

Delhi High Court

The Chancellor, Masters & ... vs Rameshwari Photocopy Services & ... on 9 December, 2016

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : December 07,2016
Judgment Delivered on : December 09, 2016

+ RFA(OS) 81/2016

THE CHANCELLOR,
MASTERS & SCHOLARS
OF UNIVERSITY OF OXFORD
& ORS

..... Appellants

Represented by: Mr.Sudhir Chandra and Ms.Pratibha
M.Singh, Sr.Advocates instructed by
Mr.Saikrishna Rajagopal, Mr.Sidharth
Chopra, Mr.Sahil Sethi, Ms.Sneha
Jain, Mr.Devanshu Khanna,
Mr.Prasanna and Ms.Rachel Mamatha,
Advocates for appellants
Mr.Pravin Anand, Advocate with
Mr.Dhruv Anand, Ms.Udita Patro and
Mr.Shamim Nooreyezdan, Advocates
for interveners

versus

RAMESHWARI PHOTOCOPY
SERVICES & ORS

..... Respondents

Represented by: Mr.Sourabh Seth, Advocate with
Mr.Neeraj Yadav and Mohd.Umar
Iqbal Khan, Advocates for R-1
Mr.Aman Sinha, Sr.Advocate
instructed by Mr.Sourabh Banerjee,
Mr.Sanjai Pathak and Mr.Pravesh
Thakur, Advocates for R-2
Mr.Anup Bhambani, Sr.Advocate
instructed by Mr.Jawahar Raja,

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Mr.Gautam Bhatia and Mr.Chinmay
Kanojia, Advocates for R-3
Mr.Neeraj Kishan Kaul, Sr.Advocate
instructed by Ms.Swathi Sukumar,
Ms.Anu Paracha, Mr.Sanyat Lodha,
Ms.Chanan Parwani and Mr.Sai
Vinod, Advocates for R-4

CORAM

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. We shall be referring to the parties by their nomenclature in the suit. The appellants are the plaintiffs. The respondents are the defendants. The dispute before the learned Single Judge concerned photocopying of pages from the copyrighted publications of the plaintiffs; namely (i) Oxford University Press; (ii) Cambridge University Press, United Kingdom; (iii) Cambridge University Press India Pvt. Ltd.; (iv) Taylor & Francis Group, U.K.; and (v) Taylor & Francis Books India Pvt. Ltd. The first defendant : Rameshwari Photocopy Services has a shop licensed to it within the precincts of the Delhi School of Economics (University of Delhi). Albeit with an initial denial by the University of Delhi, the ultimate picture which emerged was that the professors imparting teaching in the Delhi School of Economics had authorized preparation of course packs and Rameshwari Photocopy Services was entrusted with the task of photocopying the pages from the books published by the plaintiffs, and after binding the same, to supply them to the students charging 50 paise per page. Though not a part of the pleadings of the parties, access to the website of the plaintiffs gives valuable data concerning the number of pages comprising the publications, the price thereof in the paper back edition as also the hardcover edition. The number of pages copied and bound in the course pack have been pleaded in the plaint and therefore mixing the information available on the website with the one pleaded in the plaint, reduced in a statement form, pertaining to the four course pack prepared, the data would be as under:-

Course Pack I

(i) Transforming India : Social and Political dynamics of Democracy (456 pages; 36 pages copied constituting 7.89%; publisher Oxford University Press; Approximate Price : Paper Back `495, Hard bound `6220)

(ii) The BJP and Compulsions of Politics in India (402 pages; 26 pages copied constituting 6.46%; publisher Oxford University Press; Approximate Price : Paper Back `19,068, Hard bound Data N/A)

(iii) Parties and Party Politics in India (584 pages; 33 pages copied constituting 0.05%; publisher Oxford University Press; Approximate Price : Paper Back `534, Hard bound `8020)

(iv) Ethno-nationalism in India: A Reader (576 pages; 36 pages copied constituting 6.25%; publisher Oxford University Press; Approximate Price : Paper Back `445, Hard bound `15,889)

(v) Nehru and the Language Politics of India : (280 pages; 27 pages copied constituting 9.64%; publisher Oxford University Press; Approximate Price : Paper Back `650, Hard bound Data N/A)

(vi) The Political Economy of Federalism in India : (432 pages; 14 pages copied constituting 3.24%; publisher Oxford University Press; Approximate Price : Paper Back `1304, Hard bound `3487)

(vii) Politics in India : (618 pages; 19 pages copied constituting 3.07%; publisher Oxford University Press; Approximate Price : Paper Back `595, Hard bound Data N/A)

(viii) The Production of Hindu-Muslim Violence in Contemporary India : (500 pages; 21 pages copied constituting 4.2%; publisher Oxford University Press; Approximate Price : Paper Back `2364, Hard bound `6210)

(ix) The New Cambridge History of India (IV) The Politics of India since independence (428 pages; 21 pages copied constituting 4.9%; publisher Cambridge University Press; Approximate Price : Paper Back `3918, Hard bound Data N/A) Course Pack II

(i) The New Cambridge History of India III : 4 Ideologies of the Raj : (256 pages; 32 pages copied constituting 12.5%; publisher Cambridge University Press; Approximate Price : Paper Back `2750, Hard bound Data N/A)

(ii) Capitalism : A Very Short Introduction : (160 pages; 48 pages copied constituting 30%; publisher Cambridge University Press; Approximate Price : Paper Back `225, Hard bound Data N/A)

(iii) Post-Colonialism : An Historical Introduction (512 pages; 57 pages copied constituting 11.1%; publisher Oxford University Press; Approximate Price : Paper Back `3126, Hard bound Data N/A)

(iv) A Concise History of India : (372 pages; 16 pages copied constituting 4.3%; publisher Cambridge University Press; Approximate Price : Paper Back `2010, Hard bound `4411)

(v) Oxford Journals : The Past and Present Society (204 pages; 39 pages copied constituting 19.1%; publisher Oxford University Press; Approximate Price : Paper Back Data N/A, Hard bound Data N/A)

(vi) An Anthropologist among the Historians and other Essays (682 pages; 18 pages copied constituting 2.63%; publisher Oxford University Press; Approximate Price : Paper Back `814, Hard bound Data N/A) Course Pack III

(i) Issues in Political Theory : (416 pages; 141 pages copied constituting 33.8%; publisher Oxford University Press; Approximate Price : Paper Back `10,720 , Hard bound Data N/A)

(ii) Practical Ethics : (352 pages; 31 pages copied constituting 8.8%; publisher Oxford University Press; Approximate Price : Paper Back `1946, Hard bound `7772)

(iii) Political Philosophy : (Not available; Not available; publisher Routledge/Taylor & Francis; Approximate Price : Paper Back Data N/A, Hard bound Data N/A) Course Pack IV

(i) Hindu Nationalism and Indian Politics : An Omnibus (393 pages; 12 pages copied constituting 3.05%; publisher Oxford University Press; Approximate Price : Paper Back `3329, Hard bound Data

N/A)

(ii) Politics in India : (618 pages; 20 pages copied constituting 3.23%; publisher Oxford University Press; Approximate Price : Paper Back `595, Hard bound Data N/A)

(iii) Transforming India : Social and Political Dynamics of Democracy : (456 pages; 17 pages copied constituting 3.72%; publisher Oxford University Press; Approximate Price : Paper Back `495, Hard bound `6220)

(iv) India's Political Economy : The Gradual Revolution : (840 pages; 106 pages copied constituting 12.61%; publisher Oxford University Press; Approximate Price : Paper Back `2635, Hard bound `6418)

(v) Politics and Ethics of the Indian Constitution : (418 pages; 14 pages copied constituting 3.34%; publisher Oxford University Press; Approximate Price : Paper Back `450, Hard bound `11429)
AVERAGE PRICE OF BOOK = `2542 AVERAGE PERCENTAGE OF ENTIRE BOOK COPIED = 8.81%

2. For record it be noted that vide order dated March 01, 2013, allowing IA No.3454/2013 filed by the Association of Students for Equitable Access to Knowledge (ASEAK), the Association was impleaded as defendant No.3. Thereafter, vide order dated April 12, 2013 allowing IA No.5960/2013, Society for Promoting Educational Access and Knowledge (SPEAK) was impleaded as defendant No.4.

3. It is the case of the plaintiffs that the inclusion of specific pages of its publications by Rameshwari Photocopy Services, under the authority of the Delhi School of Economics, amounts to institutional sanction for infringement of its copyright. It is the further case of the plaintiffs that the professors of the Delhi School of Economics, through its Library, issued the books published by the plaintiffs to Rameshwari Photocopy Services for preparing course packs. It is the case of the plaintiffs that the course packs, which contain no additional material apart from photocopies of its copyrighted publications, were being used like textbooks and therefore, the compilations prepared were competing with the publications of the plaintiffs. According to the plaintiffs, Rameshwari Photocopy Services was operating commercially as was evident from the rate charged by it for selling the course pack is 40/50 paisa per page, as distinct from the market rate of 20/25 paisa per page being charged by other photocopiers from the students while photocopying material given by the students to be photocopied. Anticipating that the defence would be predicated under Section 52(1)(i) of the Copyright Act, 1957, the plaintiffs have pleaded that Section 52(1)(i) was not applicable since reproduction by Rameshwari Photocopy Services, with the assistance of Delhi School of Economics, could not be classified as reproduction by a teacher or a pupil in the course of instruction. Additionally/alternatively the reproduction in the manner carried out by Rameshwari Photocopy Services if held falling within the ambit of Section 52(1)(i) would render Section 52(1)(h) superfluous was the contention. Meaning thereby, the plaintiffs had required the two sub-Sections to be harmonized. The plaintiffs have further pleaded that Section 52(1)(i) only covered reproduction in the course of instruction' and not in the course of preparation for instruction' as was

evident from the replacement of the expression in the course of preparation for instruction' in the Bill which was tabled before the Legislature with the expression in the course of instruction' in the Act as finally promulgated upon the Bill being adopted; with modifications by the Legislature. According to the plaintiffs, reproduction by Rameshwari Photocopy Services fell within the ambit of Section 52(1)(h) and would have to be limited to two passages from works by the same author published by the same publisher during any period of five years as provided under the sub-Section. According to the plaintiffs, such an interpretation was buttressed by Article 9 and Article 10 of the Berne Convention, 1886 as well as Article 13 of the Agreement on Trade-Related Aspect of Intellectual Property Rights, 1995. Relying upon the decisions reported as 99 F.3d 1381 Princeton University Press Vs. Michigan Document Services Inc., 2012 SCC 37 Province of Alberta Vs. Canadian Copyright Licensing Agency and 758 F. Supp. 1522 Basic Books Inc. Vs. Kinko's Graphics Corporation, the plaintiffs pleaded that in order to equitably balance the interests of academic publishers and students, the University must be directed to obtain licenses from the Indian Reprographic Rights Organization (IRRO) in order to reproduce extracts from the books published by academic publishers : given that academic institutions are the only market for academic books published by academic publishers and if unrestricted reproduction from these books are allowed the academic publishing business would suffer irreparable loss. Relying upon the decision reported as (2001) Chancery 143 Hyde Park Residence Ltd. Vs. Yelland, the plaintiffs pleaded that relief cannot be denied on the ground of public interest'; when exceptions to public interest had been delineated in the statute itself.

