

MANU/DE/1341/2008

**Equivalent Citation:** (2009)ILR 2Delhi250, 2008(38)PTC212(Del)

**IN THE HIGH COURT OF DELHI**

IA Nos. 4247 and 6613/2007 in CS (OS) 677/2007

Decided On: 18.09.2008

Appellants: **Jaypee Brothers Medical Publishers (P) Ltd.**  
**Vs.**

Respondent: **Dr. Ramya Raghu and Ors.**

**Hon'ble Judges/Coram:**

Rajiv Sahai Endlaw, J.

**Counsels:**

For Appellant/Petitioner/plaintiff: Jagdish Sagar and Bhagwati Prasad, Advs

For Respondents/Defendant: Pratibha M. Singh, Sudeep Chatterjee, Deepak Gogia and J.P. Karunakaran, Advs.

**Subject: Intellectual Property Rights**

**Acts/Rules/Orders:**

Copyright Act, 1957 - Section 18, Copyright Act, 1957 - Section 18(2), Copyright Act, 1957 - Section 19, Copyright Act, 1957 - Section 21, Copyright Act, 1957 - Section 22; Specific Relief Act, 1877 - Section 42; Code of Civil Procedure (CPC) - Order 39 Rule 4

**Cases Referred:**

Oxford University Press v. Orient Longman Private Limited and Ors. 103 (2003) DLT 139; K.P.M. Sunderam v. Rattan Prakashan AIR 1983 Delhi 461; Deshmukh & Co. v. Avinash Vishnu Khandekar 2006(32) PTC 358 (Bom)

**Citing Reference:**

Discussed	■	2
Mentioned	■	1

**Case Note:**

**Intellectual Property Right - Copyright - Present appeal filed against order whereby respondents were permitted to go ahead with sale of book, whose copyright is claimed by appellant and to restore ex-parte injunction regarding sale of book against respondents - Held if it had been found that there has been an agreement of assignment of copyright, there would have been no question of restraint of trade inasmuch as appellant would then have been entitled to protect its copyright - Moreover, injunction in present case is claimed on basis of infringement of copyright only and not on basis of actions impugned of defendants 2 and 3 and for which a separate suit for damages is pending - Even on ingredients of irreparable loss and injury and balance of convenience this Court does not find appellant to be entitled to sustain injunction - It is admitted position that book authored by defendant No. 1 is ready and has been published - It is allegation of appellant that defendant No. 1 has violated order of injunction of this Court - Injunction has already been in operation for last one and a half year - Documents filed by appellant themselves show life of book to be of 3-5 years - If injunction is to be continued, considering normal time taken in disposal of such suit, effort of defendant No. 1 of authoring book would be rendered useless - On contrary for appellant agreement with defendant No. 1 was a commercial transaction in connection with its business - Hence appeal dismissed**

**JUDGMENT**

**Rajiv Sahai Endlaw, J.**

1. The plaintiff has instituted the suit for declaration that the plaintiff is the owner of copyright in a book, authored by the defendant No. 1 with the assistance of the defendant No. 4 and published by the defendants No. 2 and 3, for the reason of the defendant No. 1 having assigned copyright therein to the plaintiff even before the book had come into existence and on the plea that such assignment has taken effect on the book coming

manupatra into existence. The plaintiff has also sought consequential relief of injunction restraining the defendants from distributing, selling or in any manner exploiting the said book and for damages etc. On IA. No. 4247/2007 filed by the plaintiff alongwith the plaint for interim relief, vide ex parte order dated 23rd April, 2007 the defendants were restrained from selling, distributing or exploiting the book.

2. IA. No. 6613/2007 has been filed by the defendants under Order 39 Rule 4 CPC. Vide order dated 27th February, 2008 the said ex parte order was modified permitting the defendants to go ahead with the sale of the book, subject to keeping accounts. The plaintiff preferred an appeal to the Division Bench which vide order dated 27th May, 2008 set aside the order dated 27th February, 2008 and restored the ex parte injunction dated 23rd April, 2007 till the disposal of the applications.

