APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1919. December 18.

VASUDEO GANESH JOSHI (ORIGINAL DEFENDANT), APPELLANT *v.* ANUPRAM HARIBHAI TRAVADI (ORIGINAL PLAINTIFF), RESPONDENT*.

Indian Contract Act (IX of 1872), section 23—Contract for supply of copies of a specimen picture—Copy-right in the picture obtained by a firm in England—Publication of picture in India not fraudulent—Copy-right at common law—Fine Arts Copy-right Act of 1862 (25 & 26 Vict. c. 68).

On the 19th February 1912, the defendant entered into a contract with the plaintiff to prepare and supply to the plaintiff, within three months from the date of the contract twenty thousand copies of a picture of the Coronation of Their Majesties in England. The specimen picture was originally published in England by A. Vivian Mansell & Co., which had obtained a copy-right in the said picture. The defendant having committed a breach of contract, the plaintiff sued for damages. The defendant contended that the object of the contract being to defraud an English Company who had a copy-right in the picture the contract was void under section 23 of the Indian Contract Act, 1872.

Held, overruling the contention, that the contract did not come within section 23 of the Contract Act, 1872, and the plaintiff was entitled to sue for damages for breach.

The Fine Arts Copy-right Act of 1862 (25 & 26 Vict. c. 68) does not extend to any part of the British Dominions outside the United Kingdom.

As soon as an author, a publisher, or a painter gave to the world what he had written or created, it became public property, and there was no right at Common Law before the Statute of Anne (8 Anne c. 19) which protected him from his works being copied by one who chose to do so.

Graves & Co., Limited v. *Gorrie* [1]; *Jefferys* v. *Boosey* [2]; and *MacMillan* v. *Khan Bahadur Shamsul Ulama M. Zaka* [3], referred to.

SECOND appeal against the decision of C. N. Mehta, Joint Judge of Poona, reversing the decree passed by R. B. Gupte, Joint Subordinate Judge at Poona.

* Second Appeal No. 222 of 1918.

[1] [1903] A. C. 496. [2] (1854) 4 H. L. C. 815.

[3] (1895) 19 Bom. 557.

Suit to recover damages.

On the 19th February 1912, the defendant entered into a contract to prepare and supply to the plaintiff 20,000 copies of a specimen picture which referred to the Coronation of Their Majesties in England in 1911 and which purported to have been originally published in England by A. Vivian Mansell & Co. This contract was to be fulfilled within three months from the date of the agreement and on the 24th February 1912 an advance of Rs. 100 was remitted to the defendant.

On the 17th June 1912, the defendant informed the plaintiff that unless Rs. 100 more were advanced the pictures would not be printed.

The plaintiff, therefore, sued to recover Rs. 1,800 as damages from the defendant for refusing to carry out the contract.

The defendant contended that under the terms of the agreement, Rs. 100 more were to be paid by the plaintiff to the defendant on the proofs being approved and that a letter of indemnity was to be passed by the plaintiff to the defendant undertaking to bear himself all damages consequent on a possible action by Mansell & Co., against the defendant for an infringement of their copy-right in the said picture and that as the plaintiff declined to abide by these terms, it was he (the plaintiff) who had broken the contract: and that therefore the plaintiff should be non-suited.

The Subordinate Judge disallowed the plea of the defendant and assessed the plaintiff's damages at Rs. 800 plus Rs. 100 (the amount paid by him to the defendant as advance) but disallowed his claim on the ground that the agreement offended against the provisions of section 23 of the Indian Contract Act and was accordingly illegal and void.

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On appeal, the Joint Judge held that the defendant had broken the contract and that the agreement did not offend against the provisions of section 23 of the Indian Contract Act, 1872. He, therefore, allowed the plaintiff a decree for Rs. 900 and costs. The reasons were as follows :—

In the first place we have to determine whether the consideration or object of the agreement was forbidden by law or was of such a nature that, if permitted, it would have defeated the provisions of any law (vide section 23 of the Contract Act). The finding on this depends on the question whether on the date of the agreement (19th February 1912) Mansell & Co. had a subsisting copy-right in the picture, Exhibit 52, or not and whether it was enforceable in British India.