4. Rameshwari Photocopy Services contested the copyright of the plaintiffs in the books from which the course packs were prepared. Rameshwari Photocopy Services pleaded that the preparation of course packs by it amounts to fair use within the meaning of Sections 52(1)(a) and (h) of the Copyright Act, 1957. (We are surprised as to why right under Section 52(1)(i) was not predicated for the reasons as would be evident from the decision of the learned Single Judge the debate principally centered around said sub-Section). Rameshwari Photocopy Services pleaded that its activity does not affect the market for the plaintiffs' books since it charges a nominal rate for its services as fixed by the License Deed executed between the Delhi School of Economics and Rameshwari Photocopy Services. As per it, the students cannot afford to buy all the books, extracts of which were mentioned in the syllabi prepared by the Delhi School of Economics.

5. Apart from adopting the stand taken by Rameshwari Photocopy Services, in its written statement, the University of Delhi pleaded that Section 52(1)(i) of the Copyright Act, 1957 permits students and educational institutions to copy portions from any work for research and educational purpose. The University pleaded that Rameshwari Photocopy Services has been licensed by it to operate a photocopy shop within its premises in order to facilitate photocopying by students for educational and research purpose. Denying issuing books to Rameshwari Photocopy Services for the purposes of preparation of course packs, the University pleaded that no limitation on the quantum of reproduction under Section 52(1)(i) has been provided under the Copyright Act, 1957 and because Section 52(1)(i) covers reproduction for educational purposes, unlimited photocopying would be permitted. For which argumentative pleadings reference to the limitation of two passages provided under Section 52(1)(h) was highlighted. The argument was that wherever the legislature had deemed fit, it had limited the extent of the copying which was permissible. It was argued, by way of

pleading, that the term 'reproduction' used in Section 52(1)(i) was distinct from the term 'publication' used in Section 52(1)(h), with Section 3 of the Act defining publication' as making a work available to the public', with the term 'public' having a wider connotation than the term students' and therefore, Section 52(1)(h) would not be applicable to preparation of course packs to be used by students for an educational purpose. Relying upon the decision reported as (1991) 2 NZLR 574 Longman Group Ltd. Vs. Carrington Technical Institute Board of Governor, the University of Delhi pleaded that the expression course of instruction' must be interpreted expansively. The University of Delhi pleaded that both, the Berne Convention and the TRIPS Agreement, permit signatory nations to make reasonable exceptions to copyright and the educational exception created under Section 52(1)(i) was such a reasonable exception.

6. Relying upon Province of Alberta's case (supra), SPEAK pleaded that the market for the plaintiffs' books are not affected by preparation of course- packs by Rameshwari Photocopy Services since these course-packs contain only small portions from the books in question; carry an independent user right and in any case students would not be able to purchase all the books. Only extracts have been prescribed in the syllabi of the Delhi School of Economics. Relying upon Longman Group Ltd. case (supra), SPEAK pleaded that the expression course of instruction' could not be limited to the time period of instruction in a classroom. SPEAK pleaded that the minority opinion, as opposed to the majority opinion, in the Princeton University Press case (supra) would be applicable in the Indian context; wherein it was held by the minority that the identity of the person operating the photocopy machine would not be material since the effect of commercial photocopying in bulk quantities was the same as photocopying by each student acting separately. Relying upon Province of Alberta's case (supra), SPEAK pleaded that Section 52 of the Copyright Act, 1957 was not to be interpreted as a proviso to Section 51 and therefore, there was no requirement to give a restrictive interpretation to the rights granted therein. SPEAK pleaded that given the beneficial nature of the Copyright Act, 1957; which seeks to promote creation and dissemination of knowledge in society by balancing the interests of creators of works with the society at large, Section 52(1)(i), which covers the preparation of course-packs by the Rameshwari Photocopy Services, with the co-operation of University of Delhi, must be interpreted widely. According to SPEAK, the term 'reproduction' used in Section 52(1)(i) was distinct from the term publication' used in Section 52(1)(h), and Section 52(1)(h) would not be applicable to the preparation of course- packs by photocopying of copyrighted work for educational purpose, since the Section related to preparation of guide books by third persons, who were neither teachers nor pupils.

7. Relying upon the dictionary meaning of the word instruction' and definition of the term lecture' in Section 2(n) of the Copyright Act, 1957, ASEAK pleaded that the term in the course of instruction' must have a wider import than mere classroom teaching and would include all instruction given by teachers to the pupils during the academic session.

8. Recording that the learned senior counsel appearing for the University of Delhi had taken the stand that the University assumed full responsibility for the preparation of the course packs by Rameshwari Photocopy Services, the learned Single Judge has opined that this stand amounts to the University of Delhi and Rameshwari Photocopy Services giving up the plea of disputing the copyright claimed by the plaintiffs and since the University of Delhi, would be a State' under Article

12 of the Constitution of India, it could not be seen as violating the Copyright Act, 1957 by infringing the copyright, regardless of the identity of the person in whom such copyright vested. According to the learned Single Judge, the issue in dispute, whether the preparation of the course packs by the University of Delhi and Rameshwari Photocopy Services amounted to infringement of the plaintiffs' copyright, was a question of law not warranting a trial.

9. Referring to Section 13, Section 14, Section 16 and Section 51 of the Copyright Act, 1957, wherein right of the copyright holder have been recognized, the learned Single Judge has noted Section 52 thereof which, if we may use the expression, makes particular use of a copyrightable work non-actionable or to put it differently could be said to be without limiting the rights of the copyright holder permitting use of a copyrightable work by the members of the society without any limitation; and the decisions reported as (2007) 140 DLT 758 Time Warner Entertainment Company, L.P Vs. RPG Netcom, (2008) 13 SCC 30 Entertainment Network (India) Ltd. Vs. Super Cassettes Industries Ltd. and (2016) 2 SCC 521 Krishika Lulla Vs. Shyam Vithalrao Devkatta, wherein copyright was held to be a statutory right subject in its operation to the provisions of the Copyright Act, 1957, the learned Single Judge has opined that copyright has been converted from a natural/common law right into a statutory right by the Copyright Act, 1957.

Consequently unless it could be proved that the University of Delhi and Rameshwari Photocopy Services had infringed the copyright of the plaintiffs within the meaning of infringement under the Copyright Act 1957, no action for infringement would lie against them.

10. Relying upon the decisions reported as 1925 Ch. 383 British Oxygen Company Ltd. Vs. Liquid Air Ltd. and (2009) 3 Arb LR 486 Continental Telepower Industries Ltd. Vs. Union of India, the learned Single Judge has opined that the right to 'reproduce the work' which has been vested exclusively in the owner of the copyright under Section 14(a)(i) would include within its ambit the right to make photocopies of the copyrighted work. The learned Single Judge has opined that this conclusion was buttressed given that while the term 'reproduce' had not been defined in the Copyright Act, 1957, Section 2(hh) which defines 'duplicating equipment', Section 2(s) which defines 'photograph' and Section 2(x) which defines 'reprography', contemplate the process of copying. Therefore, according to the learned Single Judge, the act of making of photocopies of copyrighted material would amount to infringement of the copyright under Section 51, unless Section 52 could be shown to be applicable. According to the learned Single Judge, a conjoined reading of Section 14(a)(i), Section 51(a)(i) and Section 2(m) makes it evident that infringement of a copyright would be complete upon the reproduction of the work and would not require distribution of the reproductions. The learned Single Judge has held that even the issue of copies of a copyrighted work to the public would constitute infringement of copyright under Section 14(a)(ii) read with Section 51(a)(i), and condition that such issue of copies need to be for consideration had not been put under Section 14(a)(ii) read with Section 51(a)(i). According to the learned Single Judge, the principle of exhaustion encapsulated in the Explanation to Section 14 provides that a copy once sold is deemed to be a copy already in circulation within the meaning of Section 14(a)(ii) and thus issuing such copy would not amount to infringement. But that the principle of exhaustion does not enlarge the scope of the right of a purchaser to 'issue copies of the work to the public' to include making of copies of the copyrighted work. The learned Single Judge has opined that as per Section 14(a)(ii) and (b),

facilitation of infringement or dealing in infringing copies of a copyright constitute infringement only when such facilitation or dealing is carried out with a commercial intent. Relying upon the decision reported as (1995) 4 SCC 572 Nand Kishore Mehra Vs. Sushil Mehra, the learned Single Judge has opined that the scheme of the Copyright Act, 1957, as evident from a reading of Sections 2(m), Section 14, Section 16 and Section 51(a)(i) gives rise to the conclusion that Section 52 cannot be read as a proviso to Section 51 of the Copyright Act, 1957. According to the learned Single Judge, under Section 52 certain acts are declared as not constituting infringement of copyright, and therefore, these acts do not fall within the ambit of Section 14, which enumerates acts which can be performed exclusively by the owner of the copyright. Consequently, according to the learned Single Judge, since acts enumerated under Section 52 are outside the scope of Section 14, the performance of these acts cannot be an infringement of a copyright under Section 51. Accordingly, the learned Single Judge has held that Section 52 could not be read as a proviso to Section 51, and the rights of the persons mentioned therein had to be read expansively.

