
(1958) 08 BOM CK 0003

In the Bombay High Court

Case No : Misc. No. 137 of 1957 and Appeal No. 7 of 1958

Glaxo Laboratories (India) Private Ltd.

APPELLANT

Vs

A.V. Venkateswaran and Another

RESPONDENT

Date of Decision : 26-08-1958

Acts Referred:

Constitution of India, 1950 — Article 226

Sea Customs Act, 1878 — Regulation 62, 167, 182, 188, 191

Citation : AIR 1959 Bom 372 : (1959) 61 BOMLR 1 : (1959) ILR (Bom) 923

Hon'ble Judges : Chagla, C.J.; S.T. Desai, J

Bench : Division Bench

Advocate : H.M. Seervai, General, R.J. Joshi and N.A. Palkhivala, for the Appellant; N.P. Engineer and V.J. Taraporevala, for the Respondent

Judgement

Chagla, C.J.—Although the ultimate question that we have to decide in this appeal lies in a very narrow compass, it raises certain questions of considerable public importance. The appellants before us are a company registered in India and they deal in antibiotics, pharmaceuticals and foods, and for the purpose of their business they have been importing into India since about February 1951 large quantities from Glaxo Laboratories Ltd., U.K. of Vitamin B.12 in bulk of the value of several lakhs of rupees every year. The appellant company admittedly is a subsidiary company of the English company. From February 1951 to May 1955 the appellants entered in their bill of entry for the purpose of customs duty the invoice value of the goods. Between June 1955 to May 1956 they showed the real value of the goods as the wholesale price of the goods in the United Kingdom, and after May 1956 they reverted to their original practice of showing the invoice value. In this appeal we are concerned in all with 10 consignments. The first six consignments arrived in India in April 1956 and September 1956 and the value of these consignments was shown in the bill of entry as ₹. 72-73 per gram. This was the invoice price. The Customs authority did not accept the invoice value and assessed these six consignments on the basis of the price of ₹. 87-10-0 per gram and levied assessment on that basis. Thereupon the appellants

made applications for refund claiming the difference between ₹. 87-10-0 per gram and ₹. 72-3-9 per gram. The Customs authority on its part issued what has been described as short levy notices. These notices were in respect of liability to pay a larger amount and it was stated in these short levy notices that pending finalisation of the investigation an amount was mentioned as an anticipated less charge. After the six consignments had arrived, the price of vitamin B.12 was reduced from ₹. 72-3-9 to ₹. 65-2-3. The 7th consignment arrived in November 1956, 8-12-1956 and 9-2-1957, and the appellants prepared their bill of entry with regard to these three consignments on the basis of the invoice price. In respect of these three consignments short levy notices were issued by the Customs authority on the basis that the appellants were liable to pay 12 1/2 per cent in addition to the invoice price. The goods were passed on the basis of the amount entered in the bill of entry by the appellants, but the assessment was not accepted by the Customs authority, and therefore the short levy notices were issued. With regard to the first six consignments prior to the date of the petition which the appellants filed, the short levy notices were withdrawn and as a matter of fact a certain amount was refunded by the Customs authority because it was found that even on the basis that they had adopted the amount at which the goods had been assessed was not the prior amount. With regard to the short levy notices in respect of consignments 7, 8 and 9, they were followed up by a demand notice which called upon the appellants to pay the amount in respect of which the short levy notices were issued. The 10th consignment with which we are concerned is the consignment of 10-3-1957 and, without going into unnecessary details, as far as this consignment was concerned the final order of assessment was made by the Collector himself on 15-4-1957 and the assessment of this consignment was also made on the basis that the appellants were liable to pay 12 1/2 per cent more than the invoice value. The invoice value which was accepted for the purpose, as we shall presently point out, was the invoice of Messrs. Voltas Ltd. This petition was filed challenging the order of assessment with regard to the six consignments and for a direction that the refund application made by the appellants should be disposed of by the Customs authority. With regard to the 7th, 8th and 9th consignments, the challenge was made against the short levy notices which were served upon the appellants and, as pointed out, in respect of which a notice of demand had been sent by the Customs authority. With regard to the 10th consignment, the challenge was against the order of assessment passed, as pointed out, by the Collector.

2. The narrow issue that arises in this case for our determination, and which is a matter of controversy between the appellants and the Customs authorities, is this. What the Customs authorities have done and what they seek to justify is that they have taken into consideration identical goods Vitamin B.12 manufactured by Glaxo Ltd. of United Kingdom and imported by Voltas Ltd. and added to the invoice price shown in the invoice of Voltas Ltd. 12 1/2 per cent discount and the question that we have to decide is whether, looking to the language of the statute and the liability of the appellants to pay customs duty,

this assessment is in accordance with law.

3. The first and the most imported question that has been debated at the Bar is whether the order made by the Customs authorities is an administrative order or a quasi-judicial order. The consequences of holding the order to be quasi-judicial are important and serious because the consequence is not merely this that in this particular case we would be in a position to issue a writ of certiorari against the Customs authorities and to correct any error of law apparent on the face of the record. If the consequences stopped at that, even then we would have to seriously consider the arguments advanced by the Advocate General and Sir Nusserwanji Engineer. But the consequences are much more far-reaching because if we were to hold that when the Assistant Collector or the Appraising Officer assessed goods imported into India to customs duty he is performing a quasi-judicial function, then it must follow as a necessary and inevitable consequence that in assessing the goods of every importer he must observe the rules of natural justice. In other words, his assessment must be in accordance with what is known as the judicial process. Administrative and executive processes are very different from judicial processes. A Court or a body which is acting judicially has to conform to certain judicial standards. There are certain rules which are known as rules of natural justice which have got to be conformed with. A decision cannot be given behind the back of the party affected. The Court or the authority or the tribunal cannot take into consideration evidence without giving the party affected an opportunity to explain that evidence. Therefore, the difference between an administrative and a quasi-judicial order does not lie merely in this that in the case of a quasi-judicial order a writ of certiorari can be issued. The more fundamental difference between the two orders is that in the case of a quasi-judicial order the Court must require and demand from the authority exercising his functions that he will conform to the judicial process.

