the story of Nirmala appeared in the 'Chand'. Exs. B to I are some of the issues of the 'Chand' carrying the story. Each issue contains at the end the words 'copy right' or 'all rights reserved'. The contention is that the above words indicate unmistakably that the copy right in the story belonged to the proprietors of the 'Chand'. The defendant No. 1 admitted in his evidence that the

copyright in the first edition had been sold to the proprietors of the 'Chand'. This is consistent with the publication of the story in serial in the 'Chand' and of the first edition of the Nirmala. It is permissible to transfer limited copyright. It does not therefore follow that the copyright in the book had been transferred absolutely. It is further in evidence that the defendants brought out several editions of the Nirmala extending over a period of several years. This is a strong circumstance against the ownership of the copyright vesting in R. Saigal and after the auction sale in the plaintiffs.

17. The learned District Judge has also held that as the 'Chand' had been incorporated as a limited company, R. Saigal could not retain the ownership of the copyright and therefore the plaintiffs did not acquire any right by auction sale. This was not one of the pleas taken by the defendants in the written statement and should not have been considered by the learned District Judge.

18. The defendants have stressed the plea of limitation. Section 10, First Schedule, Part II, Copyright Act, 1914, says:

'An action in respect of an infringement of Copyright shall not be commenced after the expiration of three years next after the infringement.'

Evidently the bar is against an infringement of copyright after three years but each infringement gives rise to a fresh cause of action. The copyright itself cannot cease to belong to its owner. The suit was therefore not barred by limitation.

19. The appeal has no force and is dismissed with costs and the judgment and decree of the learned District Judge are confirmed.

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