(1984) 2 Supreme Court Cases 534

Gramophone Company Of India Ltd — Appellant

Versus

Birendra Bahadur Pandey And Others — Respondents

Civil Appeals Nos. 3216 to 3218 of 1983,

decided on February 21, 1984

The Judgment of the Court was delivered by

CHINNAPPA REDDY, J.—Nepal is our neighbour. Unfortunately Nepal is land-locked. Nepal's only access to the sea is across India. So, as one good neighbour to another with a view to "maintain, develop and strengthen the friendly relations" between our two countries, by treaty and by International Convention, we allow a right of innocent passage in order to facilitate Nepal's international trade. One of the questions before us is the extent of this right: Does the right cover the transit of goods which may not be imported into India? May goods which may not be brought into India be taken across Indian territory? What does 'import' mean, more particularly what does 'import' mean in Section 53 of the Copyright Act? Can an unauthorised reproduction of a literary, dramatic, musical or artistic work or a record embodying an unauthorised recording of a record (which, for short, adopting trade parlance, we may call a pirated work), whose importation into India may be prohibited, but whose importation into Nepal is not prohibited, be taken across Indian territory to Nepal? These are some of the questions, which arise for consideration in this appeal.

2. The questions have arisen this way: The appellant, the Gramophone Company of India Limited, is a well-known manufacturer of musical records and cassettes. By agreement with the performing artistes to whom royalties are paid, the appellant company is the owner of the copyright in such recordings. The appellant received information from the customs authorities at Calcutta that a consignment of pre-recorded cassettes sent by Universal Overseas Private Ltd., Singapore to M/s Sungawa Enterprises, Kathmandu, Nepal, had arrived at Calcutta Port by ship and was awaiting dispatch to Nepal. The appellant learnt that a substantial number of cassettes were 'pirated works', this fact having come to light through the broken condition of the consignment which was lying in the Calcutta docks. Basing upon the information received, the appellant sought the intervention of the Registrar of Copyrights for action under Section 53 of the Copyright Act, 1957. This provision enables the Registrar, after making such enquiries as he deems fit, to order that copies made out of India of a work which if made in India would infringe copyright, shall not be imported. The provision also enables the Registrar to enter any ship, dock or premises where such copies may be found and

to examine such copies. All copies in respect of which an order is made prohibiting their import are deemed to be goods the import of which is prohibited or restricted under Section 11 of the Customs Act, 1962. The provisions of the Customs Act are to have effect in respect of those copies. All copies confiscated under the provisions of the said Act are not to vest in the Government, but to be delivered to the owner of the copyright in the work. As the Registrar was not taking expeditious action on the application of the appellant and as it was apprehended that the pirated cassettes would be released for transportation to Nepal, the appellant filed a writ application in the Calcutta High Court seeking a writ in the nature of mandamus to compel the Registrar to pass an appropriate order under Section 53 of the Copyright Act and to prevent release of the cassettes from the custody of the customs authorities. The learned single Judge of the Calcutta High Court, on the request of the appellant, issued a rule nisi and made an interim order permitting the appellant to inspect the consignment of cassettes and if any of the cassettes were thought to infringe the appellants copyright, they were to be kept apart until further orders of the Registrar. After causing the necessary inspection to be made, the Registrar was directed to deal with the application under Section 53 of the Copyright Act in accordance with law after hearing interested parties. The Registrar was directed to deal with the application within eight weeks from the date of the High Court's order. In the event of any of the cassettes held back by the appellant being found not to infringe any provision of the Copyright Act, the appellant was to pay damages as assessed by the Court. Against the learned single Judge's order, the consignee preferred an appeal under Clause 15 of the Letters Patent. A Division Bench of the Calcutta High Court held that the word 'import' did not merely mean bringing the goods into India, but comprehended something more, that is, "incorporating and mixing, or mixing up of the goods imported with the mass of the property in the local area". The learned Judges thought it would be wrong to say that there was importation into India, the moment the goods crossed the Indian customs barrier. Keeping in view the treaties with Nepal, the Division Bench took the view that there was no importation when the goods entered India en route to Nepal. The appeal was, therefore, allowed and the writ petition filed by the present appellant was dismissed. And so, the writ petitioner in the High Court has appealed to us under Article 136 of the Constitution.

