
(1984) 08 DEL CK 0030
In the Delhi High Court
Case No : First Appeal No. 93 of 1983

Penguin Books Ltd.

APPELLANT

Vs

India Book Distributors and Others

RESPONDENT

Date of Decision : 01-08-1984

Acts Referred:

Citation : AIR 1985 Delhi 29 : (1984) 26 DLT 316 : (1985) 1 ILR Delhi 35

Hon'ble Judges : Gian Chand Jain, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : B.R. Aggarwal, P.B. Agarwal, Soli J. Sorabjee, J.M. Mukhi, P.B. Agarwala, N.A. Ajmerwala and P.B. Agarwal, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) The appellants, Penguin Books Ltd of England original plaintiffs brought a suit for perpetual injunction against the respondents, M/s. India Book Distributors of New Delhi, Bombay, Madras, Calcutta (original defendants) restraining them from infringing Penguins' territorial c[license in 23 books, the subject matter of the suit. Admittedly India Book Distributors, Bombay are importing, distributing and offering for sale in India 13 out of these 23 titles. Some of these books arc well known works such as Animal Farm by George Orwell, Far Pavilion, Shadow of the Moon. both by M. M. Kaye. Some are recent publications such as Celebrity by Thomas Thompson, Lacs by Shiriey Conran.

(2) Penguins asked for a temporary injunction in the suit. The application was heard by a learned single judge on the original side of this court where the suit was instituted. He refused the injunction. From his order of refusal Penguins appeal to this court.

(3) The learned judge formed the view that by reason of the consent decree which was passed by the district court in the United States of America Penguins were disentitled to claim the equitable relief of injunction. What had happened was this. The U.S. Government brought a suit against various publishers, British

and American including Penguin:, Inc., on the complaint that their agreements were in breach of the Anti-Trust: suit ended in a consent judgment.

(4) Clauses V and Vi of the consent decree provide as follows

"V. Each defendant is enjoined and restrained, directly or indirectly, from preventing or restricting any purchaser of a lawfully published book from importing or exporting such book to or from the limited States or such purchaser from selling, distributing or providing for the resale of such Book to customers in United States interstate or foreign commerce."

VI. "Nothing in this Final Judgment shall prevent any defendant, in and of itself, from acquiring, granting or otherwise transferring exclusive or non-exclusive copyright rights, or from exercising or authorising the exercise of such rights under the copyright law of any country, including the United States, or from the assertion of such other statutory rights as such defendant may have, provided that no foreign copyright law or other foreign statutory right may be used by any defendant to exclude or restrict the importation or resale in the United States of a lawfully published Book

(5) The learned judge on a construction of these clauses came to the conclusion that Penguins cannot prevent any purchaser of lawfully published books in America from importing them into India. He said : "On a plain reading of the clauses, it is clear that liberty is given to any purchaser in any part of the world to purchase lawfully published books in America and to export them wherever he likes."

(6) At one stage Penguins" attorney denied the knowledge of the consent decree. Later on he admitted that that was so. The learned judge was of the opinion that Penguins had not come with clean hands. In any case, he held, they had "cut off their hands" by being a consenting party to the decree. He said : "Before anybody approaches the court of equity for discretionary relief, he has to come with clean hands. What to talk of clean hands, the plaintiffs have already cut off their hands."

(7) Several contentions were raised in the appeal. Firstly Penguins argued that the consent decree was not a bar to the assertion of their statutory rights under the Copyright Act, 1957 of India. From the various agreements filed by Penguins it appears that they are the licensees or assignees of territorial rights in the copyright of the subject books as regards India. They being the exclusive licensees it is claimed that Penguins are entitled to restrain India Book Distributors (India Distributors) from importing the parallel American editions of these 23 titles in India. India Distributors deny the title of Penguins. In my opinion there is a prima facie proof of their being licensees of the books in question. Whit ford Committee observed that "the practice of challenging title is very often no more than abuse of process." (p. 186).

(8) On the consent decree my view is that clause V has no extra-territorial

effects. It prohibits the publishers from entering into agreements which are hit by the Anti-Trust- Laws of the United States. "All jurisdiction is properly territorial." (*Gurdayal Singh v. Raja of Faridkot* (1895) 22 Cal. 222(1). It was said long ago by Story J. in the Supreme Court of the United States in *The Apollo* (1924) 9 Whe 362(2), 370 : "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." And in his book, *Story's Conflict of Laws* 2nd ed. (1841) p. 26, he said : "No state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein." U.S. is a foreign state. It is an independent sovereign government which exercises sovereign authority over its own territory, and which, by international law, has no right to exercise sovereign authority beyond its own territorial limits.

