
(1987) 08 DEL CK 0004
In the Delhi High Court
Case No : C.W. No. 1551 of 1981

Glindia Ltd.

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 31-08-1987

Acts Referred:

Citation : AIR 1988 Delhi 109

Hon'ble Judges : S. Ranganathan, J;H.C. Goel, J

Bench : Division Bench

Advocate : T.R. Andhyarujina, with G.E. Vahanuvati, J.R. Gagrath, P.G. Gokhale and J. Lal, for the Appellant; R.K. Anand, S.P. Sharma and Ashok Bhasin, for the Respondent

Final Decision : Allowed

Judgement

S. Ranganathan, J.—The petitioner, Glaxo Laboratories (I) Ltd., (renamed as Glindia Ltd.) is the manufacturer, inter alia, of three "bulk drugs" - we need not pause to set out the definition of this expression as it is not relevant for purposes of the present case - known as Betamethasone Alcohol (B.A.), Betamethasone 17 - Valerate (B.V.) and Betamethasone Di-Sodium Phosphate (B.P.) They come to this Court in June 1981 challenging the legality and validity of an order dt/- 12-5-1981 by which the Union Government fixed the maximum prices at which the above drugs could be sold. Subsequently, however, the writ petition had to be amended since the respondents, on a the maximum prices (at figures slightly higher than before) by an order dt/- 20-11-1986. The petitioners are also not satisfied with the revised prices so fixed and have amended the petition to pray that this Court should strike down and quash the order dt/-20-11-1986 and direct the respondents to refix the maximum prices in the light of certain factors.

2. The recent decision of the Supreme Court dt/- 10-4-1987 in Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., has considerably narrowed down the scope of the debatable issues between the parties but it is nevertheless necessary, in order to appreciate the contentions raised on behalf of

the petitioners, to set out in some detail the factual background as well as the legal context in which the questions arise.

3. The first attempt of the law to impose some control on the prices of drugs in India was initiated by the Drug (Prices Control) Order, 1970 (1970 DPCO) made in exercise of powers conferred by S. 3 of the Essential Commodities Act (10 of 1955). Paragraph 4 of this order empowered the Central Government to fix the maximum sale price of "an essential bulk drug" by which expression were meant those bulk drugs the names of which were specified in Schedule I to the order. It is common ground that the three drugs we are concerned with were not among those specified in the said schedule,. In respect of other bulk - except ones which were imported (which is not the case here) - the order only required the manufacturer to report to the Central Government, soon after the commencement of the order, the names of the bulk drugs marketed by him or used exclusively by him for formulations, i.e., medicines processed by him out of one or more of the bulk drugs. Where he was selling the bulk drugs, he had to report the maximum selling price and where he was using them in his formulations, he had to report the notional price which he was debiting, in his manufacturing accounts, towards the costs of such drugs. This was the purport of para 5 of the order in so far as it is relevant for our present purposes. Once this was done the manufacturer could not increase the said selling price or notional price, as the case may be, without the approval of the Government nor could any person sell the bulk drug at a price higher than this. There were other provisions regarding the fixation of prices for formulations but there was an alternative scheme of pricing permitted under para 14 of the order under which, in a case where the overall gross profit of the manufacturer did not exceed 15%, all he had to do was to submit for the approval of the Central Government a price list regarding the formulations manufactured by him. The Central Government could approve or modify the price list and no formulation could be sold at a price higher than the one approved by the Government. The petitioner had its price lists of formulations approved by the Central Government under para 14, and, so far as bulk drugs are concerned, it had reported the following prices as per para 4 on 1-6-1970 :

Name of Bulk Drug Price Intimated

B.A. Rs. 200 per gm.

B.V. Rs. 220 per gm.

B.P. Rs. 225 per gm.

4. It may be mentioned that, after the 1970 DPCO came into operation, the Government referred the issue of the cost structure of certain drugs for examination by a working group presided over by the Chairman of the Bureau of Industrial Costs & Prices (BICP). In implementation of this exercise, the Government purported to fix the maximum selling price of Batamethasone, the existing price of which according to the petitioner was Rs. 176 per gm, at Rs.

119.88 per gm. by an order dt/-19-4-1974, revised to Rs. 134.28 per gm by an order dt/-22-8-1974. The intention of the petitioner is that, under the 1970 DCPO, the Government had no power to fix the maximum selling price in that manner but it is said that, since most of the drug was used by the petitioner for captive consumption and the sales thereof were insignificant, the petitioner took no steps to challenge the above prices fixed by the Government.