3. The plaintiff has based its case on the plea of assignment of copyright in a future work by the defendant No. 1 and the plaintiff consequently being the owner of the copyright on the work coming into existence. The plaintiff thus claims the defendants to be in infringement of the plaintiff's copyright. The plaintiff has not sued for specific performance of the agreement with the defendant No. 1 or for preventing breach of the same, save with respect to the assignment of copyright as aforesaid.

4. The defendants have contested the suit denying that there was any assignment of copyright in favour of the plaintiff. The defendants contend that the agreement between the plaintiff and the defendant No. 1 was at best an agreement between the author and a publisher and which agreement by its very nature is not specifically enforceable (and for which reason only the plaintiff has not sued for specific performance of a publishing agreement). It is further contended that the agreement of assignment is without any consideration and hence void; that the agreement is in restraint of trade and void for the said reason also; that the contract, if any, stood abandoned by the plaintiff; that the contract is onerous to the defendant No. 1 and ought to be set aside by the court for the said reason. It is finally contended that the book authored by the defendants No 1 and 4 and published by defendants No 2 and 3 is different from the book (to be brought out in future) with respect to which the plaintiff and the defendant No. 1 had entered into the agreement.

5. Besides the aforesaid pleas with respect to the ingredients of prima facie case, arguments were also addressed on the ingredients of irreparable loss and balance of convenience.

6. The plaintiff having approached the court for declaration that the copyright stood assigned to the plaintiff and consequentially seeking injunction, has to make out a prima facie case of assignment of copyright. For the said purposes I find the plaint itself states that the plaintiff is engaged in the business of publishing, distribution and sale of medical books; the plaintiff has opened up new opportunities to previously unknown academics and other professionals in the field of medicine by encouraging them to author books in the field of medicine; that the plaintiff is involved in identifying and developing new authors; the plaintiff for the said purposes identifies potential authors and then arranges meetings with the potential authors by holding authors meet; that during the said meetings, the proposed books are discussed and thereafter the prospective authors and the plaintiff enter into the agreements, inter alia, of a future assignment of copyright in consideration of the plaintiff's commitment to produce and publish the book at its own risk and to pay the author suitable royalty of 10% of the printed price as per the norms in the publishing industry; that the defendant No. 1 is Professor and Head, Conservative Dentistry & Endodontics at the Bangalore Institute of Dental Science at Bangalore and was one of the invitees to the authors' meeting arranged by the plaintiff on 7th September, 2003 at a hotel in Bangalore; sample copy of the invitation is filed before the court; the defendant No. 1 attended the said meet and thereafter executed an agreement with the plaintiff in September 2003 itself which was sent by the defendant No. 1 from Bangalore to Delhi; the plaintiff accepted the defendant No. 1 proposal by signing the agreement at Delhi.

7. That since there is a written document between the parties, the clauses thereof relevant to determine whether the same is an assignment of copyright or a publishing agreement are quoted hereinbelow. It is significant that the plaintiff in the said agreement is described as the publisher and the defendant No. 1 as the author.

1. The author(s) to deliver to the publishers the complete typed script of the book with diagrams, pictures, transparencies, maps, etc. at present entitled 'Art & Science of Operative Dentistry' within 365 days of this agreement. He/She/they also agree(s) to help in the preparation of the publication. The author(s) agree(s) to correct, approve and pass for printing the final page proofs of the book without in anyway delaying or inconveniencing the printers.

2. (a) The publishers shall at their own risk and expense produce and publish the above book and shall have during the legal term of copyright the exclusive right of producing the book(s) or any portion of it and its/their subsequent editions throughout the world, as also the general control of the publication(s) and the right to publish a translation.

(b) The copyright of this work vests with the author and the author(s) willingly assign(s) the right to the publishers to publish the work, and to reassign the rights of co-publishing, translation, adaptations, as may be considered necessary by the publishers.