11. Recording that the case of the defendants could lie perhaps only under Clauses (h), (i) and (j) of sub-Section (1) of Section 52 of the Copyright Act, 1957, the learned Single Judge held, relying upon the decisions reported as AIR 1961 SC 1170 J.K. Cotton Spinning & Weaving Mills Cp. Ltd. Vs. State of U.P. and (2014) 8 SCC 319 Commercial Tax Officer Vs. Binani Cements Ltd., that Clause (a) of sub-section (1) of Section 52, which was a general provision, would not operate to widen or restrict the scope of Clauses (h), (i) and (j) of sub-Section (1) of Section 52, which were special provisions covering the field of education/instruction. The learned Single Judge has opined that clause (h) would not be applicable to the preparation of course- packs by Rameshwari Photocopying Services, since Section 52(1)(h) would be applicable only where there was : (i) publication' of a collection, and (ii) comprising mostly of non-copyrighted material. According to the learned Single Judge, the context of the use of the term 'publication' in Section 4 and Section 5 of the Copyright Act, 1957 as well as the lack of the use of the term in Section 14 gave rise to the inference that the term 'publication' was to be interpreted as preparation and issuing of material for public sale and would not include the photocopying and issuing of a work to students for purposes of teaching. Relying upon Explanation (d) to Section 32, wherein the phrase 'purposes of teaching, research and scholarship' has been defined as (i) purposes of instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions; and (ii) purposes of all other types of organized educational activity', as well as decisions reported as 1981 Supp SCC 87 S.P. Gupta Vs. President of India and (2003) 4 SCC 601 State of Maharashtra Vs. Dr. Praful B. Desai, wherein the Supreme Court held that statutes must be interpreted keeping in mind contemporary societal realities, the learned Single Judge has opined that notwithstanding the difference in the wordings of Clauses (j) and (i) of sub- Section (1) of Section 52, wherein while Clause (j) used the term 'educational institution', Clause (i) only used the terms 'teacher' and 'pupil', given that education in the country had long been institutionalized, Section 52(1)(i) would not be limited to reproduction in the course of individualized teacher-student interactions and would apply to reproduction by educational institutions in the course of instruction as well.

12. Noting that the term 'instruction' had not been defined in the Copyright Act, 1957, the learned Single Judge negated the plea of the plaintiffs that the term 'instruction' used in Clause (i) of sub-Section (1) of Section 52 ought to be interpreted to mean the imparting of instruction in

classrooms or tutorials, and thus opined that such a limited interpretation of the term 'instruction' would mean that the term was synonymous to the term 'lecture', as defined in Section 2(n) of the Act; and if the legislature had intended such a narrow interpretation, it would have simply used the term 'lecture' in Clause (i) of sub-Section (1) of Section 52. Relying upon the dictionary meaning of the term 'instruction' as well as the decisions reported as ILR 2009 Karnataka 206 B.K. Raghu Vs. The Karnataka Secondary Education Examination Board and AIR 1960 Bom 58 Bombay Municipal Corporation Vs. Ramchandra Laxman Belosay, the learned Single Judge has opined that the term 'instruction' was of wide import and would include anything that 'a teacher tells the student to do in the course of teaching or detailed information which a teacher gives to a student or pupil to acquire knowledge of what the student or pupil has approached the teacher to learn.' Noting that the term 'instruction' in Section 52(1)(i) was preceded by the expression 'in the course of', the learned Single Judge posited the question whether the interpretation of the term 'in the course of' would determine whether the scope of the term 'instruction' was limited to imparting instructions within the classroom or whether it had a wider import.

13. Relying upon the decisions reported as AIR 1953 SC 333 State of Travancore-Cochin Vs. Shanmugha Vilas Cashewnut Factory Quilon, (1969) 2 SCC 607 Mackinnon Mackenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmmed Issak, (1996) 6 SCC 1 Regional Director, E.S.I. Corporation Vs. Francis De Costa, (1989) 1 SCC 760 Commissioner of Income Tax, New Delhi Vs. East West Import and Export (P) Ltd. and AIR 1973 Ori 244 Registrar of the Orissa High Court Vs. Baradakanta Misra, the learned Single Judge held that the expression 'in the course of' was to be interpreted as (i) integral part of continuous flow; (ii) connected relation; (iii) incidental; (iv) causal relationship; (v) during (in the course of time, as time goes by); (vi) while doing; (vii) continuous progress from one point to the next in time and space; and, (viii) in the path in which anything moves'. Accordingly, the learned Single Judge concluded that the expression 'in the course of instruction' had to be interpreted widely and would include 'reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues i.e. during the entire academic session for which the pupil is under the tutelage of the teacher and that imparting and receiving of instruction is not limited to personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn.' The learned Single Judge further added the reasoning that even if the term 'instruction' was given a limited scope, the generality of the term 'in the course of' would widen the scope of the phrase 'in the course of instruction' to reproduction by teachers and pupils pre and post lecture.

14. A subtle, but distinct reasoning also emanates in the impugned decision concerning the applicability of Section 52(1)(a) of the Copyright Act, 1957. Relying upon the decision reported as 420 U.S. 376 Williams & Wilkins Co. Vs. U.S., the learned Single Judge has opined that since photocopying of copyrighted books by individual students, acting separately, would be fair dealing under Section 52(1)(a), the University making multiple copies of copyrighted material for its students in the course of instruction while photocopying could also not be deemed to be infringing copyright, since the effect of the two actions was the same.

15. Examining the relationship between Rameshwari Photocopy Services and the Delhi School of Economics, the learned Single Judge opined that making of multiple copies by photocopying copyrighted material by the University, being in the course of instruction was permissible under the Copyright Act, 1957, holding further that it was immaterial whether the University carried out the photocopying through its employees or outsourced this work to a contractor. The learned Single Judge has further opined that since it was not the case of the plaintiffs that entire books published by them were being photocopied and offered for sale, and in any case, the students of Delhi School of Economics could not be regarded as potential customers of the plaintiff's books since it could not be expected that students would buy all the books, portions of which had been prescribed as part of the syllabus, Rameshwari Photocopy Services and Delhi School of Economics could not be called competitors of the plaintiffs. The learned Single Judge opined that the price being charged by Rameshwari Photocopy Services for its services was not competitive with the price being charged by the plaintiffs for their books and therefore, it could not be said that Rameshwari Photocopy Services was operating commercially.

16. Referring to Article 9 and Article 10 of the Berne Convention, Clauses 9.6 to 9.13 of the Code to the Berne Convention and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, the learned Single Judge opined that the only restrictions on the signatory countries vis-à-vis extent of exceptions to copyright that they could draft into their national legislations was that : (a) reproduction conflicting with the normal exploitation of the work so as to unreasonably prejudice the legitimate interests of the copyright holder ought not to be allowed; and (b) reproduction for teaching purposes must be limited to the extent justified by the purpose. The learned Single Judge opined that it had been left to each signatory country to define the scope of 'unreasonably prejudice the legitimate interests of the copyright holder' and 'justified by the purpose'; and since the legislature is deemed to have been cognizant of India's obligations under the International Covenants while in the year 2012 incorporating the amendments to the Indian Copyright Act, 1957, and had allowed reproduction in the course of instruction' by teachers and pupils without placing any limits on the extent of reproduction, it could not be said that India's obligations under International covenants were not met.

17. We propose to pose the legal issue which arises for consideration in a simple language. The legal issue would be the interpretation of Section 52(1)(i) of the Copyright Act, 1957 because the defendants admit photocopying from the publications, pages in different proportions vis-à-vis the complete text of the book, and in respect of which we have enlisted the data in paragraph 1 above. The issue would be : Whether the right of reproduction of any work by a teacher or a pupil in the course of instruction is absolute and not hedged with the condition of it being a fair use. This would subsume a sub-question : What is the span of the phrase 'by a teacher or a pupil in the course of instruction' in Section 52(1)(i)(i). Sub issues arising regarding 'reproduction' and 'publication' shall be discussed at the appropriate places.

18. These are the two questions which were principally debated, and the task of answering the two by no means would be simple because it would require an understanding of the other related provisions in the Act and ascribing a meaning to the words and expressions used therein, for the reason a statute has to be read harmoniously, within the confines of the legislative policy, with rights

and obligations created under the Act to be harmonized if there is fuzziness found.

19. Whilst it is true that winds from across the border should be welcome in a country, but care has to be taken to retain the fragrance thereof and filter out the remainder. Reference to foreign case law while interpreting a municipal statute has to be with care and caution. Language used in a statute covering a field of law in different municipal jurisdictions may be different and we caution ourselves that some minor points of details here and there and difference in the language here and there may assume importance.

20. The debate before the Division Bench centered around the decisions rendered by the Courts in United States of America, United Kingdom, Canada and New Zealand. The decisions referred to were eleven in number, five of which have been referred to by the learned Single Judge. The eleven decisions referred to by learned counsel for the parties in the appeal are : 99 F.3D 1381 Princeton University Press vs. Michigan Document Services Inc, 758 F.SUPP.1522 Basic Books, Inc. vs. Kinko's Graphics Corporation; 661 F.SUPP.2D.786 Blackwell Publishing Inc.vs.Excel Research Group, LLC, 60 F.3D 913 American Geophysical Union vs. Texco Inc., 487 F.2D 1345 (CT.CL.1973) Williams & Wilkins Co.vs. United States, 769 F.3D 1232 (11th Cir.Ga.2014) Cambridge University Press vs. Patton (Court of Appeals), Civil Action No.1 :08-CV-1425-ODE District Court : Cambridge Univ.PR.ET AL.vs. Becker ET AL, 1983 E.S.R.545 Sillitoe & Ors. vs. Megraw Hill Book Company (U.K.) Ltd., 2012 SCC 37 Alberta (Education) vs. Canadian Copyright Licensing Agency, (2002) 3 NZLR 76 (NZHC) Copyright Licensing Authority vs. University of Auckland, (1991) 2 NZLR 574 (H.C.) Longman Group Ltd. vs. Carrington Technical Institute Board of Governors.