(9) As with legislatures so with courts. No court can pass a decree so as to affect the rights of persons outside their jurisdiction. This is clear from clause Vi which is in the nature of a proviso. The courts in India cannot recognise the extra territorial jurisdiction of a District Court of the United States, notwithstanding the comity of nations. The writ of the United States does not run in this . country. Clause Vi is a saving clause. Its object is to save the rights which are subject to the protection of foreign courts namely, courts other than those in the United States. Clause V does not destroy or qualify the statutory rights belonging to the publishers which they may have in foreign countries under regional arrangements. (*See British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, 69 Rpc 288(3) affirmed in 71 Rpc 327).

(10) Copyright law is a territorial concept and each nation has its own laws. In America in. America it may not be possible to place restrictions on the resale of books. But sale within the United States obviously cannot abrogate the effect of the laws of the particular place where they are imported. It appears to me that an importer would be subject to the law of the particular country to which he happens to take the books. The importer cannot disregard the laws of other countries. I would decide against the freedom ("liberty" as the learned judge phrased it) from restriction claimed by India Distributors. The learned judge upheld this freedom. In my respectful opinion he was wrong, American books cannot be sold into India so as to defeat the rights of the exclusive licensee.

(11) Mr. Mukhi, counsel for the defendants, submitted that the gist of the consent decree is that there will be no ban on American editions in 70 countries of the British traditional market. The learned judge accepted this contention. In my opinion this is not a sound view. Whatever may be the position under American law, its "interstate or foreign commerce" (meaning is certain. Penguins have not renounced their foreign copyrights in the subject books.

(12) Counsel for the plaintiffs contended that the importation of American editions for the purpose of resale in India is an infringement of copyright of Penguins. They have a territorially exclusive license for India. Therefore the act of importation of American books by the defendants must be shown to have been

licensed. "Importation is forbidden unless a license has been given." If this view is not taken, not only will the procedure of granting exclusive licenses for particular areas of copyright be seriously undermined, but the national division of copyright set up under the system of International Copyright Convention in so far as it provides for partial assignments and exclusive licenses, both vertical and horizontal, would to a significant degree be subverted. (*Time-Life International v. Interstate Parcel Express Co.* (1978) FSR 251(4) per Bowen CJ).

(13) For the purposes of this application it was conceded by Mr. Michael Fysh, counsel for Penguins, that Penguins Inc. and Penguins Ltd. may be taken to be the same. He made it clear that concession was solely for the purposes of this motion and that does not prejudice any contention that Penguins may like to put forward upon that matter when the suit comes to trial.

(14) On the construction of the consent decree I am of opinion that copyright is a species of property and an effective right to use the copyright can be asserted in India by Penguins notwithstanding the fact that they were consenting parties to the U.S. judgment. I cannot accept the view of the learned judge that they had "cut off their hands" and bartered away their rights.

(15) The learned judge took the view that Penguins had not come with clean hands. He who comes into equity must come with clean hands. This is true. But if at one stage Penguins' attorney denied the existence of the consent decree it does not follow that he could act to rectify the error by admitting the fact of the consent decree. The denial was born of ignorance. The denial was retracted. The maxim of clean hands must not be taken too widely. "Equity does not demand that its suitors shall have led blameless lives", as Brandeis J. said. (*Loughran v Loughran* 292 U.S. 216(5)). What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for." (Snell's Equity 28th ed. p. 33).

(16) There was no bad faith. It was an innocent failure to disclose a material fact. The maxim withholds assistance of court where the wrongdoer is trying to enjoy the fruits of his own wrong. It is not a maxim of which a defendant can take advantage. It is a self-imposed ordinance that closes the door of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.

(17) Secondly, Messrs Sorabjee and Mukhi, counsel for India Distributors, argued that importation of lawfully published books from America into India is not an infringement under the Copyright Act, 1957 (the Act). This is a fallacious argument. The expression "owner of copyright" includes an exclusive licensee. (Section 54(a)). Exclusive licensee is defined in section 2(g) as a licensee having "any right comprised in the copyright" in a work to the exclusion of all other persons including the owner of the copyright. Licenses may be limited in time, territory and scope. Assignment either wholly or partially of the rights of the copyright owner is permissible under the Act (Section 18).