3. First, we shall examine if there is any mandate of international law or if the rules of international law afford us any guidance and if such mandate or guidance is perceptive under Indian law. Two questions arise, first, whether international law is, of its own force, drawn into the law of the land without the aid of municipal statute and, second, whether, so drawn, it overrides municipal law in case of conflict. It has been said in England that there are two schools of thought, one school of thought propounding the doctrine of incorporation and the other, and the doctrine of transformation. According to the one, rules of international law are incorporated into the law of the land automatically and considered to be part of the law of the land unless in conflict with an Act of Parliament. According to the other, rules of international law are not part of the law of the land. Unless already so by an Act of Parliament, judicial decision or

long established custom. According to the one whenever the rules of international law changed, they would result in a change of the law of the land along with them, "without the aid of an Act of Parliament". According to the other, no such change would occur unless those principles are "accepted and adopted by the domestic law". Lord Denning who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and explained how courts were justified in applying modem rules of international law when old rules of international law changed. In fact, the doctrine of incorporation, it appears, was accepted in England long before Lord Denning did so. Lord Denning himself referred to some old cases. Apart from those, we may refer to *West Rand Central Gold Mining Co.* v. *King* where the Court said:

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

4. Lauterpacht in *International Law* (*General Works*) refers to the position in Germany, France, Belgium and Switzerland and says it is the same. He quotes what a German court said to meet an argument that the role of customary international law conflicted with Article 24 of the German Code of Civil Procedure. The court had said, "The legislature of the German Reich did not and could not intend any violation of generally recognised rules of international law, when enacting Article 24 of the German Code of Civil Procedure". Lauterpacht refers to another German case where the argument that "there ought not to be a direct recourse to the law of nations, except insofar as there has been formed a German customary law" was rejected with the statement, "The contention of the Creditor that international law is applicable only insofar as it has been adopted by German customary law, lacks foundation in law. Such a legal maxim would, moreover, if generally applied, lead to the untenable result that in the intercourse of nations with one another, there would obtain not a uniform system — international law — but a series of more or less diverse municipal laws". Lauterpacht summarises the position this way:

While it is clear that international law may and does act directly within the State, it is equally clear that as a rule that direct operation of international law is within the State subject to the overriding authority of municipal law. Courts must apply statutes even if they conflict with international law. The supremacy of international law lasts, pro foro interno, only so long as the State does not expressly and unequivocally derogate from it. When it thus prescribes a departure from international law, conventional or customary, Judges are confronted with a conflict of international law and municipal law and, being organs appointed by the State, they are compelled to apply the latter.

5. There can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, *unless they are in conflict with an Act of Parliament.* Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.

6. The proposition has been well stated by Latham, C.J. in *Politics* v. *Commonwealth*:

> Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law.... It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

7. The Supreme Court of India has said practically the same thing in *Tractoroexport, Moscow* v. *M/s Tarapore & Co.:* (SCC p. 571, para 15)

> Now, as stated in *Halsbury's Laws of England,* Vol. 36, page 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided, that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their

meaning even though they are contrary to the comity of nations or international law.

The observations show that the Court was only concerned with a principle of interpretation, but, by implication, it may be possible to say that the Court preferred the doctrine of incorporation; otherwise the question of interpretation would not truly arise. What has been said in the *Tractoroexport case* is entirely consistent with what we have said earlier.

8. Is there any well established principle of international law on the question of the right of land-locked States to innocent passage of goods across the soil of another State? It appears that "the leading authorities on international law have expressed divergent views on the question of the transit rights of land-locked countries. While one group of writers, such as, Sibert, Scelle and others have held the view that these countries have an inherent right of transit across neighbouring countries, other 'equally eminent authorities, such as, McNair and Hyde have held the view that these rights are not principles recognised by international law, but arrangements made by sovereign States. The result of the lack of unanimity has been that the land-locked countries have to rely on bilateral, regional or multi-lateral agreements for the recognition of their rights. The very existence of innumerable bilateral treaties, while on the one hand it raises a presumption of the existence of a customary right of transit, on the other it indicates the dependence of the right on agreement. The discontenting situation led to attempts by nations to codify the rules relating to transit trade. The earliest attempt was the Convention on the Freedom of Transit known generally as the Barcelona Convention. The second attempt was the Convention on the High Seas, 1958. The most recent is the 1965 Convention on Transit Trade of Land-locked States. As this is the latest Convention on the subject and as both India and Nepal have signed the Convention, it may be useful to refer to it in some detail. The Convention was the result of a Resolution of the United Nations General Assembly which, "recognising the need of land-locked countries for adequate transit facilities in promoting international trade", invited "the Governments of Member States to give full recognition to the needs of land-locked Member States in the matter of transit trade and therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries". Article 1(fl) of the Convention defines the term 'land-locked States' as meaning "any Contracting State which has no sea-coast". The term 'traffic in transit' is defined like this: "the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, ware-housing, breaking bulk, and change in the mode of transport of such goods as well as the

assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of 'traffic in transit' provided that any such operation is undertaken solely for the convenience of transportation. Nothing in this paragraph shall be construed as imposing an obligation on any contracting State to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly or reassembly". The term 'transit State' is defined as meaning "any Contracting State with or without a sea-coast, situated between a land-locked State and the sea, through whose territory 'traffic in transit' passes". Article 2 prescribes that freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Traffic in transit is to be facilitated on routes in use mutually acceptable for transit to the Contracting States concerned. No discrimination is to be exercised based on the place of origin, departure, entry, exit or destination or any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used. Article 3 provides for exemption of Traffic in Transit from customs duties or import or export taxes or any special dues in respect of transit, within the transit State. Article 4 refers to means of transport and tariffs. Article 5 refers to methods and documentation in regard to customs, transport, etc. Article 6 refers to storage of goods in transit. Article 7 refers to delays or difficulties in traffic in transit. Article 8 refers to free zones or other customs facilities. Article 9 refers to provision of greater facilities. All that we need mention about Articles 4 to 9 is that details have necessarily to be worked out by mutual agreement. Article 10 refers to relation to most-favoured-nation clause. Article 11 refers to 'Exceptions to Convention' on grounds of public health, security, and protection of intellectual property. It is perhaps useful to extract the whole of Article 11.

> *Exceptions to Convention on grounds of public health, security, and protection of intellectual property*
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> 1. No Contracting State shall be bound by this Convention to afford transit to persons whose admission into its territory is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public morals, public health, or security or as a precaution against diseases of animals or plants or against pests.
>
> 2. Each Contracting State shall be entitled to take reasonable precautions and measures to ensure that persons and goods, particularly goods which are the subject of a monopoly, are really in transit, and that the means of transport are really used for the passage of such goods, as well as to protect the safety of the routes and means', of communication.
>
> 3. Nothing in this Convention shall affect the measures which a Contracting State may be called upon to take in pursuance of provisions in a general international convention, whether of a world-wide or regional character, to which it is a party, whether such

convention was already concluded on the date of this Convention or is concluded later, when such provisions relate:

(*a*) to export or import or transit of particular kinds of articles such as narcotics, or other dangerous drugs, or arms; or

(*b*) *to protection of industrial, literary or artistic property,* or protection of trade names, and indications of source or appellations of origin, and the suppression of unfair competition.

4. Nothing in this Convention shall prevent any Contracting State from taking any action necessary for the protection of its essential security interests.

Article 12 refers to exceptions in case of emergency. Article 13 refers to application of the Convention in time of war. Article 14 refers to obligations under the Convention and rights and duties of United Nations Members. Article 15 refers to reciprocity. Article 16 refers to settlement of disputes. Article 17 refers to signature. Article 18 refers to ratification. Article 19 refers to accession. Article 20 refers to entry into force. Article 21 refers to revision. Article 22 refers to notifications by the Secretary-General. And Article 23 refers to authentic texts.

9. It is thus seen that the Convention while providing for freedom of transit for the passage of goods between a land-locked State and the sea, across the territory of a transit State emphasizes the need for agreement between the land-locked country and the transit country and, more important for our present purposes, it specifies certain exceptions. It is indeed remarkable that the Convention places traffic (illicit) in industrial, literary or artistic property on the same footing as traffic in narcotics, dangerous drugs and arms This opinion of the International Community as revealed by the Convention must be borne in mind in our further consideration of the question. It may be interesting to notice here what John H.E. Fried, who represented the Government of Nepal as one of the members of the delegation at the U.N. Conference which produced the Convention, has to say about those exceptions. In an article which he wrote in the *Indian Journal of International Law,* he said:

> The test of a treaty are its exceptions. The proof of a treaty pudding is, when it cannot be eaten. It is the old problem of finding a balance between demands for saving clauses, and the opposite claim that the very value of a treaty depends on its reliability. For land-locked States, conditions under which their outlet to the outside world may be curtailed can of course be crucial.
>
> The Convention declares exceptions permissible for five reasons: (1) certain well-specified reasons of public policy; (2) because of overriding international obligations; (3) emergency in the country of transit; (4) in case of war; (5) protection of its essential security interests.

A few words about each, in view of their extraordinary importance.

(1) Exceptions for reasons of public policy. The State of transit may — this is permissive, not obligatory — prohibit transit of certain goods for the reason that import into their own territory is prohibited, namely (Article 11, Para 1):

(*a*) grounds of public morals — e.g., indecent literature;

(*b*) on grounds of public health or public security; (e.g., contaminated food or improperly packed explosives);

(c) as precaution against animal diseases, plant diseases, or pests.