21. Section 52(1)(a), (h) and (i) of the Copyright Act, 1957 read as under:-

52. Certain acts not to be infringement of copyright- (1) The following acts shall not constitute an infringement of copyright, namely:-

(a) a fair dealing with any work, not being a computer programme, for the purposes of-

(i) private or personal use, including research;

(ii) criticism or review, whether of that work or of any other work;

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

x x x

(h) the publication in a collection, mainly composed of non- copyright matter, bona-fide intended for instructional use, and so described in the title and in any advertisement issued by or on behalf of the publishers, of short passages from published literary or dramatic works, not themselves published for such use in which

copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

Explanation- In the case of a work of joint authorship, references in this clause to passages from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person.

x x x

- (i) the reproduction of any work-
- (i) by a teacher or a pupil in the course of instruction; or
- (ii) as part of the questions to be answered in an examination; or
- (iii) in answers to such question;'

22. The learned Single Judge has highlighted that whereas clause (h) uses the word 'publication', clause (i) uses the word 'reproduction' and has held that the concept of publication would be the preparation and issuing of material for public sale and would exclude use by students for teaching purpose. The word 'reproduction' which finds a purpose in clause (i) has been given its ordinary meaning by the learned Single Judge (though not expressly so stated in the impugned judgment).

23. Whereas Sh.Sudhir Chandra, Senior Counsel and Ms.Pratibha M.Singh, counsel argued on behalf of the appellants, Sh.Pravin Anand, Advocate argued on behalf of the three interveners (supporting the appellants) : (i) Association of Publishers in India; (ii) The Federation of Indian Publishers; and (iii) Indian Reprographic Rights Organization. Though the three learned counsel took pain to ensure that there was no repetition in their arguments, keeping in view the span of the subject at hand, there was bound to be some overlapping and inter-mixing and thus we propose to intertwine the argument advanced by the three eminent counsel while recording the submissions.

24. Learned counsel argued that the historical origin of the law of copyright, as is well known, is the grant given by the Crown creating a monopoly in favour of the author of a work. This right was not treated as akin to a property. Eminent authors and thinkers of the 16th and the 17th century, such as John Locke and Raymond Astbury led the campaign resulting in the monopoly right tenure being cut down. The reason for the campaign was the view taken by these eminent personalities that the unlimited grant for unlimited duration was not only unreasonable but was injurious to learning. The idea of limiting the term of the copyright appealed to those who were concerned about monopolies and restraint of trade. The debate also encompassed the institute of copyright standing on the boundary, between the private and the public. The right could be treated as a form of private

property. It could also be treated as an instrument of public policy created for the encouragement of creation and dissemination of knowledge. As the law developed, issues of 'fair use' concerning copyright started troubling. Copyright initially developed as a consequence of the ability of printing technologies to produce large number of copies of a text quickly and cheaply. But with the advent of the computer, the internet and photocopying machines the process of copying copyrighted material became easy and indeed it is virtually impossible to prevent people from making copies of almost any text - printed, musical, cinematic, at a negligible cost. Mark Rose in the treatise 'Authors and Owners The invention of Copyright' published by Harvard University Press, in the year 1993 therefore posited the question : Why, then, don't we abandon copyright as an archaic and cumbersome system? He answered : The institution of copyright is of course deeply rooted in our economic system, and much of our economy does in turn depend on intellectual property. But, no less important, copyright is deeply rooted in our conception of ourselves as individuals with at least a modest grade of singularity, some degree of personality. And it is associated with our sense of privacy and our conviction, at least in theory, that it is essential to limit the power of the State. We are not ready, I think, to give up the sense who we are.'

25. The aforesaid formed the backdrop of the canvass on which learned counsel painted their picture. Referring to the Copyright Act, 1957, learned counsel urged that works in which copyright subsists are enumerated in Section 13 of the Copyright Act, 1957. As per Section 14, copyright would mean the exclusive right to do or authorize the doing of the acts enumerated in various clauses of Section 14 in respect of the work or any substantial part thereof. Each counsel highlighted the word 'substantial' used in Section 14 to urge that the legislative intent was clear. There was exclusivity in the exploitation of the copyright even with respect to a substantial part thereof in the copyright holder. With reference to sub-para (i) and (ii) of clause (a) of Section 14, learned counsel urged that in the case of literary, dramatic or musical works, right to reproduce the work in any material form was exclusively that of the author as also the right to issue copies of the work to the public. Learned counsel urged that the rights conferred under Section 52 are actually privileges in others and therefore on the principle of fiduciary obligation itself, where a person exercises a privilege with respect to the work of another, the privilege has to be exercised in a manner where the right or the interest of the owner is not prejudicially affected. With reference to Section 14, learned counsel argued that seven identifiable acts emerge as the right of the copyright holder : (i) reproduction, (ii) issuing copies (and with reference to Section 3 it would mean publication), (iii) performance in public,

(iv) adaptation, (v) communication, (vi) translation, and (vii) qua films and sound recording, adaptation created as a right separately. Learned counsel urged that a copyright is infringed where a person commits an act envisaged by Section 51 of the Act. With respect to Section 52, learned counsel urged that the acts contemplated therein, if committed by third parties, would not be treated as infringement of copyright. Learned counsel were in agreement that Section 52 is neither to be read as a proviso nor an exception to Section 51 of the Copyright Act, 1957, for the reason it neither carves an exception nor, as provisos thereto, limit or expand the rights under Section 51. Learned counsel stated that the correct phraseology to describe Section 52 in the context of Section 51 would be to say that notwithstanding the right of a copyright holder remaining/subsisting in its full glory, a third party act, if covered by Section 52 would be a permissible act and would therefore

not be actionable.

26. Highlighting that different clauses of sub-Section (1) of Section 52 contemplate different copyrighted works, learned counsel urged that the same would be apparent from the fact that in some clauses the expression 'any work' is used and in the others the expression 'work' is used :

(i) Clause (a) embraces all works except computer programmes

(ii) Clause (aa) (ab) (ac) and (ad) embrace computer programmes.

(iii) Clause (b) and (c) embrace all works.

(iv) Clause (d) (e) and (f) embrace all works.

(v) Clause (g) embraces published literary or dramatic works.

(vi) Clause (h) embraces published literary or dramatic works.

(vii) Clause (i) embraces all works.

(viii) Clause (j) embraces literary, dramatic, musical and cinematographic works.

(ix) Clause (k) embraces sound recordings.

(x) Clause (l) embraces literary, dramatic and musical work.

(xi) Clause (m) embraces a literary work being an article,

(xii) Clause (n) embraces all works.

(xiii) Clause (o) embraces literary work.

(xiv) Clause (p) embraces unpublished literary, dramatic and musical work.

(xv) Clause (q) embraces official gazettes, the legislative enactments made by the Legislature, the report of Committees, Commissions, Councils, Boards, or the like appointed by the Government unless reproduction or publication is prohibited by the Government, and the judgment or order of a judicial authority unless prohibited by the judicial authority. (xvi) Clause (r) embraces legislations, including delegated legislations with reference to translations.

(xvii) Clauses (s) and (t) embrace painting, drawing, engraving, photograph of sculpture or other artistic works contemplated by the clause. (xviii) Clause (u) embraces cinematographic film.

(xix) Clause (v) and (w) embrace artistic work.

(xx) Clause (x) embraces architectural drawings and plans. (xxi) Clause (y) embraces literary, dramatic, artistic and musical works. (xxii) Clause (z) embraces sound recording.

(xxiii) Clause (za) embraces literary, dramatic, musical works and sound recordings.

(xxiv) Clause (zb) embraces all works.

(xxv) Clause (zc) embraces literary and artistic works.

27. Thus, learned counsel urged that while interpreting various clauses of sub-Section (1) of Section 52 of the Act it has to be kept in mind as to which copyrightable work is embraced in a clause. Thereafter, the second stage analysis had to be on the activity. The activity could be a private use, a personal use, research, criticism, review, reporting of a current event, a judicial proceeding, legislative business, imparting education etc. Learned counsel urged that different clauses dealt with different activities. The third stage analysis would be to identify whether there was express or implied limitation in the use of the copyrighted material while performing the activity. Counsel urged that keeping in view public policy, concerning judicial proceedings, legislative proceedings etc. no limits have been prescribed; in other activities and in relation to the works either expressly or impliedly, limitations have been provided by the legislature. Since the issue at hand concerns books i.e. literary works, learned counsel highlighted that it would be profitable to refer to clause (a), (h), (i), (j), (o), (p) and (zb) of sub- Section (1) of Section 52 of the Copyright Act, 1957. The argument was there was an inherent limitation prescribed in these clauses while conferring a non-actionable right in favour of a third party using a copyrighted work. Learned counsel urged that fair dealing was expressly used in clause (a). The limitation of two passages in clause (h) was the manifestation of fair use i.e. for the purposes of the act contemplated by clause (h) upto use of two passages was a fair use. Albeit unlimited in its use, pertaining to literary, dramatic, musical or cinematographic works i.e. extending upto use of the entire copyrighted work, the fair use was weaved by limiting the act to the course of activities of an educational institution' with further limit that the performance was restricted to the audience comprising staff, students, parents and guardians. Fair use was in built concerning the act contemplated by clause (o) by limiting the making of the copies of the works envisaged by the clause to only three; further fairness to be found on the condition that such work was not available for sale in India, with further fair use in the form of use of the copies in a non-commercial public library. Concerning clause (p) the fair use was in built in the form of the work being unpublished and its reproduction being by a library, museum or other institution to which the public has access for the purpose of research or private study by the public or with a view to publication. Concerning clause (zb) learned counsel urged that meant to facilitate spread of knowledge to differently abled persons, the fair use principle was weaved in the form of the organization being of the kind contemplated by the second proviso and the explanation thereto with further obligation on the organization to ensure reasonable steps to prevent the adaption or reproduction of the works contemplated by the clause to enter into the ordinary channels of business. The argument was that clause (i) cannot be read as done by the learned Single Judge for the reason it permits substantial photocopying of copyrighted works to prepare course packs. Learned counsel urged that the principle of fair use was to be found in the clause with reference to the phrase : (i) by a teacher or a pupil; and (ii) in the course of instruction. Thus, according to