4. In deciding whether this order made by the Customs authorities is a quasi-judicial order or not, a large number of authorities were cited by the Advocate General. As far as India is concerned, the test that has got to be applied is the test which was laid down by the Supreme Court in *Province of Bombay Vs. Kusaldas S. Advani and Others*, , and it has not been suggested & it cannot be suggested that the Supreme Court in any subsequent decision has revised or reviewed that case. But what is urged by the Advocate General is that the law has developed since *Province of Bombay Vs. Kusaldas S. Advani and Others*, , was decided and there is nothing in subsequent decisions which is contrary to what was laid down in *Province of Bombay Vs. Kusaldas S. Advani and Others*, , but the subsequent decisions clarify and to a certain extent simplify what was stated by the learned Judges of the Supreme Court in that case. Now, *Province of Bombay Vs. Kusaldas S. Advani and Others*, , with respect, did not lay down anything new. It laid down a test which has become a locus classicus in any decision dealing with quasi-judicial or administrative orders, and the test is the famous test laid down by Lord Justice Atkin in *Rex v. Electricity Commissioners; Ex parte, London Electricity Joint Committee Co.*, (1924) 1 KB 171, and the test

is -- if repetition may be forgiven -

"Whenever any body of persons having legal authority to determine questions affecting the rights of subject, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Therefore, this definition lays down three tests. You must have a body of persons who must have legal authority to determine questions, the second test is that the questions which they have to determine affect the rights of subjects, and the third test is that a duty must be imposed upon this body of persons to act judicially. There can be no doubt in this case that the first two tests are satisfied. The Customs officer who makes the assessment has to determine certain questions. There is also no doubt that these questions affect the rights of subjects and affect them very seriously because on the determination of the Customs officer depends the liability of the assessee to pay certain customs duty. But the difficulty is caused, as it was caused in *Province of Bombay Vs. Kusaldas S. Advani and Others*, , with regard to the third test. Is there a duty cast upon the Customs officer to act judicially? Therefore, however serious the question may be which the officer has to decide, however much it may affect the rights of subjects, if the Court cannot find a duty imposed upon the officer to act judicially, the act will not be a quasi-judicial act but an administrative act. This third test was emphasised in the majority judgment and especially in the judgment of Chief Justice Kania. AT page 6 (of Bom LR): (at p. 226 of AIR) the learned Chief Justice says:

"It seems to me that the true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial."

Therefore, we must look at the statute which sets up a tribunal or which provides for certain decisions by officers, to see whether that statute requires the tribunal or the officer to act judicially. It is perfectly true that no statute will provide that the tribunal or the officer shall act judicially. If there was such an express provision, no difficulty whatsoever would arise in construing provisions of a statute. But the difficulty arises because the statute in express terms does not impose the duty of acting judicially. One has got to look at the various provisions of the statute in order to come to the conclusion whether considering those provisions it was incumbent upon the authority or the tribunal to act judicially.

5. Now, as we shall presently point out, in no subsequent case in India or in England this third test laid down by Lord Justice Atkin has ever been departed from. The Advocate General's contention is this that what the recent English decisions have laid down is that in order to apply the third test a simple method has been devised and that simple method is to find out whether the particular authority or tribunal has to ascertain facts according to law, and if that tribunal or authority has to ascertain facts according to law and in ascertaining those

facts that authority cannot be influenced by any considerations of policy or expediency, then you must infer and must come to the conclusion that that tribunal or authority has to act judicially. If that were the true test, undoubtedly the task of the Courts would be considerably simplified. Take this very case. It is perfectly true that the Customs authorities have to ascertain facts according to law. The Customs authorities have to determine what the nature of the goods is and what is the duty which the importer has to pay according to the provisions of the Sea Customs Act. It is equally clear that in ascertaining those facts the Customs authorities have not got to be influenced by any questions of policy or expediency. They must do their duty honestly and impartially. Therefore, if the test suggested by the Advocate General were sound, then without considering the other provisions of the statute we must come to the conclusion that the Customs authorities in passing orders of assessment must act judicially and that an order of assessment is a quasi-judicial order. But unfortunately such simple tests are always denied to Courts of law. When we look at the English decisions on which the Advocate General has relied, it will be found that the learned Judge there had emphasised the facts that each case must be considered on its own merits, that in each case the Act or the statute must be looked at, and taking the circumstances of each case and the provisions of the statute particular order is an administrative order or a quasi-judicial order. If all that had to be done was to apply the test as suggested by the Advocate General, then it would be unnecessary for the Courts in England to have emphasised the necessity of considering each case on its own merits. In *Province of Bombay Vs. Kusaldas S. Advani and Others*, , it was pointed out that in applying this test it made no difference whether a decision of an officer was subjective decision or an objective decision. The Advocate General sought to distinguish *Province of Bombay Vs. Kusaldas S. Advani and Others*, , on the ground that under the Requisition Act it was the subjective determination of the officer for the purposes of requisitioning which largely influenced the Supreme Court in coming to the conclusion that the requisitioning order was an administrative order, and it is pointed out that in the Sea Customs Act the decision is not a subjective determination but is an objective determination. The Customs officer has objectively to find facts. He has not to import any subjectively to find facts. He has not to import any subjective influence or attitude or outlook into his determination, and it is said that the principle laid down in *Province of Bombay Vs. Kusaldas S. Advani and Others*, , cannot possibly apply to the Sea Customs Act. It seems to us a rather difficult proposition to accept that whenever an officer is acting objectively and whenever he is required to act impartially and not to be influenced by policy or expediency, his order must in every case and of necessity be a quasi-judicial order. As one of the Judges in England has said, even an administrative officer not acting judicially may act reasonably, and we may say that even an administrative officer not acting judicially must act honestly and impartially. But to suggest that whenever there is a duty to act impartially and honestly, to be loyal to facts and not to persons, converts the decision of an officer into a quasi-judicial order, is a proposition which on the authorities we find it difficult to accept.

6. The decision which has been most strongly relied upon is the decision in *R. v. Manchester Legal Aid Committee*, (1952) 2 QB 413. That was rather an unusual case and such a case could only have arisen in England. The question was with regard to legal aid and a debtor applied for legal aid and a certificate for legal aid was given to him. The debtor then became insolvent and the trustee in bankruptcy then applied for the legal aid certificate which had been given to the debtor. The legal aid certificate was given to the trustee to continue the bankrupt's claim against the defendant which happened to be a company. Thereupon the company applied for an order of certiorari on the ground that the committee, under the Legal Aid and Advice Act of 1949 which had issued the certificate, had no power to grant a certificate to a trustee in bankruptcy, and the question that was raised and discussed at great length was whether the order passed by this committee was an administrative order or a quasi-judicial order, because a writ of certiorari could not have been issued unless it was held that the order passed by the committee was a quasi-judicial order. At pages 415 and 416 the provisions of the Legal Aid and Advice Act are set out, and in his able argument Sir Hartley Shawcross points out that it would be shocking if a committee consisting entirely of lawyers had not to make its decisions judicially. Therefore, here we have a law by which lawyers had to decide whether a particular person was entitled to legal aid or not, and it was this decision which was being considered by the English Court as to whether it was a quasi-judicial decision or an administrative decision, and it is in this context and with this background that one must look at the observations made in the judgment. At page 428, in the judgment of Mr. Justice Parker, what is emphasised, and with respect we agree, is that it is not necessary that there should be a formal *lis* before it could be said that the decision of the authority is a quasi-judicial decision. It is sufficient if there are proposals and opposition and evidence has to be taken by the authority. But at the end of page 428 Mr. Justice Parker says:

"The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a Court, then, unless, as in the case, for instance, of justices granting excise licenses, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry."