5. In 1979, the Government of India issued the Drugs (Prices Control) Order, 1979 (1979 DCPO) in place of the 1970 DPCO. This order abolishes the distinction between "essential" and other bulk drugs. Its scheme is as follows : (a) Three Schedules are appended to the order. The third schedule contains a list of drug formulations divided into three categories - I, II and III. The first schedule contains a list of bulk drugs used in Category I and II formulations and the second schedule gives a list of bulk drugs used in Category III formulations. Betamethasone finds a place, under the head : "XIX - Corticosteroids in the second schedule. Para 3 of the order empowers Government to fix the maximum sale price of indigenously manufactured bulk drugs specified in the First or Second Schedule. It runs, in so far as is relevant for our present purposes, thus :

"(1) The Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions contained in sub-para (2) and after making such enquiry as it deems fit, fix from time to time, by notification in the Official Gazette, the maximum price at which such bulk drug shall be sold.

(2) While fixing the prices of a bulk drug under sub-para (1), the Government may take into account the average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return on net worth.

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(3) No person shall sell a bulk drug at a price exceeding the price notified under sub-para (1), plus local taxes, if any, payable :

Provided that until the price of the bulk drug is so notified the price of such bulk drug shall be the price which prevailed immediately before the commencement of this Order and the manufacturer shall not sell such bulk drug at a price exceeding the price which prevailed as aforesaid."

This is so far bulk drugs are concerned.

(b) In so far as formulations are concerned, para 13(2) enables a manufacturer, as soon as the price of any bulk drug is fixed or revised, to apply to the Government for fixing or revising the price of formulations manufactured by him by the use of such bulk drug. Sub-para (1) of para 13 also empowers the Government to fix the retail price of a category III formulation, from time to time. Such retail price has to be fixed in accordance with the provisions of paras

10 and 11. Para 10 sets out a formula for fixing the retail price. It envisages the retail price (RP) as the aggregate of the material cost (MC), the cost of conversion (CC), the cost of packing material (PM) and the packing charges (PC) worked out with reference to a unit of the formulation manufactured. This aggregate is increased under Para 11 - and this is defined as the mark-up - in the case of a category III formulation by 100% of the said aggregate or the actual amount of the distribution costs, outward freight, promotional expenses, manufacturer's margin and trade commission, whichever is lower. To this marked-up retail price would be added the excise duty payable in respect of the formulation in question. The Government, under para 15, has a right to revise the retail prices of any category III formulation if it considers it necessary to do so in public interest. The retail prices, in turn, control the wholesale prices of drugs and formulations as envisaged in para 24.

(c) The 1979 DPCO also envisages in para 17 the maintenance by Government of a Drug Prices Equalisation Account (D.P.E.A.). This account comprises, besides such grants as the Government may make, of deposits to be made by manufacturers, importers and distributors in the following circumstances :

(i) Para 4 empowers the Government to fix, in the case of bulk drugs specified in the First and Second Schedules, a retention price (for each manufacturer) and a common selling price (taking into account the weighted average of such retention prices). The manufacturer can sell at the common selling price but, where such selling price is higher than the retention price, may keep for himself only the retention price. The excess is to be deposited into the D.P.E.A. If the common selling price is less than the retention price, he can get the difference from the D.P.E.A.

(ii) Where a First or Second Schedule bulk drug is indigenously manufactured and also imported, the Government is empowered, under para 7, to fix a retention price for each individual manufacturer or importer and a pooled price at which the drugs can be sold. If the latter is higher than the retention price, the excess should be deposited into the D.P.E.A. If the latter is lower than the former, the importer or manufacturer will be paid the difference out of the D.P.E.A.

(iii) Where a manufacturer uses a bulk drug in his formulations and is able to acquire the same at an actual or notional price which is less than the price allowed to him in fixing the price of his formulations, the Government, under para 7(2), can ask the manufacturer either to sell the formulations at such prices as may be fixed by the Government or to deposit the excess amount (to be determined by the Government) into the D.P.E.A. The funds in the D.P.E.A. are to be used, after meeting the expenses incurred by the Government for maintaining the account, only for payment to manufacturers, importers or distributors whose retention price is more than the common selling price or pooled price as mentioned at (i) and (ii) above.

(d) Para 27 gives a power of review. Any person aggrieved by any notification or

order under paras 3,4,5,6,7,9,12,13,14,15 or 16 may apply to the Government for its review within 15 days and the Government may make such order on the application as it may consider necessary.