learned counsel institutional sanction or intervention in the reproduction of the works contemplated by the clause was not permissible. A direct connection between the teacher and the pupil, without an intermediary, had to exist. It had to be in the course of instruction and the phrase would be a verb i.e. the act of teaching by the teacher to the pupil and thus prepared course packs would not be a fair use. Learned counsel cited the decision reported as 695 F.2d 1171 (1983) Marcus Vs. Rowley, to urge that the test of spontaneity required the use of the work at the moment for maximum teaching effectiveness i.e. so closed in time that it would be unreasonable to expect a timely reply to a request for permission. As per learned counsel, keeping in view that as per Section 14 of the Act the right of the owner of the work extended to substantial parts thereof, the qualitative and quantitative test for fair use purposes developed in jurisdiction abroad had to apply. Learned counsel highlighted that whenever the legislature intended use of a copyrighted work by an institution, it had so mentioned; as in clause (j), (l), (n), (p) etc. Learned counsel referred to the treatise 'Copinger and Skone James on Copyright' 16 th Edition (2010) and cited page 499-500 thereof to urge that the expression in public' is not only a matter of fact but also a question of law and the chief guide in answering the question should be common sense. The test would be whether persons coming together to form the audience are bound together by a domestic or private tie, or by an aspect of their public life. The character of the audience is crucial. In other words, it is the targeted audience which has to be kept in mind while deciding whether publication of a work takes place. It is not necessary that all members of the community should be the targeted audience. Giving the example of a book on medicine, learned counsel urged that printing and making available the same to students, teachers, and medical practitioners and perhaps research laboratories would be a publication notwithstanding it not being made available to all and sundry. The relevance of the argument was to criticize the view taken by the learned Single Judge by equating publishing a literary work, to it being made available to all the members of the community. Learned counsel criticized the view taken by the learned Single Judge concerning interpretation put to clause (a) by urging that the four well known principles of fair use had been overlooked by the learned Single Judge while upholding the offending activity in the context of clause (a). Since the learned Single Judge has heavily relied upon the law declared by the High Court of New Zealand reported as (1991) 2 NZLR 574 Longman Group Ltd. Vs. Carrington Technical Institute Board of Governors, learned counsel urged that the phrase 'in the course of instruction' used in clause (i) could not be interpreted as done by the High Court in New Zealand because the Statute in New Zealand expressly encompassed 'by correspondence'; which was missing in the Indian statute. As noted above, the argument was that the phrase in question denoted the activity of teaching and thus was a verb and could not be treated as a phrasal noun. Learned counsel urged that the learned Single Judge overlooked that in said judgment the offending course packs was held to be a text book since 2% to 18% copyrighted material was photocopied; spiral bound and made available to students from year to year. Save and except availability of instant course packs from year to year, learned counsel urged that offending course packs had all the features of a text book and on said account, there not being a claim of the same be a derivative work, infringement was writ large inasmuch as the protective umbrella of clause (i) was not available. Referring to articles authored by eminent academicians and treatise on the public debate concerning copyright issues, learned counsel urged that recognizing education being a good cause, the unanimous view was that a licensing regime was the only solution to harmonize the right of the users and those of the copyright holders. Learned counsel urged that in view of the fact that the Copyright Act, 1957 has provisions for licensing, with a statutory body to

decide on the licence fee prescribed, the balancing act required clause (i) to be interpreted as suggested by them. It was urged that copying by hand was recognized by the Act and not photocopy and that too in a mass scale i.e. at best a single photocopy by a single pupil for a personal need may be permitted but not mass scale photocopying by all the pupils in a class. Referring to Article 13 of the TRIPS Agreement, to which India is a signatory, learned counsel urged that it enjoined India to confine limitations or exceptions in a manner which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder. Referring to Article 9(2) of the Berne Convention, to which India was a signatory, learned counsel urged that though it was left to the signatory countries as to what kind of municipal legislation permitting reproduction of works was to be permitted, but it was expressly made clear that such reproduction would not conflict with the normal exploitation of the work and did not unreasonably prejudice the legitimate interest of the author. The argument thus was that clause (i) must be interpreted in harmony with India's international obligations. Learned counsel relied upon a decision rendered by the World Trade Organization on June 15, 2000 concerning playing of music in restaurants in the United States of America whereby a blanket exemption to restaurants having covered area of 3750 sq.feet was permitted as per Section 110 of the Copyright Act in United States of America and the decision was to the effect that such user would not be fair use, being violative of Article 13 of the TRIPS Agreement and Article 11 of the Berne Convention. It was held in said decision that the exemption does not qualify as 'certain special case' as contemplated by Article 13 of the TRIPS Agreement. Referring to the legislative intent underlying Section 52(1)(i) learned counsel referred to the debate in the Rajya Sabha concerning the Copyright Bill, 1955 wherein the distinction given to educational institutes to reproduce the work of an author was highlighted as distinct from reproduction of a work while a teacher is giving instructions in the class room. Learned counsel relied upon the Division Bench judgment of this Court reported as 2011 (47) PTC 244 (Del.) (DB) *Syndicate of the Press of the University of Cambridge vs. B.D.Bhandari & Ors.* to urge that Section 52(1)(h) as it existed in the statute book before the Copyright Act was amended by Act No.27 of 2012, which is identical to clause (i) post amendment of the Act, was interpreted by the Division Bench as incorporating fair use. As per learned counsel the issue was no longer res- integra. The lament was that the learned Single Judge noted the argument by the appellants in the impugned decision but left it at that. Learned counsel urged that at the relevant time charges for photocopying was 25 paisa per page and respondent No.1 was charging 50 paisa per page and thus there was a profit element in the enterprise undertaken at the instance of the University by respondent No.1. Lastly, learned counsel urged that notwithstanding definitions for textbooks being wide and varied, one common definition was that a textbook is a printing and bound artifact for each year or course of study containing facts and ideas around a central subject. Referring to a passage from the treatise *The History of the Textbook in Education* by Glenn Goslin, learned counsel urged that textbooks are not like other books. Today, textbooks are assembled more than they are written. They are, in fact, usually specially made to follow a set standard curriculum for a school system or large organizations. On facts it was urged that the course packs in question are textbooks.

28. The sum total of the response of learned counsel for the respondents needs now to be penned by us. Apart from adopting the reasoning in their favour by the learned Single Judge, and which we need not recapitulate for the reason we have already analyzed the reasoning of the learned Single Judge in the preceding paras above, learned counsel added that the Delhi School of Economics,

where the course packs in question were photocopied offers Post-Graduate Degrees where reading, research, analysis and discussions in the class room play a very important role. The aim is not to award a degree at the end of the course but is to ensure growth and development of knowledge. The curriculum is set by the academic council of the University of Delhi. The teachers at the institute sit down and prescribe the relevant reading material, which would obviously include publications. Eclectic selection of reading material results at the end of this exercise. This reading material is then bound. The compilation is random and does not comprise chapters akin to a textbook. As against a textbook which is capable of being comprehended by even an outsider, the course pack would make no sense to an outsider and would appear to be irrelevant. It has a limited use. It has a meaning only if used as part of a lecture or a discussion in the course of instructions as reference material. It is not to be that one can sit at home and after reading the course pack and proclaim that one has understood the subject. It is a primer and a precursor to the discussions which transpire in the class as part of the course. Learned counsel referred to articles by authors to highlight that in third world countries, where literacy levels are low and purchasing power weak, even compulsory licensing had failed to achieve the desired end of dissemination of knowledge. Meaning thereby, a very liberal interpretation had to be accorded to clause (i). Learned counsel referred to the debate in the Parliament when the Bill which led to the enactment of Act No.27 of 2012 was debated to highlight that the Minister piloting the Bill clearly told the House 'Of course, non-profit libraries should not be charged. Many of these copyrighted materials can be used, should be used and must be used in non-profit libraries'. Responding to the argument that the phrase 'course of instruction' in clause (i) was used as a verb, learned counsel urged that it could well be used as a noun, but left the quibbling at that for the reason the end would be the same and for which argument a flow chart could be prepared as under:-

Education/Teaching Instruction Course of Instruction Course Verb Noun Process
Programme Process of Programme of Education/Teaching Education/Teaching
Narrow Wider Interpretation Interpretation Reproduction Reproduction permissible
in the Reproduction permissible in the entire programme of permissible entire
process of education, e.g. a only in education, e.g. a semester classroom semester

29. On facts, learned counsel for respondent No.1 and respondent No.2 urged that as of January, 2012 the permissible charges for photocopying by respondent No.1 was 40 paise per page and this was the market rate for photocopying and thus respondent No.1 did not make any extra profit for the course packs. The normal profit which respondent No.1 would have made while photocopying is the only profit made and thus the preparation of the course packs could not be equated with a profit making activity.

30. The importance of education lies in the fact that education alone is the foundation on which a progressive and prosperous society can be built. Teaching is an essential part of education, at least in the formative years, and perhaps till post-graduate level. It would be difficult for a human to educate herself without somebody : a teacher, helping. It is thus necessary, by whatever nomenclature we may call them, that development of knowledge modules, having the right content, to take care of the needs of the learner is encouraged. We may loosely call them textbooks. We may loosely call them guide books. We may loosely call them reference books. We may loosely call them

course packs. So fundamental is education to a society - it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.

31. It is true that there has to be fairness in every action, and irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use, and especially when a person's result of labour is being utilized by somebody else, fair use must be read into the statute. A plain reading of clause (i) would show that the legislature has not expressly made fair use a limiting factor while permitting reproduction by a teacher or a pupil during course of instruction. Therefore, the general principle of fair use would be required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad and especially in the United States of America which was held to be applicable to clause (a) by the Division Bench of this Court in the decision reported as 2013 (53) PTC 586 (Del.) (D.B. India TV Independent News Service Pvt.Ltd. & Ors. vs. Yashraj Films Pvt.Ltd.

32. But what would be fair use? Obviously, the purpose of the use would determine whether it is fair use.

33. In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative or quantitative. The reason being, 'to utilize' means to make or render useful. To put it differently, so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood.

34. Teaching is the imparting of instructions or knowledge. Perhaps this is a standard definition of the term. It places no limits on where the imparting of knowledge takes place. It certainly would include face-to-face instructions at a formal institution. Education is not just a relationship in a classroom between one teacher and multiple students. It is a process involving communication between students inter-se and between the student and the teacher and perhaps teachers inter-se too.