(18) Now Penguins are exclusive licensees as they are the assignees of copyrights from the authors in some cases and publishers in others and have an exclusive right to print, publish and market these twenty three titles in India. Section 55(1) provides "civil remedies" for infringement of copyright, namely, injunction, damages, accounts "as are or may be conferred by law for the infringement of a right". So Penguins are entitled to sue "for the infringement of a right".

(19) It is not the case of India Distributors that they were not aware of Penguins' copyright or had no knowledge that copyright subsisted in them under a territorial arrangement with the authors or publishers of those books. Penguins are the assignees of the copyright and "entitled to any right comprised in the copyright so assigned." (Section 18(2)).

(20) Copyright means the "exclusive right" in the case of a literary work to do or authorise the doing of the following among others : (i) to reproduce the work in any material form; (ii) to publish the work. (Section 14(1)(a)(i) and (ii)).

(21) Section 51 deals with infringement of copyright. It is a basic provision. It says : "51. Copyright in a work shall be deemed to be

(A) Infringing when any person, without a license granted by the owner of the Copyright or the Registrar at Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act

(i) does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright, or (ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had not reasonable ground for believing that such performance would be an infringement of copyright, or

B)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.

Explanation .For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film Shall be deemed to be an "infringing copy".

(22) Importation of books which are "infringing copies of the work" is an infringement. So is the sale thereof. If any person, without the license of the copyright owner, imports into India for the purpose of selling or distributing for purposes of trade the literary work the copyright is infringed. Any importation of

infringing copies is Therefore an infringement unless it is for the importer's own use. American books may be lawfully published in America. But when the copies of those publications are imported into this country, an action for infringement would lie in this country against the importer in respect of those copies. An action would also lie against any person who for instance sold or distributed such copies here. Because the books have been imported and sold without the license of the owner of the copyright or his exclusive licensee.

(23) "infringing copy" is defined in section 2(m). An infringing copy means a copy "imported in contravention of the provisions of the Act." The central provision in section 51 which says that copyright shall be deemed to be infringed where any person without a license granted by owner of the copyright "does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright." The owner of the copyright or his licensee has the "exclusive right" of printing, or otherwise multiplying, publishing and vending copies of the copyrighted literary production in India. India Distributors are infringing this right. Therefore, India Distributors are dealers in "infringing copies". They are handling unlicensed copies.

(24) This is abundantly made clear by the Act in Section 53(1). It empowers the Registrar of Copyrights to "order that copies made out of India of the work which if made in India would infringe copyright shall not be imported." This is the acid test. It is a misuse of words to say that the expression "infringing copy" has one meaning in section 51(b)(iv) and a different in Section 53. The essence of the thing is unauthorised appropriation or use of another man's property. It amounts to taking what is not yours. It is an improper use of that which does not belong to you. It has been well said : "The position of the person dealing in infringing copies is in fact similar to that of the "receiver", the person dealing in stolen property. (S. M. Steward International Copyright 1983 ed. p. 80). In importation it is the locals that matters. Territorial division and geographical area are of importance. Outside a defined territory the sale of a copyrighted work constitutes a sale of an "infringing copy". Because there is infringement of territorial restrictions. Penguins" case is that they hold a territorially exclusive license coupled with an interest so far as India is concerned. Generally speaking, whenever there is misappropriation of intellectual property of which the primary beneficiary is the copyright owner there is infringement of copyright. Copyright is a property right. Throughout the world it is regarded as a form of property worthy of social protection in the ultimate public interest. The law starts from the premise that protection should be as long and as broad as possible and should provide only those exceptions and limitation which are essential in the public interest. The courts adopt a "purposive" approach to statutes.

(25) Importation of "infringing copies" is prohibited by the Act. Because if made in India these titles would infringe the copyright of Penguins. Not only this. India Distributors arc "publishing" these titles. Publication means in the case of a Itinerary work, "the issue of copies of the work, either in whole or in part, to the

public in a manner sufficient to satisfy the reasonable requirements of the public having regard to the nature of the work." (Section 3 as amended by the Copyright (Amendment) Act 1983). The Act treats infringement of copyright as "infringement of a right" in property. Copyrights considered as unique forms of property and monopoly, are essentially pecuniary rights. In its most elementary form copyright means "the exclusive right to multiply copies of a book."