(c) The author(s), however, agree not to assign the copyright to anyone else without the explicit

(3) The author(s) hereby guarantee(s) that the book is in no way an infringement of copyright and does not contain any matter of libelous nature and that he/they shall indemnify the publishers against all losses and expenses arising out of such infringement of copyright or on account of matter of libelous/objectable nature contained in the book(s).

9. The author(s) agree(s) to edit and revise, if necessary, with additions and alternations every subsequent edition of the book(s). In case the author(s) refuse(s) to do so or is/are unable to do so on any account, the publishers may get it revised by somebody else and the charges will be borne by the author(s).

10. The author(s) shall not be directly or indirectly interested in any other similar book(s) or in anyway so act that the sale of the books(s) may be adversely affected and if at any time he/she/they does/do so he/she/they will be responsible for all losses the publishers may be put to through such action of the author(s).

8. Prior to the signing of the agreement aforesaid, the plaintiff had made the defendant No. 1 to fill up "Manuscript Information Questionnaire" at the authors meet. A copy of the same has been filed by the plaintiff. The particulars of the defendant No. 1 and the proposed and alternative title of the proposed book have been filled up by the defendant No. 1 in the same. Against column No. 3 : "Is it to be multi-authored or single authored book: In case it is multi authored book, please give the number of contributors," the defendant No. 1 has filed up "3 - 4". The defendant No. 1 had therein disclosed the current position of the script as "initial stage of preparation" and had given the approximate number of typed script pages as 400 with 1000 diagrams and 50-75 illustrations. The defendant No. 1 had in the said form disclosed that the proposed book was meant for undergraduate reference and had also listed the competing titles, in her view. Most important for the present purpose, the defendant No. 1 had filled in the said form that the proposed book would need revision for subsequent editions within 3-5 years. The plaintiff in the said form had also sought information from the defendant No. 1 of the ways to boost the sales of the book. Needless to state that the aforesaid questionnaires as well as the agreement are standard form printed contracts got prepared by the plaintiff and blanks whereof were filled in by the defendant No. 1.

9. Section 18 of the Copyright Act, 1957 provides that the owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations. The proviso thereto states that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence. Section 18(2) provides that the assignee of a copyright is to be treated as the owner of the copyright. Section 2(j) of the Act defines an exclusive licence as a licence which confers on the licensee to the exclusion of all other persons including the owner of the copy right, any right comprised in the copyright in a work. Publication is a right comprised in the copyright of the work. The question which arises is whether on the basis of the agreement aforesaid, there was an assignment of copyright in a future work which has come into effect upon the book coming into existence (if it is the same book) or the plaintiff had merely agreed to give right of publishing the book to the defendant No. 1.

10. On this aspect, in my view, besides the language of the agreement in determining the aforesaid question, the manner in which the plaintiff itself has described the agreement to have come into existence has a bearing. The invitation card issued by the plaintiff for the meet aforesaid itself described the meet as an "Authors - Publisher Meet 2007." The list prepared by the plaintiff of the doctors who were invitees for the said meet and which was signed by attending authors also described the meet in a similar fashion. The Chairman and Managing Director of the plaintiff in his letter to the defendant No. 1 after the meet also thanks the defendant No. 1 for attending the Authors-Publisher Meet. The questionnaire which the defendant No. 1 was needed to fill up at the meet, also does not give any inclination of the proposed relationship between the plaintiff and the defendant No. 1 being intended to be anything other than of an author and a publisher. Though the defendant No. 1 described her proposed work to be a multi-authored book with 3-4 persons contributing to the same, no inquiry of the said contributors was made nor were they required to be signatories to the agreement. There do not appear to have been any discussions or negotiations between the parties. Prima facie, it appears that the defendant No. 1 at the said meet having evidenced interest to author a book was made to fill up the questionnaire and was left with a printed form agreement. Thus, it is not as if there was any discussion between the plaintiff and the defendant No. 1 as to whether the defendant No. 1 was to assign her copyright to the plaintiff or the plaintiff was to merely publish the book to be written by the defendant No. 1. No such discussion or negotiation have been pleaded.