35. Thus, we reject the arguments by learned counsel for the appellants that the four factors on which fair use is determined in jurisdictions abroad would guide fair use of copyrighted material during course of instruction. The qualitative and quantitative test which is one of the four tests would not apply to clause (i).

36. In the context of the argument of an adverse impact or the likelihood of the same on the market of the copyrighted work in question, taking the example of a literacy programme, assuming the whole of the copyrighted material is used to spread literacy, one cannot think of any adverse impact on the market of the copyrighted work for the simple reason the recipient of the literacy programme is not a potential customer. Similar would be the situation of a student/pupil, who would not be a

potential customer to buy thirty or forty reference books relevant to the subject at hand. For purposes of reference she would visit the library. It could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials.

37. Agreeing with the submissions advanced that various clauses of sub- Section (1) of Section 52 need to be interpreted as stand alone for the reason that each deals with a different kind of a permissible use/activity, but with the caveat that whenever necessary, to understand the legislative intent, the language used may be contrasted here and there.

38. This takes us to the core issue. The interpretation of clause (i) of sub- Section (1) of Section 52. It reads:-

- (i) the reproduction of any work-
- (i) by a teacher or a pupil in the course of instruction; or
- (ii) as part of the questions to be answered in an examination; or
- (iii) in answers to such question;'

39. The word 'reproduction', the phrases 'by a teacher or a pupil' and 'in the course of instruction' were debated. As per the appellants the expression 'reproduction' not being defined in the Act must be given the ordinary grammatical meaning, to which learned counsel for the respondent conceded. 'Reproduction' means - to make a copy of. Section 13(2) of the General Clauses Act, 1897 states that unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and vice-versa. Thus, making more than one copies of the original i.e. photocopying is contemplated by the statute. Similarly, the words 'teacher' and 'pupil' would also include the plural and hence it could be teachers or pupils. Meaning thereby, the activity of reproduction could be resorted to by teachers as well as pupils. Is the phrase 'in the course of instruction', a phrasal verb or is it a phrasal noun. We need not quibble for the reason we find merit in the graphic reproduction of the argument by learned counsel for the respondents which we have tabulated in paragraph 28 above. The end result would be, irrespective of the word 'course' being treated as a verb or a noun, the entire process of education as in a semester or the entire programme of education as in a semester. Meaning thereby in a class room where the interactive method of imparting knowledge is adopted by a teacher and not the boring method where the teacher simply lectures and the pupils simply note, the photocopied work, pre-read and digested by the students, is discussed and debated in the class in an interactive manner with the teacher regulating the discussion. It would be akin to a group discussion with an anchor ensuring that the participants stick to the theme and do not stray.

40. On this aspect of the matter, the learned Single Judge has noted that the rival viewpoints urged were premised on the law declared by the High Court of New Zealand reported as (1991) 2 NZLR 574 Longman Group Ltd.

Vs. Carrington Technical Institute Board of Governors. In that case, multiple copies of compilations stated by educational institutions to be course packs, consisting of extracts from copyrighted literary and artistic works, were prepared by a teacher and distributed amongst the students; to be utilized for classroom use and private study. The compilation consisted of 200 pages. Extracts from fourteen original works in which copyright existed, ranging between 2% to 18% of the original work, comprised 70% of the total number of pages in the compilation, with the rest being original content. Prepared for the academic year 1982, the compilation was used for the next two ensuing academic years : 1983 and 1984.

41. No profit motive being involved, based on the pleadings of the parties the High Court of New Zealand settled following two issues:-

"(i) Does the admitted copying of parts of each of the copyright works in the Carrington book constitute reproduction of a substantial part of such works, so that there was a prima facie infringement of the copyright in the copyright works?

(ii) If there was a prima facie infringement of the copyright in the copyright works by the Carrington book, does that book fall within one of the following statutory exceptions to copyright infringement:

(a) Fair dealing for research or private study--ss 19(1) and 20(1);

(b) Teacher reproduction for purposes of research or private study--s 21(1);

(c) Teacher reproduction in the course of instruction'--s 21(4); or

(d) Crown use reproduction--s 53(2)?

42. The defendants acknowledged that if it was proved that the course- pack contained a 'substantial' part of each copyright work, a prima-facie infringement of the copyrighted work by the defendants would be proved. But this would be subject to the defence under Section 21(4).

43. Relying upon the decisions reported as [1964] 1 All ER 465 *Ladbroke (Football) Ltd. Vs. William Hill (Football) Ltd.* and [1916] 2 Ch 601 *University of London Press Ltd. Vs. University Tutorial Press Ltd.*, the Court opined that in order to ascertain whether a substantial portion of the copyrighted work had been reproduced, the quantitative and qualitative aspects of the portion reproduced were to be evaluated. Opining that the extracts copied from the copyrighted work were of importance and significance, and essential to the integrity of the work being copied from, the Court held that the teacher had copied a 'substantial' part of each copyrighted work and had therefore, infringed the copyright of the plaintiffs. Consequently, the Court evaluated whether the defendants could take the benefit of statutory exceptions enumerated in sub-Sections 19(1), 20(1), 21(1), 21(4) and 53(2) of the Copyright Act in New Zealand.

44. Recording that sub-Sections 19(1), 20(1), 21(1) and 21(4) were independent of each other and had to be given distinct meaning, failing which sub-Sections 21(1) and 21(4) would become superfluous, the Court opined that in order to claim the benefit of the exceptions under Section 19(1) and 20(1), the user of the copyrighted material had to meet the additional standard of fair dealing, while no such standard had to be met under Section 21(1) and Section 21(4). Concerning Section 21(1) the Court held that since the primary purpose of the preparation of the course-pack was to act as a teaching aid for the teacher; and since the course-pack had reproduced significant extracts from the copyrighted work, which had been reproduced for the same purpose, i.e. to act as a teaching aid, the course-pack was competing with the copyrighted works and therefore, its preparation could not be held to be fair dealing. Further, the Court held that the preparation of course-packs was not contemplated under Section 21(1) since the course-packs had been prepared primarily for the purpose of teaching, not for research or private use, and in any case, 'supply' at the request of the person doing research or private study was an essential facet of Section 21(1).

45. Section 21(4)(a) of the Copyright Act, 1962 in New Zealand is a provision analogous to Section 52(1)(i) of the Copyright Act, 1957 in India and Section 19(6) of the Copyright Act, 1962 in New Zealand is a provision analogous to Section 52(1)(h) of the Copyright Act in India. Having noted the corresponding enactment in India we note the analogous provisions in New Zealand. Section 19(6) of the Copyright Act in New Zealand reads:-

(6) The copyright in a published literary, dramatic, or musical work, or in a published edition of such a work, is not infringed by the inclusion of a short passage therefrom in a collection intended for the use of schools, if:

(a) The collection is described in its title, and in any advertisements thereof issued by or on behalf of the publisher, as being so intended; and (b) The work or edition in question was not published for the use of schools; and

(c) The collection consists mainly of material in which no copyright subsists or in which the copyright is owned by the publisher or by the Crown; and

(d) The inclusion of the passage is accompanied by a sufficient acknowledgement:

46. Section 21(4) of the Copyright Act, 1962 in New Zealand reads as under : -

(4) The copyright in a literary, dramatic, musical, or artistic work is not infringed by reason only that the work is reproduced, or an adaptation of the work is made,-

(a) In the course of instruction, whether at a University or school or elsewhere or by correspondence, where the reproduction or adaptation is made by a teacher or student; or

(b) As part of questions to be answered in an examination or in answer to such a question.

47. Relevant for the purposes of the Indian statute would be the Court interpreting Section 21(4) strictly; holding that no restrictions on the method of reproduction, the length of the extract that could be copied from any copyrighted work or the number of copies of any extract could be read into the section since no such restriction had been provided for in the provision by the legislature, the Court further held that the language of the provision did not bar the use of an agent to conduct the copying and as long as the reproduction was done by or for the teacher or student in the course of instruction, such copying would be permissible under Section 21(4). Interpreting the expression 'course of instruction', the Court negated the contention of the plaintiffs that the expression was to be limited to the time and place of instruction, and held that in its ordinary meaning 'the course of instruction would include anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction.' Further, according to the Court, this view was buttressed by the inclusion of the term 'by correspondence' in Section 21(4), which implied that the expression 'course of instruction' would include preparation of material to be used in the course of instruction and copying by the teacher prior to the delivery of the instruction.

48. Opining further that the interpretation of Section 21(4) must be informed by the presence of Section 19(6), which provided an exception for preparation of compilations for educational purposes, the Court held the course-pack produced by the teacher was a textbook assembled from the copyrighted works, and not an extract of a copyright work. Additionally, the Court opined that since the textbook had not been prepared in or before any class, term or even teaching year but had been prepared before 1982 for subsequent use, it would not come within the definition of 'in the course of instruction'. According to the Court, despite the fact that a teacher would be entitled to reproduce the same extracts that had been used in the course-pack provided it was used in the course of instruction, the course-pack in question (being textbooks) could not be deemed permissible under Section 21(4).

49. Rejecting the plea of the defendants that they were entitled to the benefit of the exception of 'crown use reproduction' under Section 53(2), the Court declared that the defendants had infringed the copyright of the plaintiffs.