Therefore, far from laying down a simple and invariable test, Mr. Justice Parker is at pains to emphasise not only that it will be impossible but it would be inadvisable to attempt to define exhaustively the circumstances in which it could be said that it was the duty of an authority or a tribunal to act judicially. Then comes the passage at page 431 which has been most strongly relied upon by the

Advocate General and which is the whole basis of his argument, and this is what the learned Judge says:

"The present case, as it seems to us, is an a fortiori case. Though the local committees may be said to be administrative bodies in the sense that they are responsible for administering the Act, they are quite unconcerned with questions of policy. They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially, not judiciously."

It is perfectly true that in the context of this case, considering the provisions of the Act, Mr. Justice Parker did attach great importance to the fact that the committee had to decide the matters on facts and evidence without permitting extraneous considerations to affect their decision. But to say that in this passage the English Court has laid down an unfailing and unvarying test, is to read this passage out of its context. This passage must be read with the caution which the learned Judge has administered earlier to which reference has been made.

7. A decision of the Privy Council was also strongly relied upon and that is the case of AIR 1940 105 (Privy Council) . There is a passage in the judgment of the Privy Council which, divorced from its context, may lead to the conclusion that where tribunals are set up which may be considered as statutory tribunals, it is the duty of these tribunals to act judicially. What the privy Council there said was that even if jurisdiction is so excluded (dealing with the Sea Customs Act which excluded the jurisdiction of the Civil Courts) the Civil Courts had jurisdiction to examine into cases where the provisions of the Act had not been complied with, or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure; and the Advocate General says that if we find that the Customs officer has not acted in conformity with the fundamental principles of judicial procedure, we have a right to interfere, and he says that fundamental principles of judicial procedure are merely a paraphrase of rules of natural justice and therefore the Privy Council held that there was a duty cast upon the authority set up under the Sea Customs Act to act judicially. It should be borne in mind that what was challenged before the Privy Council was not the original order of the Customs authorities but the order in appeal. An appeal had been preferred, a revision had also been preferred, and after exhausting all the legal remedies the matter had come before the Privy Council. It is perfectly clear, as has been pointed out in (1952) 2 QB 413, that there may be stages laid down by a statute which would provide that at a particular stage the officer or the tribunal acts in his executive capacity or in his administrative capacity and at a different stage he has got to act judicially or quasi-judicially and as we will point out when we examine the provisions of the Sea Customs Act, under that Act also it is quite possible to take the view that although the Customs officer when he passes the order of assessment is acting administratively, when the matter goes

in appeal to the higher authority at that stage the authority set up under the Act has got to act quasi judicially. Therefore, we do not read this judgment of the Privy Council, and indeed we cannot, as laying down an all-embracing principle that wherever statutory tribunals are set up it is their duty to act in conformity with fundamental principles of judicial procedure. The Privy Council could not have overlooked the test laid down by Lord Justice Atkin and could not have decided that whether there was a duty cast upon the tribunal to act judicially or not, the mere fact that a statutory tribunal was set up was sufficient for a Court to take the view that it was the duty of that tribunal to act in conformity with the fundamental principles of judicial procedure.

8. Reliance was also placed by the Advocate General on a decision of the Calcutta High Court in *Assistant Collector of Customs for appraisement and Another Vs. Soorajmull Nagarmull and Another*, . That is a judgment of Chief Justice Haries and Mr. Justice Banerjee, and passage in the judgment of the learned Chief Justice which is relied upon for another purpose and in another context is that appeals and revision provided under the Sea Customs Act are in the nature of appeals from Caesar to Caesar and might not be regarded with any great confidence by persons in the position of the respondents in the case. But on the point that we are at present considering, reliance was placed on the judgment of Mr. Justice Banerjee, and Mr. Justice Banerjee, with respect, with admirable research, has set out all the relevant decisions on the point; he has also told us what the qualifications of a Judge should be, quoting Dr. Robson, but after all this he comes to the conclusion that he has simply applied the law laid down in *Province of Bombay Vs. Kusaldas S. Advani and Others*, . So we go back, after learned discussion, to *Province of Bombay Vs. Kusaldas S. Advani and Others*, , and the test we have to apply is the test laid down in *Province of Bombay Vs. Kusaldas S. Advani and Others*, . It may be noted that that particular case on the facts turned not on an order of assessment but it was a case where the Customs authorities levied additional duty and imposed fine, and the question was whether that particular order of the Customs authorities was a quasi-judicial order, and, as we shall point out, it is now beyond controversy that such an order is a quasi-judicial order.

9. It has been pointed out to us by the Advocate-General that the decision in (1952) 2 QB 413 has been favourably considered by this Court in *Pandyan Insurance Co. Ltd. Vs. K.J. Khambatta and Others*, , and has received the approval of the Supreme Court in two cases, *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, and *Province of Bombay Vs. Kusaldas S. Advani and Others*, , might have decided, the Supreme Court as recently as this year has given its imprimatur to the decision of the English Court in (1952) 2 QB 413. But, we do not read the decision in (1952) 2 QB 413 to lay down any law different from the law laid down in *Advani's* case. It is perhaps, with respect, a fuller and a more elaborate exposition of the law, and therefore when the Supreme Court cites this decision with approval it does not mean that the Supreme Court in 1958 took a different view of the law from the view taken

by the Supreme Court in Province of Bombay Vs. Kusaldas S. Advani and Others, .

10. Reference was also made to a decision in Nakkuda Ali v. Jayaratne, 1951 AC 66. That is the decision of the Privy Council and there the Privy Council was dealing with the Controller of Textiles in Ceylon and the Privy Council held that the Controller in acting under a certain regulation was not acting judicially and that regulation dealt with the cancellation of licenses. Lord Radcliffe delivering the judgment of the Committee has reviewed all the authorities. At p. 75 the learned Law Lord rightly emphasises that the status of the person or body who passed the order has nothing to do with the question as to whether he has to act judicially or not. This is what he says:

"In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted."

And at p. 77 he poses the question:

"But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially?"

And at the same page he emphasises the duty to act judicially by saying:

"If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari."

And at p. 78 he cites with approval the judgment of Lord Hewart C.J. in Rex v. Legislative Committee of the Church Assembly, Ex parte, Haynes Smith, (1928) 1 KB 411:

"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially."

Having cited this passage the learned Law Lord went on to examine the provisions of the Ceylon Act with which the Committee was dealing and this is what he says:

"It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question; he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must

be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on mere bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules."

The Advocate General is quite right that the provisions of the Sea Customs Act are different from the provisions which Lord Radcliffe was considering. As we shall point out, the question here is not the subjective question of whether licence should be withdrawn from a particular person or not. There is a right of appeal provided under the Sea Customs Act. But the Sea Customs Act approximates to Regulation 62 which the learned Law Lord was considering to this extent that no regulation is laid down for securing that the assessee should have notice or that there should be an inquiry public or private before the Customs authorities can act. But it would be unsafe and even erroneous to apply a decision, however weighty, on a construction of a particular statute to the construction of an entirely different statute, and the Advocate General is right that although the Privy Council might have held that the Controller of Textiles in Ceylon is not acting judicially, the Customs authorities under the Sea Customs Act may have to act judicially and to observe the judicial process. But for that purpose we must look to the provisions of the Sea Customs Act itself.