11. The clauses aforesaid of the standard form agreement have to be interpreted in the aforesaid light. It becomes important to note that the plaintiff was described as a publisher. It appears that the subject book is the first book of the defendant No. 1. In any case there was no prior relationship between the plaintiff and the defendant No. 1. The defendant No. 1 appears to have taken the plaintiff merely as a publisher of her proposed book and there is nothing to indicate that the defendant No. 1 intended to assign copyright in her work to the plaintiff. For an author, copyright is of immense value, monetarily and more so otherwise, and without the author being made aware that the agreement which the author is signing would divest the author

manupatra of the copyright itself, thereby leaving no rights whatsoever in the author, I, prima facie, find it difficult to believe that the agreement between the parties can be construed as an agreement of assignment. Had the agreement described the plaintiff as an assignee, it could still have been argued that it had been made abundantly clear to the defendant No. 1 that it was assignment of her copyright which was the subject matter of the agreement. The counsel for the defendants has shown the other publications of the plaintiff in those, the copyright is shown to be vesting in the author. At this stage nothing has been shown to suggest that the agreements entered into by the plaintiff with such other authors were different from the standard form agreement entered into with the defendant No. 1. If on similar agreements the plaintiff itself has treated copyright to be vesting with author, the plaintiff appears to be now contending the same agreement to be of an assignment of copyright only for the purpose of specific enforcement thereof, which otherwise does not lie in law.

12. In my view, even the language of the agreement does not support the case of the plaintiff of assignment of a copyright. Clause 2(a) of the agreement refers to the plaintiff during the legal term of copyright having the exclusive right of producing the book. Section 22 describes the term of copyright as within the life time of the author until 60 years. Had the intention been of assignment of the copyright, there would have been no need to so provide in Clause 2(a) inasmuch as then the copyright itself would have vested in the plaintiff.

13. Clause 2(b) further makes the position clear. The same operates as assignment by the author only of a right to publish the work and to reassign the rights of co-publishing, translation, adaptation as may be considered necessary by the publisher. This language can be contrasted with the language of the agreement in *Oxford University Press v. Orient Longman Private Limited and Ors.* MANU/DE/2021/2002 : 103(2003)DLT139 relied upon by the counsel for the plaintiff, as under:

The Author hereby assigns to the Publisher during the legal term of copyright including any renewals thereof the entire copyright in the Work subject to the terms and conditions hereinafter mentioned.

In the aforesaid state of the agreement, this Court had prima facie held the agreement to be of assignment of copyright. However, the plaintiff in the present case in its standard form agreement was satisfied in receiving the assignment only of the right to publish the work and not of the entire copyright in the work.

14. Clause 2(c) of the agreement makes the position unequivocal. Had the agreement been of assignment, the question of the plaintiff incorporating therein a covenant that the author shall not assign the copyright to anyone else without the written permission of the publisher would not have been required inasmuch as in that case the author, upon coming into existence of the work would not have been left with any copyright in the same and consequentially there would have been no occasion for the author to so assign the copyright to anyone else.

15. Having reached a prima facie conclusion, that the agreement was not of assignment of copyright, even if the book which had come into existence is the same book with respect to which the agreement was entered into by the defendant No. 1 with the plaintiff, the plaintiff would have no right as the assignee of the copyright to restrain the defendants.

16. Another important feature, in my view for construing the agreement as not of assignment of copyright, is that while the defendant No. 1 had declared that the book was to be co-authored by 3-4 others besides her, the plaintiff did not deem it necessary to make any further inquiries and to have the agreement signed from the other co-authors also. There could be no assignment of copyright without the signatures of all the co-authors/contributors of the defendant No. 1. An assignment of copyright under Section 19 is valid only if it is in writing signed by the assignor or his authorized agent. This is a strong indicator of the plaintiff also at the relevant time having merely intended acquisition of rights to publish the book and having not intended to take assignment of copyright in the future book. Nothing prevented the plaintiff in the agreement which if itself had got printed to use the same language as in *Oxford University Press*. The counsel for the defendants relied on *K.P.M. Sunderam v. Rattan Prakashan* AIR 1983 Delhi 461 to contend that, prima facie, without downright payment, no assignment of copyright can be inferred. This was followed in *Deshmukh & Co. v. Avinash Vishnu Khandekar* MANU/MH/0430/2005 : 2006(2)BomCR321 . However, since I have on prima facie reading of clause of agreement found the same to be a publishing agreement, I do not advert to this aspect.