(26) It is true that India Distributors are not printing these books and are not guilty of what is called primary infringement. But when they issue copies of these titles for public distribution they are guilty of secondary infringement. The leading case on the point is *Time-Life International (Netherlands) v. Interstate Parcel Express Co. Pvt. Ltd.* (1978) FSR 251. The High Court of Australia construed the Australian Copyright Act which for present purposes is substantially the same as; our Act. The court held that an importer who purchased books in the United States of America from the American licensee of the copyright infringed the Australian Act by importing the books into Australia without the license of the Australian licensee. The importer argued that he had an implied license to import and sell the books by reason of the sale in America in the ordinary course of business without any restriction upon resale. It was held that there was no license, express or implied, that the buyer of a subject to copyright obtained rights no more and no less than the buyer of any other chattel, and that the rights which flowed from the acquisition of ownership and possession did not revolve any implied license. The same view was taken by the court of Appeal in England in *Polydor Ltd. v. Harlequin Record Shop* (1980) FSR 362(6).

(27) Thirdly counsel for India Distributors argued that the suit was a misconceived remedy and Penums remedy, if any, lay with the Registrar of Copyrights, He strongly relied on section 53 which 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 inquiry 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 subsection (1) may be found and may examine such copies.

(3) All copies to which any order made under subsection (1) applies shall be deemed to be goods of which the import has been prohibited or restricted u/s 19 of the Sea Customs Act, 1878 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."

(28) We were referred to Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others, in this connection.

(29) In my opinion this argument is meritless. Section 53 gives an additional remedy. It empowers the Registrar to enter any ship, dock or premises where the copies of which import is prohibited are to be found. He can confiscate such copies. The copies so confiscated do not vest in the Government but are to be delivered to the owner of the copyright in the work. This section deals with what Mr. Fysh called the "go down situation" where on the tip received from the owner of the copyright (who must apply to him) the Registrar of Copyright is given the power to confiscate copies from the ship, dock or premises where any such copies of which import is prohibited may be stored. Unless specific information can be given about importations which are expected to occur the Registrar cannot act.

(30) Section 53 is no bar to the owner of the copyright or licensee from claiming "civil remedies" for infringement of copyright given in Ch. XII. Section 53 cannot be called a "civil remedy" notwithstanding the fact that the Registrar is enjoined to make an "inquiry" into the matter of importation of "infringing copies" u/s 53. The "inquiry" is at best quasijudicial. It cannot be equated with a judicial or "civil remedy" "conferred by law for the infringement of a right". (Section 55).

(31) If copyright is to possess any value to its owner, it must be capable of enforcement. Laws in general are enforced in one of two ways : (i) publicly, by means of the police, custom officers, or similar agency, such as Registrar of Copyright, or (ii) privately by legal action taken by the person who suffers from any breaches of the law. Most copyright law falls into the second category, for copyright is in essence a private legal right. It is for the owner of the copyright to go to court to prevent a wrong from taking place or to seek redress when a wrong has taken place. It is for the copyright owner to seek a "civil remedy" for any infringement (actual or potential) of his legal interest. (Whale on Copyright (1983) ed. 119).

(32) Section 53 deals with importation of prohibited goods. This is why the Sea Customs Act, now of 1962 has been made applicable. Under Rule 23 the Registrar of Copyrights acts in collaboration with the Customs Authorities. In the inquiry the Registrar decides whether a copy is an "infringing copy" and whether its import is prohibited. If he finds importation is prohibited he confiscates the copies. Section 51, on the other hand, deals with infringement of copyright. For infringement "civil remedies" are given in section 55. They are injunctions, damages and accounts. Confiscation is not provided. Nor has the Customs Act any application. Confiscation is provided in section 53 by Registrar and in section 65 by magistrate dealing with offences. So the nature of the remedy is different. It is true that in each case the common factor is an "infringing copy". But remedies are different. u/s 53 it is confiscation. In section 51 injunction,

damages and accounts. In section 66 imprisonment, fine and delivery of infringing copies to the copyright owner.

(33) I have Therefore no hesitation in rejecting the argument that suit is not competent.