This clause (dubbed at the Conference as the "dirty pictures and rotten fish clause") will not hamper international trade if properly applied.

(2) The same can probably be said of the measures which a Contracting State may be called upon to take ("poutetre amene a prendre" in the equally authentic French version which is several nickes less permissive) in obedience to certain international treaties to which it is a party, namely, treaty provisions relating to

(*a*) "export, import or (!) transit of particular kinds or articles such as narcotics, or other dangerous drugs, or arms". (As to arms this would therefore only become operative if a world-wide or regional treaty prohibiting or restricting international arms trade existed.)

(*b*) "*protection of industrial, literary or artistic property, or protection of trade names", and the like*.

These provisions are noteworthy because they permit the States of transit to enforce, say a copyright or trade-mark convention even if, for example, neither the country of origin nor of destination is party to it.. . . Far as these provisions go, transit traffic must not be hampered for any other reason of public policy of the State of transit. If that State forbids importation of certain luxury goods for financial reasons, or of certain textiles to protect its own spinning industry, that is, economic reasons, or of short-wave radios for political reasons — all such goods must still be permitted to pass through its territory.

(3) Qualified Emergency. . . . ..

(4) War. . . . . .

(5) Protection of essential security interests. . . . . .

10. We may now take a look at the treaties with our neighbour Nepal and the Protocols. First, the Treaty of Trade' which was contracted "in order to expand trade between their respective territories and encourage collaboration in economic development". Article 2 stipulates that the contracting parties shall endeavour to grant maximum facilities and to undertake all necessary measures for the free and unhampered flow of

goods, needed by one country from the other to and from their respective territories. Article 3 enjoins the contracting parties to accord unconditionally to each other treatment no less favourable than that accorded to any third country with respect to (*a*) customs duties and charges of any kind imposed on or in connection with importation and exportation and (*b*) import regulations including quantitative restrictions. Article 4 provides that the contracting parties should, on a reciprocal basis, exempt from basic customs duty as well as from quantitative restrictions the import of such primary products as may be mutually agreed upon, from each other. Article 8 casts a duty on the contracting parties to cooperate effectively with each other to prevent infringement and circumvention of the laws, rules and regulations of either country in regard to the matters relating to foreign exchange and foreign trade. Article 9 specially provides that notwithstanding the earlier provisions of the treaty either Contracting Party may maintain or introduce such restrictions as are necessary for the purpose of

(*a*) protecting public morals,

(*b*) protecting human, animal and plant life,

(*c*) safeguarding national treasures,

(*d*) safeguarding the implementation of laws relating to the import and export of gold and silver bullion, and

(e) safeguarding such other interests as may be mutually agreed upon.

Article 10 which may be extracted in full is as follows: "Nothing in this Treaty shall prevent either Contracting Party from taking any measures which may be necessary for the protection of its essential security interests or in pursuance of general international conventions, whether already in existence or concluded hereafter, to which it is a party relating to transit, export or import of particular kinds of articles such as opium or other dangerous drugs or *in pursuance of general conventions intended to prevent infringement of industrial, literary or artistic property* or relating to false marks, false indications of origin or other methods of unfair competition".

11. It appears to us that the Treaty of Trade concerned itself with trade between India and Nepal and not with trade between Nepal and other countries. The provisions relating to import, export, transit and the free and unhampered flow of goods refer to the import and the export from one country to another i.e. from India to Nepal and from Nepal to India and to the transit and the free and unhampered flow of goods in the course of trade between the two countries. Even so, express reservation is made to enable each of the countries to impose restrictions for certain purposes and to take such measures as may be necessary for the protection of essential security interests and effectuating international conventions relating to opium and other dangerous drugs and also *to effectuate "general conventions intended to prevent infringement of*

industrial, literary or artistic property or relating to false marks, false indications or origin or other methods of unfair competition". (Article 10)

12. The Treaty of Transit is more relevant. Its scheme, and sequence and even the language indicate that it is based on the 1965 Convention on Transit Trade of Land-locked Countries. The Preamble to the treaty mentions that a treaty has been concluded "recognising that Nepal as a land-locked country needs access to and from the sea to promote its international trade, and recognising the need to facilitate the traffic in transit through their territories".