6. On 12-5-1981, the Government of India fixed the maximum sale price of the three bulk drugs we are concerned with as follows":

Name of Drug Maximum selling price per gram

B.A. Rs. 113.34

B.V. Rs. 105.81

B.P. Rs. 126.23

The Government claims to have fixed these prices on the basis of the costs worked out by the BICP for the year ending on 30-6-1976 revised and updated till 31-8-1980. According to the petitioners, the BICP had worked out the prices per gram for the year ending 30-6-1976 at Rs. 129.58 (B.A.), Rs. 122.59 (B.V.) and Rs. 140.61 (B.P.) They allege that, since subsequently, there have been only escalations in the costs of all raw-materials and inputs. the prices fixed by the order dt/-12-5-1981 were very low and totally inadequate. They, therefore, filed a review petition under para 27 of the 1979 DPCO on 23-6-1981. They also filed the present writ petition on 30-64981 challenging the order of 12-5-1981 on various grounds.

7. On 1-7-1981, notice was issued to the respondents to show cause why the above writ petition should not be admitted and an interim order was also passed in the following terms :

"Counsel for the petitioner undertakes that the petitioner will maintain status quo on the prices of the three bulk drugs mentioned in the petition and formulation of these three bulk drugs.

On the undertaking of the learned counsel, for the petitioner, I stay issue, or if issued, implementation of any formulation prices for these three bulk drugs."

On 21-7-1981, the writ petition was admitted and the respondents were asked to put in an affidavit making proposals for interim fixation of prices of formulations of the three bulk drugs. On 27-8-1981, the interim order of 1-7-1981 was recalled and the following order passed:

"On the petitioners undertaking to maintain prices of both bulk drugs and its formulations prior to the impugned notification, we stay implementation of the impugned bulk drug prices which have been notified as well as the prices of the formulation from the said bulk drug till further orders."

On 13-5-1982, the Court passed the following order:

"During the course of hearing it was brought to our notice that the petitioner has filed a review application to the Central Government with regard to the impugned

price fixation by the Central Government under the D.P.C.O. of 1979 for three bulk drugs manufactured by the petitioner. It was also brought to our notice that in the cases of some other manufacturers of bulk drugs and formulations, the Central Government is having a dialogue with the said firms/companies. We felt that the Central Government may explore the possibility of having a similar dialogue with the petitioner either independently of the review application filed by the petitioner or in the course of hearing of the review application. Accordingly, we adjourn the hearing of this case and in the meantime direct the parties to explore the possibilities of a settlement out of court. The pendency of the writ petition should not be treated as deterrent to consideration of the review application by the Central Government. We give liberty to the petitioner to file further representation, documents and data to enable the Central Government to hear and decide the review application or to enter into a meaningful dialogue with the petitioner. The Government may consider during the hearing of the review application or the dialogue, as the case may be, whether to disclose the basis of the fixation of the impugned prices on the recommendation of the B.1.C.P. The case is part-heard. The matter should now be listed for further directions before us on Friday, 16th July, 1982."

8. The dialogue thus started between the petitioner and the Central Government made some progress initially. According to the petitioners, it supplied all details, facts, figures and computations available with them in its letters of 8-6-1982, 6-7-1982, 31-7-1982, 16-9-1982, 9-2-1983 and 6-5-1983. There being no response, it issued letters in the nature of reminders on 20-1-1984, 26-12-1984, 31-12-1984, 14-3-1986, 21-4-1986 and 16-5-1986 requesting the Government to give them a hearing on the review application. Ultimately by letters dt. 24-7-1986 and 28-7-1986, the Government expressed its preparedness to consider the petitioner's representation based on the details made available by the petitioner and fixed a hearing on 12-8-1986. A hearing took place on 13-8-1986. There is some controversy as to what happened on this date. Letters from the petitioner followed on 20-8-1986, 21-6-1986, 27-8-1986, 2-9-1986 and 9-10-1986. On 24-10-1986, the writ petition came up for hearing but were adjourned to 21-11-1986. On 14-11-1986, there was a meeting in which both sides and their counsel participated. According to the petitioner, on this date, the parties agreed that cost audit reports of the relevant periods would be examined by the Government of India and that a further meeting be held on 21-11-1986. On 21-11-1986 some discussions took place. The petitioner alleges that its advisers went back to Bombay to prepare their figures and computations based on the cost audit reports and the discussions but were surprised to receive, on 24-11-1986, an order dt/- 20-11-1986 fixing revised prices for the three drugs as below :

Name of Drug Maximum selling price per gram

B.A. Rs. 127.70

B.V. Rs. 122.00

B.P. Rs. 135.00

Not being satisfied with the revised prices fixed, the petitioner has amended the writ petition to challenge the validity and correctness of the order dt/- 20-11-1986. The amended writ petition has now come up before us for final hearing.