17. The plaintiff has not pleaded and argued that as a publisher it is entitled to so restrain the defendant No. 1. The old Specific Relief Act, 1877 in Section 21 thereof contained an illustration of an agreement between an author and a publisher as of agreements not specifically enforceable.

18. There is, of course, a negative covenant in the agreement between the plaintiff and the defendant No. 1 whereunder the defendant No. 1 had agreed not to be directly or indirectly interested in any other similar book as may adversely affect the book subject matter of the agreement. However, the plaintiff has neither pleaded nor argued for enforcement of the said negative covenant under Section 42 of the Specific Relief Act. In fact, the counsel for the plaintiff on initial inquiry had denied that there is any such negative covenant. The plaint in para 12 does not even refer to the negative covenant while setting out therein the key terms of the agreement relevant to the suit.

manupatra 19. Though the plaintiff, on my aforesaid prima facie finding, would not be entitled to the interim relief but nevertheless prima facie findings have to be given with respect to the competing claims of the parties as to whether the book which had come into existence is the same book with respect to which the agreement was entered into.

20. Arguments had been addressed on this aspect with respect to the index, format and content of the book. It is difficult for persons not acquainted with the subject to give a finding with respect to whether the work which has come into existence is the same as the work with respect to which the agreement was entered into. However, in my view, the said questions in a matter such as the present one are irrelevant. When an author in a specialized field enters into an agreement say of assignment of copyright in a future work, the author cannot be heard to say that the work which has been produced is different from the work with respect to which the agreement was entered into. Assignment of copyright cannot be permitted to be defeated on such pleas. The description of the work at the time of entering into the agreement can never be precise and has to be general in nature inasmuch as then the concept, format and contents are all in the mind of the author and which cannot be gazed by another. When such an author instead of producing the work for the person with whom he has entered into the agreement, produces a work claiming it to be different from the work for which he had entered into the agreement, it has to be generally believed that the work produced is the same as the work for which the agreement was entered into. It would be a different matter if the author was at the time of entering into the agreement itself notify the other party that besides the future work subject matter of the assignment, the author had conceived or was in the process of producing some other work also. The defendant No. 1 in the present case did not make any such disclosure. Not only so the defendant No. 1 did not even intimate to the plaintiff that she had abandoned the work with respect to which the agreement was entered into or had thought of something different. In the absence of the same, the conduct of the defendant No. 1 in collusion with the defendant No. 2 which is none other than an ex employee of the plaintiff and with whom the defendant No. 1 was in touch as a representative of the plaintiff, was dishonest. The agreement in the present case as well as in Oxford University Press (supra) contained a negative covenant as aforesaid. The said negative covenants are incorporated in the agreement for this reason only that it is difficult to describe the future work with precision, and to prevent the author from taking any advantage of lack of such precision and which in turn is also attributable to the author. Thus, I hold that if the agreement had been of assignment of copyright, the plaintiff would have had a prima facie case restraining the defendants notwithstanding the pleas of the work being different. The authors on specialized subject such as the defendant No. 1 can write on their subject only and no other and cannot be heard to take such pleas.

21. I also do not find any prima facie case in favour of the defendant No. 1 on its plea of the agreement being without consideration or having been abandoned or of having expired. Reciprocal promises can form consideration for each other. In the present case the promise of the plaintiff to bear the publication cost and to pay royalty as mentioned to the defendant No. 1 was the consideration for the defendant No. 1 to have agreed to assign publishing rights to the plaintiff. I also do not find that the time was the essence of the agreement or that on the expiry of 365 days mentioned in the agreement for the book to come into existence, the agreement came to an end. Even otherwise, under the law, no agreement comes to an end merely by expiry of time and requires cancellation/revocation by the parties. The nature of the agreement is such so as to not make the time the essence of the agreement.