13. Article 3 defines 'Traffic in Transit' and is as follows: "The term 'Traffic in Transit' means the passage of goods including unaccompanied baggage across the territory of a Contracting Party when the passage is a portion of a complete journey which begins or terminates within the territory of the other Contracting Party. The trans-shipment, warehousing, breaking bulk and change in the mode of transport of such goods as well as the assembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of 'traffic in transit' provided any such operation is undertaken solely for the convenience of transportation. Nothing in the article shall be construed as imposing an obligation on either Contracting Party to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly, or reassembly".

14. Article 1 requires" the Contracting Parties to accord 'Traffic in Transit' freedom of transit across their respective territories through routes mutually agreed upon making no destination based on flag of vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.

15. Article 4 exempts Traffic in Transit from customs duties and transit duties or other charges except reasonable charges for transportation and such other charges as are commensurate with the costs of services rendered in respect of such transit.

16. Article 5 requires each of the Contracting Parties to provide, for the convenience of traffic in transit, warehouses or sheds, for the storage of traffic in transit awaiting customs clearance before onward transmission.

17. Article 6 stipulates that Traffic in Transit shall be subject to the procedure laid down in the Protocol. Article 8 and 9 correspond to the provisions of Articles 11, 12 and 13 of the 1965 Convention on Transit Trade of Land-locked States and are similar to Articles 9 and 10 of the Treaty of Trade and reserve the right of each of the Contracting Parties to impose restrictions for certain purposes and take measures in connection

with certain interests. In particular Article 9 mentions that nothing in the treaty shall prevent either Contracting Party from taking any measure which may be necessary in pursuance of *general conventions intended to prevent infringement of industrial, literary or artistic property* or relating to false marks, false indications of origin or other methods of unfair competition.

18. The Protocol annexed to the Treaty of Transit contains a detailed procedure for the transit of goods across the territory of India en route from the Port of Calcutta to their Nepalese destination. The Protocol contains detailed provisions to ensure the goods reaching Nepal and to prevent the contingency of the goods escaping into the Indian market while on the way to Nepal.

19. While the Treaty of Trade generally guarantees to each of the Contracting Parties the free and unhampered flow of goods needed by one country from the other, the Treaty of Transit generally guarantees to each of the Contracting Parties freedom of transit across the territory of the other Contracting Party in respect of goods which have to pass through the territory of such other Contracting Party to reach the first Contracting Party from outside the territory of the second Contracting Party. In practice the two treaties really mean a guarantee to Nepal to permit free and unhampered flow of goods needed by Nepal from India and a guarantee of freedom of transit for goods originating from outside India across the territory of India to reach Nepal. In the matter of payment of customs duties the Treaty of Trade provides for the most favourable treatment while the Treaty of Transit grants exemption from such payment. Both treaties contain reservations. There is a reservation enabling the imposition of such restrictions as are necessary for the purpose of protecting public morals, human, animal and plant life, safeguarding national treasures, the implementation of laws relating to the import and export of gold and silver bullion and the safeguarding of other mutually agreed interests. There is an express reservation for the protection of essential security interests. There is also provision for necessary measures in pursuance of general international conventions relating to transit, export or import of articles such as opium or other dangerous drugs. There is further provision for taking necessary measures in pursuance of general conventions intended to prevent infringement of industrial, literary and artistic property or relating to false marks, false indications of origin or other methods of unfair competition. So, the two treaties generally assure to Nepal the free and unhampered flow from India and freedom of transit across India, to goods or of goods which we may say in the broad way are not res extra commercium. In particular the treaties expressly contain reservations enabling each of the contracting parties to take measures in pursuance of general conventions for the protection of industrial, literary and artistic property.

20. So we have it that Article 11 of the 1965 Convention on Transit Trade of Land-locked States, Article 10 of the Treaty of Trade and Article 9 of

the Treaty of Transit contain exceptions to protect "industrial, literary or artistic property" and to prevent "false marks, false indications of origin or other methods of unfair competition", pursuant to general conventions. Neither the International Convention of 1965 nor the treaties between the two nations prohibit the imposing of restrictions for this purpose. On the other hand, they contain reservations to the contrary. So great is the concern of the International Community for industrial, literary or artistic property that the Convention on Transit Trade of Land-locked Countries views traffic in this kind of property with the same gravity as it views traffic in narcotics, dangerous drugs and arms So, the Convention on Transit Trade of Land-locked States and the treaties between the two countries, leave either country free to impose necessary restrictions for the purpose of protecting industrial, literary or artistic property and preventing false marks, false indications of origin or other methods of unfair competition in order to further other general conventions. It is clear that for this purpose, it is not necessary that the land-locked country should be a party to the general convention along with the transit country. The interpretation placed by John H.E. Fried that the provisions of the 1965 Convention permit the States of transit to enforce, say a copyright or trade mark convention even if, for example, neither the country of origin nor of destination is party to it appears to us to be a correct interpretation.