9. Sri Andhyarjuniya learned counsel for the petitioner claims that the review order dt/- 20-11-1986 falls within an area of vulnerability to attack by affected manufacturers and producers which, according to him, survives even after the decision of the Supreme Court in the Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., . Before proceeding to outline his grounds of challenge, counsel submits that, all through in their discussions with the petitioner, the respondents were only clarifying the basis adopted for arriving at the prices fixed on 12-5-1981. These were explained as having been fixed on the basis of BICP costing of 1976 as up-dated till 31-8-1980. Respondents now claim, counsel contends, that they have refixed the prices on the basis of the cost audit reports and annual reports of the company for the periods 30-6-1981 to 30-6-1985. Counsel for the petitioner submits that it was disclosed to the petitioner for the first time at the meeting held on 14.11.1986 that the respondents proposed to consider the statistics for the period 1981 to 1985, that the petitioner therefore sought time to collect and furnish the relevant material on the basis of the data for these years by 21-11-1986 when the next meeting was scheduled. He alleges that some discussions did take place on 21-11-1986 but that on 24-11-1986 the petitioner was confronted by the order dt. 20-11-1986 that had been passed by the respondents on their own. This procedure adopted by the respondents, he says, was grossly unfair and has considerably handicapped the petitioner and prevented it from submitting its own calculations on the basis of these figures and helping the respondents in arriving at a proper appraisal of the prices to be fixed on the basis of these data. According to the respondents, this is not correct. They say (para 28A(i) of the reply affidavit dt/- 27-1-1987) that, at the meeting held on 13-8-1986 the petitioners had made a "strong plea" for taking "the costs after August, 1980 so that the price fixed is fair to the petitioner". The petitioner was, therefore, given an opportunity to submit whatever additional data it wished in this behalf but since it did not make available any data following the hearing, the respondents relied on the totality of the information that was available, with them before passing the final order so that the final order is fair and just to the petitioner. It is not, however, necessary to go into the merits of these respective contentions for (a) counsel for the petitioner has no objection to - rather, he welcomes - the data for 1981 to 1985 being looked into and made use of; and (b) the respondents, in the order dt/- 20-11-1986 as well as their affidavits before the Court, have made clear the details of their calculations and the petitioner has pinpointed four items in regard to which, according to it, there are errors in the calculations made by the respondents which, given a sufficient opportunity, the petitioner will be able to demonstrate to the satisfaction of the respondents. Sri

Andhyanjuniya in fact requested us only to direct the respondents to hear the petitioners in regard to these four items, "the hearing to be in accordance with the principles laid down by the Supreme Court" and pass a modified review order within a time-bound frame.

10. The four items which have gone into the computation of a fair price for the bulk drugs in question about which the petitioner is dissatisfied are as follows :

(i) The first contention of the petitioner is that the respondents have committed errors in calculating the weighted averages of various items that enter into the cost of production on the basis of cost audit reports. In a chart filed by them, the respondents have shown details of various items which enter into the cost of production for the years ending June, 1981 to June, 1985 and then taken their weighted average to work out the ultimate price. Taking illustratively the calculations on certain of these items, counsel urges that there are manifest errors in calculation.

(ii) The second point made by the counsel for the petitioner is that the respondents have not divulged how they have calculated the "net worth" of the petitioners. This figure of net worth is claimed to have been calculated on the basis of the figures in the annual reports and cost audit reports for the above periods. But this claim overlooks that the figures of net worth for each drug cannot be obtained from the cost audit reports or the annual reports of the company. For this purpose, it is necessary to derive the proportionate capital employed in respect of each drug from the common capital of the company. It is not clear whether such an exercise in apportionment was done, and if so, on what basis. Likewise, in regard to capital employed and interest, it is not known on what basis the respondents have taken the capital and interest allowable for each drug. It is contended that the cost reports contain certain figures of interest which are computed on the basis of an ad hoc method of apportionment and the same should not be adopted for the calculations presently in question. It is not known whether the respondents simply adopted these figures or took some other basis for calculating the interest. The petitioners had furnished the correct basis for calculating their capital and net worth in the annexure to their letter dt/-8-6-1982 and this does not appear to have been taken into consideration. at all by the respondents. Again in regard to the rate of return on capital, the petitioner is not aware why and how a 12% rate of return was adopted.

(iii) It is also pointed out that while income tax was taken at 57.75% when fixing prices on 12-5-1981, the respondents have taken a tax rate of 52.25% in fixing the prices on 20-11-1986. This was not correct as, if the rates of corporate taxation relevant for the company's financial years ending 30-6-1980 to 30-6-1985 were to be taken into account, the average rate of corporate taxation would work out to 56.645%.