11. We now, therefore, turn to consider what the Sea Customs Act lays down. The charging section is Section 20:

"Except as hereinafter provided, customs duties shall be levied at such rates as may be prescribed by or under any law for the time being in force....."

Then we have Section 22 which confers upon the Central Government the power to fix tariff values on any goods exported or imported by sea on which customs duties are by law imposed. This is a very important power because not only has Government a right by law to fix the duty which an importer has to pay, but under this section the Central Government has been given the power and the authority to fix the value artificially of the goods which are imported. In other words, the Central Government could say that the value of Vitamin B.12 shall be so many pounds per gram for the purpose of customs duty. Of course, we agree with the Advocate General that this power u/s 22 has to be exercised taking into consideration the international obligations into which India has entered and which India always respects. But apart from international obligations there is nothing to prevent the Central Government from fixing artificially any tariff value in respect of any goods which are imported. This is rather important to bear in mind when we come to consider the merits of the matter. Then we have Section 29 which provides:

"On the importation into, or exportation from any customs port of any goods,

whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill."

It is this obligation which was cast upon the appellants which they had to discharge by showing in their bill of entry the real value of Vitamin B.12 which they imported into India. The real value which they had to show was not the real value determined by any objective standard. The Legislature itself has supplied a definition for the expression "real value" because in Section 30 it is provided: "For the purpose of this Act the real value shall be deemed to be--"In using this expression the Legislature is introducing a legal fiction. Whatever real value in fact may be, for the purpose of this Act the real value shall be what the Legislature has defined it to be, and that definition is:

"(a) The wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

We shall have much more to say with regard to this section when we come to deal with the question in controversy between the parties as to what duty the appellants are liable to pay. Turning back to Section 29, the second paragraph of that section provides:

"In case of doubt, the Customs-collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information."

Considerable emphasis was placed by the Advocate General on this part of Section 29 and what was urged is that this is an indication of the judicial process which the Customs Collector has to follow because if he has any doubt as to the real value, power has been conferred upon him to requisition the necessary materials not only from the owner of the goods but also from any other person, and therefore it is suggested that the Legislature did not desire that the Customs Collector should decide matters *ex parte* but that he should call for the necessary materials and evidence, decide on those materials and evidence, and therefore decide judicially and in accordance with the well known rules of natural justice. It is pointed out that this paragraph also casts a duty upon the person to produce

the document and to furnish the information when he is called upon to do. In our opinion, this only deals with cases where the Customs Collector feels doubt. Normally Customs Collectors are so constituted that they do not feel doubt and if they do not there is no obligation cast upon them by this section to call for the documents or information which this section empowers them to do. Besides, it would not be proper in this context to read the expression "may" as "shall" or "must". It is a discretionary power conferred upon the Customs Collector and the power is undoubtedly very wide because under this power not only the owner or the importer but also any other person is bound to produce materials, information and documents which the Customs Collector requires.

12. Attention was also drawn to the new section which has been incorporated in the Sea Customs Act by the Sea Customs (Amendment) Act (21 of 1955) and that is Section 29B and that section now empowers the Customs authorities to make a provisional assessment of duty. An interesting argument was advanced before us that the short levy notices were not according to law because they were in fact provisional assessment of duty and not short levy notices contemplated by Section 39 to which we shall refer. But fortunately, as we shall point out when we come to the end of this judgment, it is not necessary to decide this question in appeal. Turning to Section 39, it gives power to the Customs authorities, when customs duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis-statement as to real value, quantity or description on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such causes erroneously refunded, to call upon the person concerned to pay the duty or charge or deficiency or to repay the amount paid to him in excess, on a notice of demand being issued to him with three months from the relevant date as defined in Sub-section (2), and the relevant date is the date of the assessment. Then we come to Section 86 which obliges the importer to enter in the bill of entry the goods which have been imported. Then comes Section 87 which is the material section for the purpose of assessment. That section says:

"On the delivery of such bill the duty (if any) leviable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home-consumption, or warehouse them, subject to the provisions hereinafter contained."

A striking feature of this section, as compared with other taxing statutes to which we shall presently turn, is the almost extreme simplicity in which the power to assess has been conferred upon the relevant authority. The Legislature has given no direction whatever in this section as to how the assessment should be made, whether any notice should be given to the assessee, whether any inquiry should be held, and except the barest of language used the section contains no indication that the assessing authority has to proceed to assess according to judicial process or that while assessing it is the duty of the assessing authority to

act judicially. It is very pertinent in this connection to turn to Section 182 which deals with penalties, and to note the language used by the Legislature in this Section 87. Section 182 provides:

"In every case, except the cases mentioned in Section 167. Nos. 26, 72 and 74 to 76, both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty; or any person is liable to penalty, such confiscation, increased rate of duty or penalty may be adjudged."

and then follows the jurisdiction conferred upon the various authorities. Therefore, the Legislature expressly required the authorities, who were empowered to impose penalties, to adjudge whether a person was liable to the penalty or not, and implicit in the expression "adjudged" is the duty to act judicially; the duty to act as a Judge and not as an administrative or executive officer. It is by reason of this that although some doubt was expressed by the Supreme Court earlier, the Supreme Court has now finally held that u/s 182 the decision of the officer is a quasi-judicial order. See *F.N. Roy Vs. Collector of Customs, Calcutta*, affirmed in *Leo Roy Frey Vs. The Superintendent, District Jail, Amritsar* and *Another*. Section 188 deals with appeals and gives the right to any person who is aggrieved by any decision or order passed by a Customs officer to appeal to any officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office, or to the Chief Customs authority; and as far back as AIR 1940 105 (Privy Council), the Privy Council held that an appeal lay not only from an order passed u/s 182 but it lay against any order passed under the Sea Customs Act including an order of assessment. Section 191 deals with the revisional power of the Central Government.

13. Now, having considered the scheme of the Sea Customs Act, in our opinion it is difficult to take the view that the statute imposes any obligation upon the assessing authority to act judicially. Although that duty may be imposed in a case of an adjudication u/s 182 and also a decision of an appeal u/s 188, it does not necessarily follow that at the initial stage of assessment when an assessment is made u/s 87 the assessment order is a quasi-judicial order. In this connection it would not be out of place to compare the parallel provisions of the Income Tax Act. Mr. Seervai is right that in a sense the Sea Customs Act is in *pari materia* with the Income Tax Act. Both are taxing statutes. The Court in both cases must be anxious to construe provisions of the law in favour of the subject and try and see that the subject is not denied any right which the Court can possibly ensure to him. Turning to the Income Tax Act, it is now settled law that an assessment made by the Income Tax Officer u/s 23(3) is a quasi-judicial proceeding, and when we look at the language of that section we find that the statute has provided:

"On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, the Income Tax officer after hearing such evidence as such person may produce and such other evidence as the Income Tax Officer

may require, on specified points, shall, by an order in writing, assess the total on the basis of such assessment."