21. The next step for us to consider is whether there is any general Convention on Copyright. An artistic, literary or musical work is the brain-child of its author, the fruit of his labour, and, so, considered to be his property. So highly is it prized by all civilised nations that it is thought worthy of protection by national laws and international conventions relating to copyright. The International Convention for the protection of literary or artistic works first signed at Berne on September 9, 1886, was revised at Berlin in 1908, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and finally at Paris in 1971. Article 1 of the Convention, as revised, constitutes the countries to which the Convention applies into a Union for the protection of the rights of authors in their literary and artistic works. The expression 'literary and artistic works' is defined to include every production in the literary, scientific and artistic domain whatever any be the mode or formation of its expression. It is provided that the work shall enjoy protection in all countries of the Union. Various detailed provisions are made in the Convention for the protection of the works. Article 9 provides that authors of literary and artistic works protected by the Convention shall enjoy the exclusive right of authorising the reproduction of these works in any manner or form. It is also expressly stipulated that any sound or visual recording shall be considered as a reproduction for the purposes of the Convention. We are not really concerned with the several details of the Convention. But we may refer to Article 16 which provides:

> 1. *Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection*;

2. *The provisions of the preceding paragraphs shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected*;

3. The seizure shall take place in accordance with the legislation of each country.

India, we may mention is a party to the Berne Convention.

22. The Universal Copyright Convention which was first signed in Geneva on September 6, 1952 was revised in Paris in 1971. Each Contracting State is called upon to undertake "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works including writings, musical, dramatic and cinematograph works and paintings, engraving and sculpture". The rights are to include the exclusive right to authorise reproduction by any means, public performance and broadcasting. Each Contracting State is required to adopt such measures as are necessary to ensure the application of the Convention. The Convention is not in any way to affect the provision of the Berne Convention for the protection of literary or artistic works or membership in the Union created by that Convention. The Universal Copyright Convention is not applicable to the relationships among countries of the Berne Union insofar as its relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union. India is a signatory to the Universal Copyright Convention also.

23. The time is now ripe for us to refer to our own Copyright Act of 1957. Section 2(*c*), (*h*), (o), (*p*), (*f*) and (*w*) define 'artistic work', 'dramatic work', 'literary work', 'musical work', 'cinematograph film' and 'record' respectively. Section 2(y) defines 'work' as meaning "any of the following works, namely,—

(i) a literary, dramatic, musical or artistic work;

(ii) a cinematograph film;

(iii) a record."

Record' is defined by Section 2(w) to mean "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound-track associated with the cinematograph film". 'Recording' is defined by Section 2(x) to mean "the aggregate of the sounds embodied in and capable of being reproduced by means of a record". 'Infringing copy' in relation to a record is defined to mean, by Section 2(m)(*iii*), "any such record embodying the same recording. If such record is made or imported in contravention of the provisions of the Act". Section 13(1) states that copyright shall subsist throughout India in *(a)* original, literary, dramatic, musical and artistic works; (6) cinematograph films; and (c) records. Section 14 explains the meaning of 'copyright' in relation to various 'works'. In the case of a

record, copyright is said to mean "the exclusive right, by virtue of, and subject to the provisions of, this Act to do or authorise the doing of any of the following acts by utilising the record, namely:

> (i) to make any other record embodying the same recording;
>
> (ii) to cause the recording embodying in the record to be heard in public;
>
> (iii) to communicate the recording embodied in the record by radio diffusion" [Section 14(l)(*d*)].

Sections 17 to 21 deal with 'Ownership of Copyright and the rights of the owner', Sections 22 to 29 with 'Term of Copyright', Sections 30 to 32 with 'Licences', Sections 33 to 36 with 'Performing Rights Societies', Sections 37 to 39 with 'Rights of Broadcasting Authorities', Sections 40 to 43 with 'International Copyright' and Sections 44 to 50 with 'Registration of Copyright'. Sections 51 to 53 deal with 'Infringement of Copyright'.

24. Section 51 states when copyright in a work shall be deemed to be infringed. In particular clause (*b*) states that copyright shall be deemed to be infringed

> when any person—
>
> > (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
> >
> > (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
> >
> > (iii) by way of trade exhibits in public, or
> >
> > (iv) imports (except for the private and domestic use of the importer) into India,
>
> any infringing copies of the work.

There is an explanation to which it is not necessary to refer for the purposes of this case.