Now the only law that gave a copy-right to the authors of such pictures on their publication was the Fine Arts Copy-right Act of 1862 (25 & 26 Vict., c. 68) which has been reproduced in the Government of India's publication of the "Collection of Statutes relating to India," Volume I, Edition of 1913, and there can be no doubt that if this Statute extended, expressly or by necessary application, to British India then that law should be administered by the Courts here under Bombay Regulation IV of 1827, section 26.

It need not be said that copy-right on publication is the creation of a Statute only. The Common Law recognised the right of the author to any unpublished artistic work only (vide Halsbury's Laws of England, Vol. VIII, page 188, section 440, Edition of 1909). It was also observed in *Mac Millan* v. *Khan Bahadur Shamsul Ulama*, I. L. R. 19 Bom. 557 at page 567 as follows :— "Whether copy-right existed at Common Law before the Statute of Anne (8 Anne c. 19) has long been a question much debated by lawyers ; but since the decision of the house of Lords in *Jefferys* v. *Boosey*, 4 H. L. C. 815, it must, I think, be assumed by Courts of law dealing with questions of copy-right that no such right existed before that Statute."

The only question that, therefore, arises is whether the Fine Arts Copy-right Act of 1862 had, expressly or by necessary implication, extended to British India. It is argued that this Act did extend to British India, because it has been published in the Government of India's "Collection of Statutes relating to British India", and I am asked to draw that presumption merely on the ground of its publication in this volume under section 84 of the Evidence Act. I am afraid I cannot do that ; that section only creates a presumption about the genuineness of that book, not that a particular Statute published in it does in fact extend to British India.

on the other hand this Statute was the subject of discussion in *Graves v. Gorrie* [1903], A. C. 496. where their Lordships after a critical examination of the several sections and provisions in this Statute, held that it extends to the whole of the United Kingdom but does not extend to any part of the British Dominions outside the United Kingdom". This is a most weighty expression of opinion and I am bound to follow it. Moreover my own reading of the Act also leads me to the same conclusion. I would go further and point out that in the Copy-right Act of 1842 (5 & 6 Vict. c. 45) which was intended to extend throghout the British Dominions, the Legislature had used apt expressions to that effect (e.g., vide section 15 of that Act) and that when the Indian Legislature thought so, it itself enacted a supplementary law of copy-right in literary works in order to remove all doubts in the matter, vide India Act XX of 1847 and its preamble. A similar course has been adopted by the Indian Legislature with respect to the recent consolidated Copy-right Act of 1911 (1 & 2 Geo. V. c. 46) by the Government of India Notification, dated 30th October 1912, and by India Act III of 1914. The absence of any such supplementary Legislation or Notification declaring that the English Statute regarding the Fine Arts Copy-right Act of 1862 extends to British India leads me also to the same conclusion, namely, that it was not meant to extend to British India. It may have been anomalous that if an Indian author of a picture were to go to England and register his picture at the Stationer's Hall, he would get protection in respect of his picture throughout the United Kingdom, while that an English author's copy-right obtained by him by such registration in England would not be protected in India as there was no corresponding Legislation here until 30th October 1912, when the Consolidated Copy-right Act of 1911 (1 & 2 Geo. V. c. 46) was proclaimed here and it was directed to come into operation here from that date. But that appears to me to have been the state of the law in this country from 1862 to 1912, and I am afraid I am bound to adopt it, as copy-right on publication did not exist at Common Law but is the creature of a Statute. * * * * *

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In the view that I hold at present it is obvious that even supposing that Mansell & Co. had registered their picture at the Stationer's Hall in England under the provisions of the English Statute of 1862, they had no enforceable right here either on the date of the agreement between the parties (viz., 19th February 1912) or up to the date of the final breach between the parties which took place in June 1912 (vide the last letter, Exhibit 59) or September 1912 (vide the defendant's notice), the Consolidated Copy-right Act of 1911 not having come into operation till 30th October 1912. Therefore, the consideration or object of the agreement between the parties was never, even up to the time of its breach, forbidden by law or of such a nature that if

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permitted it would have defeated the provisions of any law. Nor can it be held that it was fraudulent as no deception was to be practised on any one or on the public as Exhibits 55, 70 and 92 show that the pictures to be prepared in the defendants' Press were to bear the name of the plaintiff and his address and the words "Made in India" and the title of the picture in Marathi also, nor can it be held that it involved or implied injury to the person or property of another; injury always implies a *jus* and Mansell & Co. had no right here. Nor can it be said that it was immoral or opposed to public policy. It was clearly not immoral. And as regards public policy it has been already observed that the works of an author after publication are *publici juris* and that copy-right on publication is the creation of a Statute and that even in making such enactments, the Legislature has always kept the interest of the public before it. Moreover in a backward country like India in the matter of Arts and Industries imitation may not be opposed to public policy; only it should not deceive or defraud the public, e.g., by passing it off as the original picture imitated.