When one compares the language of this sub-section with the language of Section 87 of the Sea Customs Act, the contrast is not only apparent but striking. Sub-section (3) of Section 23 makes it obligatory upon the Income Tax Officer to hear the evidence as may be produced by the assessee. Sub-section (2) makes it obligatory upon the Income Tax Officer to issue a notice; and the whole language of Sub-section (3) clearly indicates that the Legislature intended that the Income Tax Officer should follow the judicial process in arriving at his conclusion. No such indication is given in Section 87 of the Sea Customs Act. The next section in the Income Tax Act to which attention might be drawn is Section 37. That section deals with the power of the Income Tax authorities and it provides:

"The Income Tax Officer, Appellate Assistant Commissioner, Commissioner and Appellate Tribunal shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters,"

and power is given for discovery and inspection enforcing the attendance of any person, of compelling the production of books of account, issuing commissions, and there is also power conferred upon the various Income Tax authorities to examine persons on oath. The Advocate General said that we find corresponding powers in the second paragraph of Section 29 of the Sea Customs Act. In our opinion, the ambit of the powers of the Income Tax authorities u/s 37 is much wider than the ambit of their powers under the second paragraph of Section 29, and the wide ambit conferred upon the Income Tax authorities u/s 37 is a further indication that the Legislature intended the Income Tax authorities to act as a Court in the sense of adopting and observing the substantial principles of judicial procedure which a Court follows and observes.

14. Before we pass from this subject, a passing reference may be made to two unreported judgments which were referred to at the Bar. One is the judgment in what has come to be known as "the fountain pen case" in Appeal No. 53 of 1955 (Bom), and from the judgment it appears that the appellate Court took the view that the order of assessment passed by the Customs authorities was an administrative order. But we agree with the Advocate General that that observation was not based upon any argument advanced before the Court as to whether the order was administrative or quasi-judicial. In that case the Court assumed that the order was an administrative order, and that decision, as rightly observed by the Advocate General, authority for the proposition that this Court has held that an assessment order is an administrative order. The other case is the ball-bearing case in Appeal No. 90 of 1956 (Bom). In that case my brother Mr. S.T. Desai dismissed the application for a writ against the Customs authorities. All that we emphasised in that judgment was that whether it was a writ of certiorari or a writ of mandamus the question of fact would not be gone into by this Court and this Court could not constitute itself into a Court of appeal.

15. If then the order of assessment is an administrative order and not a quasi-judicial order, the other head of the argument which was submitted to us by the Advocate General that there is an error apparent on the face of the record, does not survive. We may point out that we listened to a very interesting argument and in this respect also our attention was drawn to the progress that the law has made in England and how the Courts have extended the jurisdiction in case where the Courts in the earlier days would not have thought of issuing a writ of certiorari, in respect of a matter when no question of jurisdiction arose but the question was confined to an error of law committed by a judicial or quasi-judicial authority acting within jurisdiction.

16. The order made by the assessing authorities is also challenged on the ground that the order, although it is appealable, gives no reasons for the decisions. Except in the case of the 10th consignment where the Collector ultimately made his order on 15-4-1957, it is not disputed that in making the assessment or in issuing the short levy notices no reasons were vouchsafed to the appellants as to how and why the assessing authorities came to a particular conclusion or assessed the appellants in a particular conclusion or assessed the appellants in a particular manner. It is again well settled law (see *C.R.H. Readymoney Ltd. and Another Vs. State of Bombay*, , a judgment of this Court, and also a judgment of the Supreme Court in that when a law confers a right of appeal, the Legislature intends that that right should be an effective right and that right can only be an effective right if the officer or authority from whose order an appeal lies give reasons for his decision. It is only then that the appellate Court can properly discharge its function. It is only then that the appellate Court could consider whether the decision of the lower authority was correct or not. Now, as already pointed out, u/s 188 a right of appeal is conferred upon the assessee against the assessment order made by the assessing authorities. But notwithstanding this right of appeal, the assessing authorities have not thought fit, except in the case of the 10th consignment as pointed out, to give reasons for their decision. It would have been open to us to take the view that the matter should go back to the assessing authorities with a direction that they should give reasons for the decision and then those reasons could have been tested by this Court if the requisite writ could have lain. But we have agreed to the procedure suggested by the Advocate General, a procedure indeed which has been followed in English Courts, that even where reasons are not given, if the reasons are disclosed in affidavit at the trial, then the Court would look into those reasons and consider those reasons as if they were the reasons embodied in the order itself. Here we have a long and argumentative affidavit from the Collector which gives reasons for the decision and therefore instead of sending the matter back with a direction to the assessing authorities to give reasons for their decision, we have agreed to consider the reasons given by the Collector in the affidavit as if they were the reasons embodied in the order.

17. One other matter which may be considered and disposed of before we come to the merits is the question as to whether we should entertain this writ in view

of the fact that the assessee had a right of appeal u/s 188, and Sir Nusserwanji has strongly argued that we have always taken the view that if effective alternative and adequate remedy is open to the petitioner the court will not grant him relief under its extraordinary jurisdiction under Article 226 of the Constitution. The position here is rather unusual. In the nine consignments the order of assessment was made by the Customs Collector and u/s 188 the appeal lay to the Collector. But when the Collector passed an order of assessment with regard to the 10th consignment, he clearly indicated what his view on the merits of the petitioner's case was and we agree with the Advocate General that the Collector clearly prejudged the decision of the appeal. It is quite true that we cannot Judge administrative officers discharging judicial functions with the same strictness that would judge a Judge sitting in Court. A Judge has to maintain certain standards of detachment and objectivity, apart from being impartial. But an administrative officer has to do a considerable amount of administrative work, decide questions of policy, give directions, give instructions, which would be intolerable if they were done by a Judge sitting in Court. But making all possible concession for an administrative officer and the Collector of Customs, we cannot possibly countenance the position urged by Sir Nusserwanji that although he may clearly express his opinion, although he may emphatically indicate what his views are, the assessee must still be compelled solemnly to go before him in appeal to hear in appeal the decision which he has practically already given. The reason why the Courts refuse to entertain writs when an alternative remedy is available is that the Legislature has set up tribunals for decision in appeals and that the remedy which the Court could give the petitioner could obtain from these tribunals. But whether the petitioner should be disentitled to maintain the petition or not is a matter of discretion with the Court and if the Court is satisfied that the petitioner will not get justice from the appellate tribunal or that the would have no confidence in the decision of the Tribunal or that the appeal would be nothing more than to use the language of Sir Trevor Harries an appeal from Caesar to Caesar, then the Court is not bound to accede to the submission of the State that it should not hear the petitioner and the petitioner should be referred to the appellate tribunal set up under the Act. With regard to the 10th consignment, it is true that in that case the appeal lay to the Central Board of Revenue. But even there the Advocate General has pointed out that Government have issued specific instructions with regard to this particular case. When discussions were going on between the petitioners and the Collector, a particular interview is recorded by the petitioners in their letter of 3-8-1956 and the correctness of the facts set out in that letter has not been denied by the Customs authorities, and this is what the letter states:

"The Collector stated that there was no point in arguing the matter further. The Customs house had received orders from the Government of India in this sense and they were bound to follow such orders."