(iv) The fourth item in the calculations with which the petitioner is dissatisfied is the computation of an addition to cost on account of packing, selling and

distribution expenses. It is pointed out, by way of example, that the fair price of B.P. "for own use" has been calculated at Rs. 134.88 per gm. by the respondents. They note that the average of package, sale and distribution expenses works out to Rs. 29.19 per gm but, since 91.34% of the petitioner's production of the bulk drug is for captive consumption and only 8.66% is for sale, the fair price for sale of the drug is worked out only at Rs. 135.03 and rounded up to Rs. 135. According to the petitioner, the packing and distribution expenses should have been taken into account in full and should not have been restricted proportionately to the quantities sold. That apart, even on their own basis, the respondents should have added at least Rs. 2,53 (8,66% of Rs. 29.19) to the fair price for own use worked out by the respondents themselves. There are also other clear errors in working out the expenses in the case of B.V. and B.P.

11. Sri Anand, learned counsel for the Union of India refutes these arguments. He contends that the discussions between the parties covered all relevant aspects. During these discussions as well as in the documents placed on record in this writ petition, the respondents have disclosed all the material on which they have acted. The prices were fixed on the basis of the documents of the company itself, viz., its annual reports and cost audit reports. The petitioner with all the legal and accountancy expertise available to it was fully in the know of every material figure. It was always open to the petitioner to have furnished its own figures and basis for working out the fair price. If this had been done, the government would have considered the same but the petitioner failed to furnish the full details called for. In the absence of co-operation from the petitioner, the Government made its own calculations, taking into account the figures appearing in the annual and cost audit reports of the company about which there is and can be no dispute. They have also furnished their broad basis for the price fixation in the charts annexed to the price fixation order as well as to the counter affidavit in the writ petition. He denies that there are any errors in calculation, as alleged. If the petitioner thought there were errors or that some figures needed reconsideration, the petitioner could and, should have applied for a review. Quoting passages from the Cynamide decision Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., he contends that the respondents have fully complied with their obligations as spelt out in the judgment and can do no more. Sri Anand also submits that the petitioner has been enjoying various benefits by reason of interim orders obtained from this court in the writ petition which it was not legitimately entitled to and some of these are :

(a) It had been profiting to the extent of Rs. 20,66, Rs. 174.15 and Rs. 98.17 per gm. in respect of B.A., B.V. and B.P. between 1981 and 1985 by continuing to sell the goods at the prices intimated under the 1970 DPCO;

(b) It had avoided the deposit of the surplus referred to above in the Drug Prices Equalisation Accounts they were bound to;

(c) The company had enjoyed a benefit of mark-up under R. 11 beyond the maximum permitted limit of 100% and also avoided depositing this excess into

the D.P.E.A. as it should have done;

(d) The cost of production, worked out by the respondents as per the cost audit report of the company for 1980-81 (and not disputed by the petitioner) works out only to Rs. 110.72, Rs. 104.62 and Rs. 129.32 per gm. in respect of B.A., B.V. and B.P. As against these, the company has claimed in its letter dt/- 8-6-1982 that its cost of production on the basis of audited cost of the same period works out to Rs. 135.01, Rs. 127.49 and Rs. 157.71 respectively. Clearly these figures are after through and highly exaggerated

(e) He points out that the average rate of actual income tax paid by the company for the years ending June, 1981 to June 1984 works out only to 46.95% as against which the company has been given the benefit of 52.25% and so have no cause for grievance.

(f) The company has secured a stay of price fixation of the formulations marketed by the petitioner and this, in the light of the dicta of the Supreme Court in the Cyanamide case, has given the petitioner undue benefits for a period of about six years and more.

12. Counsel for the petitioner, in reply, attempted to reconcile the alleged discrepancy in their figures. He also submitted that the petitioner was not under any obligation to deposit amounts in the D.P.E.A, as extended by the respondents and also denied having secured any advantage in the "mark-up" process.

13. We have set out the respective contentions of the parties but it will be at once manifest that it is not within the province of this court to delve into this forest of figures and calculations and express an opinion as to what should be the fair or correct price to be fixed in respect of the drugs in question. The Supreme Court has made it clear that the fixation of prices under the D.P.C.O. is a legislative function and that even the review provided for under para 27 is only in the nature of a legislative review of legislation, or, more precisely, a review of subordinate legislation by a subordinate legislative body at the instance of an aggrieved person. The -scope of judicial interference in either of these processes is very limited and the live issue before us can only be whether the procedure adopted by the respondents here has violated the norms indicated by the Supreme Court.