The defendant appealed to the High Court.

Pendse with *K. H. Kelkar*, for the appellant:—We submit that an agreement to print and reproduce pictures in India in colourable imitation of pictures, which are registered in England by an English Company under the Fine Arts Copy-right Act (25 & 26 Vict. c. 68) of 1862, is not enforceable in India as such an agreement is void under section 23 of the Indian Contract Act. Here, the object of the agreement is illegal inasmuch as, if allowed, it would defeat the provisions of any law, that is, the English Fine Arts Copy-right Act of 1862. Under this Statute the original English picture, which was agreed to be reproduced, was protected in England, we submit that the English Fine Arts Copy-right Act must be regarded as law in British India for purposes of section 23, Indian Contract Act. Further, as the object of the agreement is to defraud the public and also the above-mentioned English Company by printing a colourable imitation of their copy-right, the object is fraudulent within the terms of section 23. The said Statute is

included in the volume of Statutes relating to India published by the Government of India in 1913. Moreover, Bombay Regulation IV of 1827, section 26 says that the law to be followed in the trial of suits shall be Acts of Parliament and Regulations of Government. Therefore, the English Fine Arts Copy-right Act of 1862 must be regarded as law in the Bombay Presidency under this Regulation.

Secondly, even supposing that the said English Copy-right Act does not apply to India, we submit that under English Common Law which is applicable to India under the heading of "Justice, Equity and Good Conscience" as provided by Bombay Regulation IV of 1827, section 26, the copy-right in pictures produced in England is preserved in India. See also Halsbury's Laws of England, Vol. VIII, page 188, para. 440, page 189, note (i).

G. N. Thakor, for the respondent, not called upon.

MACLEOD, C. J.:—The plaintiff sued to recover Rs. 1,800 as damages from the defendant for refusing to carry out the contract to prepare and supply to the plaintiff 20,000 copies of the plaint picture. The breach is admitted, but the defendant contends that the contract came within the provisions of section 23 of the Contract Act and as the agreement is fraudulent, or involved or implied injury to some person, its object or consideration is unlawful, and the contract is, therefore, void. The defendant must depend for this contention on the argument that as there was in England a firm who had a copy-right in this picture, it was a fraud on them to print the picture in India.

It was first contended that the Fine Arts Copy-right Act of 1862 (25 & 26 Vict. c. 68) had been extended to British India, but it is quite clear from the

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decision in *Graves & Co., Limited* v. *Gorrie*[1] to which we have been referred, that the Act does not extend to any part of the British Dominions outside the United Kingdom.

Then it is alleged that at Common Law an author, a publisher or a painter has a copy-right in his productions. That question was decided in *Jefferys* v. *Boosey*[2]; and in *MacMillan* v. *Khan Bahadur Shamsul Ulama M. Zaka*[3] Farran J. said: "it must...be assumed by Courts of law dealing with questions of copy-right that no such right existed (at Common Law) before that Statute (8 Anne c. 19)." The judgments in *Graves & Co., Limited* v. *Gorrie*[1] and *Jefferys* v. *Boosey*[2] are most clear on that subject. They were based on this reasoning that as soon as an author, a publisher or a painter gave to the world what he had written or created, it became public property, and there was no right at Common Law which protected him from his works being copied by any one who chose to do so. It appears, therefore, that this contract does not come within section 23 of the Contract Act. The plaintiff is entitled to sue for damages for breach. The appeal, therefore, must be dismissed with costs.

Decree confirmed.

J. G. R.

[1] [1903] A. C. 496.

[2] (1854) 4 H. L. C. 815.

[3] (1895) 19 Bom. 557 at p. 567.