25. Section 52 enumerates the acts which shall not constitute an infringement of copyright. It is unnecessary to refer to the various acts enumerated in Section 52; it is enough to state that bringing into India an infringing work for the purpose of transit to Nepal or any other country is not one of the excepted acts.

26. Section 53 which is of direct relevance as it deals with 'importation of infringing copies' needs to be fully extracted. It says:

> 53. (1) The Registrar of Copyrights, on application by the owner of the copyright in any work or by his duly authorised agent and on payment of the prescribed fee, may, after making such enquiry as

he deems fit, order that copies made out of India of the work which if made in India would infringe copyright shall not be imported.

(2) Subject to any rules made under this Act, the Registrar of Copyrights or any person authorised by him in this behalf may enter any ship, dock or premises where any such copies as are referred to in sub-section (1) may be found and may examine such copies.

(3) All copies to which any order made under sub-section (1) applies shall be deemed to be goods of which the import has been prohibited or restricted under Section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly:

Provided that all such copies confiscated under the provisions of the said Act shall not vest in the Government but shall be delivered to the owner of the copyright in the work.

This provision empowers the Registrar of Copyrights to make an order that copies made out of India of any work which if made in India would infringe copyright, shall not be imported.. This the Registrar may do on the application of the owner of the copyright in that work or by his duly authorised agent on payment of the prescribed fee and after making such enquiry, as he deems fit. The effect of such an order by the Registrar is to deem all copies to which the order applies to be goods of which the import has been prohibited or restricted under Section 11 of the Customs Act, 1962, and to attract all the provisions of the Customs Act on that basis, including the liability to be confiscated, with the slight modification that copies confiscated under the provisions of that Act shall not vest in the Government, but shall be delivered to the owner of the copyright.

27. The question is what does the word 'import' mean in Section 53 of the Copyright Act? The word is not defined in the Copyright Act though it is defined in the Customs Act. But the same word may mean different things in different enactments and in different contexts. It may even mean different things at different places in the same statute. It all depends on the sense of the provision where it occurs. Reference to dictionaries is hardly of any avail, particularly in the case of words of ordinary parlance with a variety of well-known meanings. Such words take colour from the context. Appeal to the Latin root won't help. The appeal must be to the sense of the statute. Hidayatullah, J. in *Burmah Shell* v. *Commercial Tax Officer* has illustrated how the contextual meanings of the very words 'import' and 'export' may vary.

28. We may look at Section 53, rather than elsewhere to discover the meaning of the word 'import'. We find that the meaning is stated in that provision itself. If we ask what is not to be imported, we find that the answer is copies made out of India which if made in India would infringe copyright. So it follows that 'import' in the provision means bringing into India from out of India. That, we see is precisely how import is defined

under the Customs Act. Section 2(23) of the Customs Act, 1962 defines the word in this manner: "Import, with its grammatical variation and cognate expression means bringing into India from a place outside India". But we do not propose to have recourse to Customs Act to interpret expressions in the Copyright Act even if it is permissible to do so because Section 53 of the Copyright Act is made to run with Section 11 of the Customs Act.

29. It was submitted by the learned counsel for the respondents that where goods are brought into the country not for commerce, but for onward transmission to another country, there can, in law, be no importation. It was said that the object of the Copyright Act was to prevent unauthorised reproduction of the work or the unauthorised exploitation of the reproduction of a work in India and this object would not be frustrated if infringing copies of a work were allowed transit across the country. If goods are brought in, only to go out, there is no import, it was said. It is difficult to agree with this submission though it did find favour with the Division Bench of the Calcutta High Court, in the judgment under appeal. In the first place, the language of Section 53 does not justify reading the words 'imported for commerce' for the words 'imported'. Nor is there any reason to assume that such was the object of the Legislature. We have already mentioned the importance attached by international opinion, as manifested by the various international conventions and treaties, to the protection of copyright and the gravity with which traffic in industrial, literary or artistic property is viewed, treating such traffic on par with traffic in narcotics, dangerous drugs and arms In interpreting the word 'import' in the Copyright Act, we *must* take note that while the positive requirement of the Copyright Conventions is to protect copyright, negatively also, the Transit Trade Convention and the bilateral Treaty make exceptions enabling the Transit State to take measures to protect copyright. If this much is borne in mind, it becomes clear that the word 'import' in Section 53 of the Copyright Act cannot bear the narrow interpretation sought to be placed upon it to limit it to import for commerce. It must be interpreted in a sense which will fit the Copyright Act into the setting of the international conventions.