14. We may start with the admitted position (vide para 28 A8 of the amended petition) that the order dt/- 20-11-1986 "in so far as it is based on the figures of actual costs incurred by the petitioners for the manufacture of the said three bulk drugs, as set out in the cost audit reports of the petitioner company is correct and the same is not disputed by the petitioners". The only grievance of the petitioners has been that there have been some arithmetical errors, and that the basis on which figures of net worth, interest and return were arrived at has not been divulged to the petitioner. Sri R. K. Anand, counsel for the Union of India, contends that this argument of petitioner overlooks one important aspect of the

present case. He points out that, under the DPCO, the Government has to take into account the average cost of production of such bulk drug manufactured by an "efficient manufacturers .Where a bulk drug is manufactured by a number of manufacturers, the Government will have to consider the cost of production of such one of them as may be considered the most efficient if needed with some adjustments and modifications. In such an event the other manufacturers would not be in full know of all the figures adopted and the Government may have a duty of divulging to them the relevant figures when they file an application for review so that they may have an opportunity of being heard. But, says Sri Anand, this principle cannot apply to the present case. The price fixation here has been done on the basis of the petitioner's own figures the details of which are fully known to it. He, therefore, contends that it was for the petitioner to have made out how the prices fixed were wrong or incorrect in the light of the figures revealed by their annual and cost audit reports and this it has failed to do. Sri Anand contends that the same type of details has been furnished to the petitioner here as had been furnished in the Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., and found to be full compliance with the statutory order and that, therefore, the petitioner can have no grievance. In this context, counsel invited our attention to the following passages in the judgment of the Supreme Court:

"The reviewing authority has the fullest freedom and discretion to prescribe its own procedure and consider the matter brought before it so long as it does not travel beyond the parameters prescribed by para 3 in the case of a review against an order under para 3 and the respective other paras in the case of other orders. But whatever procedure is adopted, it must be a procedure tuned to the situation. Manufacturers of any bulk drug are either one or a few in number and generally they may be presumed to be well informed persons, well able to take care of themselves who have the assistance of Accountants, Advocates and experts to advise and espouse their cause. In the context of the Drug industry with which we are concerned and in regard to which the Control Order is made we must proceed on the basis that the manufacturers of bulk drugs are generally persons who knew all that is to be known about the price fixed by the Government. From the legislative nature of the activity of the Government, it is clear that the Government is under no obligation to make any disclosure of any information received and considered by it in making the order "

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"We do not propose to delve into the question whether there has been any such arbitrary assumption of facts and figures. We think that if there is any grievance on that score, the proper thing for the manufacturers to do is to bring it to the notice of the Government as they were not furnished the basis on which the prices were fixed. On the other hand, it has been pointed out in the counter-affidavits filed on behalf of the Government that all necessary and required information was furnished in the course of the hearing of the review applications

and there was no justification for the grievance that particulars were not furnished. We are satisfied that the procedure followed by the Government in furnishing the requisite particulars at the time of the hearing of the review applications is sufficient compliance with the demands of fair play in the case of the class of persons claiming to be affected by the fixation of maximum price under the Drugs (Prices Control) Order. As already stated by us, manufacturers of bulk drugs who claim to be affected by the Drugs (Prices Control) Order, belong to a class of persons who are well and fully informed of every intricate detail and particular which is required to be taken into account in determining the price. In most cases, they are the sole manufacturers of the bulk drug and even if they are not the sole manufacturers, they belong to the very select few who manufacture the bulk drug. It is impossible to conceive that they cannot sit across the table and discuss item by item with the reviewing authority unless they are furnished in advance full details and particulars. The affidavits filed on behalf of the Union of India show that the procedure which is adopted in hearing the review applications is to discuss across the table the various items that have been taken into account. We do not consider that there is anything unfair in the procedure adopted by the Governor. If necessary it is always open to the manufacturers to seek a short adjournment of the hearing of the review application to enable them to muster more facts and figures on their side. Indeed we find that the hearing given to the manufacturers is often protracted. As we said we do not propose to examine this question as we do not want to constitute ourselves into a court of appeal over the Government in the matter of price fixation,

The learned counsel argued that there were several patent errors which came to light during the course of the hearing in the High Court. He said that obsolete quantitative usages had been taken into consideration, proximate cost data had been ignored and the data relating to the year ending November, 1976 had been adopted as the basis. It was submitted that there were errors in totalling, errors in the calculation of prices of utilities, errors in the calculation of net worth and many other similar errors. As we pointed out earlier, these are all matters which should legitimately be raised in the review application, if there is any substance in them. These are not matters for investigation in a petition under Art. 226 of the Constitution or under Art. 32 of the Constitution. Despite the pressing invitation of Shri Diwan to go into facts and figures and his elaborate submissions based on facts and figures, we have carefully and studiously refrained from making any reference to such facts and figures as we consider it outside our province to do so and we do not want to set any precedent as was supposed to have been done in Premier Automobiles though it was not so done and, therefore, needed explanation in later cases."