50. The similarity in the language of the Copyright Act, 1962 in New Zealand and the Indian Copyright Act, 1957, makes the decision in Longman's case of special relevance in interpreting Section 52 of the Indian Copyright Act, 1957. The language of Section 52(1)(i) of the Indian Copyright Act, 1957 is substantially similar, though not identical. Section 52(1)(i) provides that : 'The reproduction of any work- (i) by a teacher or a pupil in the course of instruction; or (ii) as part of the questions to be answered in an examination; or (iii) in answers to such questions;' would not be an infringement of copyright. It would be relevant to highlight that the expression 'whether at a University or school or elsewhere or by correspondence' as provided in Section 21(4) is absent in Section 52(1)(i). The legislative provision considered in the said judgment was : 'In the course of instruction, whether at a University or a school or elsewhere or by correspondence, where the reproduction or adaption is made by a teacher or student'. As noted above, the argument by learned counsel for the appellants was that the word 'correspondence' used in the statute in New Zealand

would give a wider meaning to the phrase 'in the course of instruction' and thus as per them the judgment would not have any persuasive value. The learned Judge in said judgment has opined : 'In its ordinary meaning, the course of instruction would include anything in the process of instruction with the process commencing at a time early than the time of instruction, at least for a teacher, and ending at a time later, at least for a student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction.' We are in agreement with the opinion for this is the only logical meaning of the phrase in the course of instruction'. Having interpreted the phrase as above without factoring in the word 'correspondence' used in the statute the learned Judge reinforced the view with an additional reason that when the course of instruction encompasses correspondence, it must enable preparation of the material to be used in the course of instruction before the delivery of the instruction. Thus, the decision in Longman's case would be an authority supporting the expanded definition of the phrase in the course of instruction' opined by the learned Single Judge.

51. Similarly, the recognition by the Court in Longman's case that in the absence of legislative intent, a fair dealing standard or restrictions in the quantum of reproduction cannot be read into Section 21(4) supports the view of Section 52(1)(i) taken by the learned Single Judge.

52. With reference to Section 19(6) of the Copyright Act in New Zealand, which as noted above is analogous to Section 52(1)(h) of the Copyright Act, 1957 in India, the learned Single Judge has, without any discussion or reasoning, simply held that Section 52(1)(h) had no relevance to interpret Section 52(1)(i). However, it must be borne in mind that on facts the Court in Longman's case held course-packs considered by it to be outside the ambit of Section 21(4). While not delineating the contours of the exception under Section 21(4) vis-à-vis course-packs in great detail, the Court opined that Section 21(4) was to be interpreted keeping in mind Section 19(6) and thus the distinction was made by the Court between an extract made in the course of instruction' and a textbook'.

53. Another facet of the decision in Longman's case that needs to be noted, is the view of the Court that if a course-pack prepared in a previous academic year is re-used in subsequent academic years, such a course-pack cannot be said to have been prepared in the course of instruction'. It would be relevant to note the opinion of the Court in Longman's case is that the effect of permissible copying of individual extracts by a teacher or a student in the course of instruction being the same as the preparation of a course-pack by a teacher outside the course of instruction.

54. The law declared in Longman's case has thus to be understood with reference to the facts of the case for the reason that on the one hand the Court held that course packs with fell within the ambit of Section 21(4) of the Copyright Act in New Zealand would be an exception to the charge of infringement and there was no necessity for the Court to consider whether it was a fair dealing because the statute had not made requirement of fair dealing as a part of the exception. The phrase in the course of instruction' was given a wide meaning. But on facts the compilation was held to be akin to a textbook and copies prepared in one year were used for subsequent years as well.

55. The decision in Longman's case reconciles Section 21(4) and Section 19(6) of the Copyright Act, 1962 in New Zealand. Though not expressly stated by the learned Judge who has authored the opinion, implicit would be that a course pack if used as a textbook would obviously amount to a publication and since use of copyrighted material with reference to the publication fell within the domain of Section 19(6) of the Copyright Act in New Zealand, the course pack fouled Section 19(6) (being held to be a textbook) and did not fall within the protective umbrella of Section 21(4).

56. The decision in Longman's case probably for the reason it was not argued, does not discuss the concept of fairness in the use as has been discussed by us and therefore at this stage we must part company with the said decision concerning its persuasive value on other issues. In the view we have taken in paragraphs 31 to 35 above, we declare that the law in India would not warrant an approach to answer the question by looking at whether the course pack has become a textbook, but by considering whether the inclusion of the copyrighted work in the course pack was justified by the purpose of the course pack i.e. for instructional use by the teacher to the class and this would warrant an analysis of the course pack with reference to the objective of the course, the course content and the list of suggested readings given by the teacher to the students. This would require expert evidence, and we shall pass appropriate directions on this while bringing the curtains down.

57. In the view we have taken, the distinction between 'reproduction' and 'publication' becomes self-evident and thus the reasoning adopted by the learned Single Judge needs to be corrected by us. Publication need not be for the benefit of or available to or meant for reading by all the members of the community. A targeted audience would also be a public as rightly urged by learned counsel for the appellants. But, a publication would have the element of profit, which would be missing in the case of reproduction of a work by a teacher to be used in the course of instruction while imparting education to the pupils. That apart, if reproduction includes the plural, it cannot be held that making of multiple copies would be impermissible. It happens in law that footprints of one concept fall in the territory of other but that does not mean that the former should be restricted.

58. It would be relevant to note that after the High Court of New Zealand delivered the verdict in Longman's case (supra) in the year 1991, the Copyright Act, 1962 in New Zealand was amended in the year 1994 and the decision reported as (2002) 3 NZLR 76 (NZHC) Copyright Licensing Authority Vs. University of Auckland dealt with the amended statute. Section 44 of the Copyright Act, 1994 was considered by the Court. It reads as under:-

44. Copying for educational purposes of literary, dramatic, musical or artistic works or typographical arrangements (1) Copyright in a literary, dramatic, musical, or artistic work or the typographical arrangement of a published edition is not infringed by the copying of the whole or part of the work or edition if -

(a) the copying is done by means of a reprographic process or by any other means; and

(b) the copying is done-

(i) in the course of preparation for instruction; or

(ii) for use in the course of instruction; or

(iii) in the course of instruction; and

(c) the copying is done by or on behalf of the person who is to give, or who is giving, a lesson at an educational establishment; and

(d) no more than 1 copy of the whole or part of the work or edition is made on any one occasion.

(2) Copyright in a literary, dramatic, musical or artistic work or the typographical arrangement of a published edition is not infringed by the copying of the whole or part of the work or edition if-

(a) the copying is not done by mean of a reprographic process;

and

(b) the copying is done -

(i) in the course of preparation for instruction; or

(ii) for use in the course of instruction; or

(iii) in the course of instruction; or

(iv) after the course of instruction; and

(c) the copying is done by a person who is to give, is giving, or has given the lesson or by a person who is to receive, is receiving, or has received the lesson; and

(d) 1 or more copies of the whole or part of the work or edition is or are made on any one occasion.

(3) Copyright in a literary, dramatic, or musical work or the typographical arrangement of a published edition is not infringed by the copying of part of the work or edition if -

(a) the copying is done by means of a reprographic process or by any other means; and

(b) the copying is done for an educational purpose; and

(c) the copying is done by or on behalf of an educational establishment; and

(d) 1 or more copies of part of the work or edition is or are made on any one occasion; and

(e) no charge is made for the supply of a copy to any student or other person who is to receive, is receiving, or has received a lesson; and

(f) subject to subsection (4), either, -

(i) in the period beginning with the commencement of this Act and ending with the close of 31st December 1997, the copying is of no more than the greater of 5% of the work or edition or 5 pages of the work or edition; or

(ii) on any after 1 January 1998, the copying is of no more than the greater of 3% of the work or edition or 3 pages of the work or edition.

(4) If the effect of subparagraph (i) or subparagraph (ii) of subsection (3)(f) would be that the whole of a work or edition is copied, those subparagraphs shall not apply and the copying that is permitted under subsection (3) shall be of no more than 50% of the whole work or edition.

(4A) A copy of a work made in accordance with subsections (3) and (4) may be communicated to a person who is a student or other person who is to receive, is receiving, or has received, a lessor than relates to the work.

(5) Copyright in an artistic work is not infringed by the copying, by means of a reprographic process or by any other means, of the whole or a part of that work if the artistic work is included within the part of any work or edition copied under subsection (3).

(6) Where any part of a work or edition is copied under subsection (3) by or on behalf of an educational establishment, -

(a) that part of that work or edition may not, within 14 days of that copying, be copied again under that subsection by or on behalf of that educational establishment; and

(b) no other part of that work or edition may, within 14 days of that copying, be copied under that subsection by or on behalf of that educational establishment.

(7) In subsections (3) to (6), published edition or edition, in relation to a collective work, means that part of the edition containing each work or part of a work, in relation to a collective work, means each of the works or parts of the works in the collective work.

59. The Section deals with copying for educational purposes and pertaining to the issue at hand if done in the course of preparations for instructions or for use in the course of instructions or in the course of instructions and copying is done by or on behalf of the person who is to give, or who is giving, a lesson at an educational establishment and further that not more than one copy of the whole or part of the work or addition is made on any one occasion, same would be permitted, if done by a student with the difference being that if it is not by way of photocopying, multiple copies could be made. Pertaining to educational institutions i.e. at the institutional level, a limit of the work capable of being photocopying by way of a fixed percentage for different periods being December 31, 1998 and post January, 1998 have been prescribed. Though principles of fair use are missing even in the 1994 Act, but the provisions by limiting the percentage in the third situation and number of copies in the first two situations, answer the problem. The decision would therefore have no relevance in the Indian context.

60. Concerning the argument that there cannot be an intermediary when use of copyrighted material post reproduction takes place in the course of instruction, common sense tells us that neither the teacher nor the pupils are expected to purchase photocopiers and photocopy the literary work to be used during course of instruction in the class room. A place where a photocopying machine, with a man behind to photocopy would be identified. Whether the teacher identifies the place and asks the man in question to photocopy the material and pay money for photocopying and then, while handing over the photocopied material to the pupils seek reimbursement or the teacher tells the pupils to get the work photocopied whether individually or collectively, would not matter. The core of the activity being the same. Photocopying. The argument concerning use of an agency is thus irrelevant. The plaintiffs do not allege any profit being made by either the pupils or the teachers or the University of Delhi. They allege profit being made by Rameshwari Photocopy Services. Plaintiffs alleged that as against market rate of photocopying @ 25 paisa per page, Rameshwari Photocopy Services charges 50 paisa per page and thereby makes a profit apart from what would have been made while simply photocopying material. No document in support thereof has been filed to make good the pleading. On the contrary the University of Delhi produced a copy of the licence in favour of Rameshwari Photocopy Services as per which, as of January 2012 it could charge only 40 paisa per page and we take judicial notice of the fact that as of said year photocopiers were charging 50 paisa per page in the market and where customers were many, such as markets near educational institutes, the discounted rate was 40 paisa per page. Thus, even qua Rameshwari Photocopy Services, apart from the usual profit which it would be making while photocopying material, no profit otherwise is being made for the activity in question and the activity therefore would simply be to photocopy pages and not prepare course packs in the context of the activity.