(34) Counsel for the India Distributors referred us to inc decision of House of Lords in *In fabrics Ltd. v. Jaytex Ltd.* 1981 (1) All E R 1057(8). These were the facts. I, was the copyright owner of a fabric design J. saw a fabric in Hong Kong which he imported, made into shorts and sold. He continued selling some shirts after he received a letter before action informing that I owned the copyright in the design and that the Hong Kong fabric was an infringement. It was held that conversion damages were assessable on the full retail value of the shirts.

(35) In that case the court held that section 49(2) (e) of the English Copyright Act of 1956 referred only to the meaning of "publication" for the purpose of deciding whether an original work was published, and not for the purpose of ascertaining whether an allegedly infringing work constituted a publication of that original work. The House ruled that "publishing" for the purpose of infringement, simply meant making public what had previously been unpublished. Thus the making of copies of a work already published will not constitute infringement on the ground of "publishing" the work.

(36) This case, in my opinion, does not help India Distnouters. In the English Act there is no definition of "publication" as is given in section 3 of the Indian Act. Issue of copies for public distribution is publication. Of publication in India the right is given to Penguins under an exclusive license. What matters is the issue of copies in India for purposes of infringement. Whether they have already been published lawfully in America is of little consequence. The importation, sale and public distribution of American editions constitute infringement of copyright of the exclusive licensee.

(37) While publication generally refers to issue to public. importation for the specified purpose may be a necessary step in the process of issuing to the public, and Therefore of publishing. It appears to me that the exclusive right of Penguins to print, publish and sell these titles in India would extend to the exclusive right to import copies into India for the purpose of selling or by way of trade offering or exposing for sale the books in question. [Time-Life (*supra*) p. 267]. This is the true meaning of the word "publish" as used in section 14(1)(a)(4).

(38) It is also an infringement of copyright knowingly to import into India for sale or hire infringing copies of a work without the consent of the owner of the copyright, though they may have been made by or with the consent of the owner of the copyright in the place where they were made. In America the subject books were lawfully published, it is true. But they cannot cross the borders of India without infringing the copyright of -the exclusive licensee. [See *Clarke Irwin & Co. Ltd. v. C. Code Co. Ltd.*, 22 Dlr (2nd) p. 183. 186 (Canada)]

(39) Counsel for the defendants next argued that prohibition to import these American publications into India will be in breach of the provisions of Monopolies and Restrictive Trade Practices Act. I am not impressed by this argument. It is true that copyright is a monopoly, but all monopolies are not evil. This monopoly is a statutory creature. (See section 16). Copyright is the creation of the Act. As at present advised I am not prepared to hold that these provisions are in conflict with the statutory provisions contained in the Monopolies Act or the Contract Act.

(40) After the conclusion of arguments we asked parties counsel to address us on the question of jurisdiction in view of the fact that section 62 of the Act requires suit or other civil proceeding in respect of the infringement of copyright to be instituted in the district court having jurisdiction. We heard arguments. The consistent view of the courts in India is that the expression "district court" will include the High Court having original jurisdiction. [See section 2(4), CPC and *Bakshi Lochan Singh v. Jathedar Santokh Singh*, (1971) 1 Del 615 (10). *The Tata Oil Mills Co. Ltd. v. Hansa Chemical Pharmacy* (1979) 2 Del 236 (11), *The Daily Calendar Supplying Bureau, Sivakasi Vs. The United Concern*, and *Maheswar Swain Vs. Bidyut Probha Art Press and Another*, .

(41) Last but not the least important is the question of balance of convenience. Counsel for Penguins submitted that in copyright actions temporary injunctions are usually sought and granted since damages are rarely an adequate remedy. Counsel for India Distributors, on the other hand, argued that the learned judge had ordered them to maintain accounts and that was sufficient to safeguard the interest of Penguins pending trial.

(42) In *American Cyanamid v. Ethicon* (1975) AC 396 (14) the House of Lords laid down the process through which it should go before granting an injunction

(1) Is there a serious issue to be tried? If there is not no injunction will be issued. If there is, then the court moves to the second question;

(2) If the plaintiff can be adequately compensated by damages at trial no injunction will be issued. If the defendant can be adequately compensated at trial by the plaintiff's undertaking to pay the defendant his damages, then an injunction should be ordered.

(3) If there is no clear answer to either question then the court should attempt to determine whether the defendant would suffer greater inconvenience if the injunction were granted, or the plaintiff if it is not granted. This is known as the "balance of convenience" test.

(4) It is only if the "balance of convenience" test does not resolve the matter that the court should look at the relative strength of the parties' case as revealed by their affidavit evidence.