He also invited attention to passages from the judgment dealing with certain provisions of the Schedule regarding computation of net worth, calculation of retail prices of formulation and exclusion of "bonus in excess of statutory minimum" in working out the cost of production, emphasising the need to fix

prices of formulations close on the heels of the fixation of bulk drug prices and the need for courts to refrain from granting interim stay of implementation of the notification fixing the prices. As against the above, Sri Andhyarujuniy a strongly relied on the observations of the Supreme Court following immediately on the first of the passages cited by Sri Anand. The Court said :

"But in order to render effective the right to seek a review given to an aggrieved person we think that the Government, if so requested by the aggrieved manufacturer is under an obligation to disclose any relevant information which may reasonably be disclosed pertaining to "the average cost of production of the bulk drug manufactured by an efficient manufacturer" and "the reasonable return on net worth¹. For example, the manufacturer may require the Government to give information regarding the particulars detailed in Form No. 1 of the Fourth Schedule which have been taken into account and those which have been excluded. The manufacturer may also require to be informed the elements which were taken into account and those which were excluded in assessing the "free reserves" entering into the calculation of "net worth". These particulars which he may seek from the Government are mentioned by us only by way of illustration. He may seek any other relevant information which the Government shall not unreasonably deny. That we think is the nature and scope of the review contemplated by Para 27 in relation to orders made under Paras³,12 and 13."

He also invited attention to the following passage occurring towards the end of the judgment:

"On the conclusions arrived at by us we have no doubt that the appeal must be allowed and the writ petition in the High Court dismissed. However, we think that it is necessary to give a direction to the Government to dispose of the review applications after giving a notice of hearing to the manufacturer. The hearing may be given within two months from today and the review application disposed of within two weeks after the conclusion of the hearing. Any information sought by the manufacturer may be given to him at the hearing in terms of what we have said in the judgment"

15. It is unfortunate that the petitioner did not file an application for the review under para 27 of the order dt/- 20-11-1986. We feel not only that such an application is maintainable (for the revised order dt/- 20- 11-1986 is also an order under para 3 of the order but also that the petitioner could have, by such application, brought all its grievances to the notice of the respondents and perhaps obtained all such relief that may be permissible to it in law having regard to the nature of the price fixation process as explained by the Supreme Court. But it must be remembered that the order of 20-11-1986 was passed during the pendency of the writ petition obviously on the understanding that it would be subject to further orders in the writ petition. Also, at that time the decision of the Court in the Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., held the field and the parties did not have the benefit of the decision of the Supreme Court. We, therefore, think that the petitioner

should, not be placed at a disadvantage because of its failure to file an application under para 27 for the review of the order dated 20-11-1986 within the period specified therefore .We have, there fore, considered the matter irrespective of this circumstance and examined the facts of the present case in the light of the observations of the Supreme Court.

16. Doing this, we find the position to be as follows : The order of 12-5-1981 had fixed the prices as on this date admittedly based on BICP prices updated till the end of 1980. The discussion between the petitioner and the respondents had, therefore, all along centered round the cost or production as on that date. This is clear from the correspondence between the parties, in particular the petitioner's letter dt. 21-8-1986, the official minutes of the meeting held on 13-8-1986 as well as the petitioner's protest there against, soon after the receipt thereof, in its letter dt. 9-10-1986. The following sentence in the order dt. 20-11-1986 also lends support to that conclusion : "A hearing was granted to your company on 13th Aug., 1986 at 11 a. m. and all the relevant details taken into consideration while fixing the price on 12th May, 1981 were disclosed". Though the earlier correspondence does contain some casual reference to the years 1981-82 etc. it is fairly clear that what was being considered was only how far the prices fixed on 12-5-1981 were sought to be supported by the respondents or needed revision in the light of the information filed by the petitioner. The idea of considering the annual reports and cost audit reports of the company for the years ending 30-6-1981 to 30-6-1985 occurred to the parties only at a late stage. We need not go into the question whether this idea was mooted at the meeting of 13-8-1986 or only at the meeting of 14-11-1986. Even assuming that the idea itself had been mooted on 13-8-1986, the mode of utilisation of these data by the respondents in passing the order dt. 20-11-1986 came to be known to the petitioner only when it received that order and its annexures. There was thus an element of surprise to the petitioners in the process of the re-fixation of prices. The argument of Sri Anand also is not so much that the full basis of the figures of 1981 to 1985 mentioned in the annexures to the order dt. 20-11-1986 had been furnished to the petitioner during the discussions. He rather contends that these figures have all been culled out only from the documents of the petitioner itself viz., its own annual and cost audit reports - and it was for the petitioner, with all the legal and technical expertise available to it to compile the relevant data, work out the corresponding figures as per its computation and submit the same to the Government. He submits that in a legislative process of this type, the petitioner should not be encouraged to sit on the fence, call for more and more information and clarifications and go on criticising all the figures and workings by the respondents without stating what the computation ought to be in its opinion and why. There is some force in this contention. This is not a case where the assessee is confronted with some figures gathered by the department behind its back. The assessee knowing that the department is acting on the figures of 1981-85 could easily have put forward before the department its own case as to how the figures of net worth, return and other additions