61. We do not find any institutional sanction for photocopying as was urged by learned counsel for the appellants for the reason that the role of the University of Delhi ends when its academic council lays down the course curriculum. Thereafter, the individual teacher or the teachers acting collectively for a particular degree course sit down and prescribe the relevant reading material to be read by the students keeping in view the objective of the course as per the curriculum set by the academic council of the University. The next exercise done by the teacher or the teachers would require eclectic selection of reading material and this would be the copyrighted works. This would constitute the reading material for the pupils, to be used by the teacher in the class room in course of

instruction. Spiral bound it would be called a course pack.

62. Arguments advanced by learned counsel on either side with reference to articles and treatises by professors on what the policy of copyright law in its interface with education, especially in developing countries where literacy levels are low and purchasing power is less, should be simply noted by us for record. Being a matter of policy, it is for the legislature to decide what should be the policy underlying the statute. If transposed into a judicial verdict it would be a doctrinal approach and we prefer to interpret the statute using the tools of grammar, giving meaning to the words as in ordinary English parlance and defining concepts with common sense.

63. Nothing much turns on Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention for the reason that the contents thereof are merely directory and have enough leeway for the signatory countries to enact the copyright law in their municipal jurisdiction concerning use of copyrighted works for purposes of dissemination of knowledge. Though not conclusive, but the words of the Hon'ble Minister who piloted the Bill which resulted in Act 27 of 2012 being enacted supports this interpretation to clause (i). We do not extract the words used for reason we have extracted them in paragraph 28 above.

64. Concerning decisions rendered by the Courts in the United States of America, United Kingdom and Canada, we find no relevance of said opinions and have no persuasive value in the Indian context.

65. Section 107 of the Copyright Act in America reads as under:-

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

66. Suffice it to note that the statute in America, with reference to teaching, which would include multiple copies for classroom use, is circumscribed by 'fair use'. The statute has an expansive definition as to what would be fair use and lists four fair use factors. The decisions by Court in America would therefore have no persuasive value in the Indian context. It would be further relevant to note that in the United States of America an Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions exists which provides guidelines on the extent of permissible photocopying. The majority opinion in the decisions in the United States of America has relied thereupon while discussing concept of fair use to hold on the facts of different cases for infringement being made out and photocopying not protected by Section 107. The minority opinions have taken the view that the guidelines in question being non-statutory are not to be taken into account while discussing photocopying with reference to fair use.

67. Pertaining to the decision reported as (1983) F.S.R. 545 *Sillitoe and Others Vs. McGraw-Hill Book Company (U.K.) Ltd.* it deals with the scope of Section 6(1) and 6(2) of the U.K. Copyright Act, 1956, which has subsequently been replaced by the Copyright, Designs and Patents Act, 1988. Sections 6 of the U.K. Copyright Act, 1956 enumerated the exceptions to copyright protection. Sub-Section (1) of Section 6 provided that fair dealing with a literary, dramatic or musical work for the purposes of research or private study would not constitute infringement, while Sub-Section (2) of Section 6 provided that fair dealing with a literary, dramatic or musical work for the purposes of criticism or review, whether of that work or another work, would not constitute infringement, subject to a sufficient acknowledgement of the copyrighted material accompanying the dealing.

68. The decision would be relevant in the Indian context if Section 52(1)(a) of the Copyright Act, 1957 is under focus and would have no persuasive value qua the interpretation of Section 52(1)(i), because the concept of fair dealing is inbuilt in the statute in the United Kingdom concerning photocopying for purposes of research, criticism and educational purposes. In the Indian context the subject is divided in the various clauses of sub-Section (1) of Section 52.

69. Similar would be the status of the decision reported as (2012) 2 SCC 37 *Alberta (Education) Vs. Canadian Copyright Licensing Agency* for the reason Section 29 of the statute in Canada which deals with academic purposes i.e. private study and research has fair dealing inbuilt in it.

70. We need now only deal with the decision reported as (2011) 185 DLT 346 *University of Cambridge Vs. B.D. Bhandari*, whereof the appellants had urged that the Division Bench of this Court was interpreting Section 52(1)(h) before the statute was amended in the year 2012 and said provision was *pari materia* to Section 52(1)(i) of the current statute.

71. No doubt, in said decision the Division Bench was interpreting Section 52(1)(h) which is *pari materia* with Section 52(1)(i) in the statute as of today, but the observations made in the decision have to be understood in the context of the fact that the issue before the Court in B.D. Bhandari's case (*supra*) was whether guidebooks for textbooks prescribed by educational institutions in their syllabi, containing *inter alia* extracts from the prescribed textbooks, published by publishing houses not connected to the educational institutions or their students, infringed the copyright in the textbooks. While ultimately holding that the guidebooks did not constitute an infringement of the

copyright in the prescribed textbooks, the Court, interpreting Section 52(1)(h) of the Copyright Act, 1957, which is *pari materia* to Section 52(1)(i) of the Copyright Act, 1957 after the 2012 Amendment to the Copyright Act, held that since publishing houses were neither teachers nor students nor a person giving or receiving instruction, and were reproducing copyrighted material for commercial gain, Section 52(1)(h) would not be applicable. Thus, the decision in B.D. Bhandari's case (*supra*) is distinguishable on its peculiar facts.

72. Further, while the Court in B.D. Bhandari's case (*supra*) did hold that a fair dealing standard was to be read into all clauses of Section 52 of the Copyright Act, 1957, as held hereinabove, a fair dealing standard has only been provided in clause (a) of sub-Section (1) and not in the other clauses of sub-Section (1) of Section 52, and therefore, cannot be read into the other clauses.

73. Paragraph 37 of the decision B.D. Bhandari's (*supra*) reads as under :-

37. The appellant has contended before us, and rightly so, that these two concepts, as discussed above, are distinct from each other. There can be no dispute that the doctrine of fair use is an exception to the copyright protection as the opening line of section 52 uses the expression The following acts shall not constitute an infringement of copyright namely - (a) A fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of. This expression implies that without the fair use protection the use shall constitute an infringement of copyright. However, on the other hand, when we say that the work is in public domain it means that no copyright protection is available to the concerned work and everyone is free to use that work in whatsoever manner he wishes to.

74. Suffice it to state that the Court in B.D. Bhandari's case (*supra*), while contrasting the concepts of fair use' and public domain', has opined that the doctrine of fair use serves as a limitation to the rights of the copyright holder and allows certain acts to be done in respect of copyrighted material without amounting to infringement of copyright.

75. In our opinion the additional reasoning by the learned Single Judge with respect to course packs on the strength of Section 52(1)(a) of the Copyright Act, 1957 is probably intended to support the interpretation placed by the learned Single Judge to Section 52(1)(i). The reasoning being that for purposes of private research, private study and criticism if a single individual could copy a copyrighted work then it made no difference if same activity was done in the plural. This reasoning overlooks that even if a single individual were to use a copyrighted work for private research, private study and criticism the use would be subject to fair dealing' because clause (a) expressly uses the said expression and thereby limits the contours of the use. We find that the learned Single Judge has not discussed this aspect i.e. the applicability of fair dealing if the offending activity was covered by Section 52(1)(a) of the Copyright Act, 1957. Concededly, the course packs were claimed to be material used during course of instruction and therefore photocopying copyrighted material i.e. reproduction had to be determined with reference to clause (i), and clause (a) has no relevance.

76. A lay person may question as to how a provision in a statute results in an interpretation where a right conferred on a person to use the work of another without any compensation would be just and fair. The question would obviously arise : Is it possible that a provision in a statute partially drowns another provision. This lay person would obviously desire, and perhaps logic would feed the desire, that no provision should be drowned or partially drowned. After all, in the melody of the statute all notes should be heard.

77. We therefore answer this question, which certainly arises, using the imagery of music. A melody is the outcome of the sounds created when different instruments, such as a lute, flute, timbale, harp and drums are played in harmony. The notes of the instruments which are loud and resonating have to be controlled so that the sound of the delicate instruments can be heard. But it has to be kept in mind that at proper times the sound of the drums drowns out the sound of all other instruments under a deafening thunder of the brilliant beating of the drums. Thus, it is possible that the melody of a statute may at times require a particular Section, in a limited circumstance, to so outstretch itself that, within the confines of the limited circumstance, another Section or Sections may be muted.

78. And now the final direction.

79. Apart from a triable issue on fact which would be as indicated in paragraph 56 above, another issue of fact would need to be tried. The same emerges from the report dated August 27, 2012 submitted in the suit by a learned Local Commissioner. Visiting the premises given on a licence to the respondent No.1 from where the work of photocopying is carried on the learned Local Commissioner who visited the premises on August 18, 2012 found apart from the offending course packs eight books photocopied back to back. There were four back to back copies of one book, three photocopies of another book, two of the third and one each of the other five. For this we permit the plaintiffs to amend the plaint and plead said fact giving opportunity to the defendants to file written statement to the amended plaint.

The issue would then arise whether photocopying of entire books would be a permissible activity.

80. The appeal is disposed of declaring the law as above and setting aside the impugned judgment and decree holding that no triable issue on fact arises. As we have already held the triable issue on fact would be as indicated in paragraph 56 above. Another triable issue on fact would be as per paragraph 79 above. The suit is restored for trial on the issue of fact and for which parties would be permitted to lead expert witness testimony. We find that the learned Single Judge has dismissed the application seeking interim injunction against the defendants and simultaneously on the reasoning that no triable issue arises the suit has been dismissed. Having restored the suit and identifying the triable issue warranting evidence, we are not inclined to grant interim injunction to the appellants but would direct respondent No.1 to maintain a record of course packs photocopied by it and supplied to the students. Every six months the statement of number of course packs photocopied and supplied shall be filed in the suit.

81. The suit would now be listed for directions before the learned Roster Judge on January 04, 2017.

82. Parties shall their bear their own costs in the appeal.

(PRADEEP NANDRAJOG) JUDGE (YOGESH KHANNA) JUDGE DECEMBER 09, 2016
skb/mamta