22. Without any express conduct having been shown on the part of the plaintiff, it cannot also be urged that the plaintiff had abandoned the agreement. The plaintiff under the agreement was not required to do anything till the defendant No. 1 intimated the plaintiff of the completion of the work. The period of one year in the present case expired in September, 2004. In my view, the period of about two years thereafter when the book was published cannot be, considering the nature of the contract and the work to be done there under, be described as the period in which the agreement would become stale. The publishers who have entered into such agreement without any financial commitment cannot be expected to breathe down the neck of the authors or to push the authors into publishing within the time of 365 days. In any case the plaintiff has filed affidavits of its employee to the effect that they were in touch with the defendant No. 1 and the defendant No. 1 was always intimating that the work was in progress. These aspects are to be subject to trial.

23. I having found the agreement between the parties to be of an author and not of an assignment of copyright do not consider it necessary to deal with the argument of the defendants of the agreement been onerous or inconceivable. I may notice that the counsels have relied on plethora of case law and other literature with respect to such contracts and practice of trade, on the question of time being of essence of contract, on onerous contracts and on the aspect of contracts in restraint of trade. I do not consider it necessary to burden this order with the same, in view of my findings above. The counsel for the defendants has also addressed the arguments on as to how the claim of the plaintiff is in restraint of trade. In my view, the said arguments are also not relevant for adjudication of this application. If it had been found that there has been an agreement of assignment of copyright, there would have been no question of restraint of trade inasmuch as the plaintiff would then have been entitled to protect its copyright. Moreover, the injunction in the present case is claimed on the basis of infringement of copyright only and not on the basis of the actions impugned of the defendants 2 and 3 and for which a separate suit for damages is pending.

24. Even on the ingredients of irreparable loss and injury and balance of convenience I do not find the plaintiff to be entitled to sustain the injunction. It is the admitted position that the book authored by the defendant No. 1

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is ready and has been published. It is the allegation of the plaintiff that the defendant No. 1 has violated the order of injunction of this Court. The injunction has already been in operation for the last one and a half year. The documents filed by the plaintiff themselves show the life of the book to be of 3-5 years. If the injunction is to be continued, considering the normal time taken in disposal of such suit, the effort of the defendant No. 1 of authoring the book would be rendered useless. On the contrary for the plaintiff the agreement with the defendant No. 1 was a commercial transaction in connection with its business. Of course, it can be urged that with a successful book in its kitty, the future prospects of the plaintiff would have stood to benefit. But the same can also be gathered from the success of the book published by the defendants No 2 and 3. If it is found that the book has done well and would have made value addition to the plaintiff as a publisher, the same can be taken into consideration while computing the damages, if the plaintiff ultimately succeeds in the suit. During the pendency of the suit, several efforts to settle the matter appear to have been made though they do not bear fruit. Thus, it is not as if, instead of defendants No 2 and 3, the plaintiff can be permitted to publish and sell the book. It is the case of the defendants that plaintiff has already published a competing book. The effect of injunction if continued would be to make the book valueless in another one and half to two and half years from now. The balance of convenience is thus not in favour of grant/continuance of injunction.

25. The counsel for the plaintiff has also argued that the defendant No. 1 being in breach of the injunction order ought not to be heard. However, in view of the order of the Division Bench in Appeal (FAO(OS)164/2008) the said argument is no longer available to the plaintiff.

26. I, therefore, find that IA. No. 4247/2007 of the plaintiff is liable to be dismissed and IA. No. 6613/2007 of the defendant is entitled to succeed. However, seeing the contentious nature of the litigation and further considering the fact that the ex parte order has been in force for one and a half years and with a view not to change the ground situation if the plaintiff decides to take the matter in appeal, I deem it expedient to make this order effective w.e.f. 26.09.2008. Nothing contained herein shall be deemed to be an expression on merits at the time of final adjudication.