should be worked out which the Government could have taken into account before passing the review order. All the same, we think the petitioner is right in contending that the department should also have disclosed a few more pieces of information. For, as pointed out by the Supreme Court in the extract set out earlier and relied on by counsel for the petitioner, the right to seek review must be capable of being effectively exercised. So, the Government is under an obligation to disclose any relevant information which may reasonably be disclosed pertaining to "the average cost of production" or "the reasonable return on net worth". So far as the first of these items is concerned, the only grievances of the assessee are (a) that certain weighted averages have not been correctly worked out; (b) the rate of income tax taken is low; and (c) the packaging and distribution expenses should have been taken into account to the fullest, or at least to a larger extent. So far as the latter is concerned, the enclosures furnished by the respondents do not explain the basis on which the net worth, rate of interest on borrowings and the rate of return have been worked out, particularly as the first two of these need to be worked out proportionately in regard to each of the full drugs in question. The petitioner, therefore, is, we think, within its rights in contending that the broad features of information on all these aspects should be supplied to it. That apart, as we have already pointed out, the petitioner could have raised all these points in a review application against the order dt. 26-11-1986. In all probability, it would have filed a review straightway had the Supreme Court decision been available earlier. In view of this circumstance, we think, the petitioner should now have an opportunity of urging all these contentions before the respondents and that the departments should fairly consider all the points urged before it.

17. For the above reasons, we have come to the conclusion that the interests of justice require that the respondents should give the petitioner once more an opportunity of being heard on the price fixation order of 1986. We, however, wish to make it clear that we are not setting aside the order dt. 20-11-1986 for this purpose; nor do we, in view of the categorical observations of the Supreme Court, consider it necessary, proper or appropriate to stay further implementation of the said order or to stay any proceedings for fixation of prices of various drug formulations of the petitioner which the respondents might wish to initiate. We would only direct the petitioner to file a formal application for review and the Government to deal with the same (condoning the delay in filing the same due to the pendency of this writ petition) after giving the petitioner a hearing on the lines indicated above and, in the light of such hearing, to affirm or revise the prices fixed by the order dt. 20-11-1986 and to make consequent changes, thereafter, in the prices for drug formulations, if fixed in the meanwhile.

18. We would also, as was done by the Supreme Court, indicate a time bound schedule for the course of action suggested above :

(a) Within ten days from the date of receipt of this order, the applicants may

request the department to furnish such specific information as it may need as to the basis on which the figures of net worth of assets, interest on borrowings and rate of return have been taken by them in respect of each of the drugs and the department should make the same available to the petitioner within ten days thereafter;

(b) Within ten days thereafter the petitioner may file a formal application for review of the order dt. 20-11-1986 with an application to condone delay. This application- should not content itself with criticising the department's figures but should specifically set out petitioner's own detailed working out of the price to be fixed on the basis of the annual and cost audit reports of the company for the period 1981 to 1985;

(c) The respondents should fix a hearing within a period of 15 days from the date of receipt of the application and the petitioner may be heard thereon;

(d) Within two weeks thereafter, the respondents may dispose of the application as they deem fit. In case they allow it in whole or in part they should pass an order notifying the revised prices under para 3 of the 1979" DPCO.

19. The writ petition is disposed of accordingly with no order as to costs. It is made clear that the interim stay orders are vacated and the department will be free to implement the order dt. 20-11-1986 as well as to proceed to fix the prices for the petitioner's drug formulations, subject to the outcome of the procedure indicated in the previous para.