This was in connection with the assessing of the petitioners' goods. Well, if the Customs authorities had to carry out the orders of Government, then very little

would be left either of judicial process or the doing of justice in the sense that justice not only should be done but should seem to be done. While not in any way deviating from the principle we have laid down in writ cases, in our opinion in this particular case under the special circumstances of the case we will not refuse to maintain the petition on the ground that the appellants have had recourse to the appellate tribunal set up under the Sea Customs Act.

18. Coming to the merits of the matter, if the order of assessment is an administrative order, there can be no doubt that by a writ of mandamus we could compel the assessing authorities to act according to law. But before such a writ could be issued, it must be clear on the language of the statute itself that the action of the authorities was in contravention of the law. The petitioners must satisfy us that there was a clear duty incumbent upon the assessing authorities to act in accordance with certain specific provisions of the law and that they had failed to discharge that duty and have acted in contravention of the law. What is urged by the petitioners in this case is that in assessing the goods of the petitioners, the assessing authorities have taken into consideration matters which are extraneous matters which the law does not permit them to take into consideration. What is pointed out is that u/s 30(b) in order to determine the real value what the assessing authorities have to do is to ascertain the cost at which goods of the like kind and quality could be delivered in Bombay, and in so ascertaining the cost the Customs authorities can only take into consideration matters which are relevant and germane to that question and not matters which are entirely foreign to the consideration of that question. In this case it is clear that the case does not fall u/s 30(a) and the goods of the appellants are to be ascertained on the basis of Section 30(b). Looking at the language of that sub-section it is clear that what the assessing authorities have to do is to find out goods which are of the like kind and quality which are imported into Bombay and determine the cost at which they could be delivered in Bombay. In most cases there would be no difficulty in finding goods of like kind and quality, but we may have a case where goods are *sui generis* and you have only one importer importing those goods, and the question may arise how are you going to find the cost of the goods of like kind and quality when no other goods are available in the market or no other goods have been imported in the country.

19. Now, this problem came up before the Privy Council and the Privy Council resolved this problem in AIR 1938 15 (Privy Council) , by holding that Clause (a) of Section 30 can be applied distributably to each of the Ford Motor cars contained in a particular consignment. There the question was of assessing the Ford motor cars to duty and a Ford motor car cannot be compared with a motor car of any other make, and the Privy Council said, "take any one motor car, find out what the cost would be to deliver it at the place of import, and that would be the real value for the purpose of Section 30(a)". Therefore, the decision of the Privy Council was that the goods under assessment themselves may under Clause (a) be considered as members of their own class even though at the time and place of importation there are no other members. The decision of the Privy

Council was under Clause (a) of Section 30, but the language for the purpose of this discussion was the same as the language used in Clause (b), viz., goods of the like kind and quality, and what fell for construction before the Privy Council was the expression which we are construing. In this particular case this difficulty does not arise because, as we shall presently point out, although the case of the Customs authorities is that Vitamin B.12 manufactured by Glaxo Ltd. in the United Kingdom and imported into India are goods which are sui generis, admittedly, there is another importer besides the appellants and that is Voltas Ltd. and the whole basis of the assessment made by the Customs authorities is the cost at which these goods were delivered to Voltas Ltd. We have a clear indication of the case of the Collector of Customs in the letter of the 15th April 1957 to which reference has been made, and this is what the Collector says:

"It has been found that goods of like kind and quality are being imported by another importer M/s. Voltas Ltd., Bombay, under a sole distributors' agreement entered into by them with the same suppliers. It has also been found necessary to enhance the invoice values charged by the suppliers to M/s Voltas in the proportion of 87.5 to 100 in order to arrive at the assessable value u/s 30(b) Sea Customs Act."

The whole of the controversy between the parties which we said at the outset is in a very narrow compass, is this. The appellants have no grievance, and they can have no grievance, to the Collector assessing the goods imported by the appellants on the basis of goods imported by Voltas Ltd. because they are identical goods. The grievance of the appellants is that there is no justification on the part of the Collector and no warrant in law to add 12 1/2 per cent to the invoice value of the goods imported by Voltas Ltd.

20. We must now try and point out how this 12 1/2 per cent came to be added. It appears that there was an agreement between Voltas Ltd. and Glaxo Laboratories Ltd. of U.K. dated 18-3-1955 and the relevant provision of that agreement was:

"On all sales to you of the 1 gm. pack of bulk Glaxo Vitamin B.12 we undertake to allow you a discount of 12 1/2 per cent when the c.i.f. price is ? 87-10 per gm., provided that in the event of any alteration in the said c.i.f. price or when a Glaxo's opinion changes in Indian commercial circumstances justify Glaxo doing so we shall have the right to reduce the discount to 10 per cent."

Therefore, on the goods imported by Voltas Ltd., under this agreement, although the price was ? 87-10 they were allowed a discount of 12 1/2 per cent. Therefore, the price as far as Voltas Ltd. was concerned was ? 87.10 less 12 1/2 per cent. The Customs authorities then took the view, and rightly, that they were not concerned with this 12 1/2 per cent discount and that the price must be fixed on the basis of ? 87.10 and not on the basis of ? 87.00 less 12 1/2 per cent discount. Then there came a modification of this agreement on 1-8-1956 and by that modification Glaxo Laboratories Ltd., England, agreed to supply to Voltas

Ltd. bulk Glaxo Vitamin B.12 at net f.o.b. prices without any trade discounts allowable whatsoever. Therefore, by this modification Voltas Ltd. did not get any discount or commission and they paid the price fixed by Glaxo Ltd. without getting any concession. Shortly put, the whole of the contention of the Customs authorities is that they are entitled to add back or to load the invoice price of Voltas Ltd. by 12 1/2 per cent, and therefore in the consignments with which we are concerned in this appeal what the authorities have done is that they have looked at the invoice of Voltas Ltd. and added to the price shown 12 1/2 per cent, and the question that falls for our determination is whether this is in accordance with law.

21. Now, we entirely agree with Sir Nusserwanji that in determining the real value the Customs authorities are not bound by the price shown on the invoice by the importer. It would be an impossible position as far as the revenue of this country is concerned, if the Customs authorities had to accept whatever invoice was produced for their inspection and to determine the real value on the basis of that invoice. In fact, Section 30(b) does not refer to the invoice at all. The invoice is an important piece of evidence to determine what the real value is. But that piece of evidence may be discarded if the authorities take the view that it is not a genuine document or if they take the view that over and above the price which is being paid some other consideration has passed under the document. Take this very case. Although the invoice of Voltas Ltd. may show "X" pounds as the price of one gram of Vitamin B.12, if the Customs Authorities were satisfied that Voltas Ltd. were receiving 12 1/2 per cent discount and that discount was being paid to them and that that discount was not shown in the invoice but they had reason to believe that such a discount was credited to Voltas Ltd. in some way or other then undoubtedly they would be entitled to say that the invoice price shown is not the proper price for the purpose of determining the real value. But if the Customs authorities come to the conclusion that the price shown in the invoice of Voltas Ltd. is the real price, that there is no other consideration which flows from Glaxo Ltd. to Voltas Ltd., then it is not open to the Customs authorities to take into consideration other extraneous factors which the law does not permit them to do. We are told by the Advocate General that apart from Voltas Ltd. and the appellants, there are other importers in Bombay who are importing Vitamin B.12. It would be open to the Customs authorities to compare the cost at which these various importers have imported this particular commodity. We are told that it was suggested to them what the actual cost is, but they rejected it on the ground, as already pointed out, that the goods imported by the appellants were *sui generis* and they had instructions from Government to treat these goods as *sui generis*. Therefore, if the authorities have taken up that attitude, then they must determine according to law what the goods cost to Voltas Ltd. and that cost cannot be increased by any factor or any circumstance which does not fall within the purview of Section 30(b).