(43) Applying these principles to the facts of this case find that the balance of convenience is in favor of Penguins. There is prima facie an infringement of an "exclusive right".

A continuance or repetition of infringement is threatened in future as well. In such circumstances the injured owner of an "exclusive right" may demand that the state of affairs which is contrary to law be rectified. He can ask for injunction restraining the party threatening the infringement. India Book Distributors have recently set up their business after separating from India Book House in 1980 or thereabout. Counsel for India Book Distributors told us this. In a publication of the British Council entitled "British Publishers" representatives in India" at p. 56 India Book Distributors Bombay are shown as the principal concern of which Calcutta, Madras and New Delhi offices are shown as "branches". This is controverted by India Book Distributors Bombay who claim that these are separate concerns. This may or may not be so. Whether they are one or different all must be restrained if I hold that Penguins are entitled to injunction.

(44) As most infringements of copyrights consist of a continuous process of successive infringing acts such as importation of "infringing copies" as in this case, the most important remedy and in many cases the only effective one is the injunction. This is always in the discretion of the court and the court has to weigh the possible damage to the plaintiff if the injunction is not granted against the possible damage to the defendant if it is granted. "Thus once the infringement and its continuance is proved the plaintiff will usually be entitled to an injunction, but the injunction would not be granted if the damage caused to the defendant by granting the injunction would be out of all proportion to the seriousness of the infringement or to the possible damage to the plaintiff.

(45) Here is a case of indirect infringement which the India Distributors are committing by importation and sale of titles of which the exclusive licensees are Penguins so far as India is concerned. They have prima facie shown to us that (a) They are the exclusive licensees from the copyright owners, and (b) that the India Distributors are handling "infringing copies" knowingly because even after notice dated 3-4-83 was seized on them by Penguins they did not stop sale and importation. They were not prepared to remove the cause of complaint by discontinuing the sale of those titles. The most telling circumstance in this case is that the American editions which are infringing copies are being sold at lower prices than the British Penguins in this country.

(46) Ignorance is not a defense before us. The burden of proof in copyright infringement cases is on the defendant. He has to show that he did not know or had no reasonable grounds for suspecting that the copies in his possession which he was importing, buying or selling were infringing copies. [See proviso to section 55(1) and section 51(a)(ii)]. This is not the defendants' case before us.

(47) In actions for infringement of copyright damages are often not an adequate remedy since there are difficulties in both ascertaining and quantifying such damage as injury to the plaintiff's property, business and goodwill (Copinger Copyright 12th ed p. 623). This applies to Penguins who can justly complain of injury to their worldwide business and goodwill. Some of the titles in question are highly topical titles. Penguins is a household word in English speaking countries.

This is a measure of their goodwill. Taking into account the relative strength of each party's case as revealed by affidavit evidence adduced on the hearing of the application I think this is a case in which injunction is the proper remedy. I am of opinion that balance of convenience lies in granting rather than refusing injunction.

(48) It was said that if injunction is issued India Distributors will lose their import licenses. The short answer to this is that the court cannot be a party to infringements of rights in order that the defendants' import entitlements do not diminish. Dealing in infringing copies is not a lawful trade. I would restrain the commission and continuance of the wrongful act.

(49) For these reasons I would set aside the order dated 2-8-83. I would allow the appeal and issue an injunction restraining defendants I to 4 by themselves, their servants, agents, dealers, stockists from infringing the plaintiffs' territorial copyrights/rights/license by importing, distributing and offering for sale in India the 13 titles which admittedly they are importing into India. I would permit the defendants to sell their existing stocks as on the date of this order. But no further imports will be made. The defendants will keep accounts of the sale of the existing stocks and submit the same in court every three months. They will also submit an account of their existing stocks within a week.

(50) The plaintiffs are ordered to furnish within one month a bank guarantee in the sum of Rs. one lakh as a cross-undertaking in damages for the loss which the defendants may sustain in case the plaintiffs fail in the suit.

(51) The learned judge awarded heavy costs against the plaintiffs. I think the proper way to deal with costs of this appeal and the costs below is to make them costs in the cause. If the plaintiffs succeed in the suit they will get their costs. If they fail they will have to pay them.

(52) One word more before I hold my peace. In an interlocutory appeal the loss said about the merits of the case the better. Needless to say that what I have said here will not prejudice either party at the trial.

(53) I would order an expeditious trial.