30. The Calcutta High Court thought that goods may be said to be imported into the country only if there is an incorporation or mixing up of the goods imported with the mass of the property in the local area. In other words the High Court relied on the 'original package doctrine' as enunciated by the American Court. Reliance was placed by the High Court upon the decision of this Court in the *Central India Spinning and Weaving & Mfg. Co. Ltd., The Empress Mills, Nagpur* v. *Municipal Committee, Wardha.* That was a case which arose under the C.P. and Berar Municipalities Act and the question was whether the power to impose "a terminal tax on goods or animals imported into or exported from the limits of a municipality" included the right to levy tax on goods which "were

neither loaded nor unloaded at Wardha but were merely carried across through the municipal area". This Court said that it did not. The word 'import', it was thought meant not merely the bringing into but comprised something more, that is "incorporating and mixing up of the goods with the mass of the property in the local area", thus accepting the enunciation of the 'original package doctrine' by Chief Justice Marshall in *Brown* v. *State of Maryland.* Another reason given by the learned Judges to arrive at the conclusion that they did, was that the very levy was a 'terminal tax' and, therefore, the words 'import and export', in the given context, had something to do with the idea of a terminus and not an intermediate stage of a journey. We are afraid the case is really not of any guidance to us since in the context of a 'terminal tax' the words 'imported and exported' could be construed in no other manner than was done by the Court. We must however say that the 'original package doctrine' as enunciated by Chief Justice Marshall on which reliance was placed was expressly disapproved first by the Federal Court in the *Province of Madras* v. *Boddu Paidanna* and again by the Supreme Court in *State of Bombay* v. *F.N. Balsam.* Apparently, these decisions were not brought to the notice of the court which decided the case of *Central India Spinning and Weaving & Mfg. Co. Ltd., The Empress Mills, Nagpur* v. *Municipal Committee, Wardha.* So we derive no help from this case. As we said, we prefer to interpret the words 'import' as it is found in the Copyright Act rather than search for its meaning by referring to other statutes where it has been used.

31. The learned counsel for the appellant invited our attention to *Radhakishan* v. *Union of India; Shawhney* v. *Sylvania and Laxman; Bernado* v. *Collector of Customs,* to urge that importation was complete so soon as the customs barrier was crossed. They are cases under the Customs Act and it is needless for us to seek aid from there when there is enough direct light under the Copyright Act and the various conventions and treaties which have with the subject 'copyright' from different angles. We do not also desire to crow our judgment with reference to the history of the copyright and the customs legislations in the United Kingdom and India as we do not think it necessary to do so in this case.

32. We have, therefore, no hesitation in coming to the conclusion that the word 'import' in Sections 51 and 53 of the Copyright Act means "bringing into India from outside India", that it is not limited to importation for commerce only, but includes importation for transit across the country. Our interpretation, far from being inconsistent with any principle of international law, is entirely in accord with International Conventions and the Treaties between India and Nepal. And, that we think is as it should be.

33. We have said that an order under Section 53 may be made by the Registrar of Copyrights on the application of the owner of the copyright, but after making such enquiry as the Registrar deems fit. On the order being made the offending copies are deemed to be goods whose import has been prohibited or restricted under Section 11 of the Customs Act.

Thereupon the relevant provisions of the Customs Act are to apply, with the difference that confiscated copies shall not vest in the Government, but shall be delivered to the owner of the copyright. One fundamental difference between the nature of a notification under Section 11 of the Customs Act and an order made under Section 53 of the Copyright Act is that the former is quasi-legislative in character, while the latter is quasi-judicial in character. The quasi-judicial nature of the order made under Section 53 is further emphasised by the fact that an appeal is provided to the Copyright Board against the order of the Registrar under Section 72 of the Copyright Act. We mention the character of the order under Section 53 to indicate that the effect of an order under Section 53 of the Copyright Act is not as portentous as a notification under Section 11 of the Customs Act. The Registrar is not bound to make an order under Section 53 of the Copyright Act so soon as an application is presented to him by the owner of the copyright. He has naturally to consider the context of the mischief sought to be prevented. He must consider whether the copies would infringe the copyright if the copies were made in India. He must consider whether the applicant owns the copyright or is the duly authorised agent of the copyright. He must hear those churning to be affected if an order is made and consider any contention that may be put forward as an excuse for the import. He may consider any other relevant circumstance. Since all legitimate defences are open and the enquiry is quasi-judicial, no one can seriously complain.

34. In the result, the judgment of the Division Bench is set aside and that of the learned single Judge restored. There is no order as to costs. We are grateful to the learned Attorney-General, who appeared at our instance, for the assistance given by him.