22. Now, we must say that the attitude taken up by the Collector in his affidavit seems to be a little inexplicable. As already pointed out in the letter of

15-4-1957 the case of the Collector was clearly and explicitly set out that he had found that there were goods imported by another importer Voltas Ltd. and it had been found necessary to enhance the invoice value by 12 1/2 per cent. This letter does not state why it was found necessary to enhance this value, but the reason now appears in the affidavit filed by the Collector. In para 10 of that affidavit the Collector dealing with para 22 of the petition says:

"I am not aware of and do not admit that between April and September 1956 and November 1956 to March 1957, Messrs. Voltas Ltd. did not in fact receive any discount in respect of the price of ? 72.3.9 per gm. F.O.B. Further, the Distributors" Agreement dated 18-3-1955 and the modification letter dated 1-8-1956 will also not be deemed to be admitted. I maintain that an agent is entitled to a commission on goods imported and if the invoices do not indicate the commission it is proper to interpret that the value shown in the invoices is the net value after the deduction of the commission. The "real value" of the goods in question was equal to the invoice value plus the undisclosed amount of the commission."

Now, here, we have in this affidavit a series of statements unwarranted by law, unwarranted by facts, and which disclose a complete confusion of thought. In the first part of the paragraph the Collector does not say that Voltas Ltd. received any commission in respect of the invoices after the modification of their agreement with Glaxo Ltd. after 1-8-1956. He merely takes up the technical attitude that he is not aware of and does not admit. Then he takes up rather this curious attitude that he does not admit the agreement and the modification with Voltas Ltd., although the very assessment of the petitioners was on the basis of the agreement between Glaxo Ltd. and Voltas Ltd. Then he propounds a statement of law which is erroneous that an agent is entitled to commission on goods imported. Surely, this is not a principle of law but a matter of agreement. There is no obligation on an agent to receive commission. An agent may or may not take commission and it is purely a question of fact and not a matter of law. Then he goes on to make this rather startling statement:

"....If the invoices do not indicate the commission, it is proper to interpret that the value shown in the invoices is the net value after the deduction of the commission."

We do not know what canon of construction has been adopted in order to consider these invoices. Then he ends up by saying: "The real value of the goods in question was equal to the invoice value plus the undisclosed amount of the commission." After having said that he was not aware and did not admit that Voltas Ltd. received any commission, here he seems to suggest that there was an undisclosed amount of commission which Voltas Ltd. had received.

23. Now, there does not seem to be any warrant on the record for the suggestion that Voltas Ltd. had received any commission which had not been disclosed. We would not have proceeded further in the matter if the Collector had told us that

on the evidence or on the information he had come to the conclusion that Voltas Ltd. had received commission from Glaxo Ltd. which had not been disclosed and that he had added this commission to the invoice value of the goods consigned to Voltas Ltd. But as pointed out, he does not take up this attitude in the earlier part of para 10 of his affidavit. It is more a case of suspicion and surmise. It is a case of willing to wound but afraid to strike. We do not think that this is a fair attitude for the Collector to take. We are all the more surprised because in all case we have been dealing with under the Sea Customs Act in this Court, as we told Sir Nusserwanji and the Advocate General, we have always found the Customs authorities taking up a very responsible attitude and always trying to discharge their duty, which is always an unpleasant duty, to the best of their ability and always with due regard to the rights of the assessee under the law. Then we come to para 12 and this is what the Collector says:

"As regards the case of Messrs. Voltas Ltd. cited by the petitioners, I say that Messrs. Voltas Ltd. were appointed Agents-Distributors of the English company and were allowed for their services, a commission of 12 1/2 per cent. I say that the petitioners are not the Agents-Distributors of the said goods. In the circumstances, I say that in order to ascertain the "real value" of the said goods, the relevant matter for consideration would be as to what is the gross value shown in the invoices of importers other than the Agents-Distributors, without abatement of the 12 1/2 per cent discount given to Messrs. Voltas Ltd., as the Agents-Distributors."

Now, this is an extraordinary volte face on the part of the Collector, because having based his assessment on the invoices of Voltas Ltd. he here tells us that Voltas Ltd. were Agents-Distributors of the English Company and that in order to ascertain the real value of the goods what has got to be found is the gross value shown by the importers other than the Agents-Distributors, and again he adds the insinuation "without abatement of the 12 1/2 per cent discount given to Messrs. Voltas Ltd. as the Agents-Distributors." Well as we pointed out it was perfectly open to the Collector to have taken into consideration Vitamin B.12 imported by different importers. But he came to the conclusion advisedly under instruction from Government that Vitamin B.12 imported by other importers were not goods of the like kind and quality as the goods manufactured by Glaxo Ltd. and imported into India. Having come to that conclusion he based his assessment on the invoice of Voltas Ltd. and in this paragraph he turns round and says: "Voltas Ltd. are after all Agents-Distributors and we cannot find the real value by looking at their invoice but we must consider the invoices of other importers."

24. We agree with the Advocate General that Section 30(b) does not in any way import into its construction any consideration as to the character of the importer. What is emphasised is the cost of the goods, whoever the importer may be. It may be said that goods may be subsidized or they may be dumped on the Indian market. But for that purpose the Customs authorities have not been given the

right to take that factor into consideration u/s 30(b). The remedy for that evil is action by Government u/s 22. As already pointed out, subject to international obligations it is open to Government, if they find that goods are being brought to Bombay at a cost less than its actual cost, to fix the tariff value of these goods, and the Advocate General has drawn our attention to some notification issued by Government where in fact they have done so. Therefore, where at one stage the Collector of Customs wanted to find out what the goods cost in England and at what price they were exported to Europe, these factors are not relevant for the purpose of deciding that the goods are being dumped or subsidized in the Indian market. The Customs authorities may take that into consideration in order to determine whether the invoice price shown by the importer is the real cost at which goods of like kind and quality could be delivered, or, let us put it this way; in order to guide the Customs authorities in assessing the goods of the appellants and other goods in future. The invoice is prima facie evidence. It is not conclusive evidence. If the Customs authorities accept the invoices, there is an end of the matter. If they do not, then in order to test the genuineness of the invoice they may requisition to their aid any other facts, but only for that purpose. They may consider if they like the cost in Europe, cost of production, or any other factor. But all those considerations must ultimately be directed to the determination and ascertainment of the only fact which has got to be determined and ascertained u/s 30(b), which is the cost of the goods of like kind and quality which could be delivered in Bombay. In this connection in para 7 of his affidavit the Collector has also drawn attention to the relation subsisting between the English Company and the appellants and he has pointed out that the Indian company is a subsidiary company and that under an agreement between them a certain amount has to be remitted out of the profits to the English Company. It is also pointed out that the Indian company has purchased the Glaxo trade marks at a certain price and these are being written off from time to time in the balance-sheet of the Indian company. These are all very important considerations for assessing the Indian company to Income Tax, but they do not seem to have much relevance to the question which the Customs authorities had to decide as to what the goods cost in Bombay. If the suggestion is that the English company sent goods to the Indian company at a cheaper value or cheaper price because of the fact that these relations subsisted between the English Company and the Indian company then, as already pointed out, unless this relationship has some bearing on the question of the determination of the real value it cannot be taken into consideration for the purpose of assessing the goods of the petitioners. Sir Nusserwanji says that there may be a special contract arrived at under special circumstances between the Glaxo Company in England and Voltas Ltd. and that the assessing authorities were entitled to take those circumstances into consideration. Now, both the agreement and the modification are before the Court and were before the assessing authorities and the assessment has been based simply on the ground that because Voltas Ltd. charged 12 1/2 per cent commission at one time, therefore the authorities will assume that they continued to charge that commission and because in law agents are entitled to

charge commission. That is, we think, a correct summary of the attitude taken up by the assessing authorities as appears on the record.

25. In this connection it may be pointed out that Voltas Ltd. on 10-4-1957 wrote to the Assistant Collector of the Customs stating:

"It has been necessary for the supplier to reduce the price to us and, in order to allow us to make our own selling prices to meet competition in India, it was agreed that the basis of our invoice prices would be a nett figure, decided upon, from time to time, after reviews of the competitive position vis-a-vis world prices. It was a result of a review of such factors which took place in Bombay with one of the Directors of Glaxo Laboratories, U.K. who was on a visit to India, that Clause 7 of the Agreement dated 18-3-1955 was amended from its original form to its present form."

The grievance of Sir Nusserwanji is that no further evidence and documents were produced by Voltas Ltd. in support of their contention that there was a modification of the original agreement. But the Advocate General rightly complains that whatever the attitude of Voltas Ltd. might have been, it was after all their goods which were being assessed to duty and at no time have they asked to request the English Company to produce any documents if there were any in connection with this modification, and the Advocate General has made the offer that he is quite prepared to get an affidavit made by a responsible officer of the English Company that after the modification no discount whatever was paid to Voltas, and the modification represents a genuine transaction. The learned Judge on this point allowed certain evidence. The appellants were compelled to call a Director of Voltas Ltd. because the agreement and modification were not admitted by the Collector, and Sir Nusserwanji wanted to take us through the cross-examination of that witness to show us that on the face of it is seemed curious that a modification of this sort should have been brought about without any correspondence, without any resolution being passed by the Board of Directors of Voltas Ltd., or by Glaxo Ltd. in England. We have not permitted him to do so because, in our opinion, on this writ application we must decide the question on the record and not by evidence led in Court. The question that we have to decide is: What was the position at the date of the petition? Were the assessing authorities justified in adding 12 1/2 per cent to the invoices of Voltas Ltd. for the reasons stated by them on record? In our opinion, it is patent that the reasons given by the authorities are not reasons which can be supported in law.

26. A question was also argued with regard to the validity of the short levy notices to which reference has been made. The learned Judge has taken the view that those notices are valid and the Advocate General wanted to satisfy us that they did not fall within the purview of Section 39. We must not be considered to have upheld the view of the learned Judge because, in our opinion it is unnecessary to decide the question in view of the order are proposing to pass.

27. Sir Nusserwanji on behalf of the Customs authorities agree that the Customs authorities will dispose of the refund applications in respect of the first six consignments in the light of this judgment. In other words, the Customs authorities will consider whether they were justified in assessing the appellants on the invoice of Voltas Ltd. plus 12 1/2 per cent. If they come to the conclusion in the light of our directions and observations that they were so justified, then the refund applications will be dismissed. If, on the other hand, they come to the conclusion that the assessment must be on the basis of the invoice, then the appellants would be entitled to succeed with regard to the whole claim made by them. If, on the other hand, they come to the conclusion that the assessment should be reduced partially, then the appellants would succeed partially with regard to the refund applications. We wish to make it clear that this has nothing to do with the refund already paid by the Customs authorities in respect of the first six consignments under the circumstances to which we have already adverted earlier in the judgment.

28. With regard to the 7th, 8th and 9th consignments, a demand has been made with regard to the short levy notice issued in respect of these three consignments. Sir Nusserwanji agrees on behalf of the Customs authorities that with regard to these notices also the Customs authorities will decide in the light of our judgment what is the proper assessment to be made on the assessment should be maintained, then the short levy notices will stand. If, on the other hand, they come to the conclusion that the 12 1/2 per cent addition is not justified, they will withdraw the short levy notices. If, on the other hand, they come to the conclusion that the amount of the assessment should be reduced, the short levy notices will be suitably amended.

29. With regard to the 10th consignment, as we have not gone beyond the stage of assessment made by the Collector, Sir Nusserwanji agrees on behalf of the Customs authorities that assessment order will be set aside and the Customs authorities will reconsider the matter in the light of our judgment and make the assessment order in accordance with the directions given by us in this judgment.

30. Sir Nusserwanji agrees that for the purpose of appeal u/s 188 and revision u/s 191, the orders made by the Customs authorities on these 10 consignment in the light of this judgment will be considered to be original orders of assessment and the petitioners will have a right of appeal within the period of limitation fixed under the relevant sections on the basis that the order of assessment was made when the decisions were given by the Customs authorities on these consignments.

31. With regard to the 10th consignment, we have already directed that the Collector will review in the light of this judgment the order of assessment made by him on 15-4-1957. If on this review it is found that the appellants are entitled to any refund, he will make the order of refund, because under an interlocutory order passed by this Court the goods covered by the 10th consignment were passed on to the appellants paying the full amount of assessment under protest and

without prejudice to their rights.

32. The result is that the decision of the learned Judge dismissing the petition with costs will be set aside and the directions mentioned in the judgment will be given on this petition to the respondents.

33. On the question of costs, the Advocate General submits that in view of the fact that the Collector of Customs has agreed through his counsel to give effect to the directions contained in this judgment and the appellants have also agreed to abide by the decision of the Collector subject to the right of appeal and revision or any other remedy in law, the proper order would be that there should be no order as to costs throughout. We accept that submission and direct that there will be no order as to costs throughout.

34. Liberty to the appellants' attorneys to withdraw the sum of Rs.500 deposited in Court.

35. Appeal allowed.

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