

(1979) 01 BOM CK 0013

In the Bombay High Court

Case No : Appeal No. 129 of 1972 (Misc. Petition No. 414 of 1972)

Union of India and Others

APPELLANT

Vs

Glaxo Laboratories (India) Ltd.

RESPONDENT

Date of Decision : 15-01-1979

Acts Referred:

Customs Act, 1962 — Section 14, 14(1)

Citation : (1980) CENCUS 203 : (1984) 17 ELT 284

Hon'ble Judges : B.N. Deshmukh, C.J.; D.P. Madon, J

Bench : Division Bench

Advocate : R.L. Dalal, for the Appellant; A.H. Setalvad, G.V. Vahanvati and C.M. Mehta, for the Respondent

Judgement

Deshmukh, C.J.—The appellants, who are the Union of India and Customs Officers, have filed this appeal against an order and judgment of the learned single judge of this Court, by which he quashed the directions contained in the order dated 13th Dec., 1971, Exh. C to the petition, and the endorsements on the licence made on 25th May, 1972 Exh. E to the petition.

2. A few facts that need to be noted for the purpose of understanding the disputes are these : The original respondents are a limited company, manufacturing drugs. They have an import licence under the Imports and Exports (Control) Act, 1947, read with Import and Export (Control) Order, 1955. This licence permits them to import a number of articles, which serve as raw materials in the manufacture of drugs in India. They have the liberty to import any one or more of those articles in any quantity they want, so as not to exceed the c.i.f. value of the licence, which in the present case, was Rs. 8,94,455/-.

3. The respondent ranks as a priority industry. It imported a raw material called "Griscofulvin" F.T. for the purpose of manufacturing antifungus formulations used in the treatment of skin diseases. So far as the disputed item covered by the Bill of Entry at Exh. E is concerned, two distinct valuations were disclosed by the respondent.

4. As required by Clause 10A of the Imports (Control) Order, 1955, the Bill of Entry disclosed that the c.i.f. value on the basis of the international market price as charged by the manufacturers of England would amount to Rs. 4,44,881/-. After adding landing charges the final value in terms of rupees would be Rs. 4,47, 105/-, equivalent to Pounds 23,307-30. They have, however, pointed out that by certain arrangements arrived at between the English Company and its associate, the respondent, less price is being charged. Instead of charging Pounds 25-30 per Kilogram, the Indian associate Company is charged at Pounds 11/- per Kilogram only. On that basis the actual c.i.f. value to the respondent was Pounds 11,190-50, and the rupee value comes to Rs. 2,30,600/-. The respondent has been assessed to import duty on the footing of the international value and it did not dispute that assessment.

5. The Customs Officers have to perform two duties. They have to guard the revenue and assess any imported article on the basis of Section 14(1) of the Customs Act, 1962, and the instructions issued by the Government of India in that behalf. It is also a part of their duty to debit the Customs copy of the licence with the value of the imported goods. In what manner this debit is to be made is the only disputed question. This would show how much of the foreign exchange permitted to be spent by a particular party has already been utilised and what balance has remained to be utilised under a valid licence within the period of the licence. It is also not disputed that this lesser value being charged to the associate Company in India became necessary on account of the foreign exchange crisis followed by devaluation of the rupee in 1965. On the basis of the licences already issued to this priority Company for manufacture of drugs, much less quantity could now be imported after 1965. The less quantity of raw materials was not enough to manufacture the drugs which would adequately serve the need of this country. Looking to the stringency of foreign exchange, the principal Company in England agreed to charge less price to this associate Company in India. The result was that the limited amount of foreign exchange available due to the price reduction much more amount or quantity of raw material could be imported. All these facts were properly disclosed to the authorities all along and from 1965 to 1971 the international market price was being taken into account for the purpose of levying Customs duty, but the reduced c.i.f. value which was the actual expense to the Indian Company was debited on the licence for the purpose of indicating the utilisation of the foreign exchange. However, the Deptt. suddenly changed its stand and informed the respondent that after 1971 not only the Customs duty would be recovered on the basis of the international market price of the sale of raw material at the time and place of import but the same value would be debited on the licence indicating the utilisation of foreign exchange. This decision of the Department is incorporated in its letter dated 13th Dec., 1971, Exh. C to the petition, and the debit entry on this new basis has been made for the first time on 25th May 1972.

6. The respondent challenged this order and the debit entry by filing a writ petition before the learned single Judge of this Court. It points out that there is

no change in the law as regards imports all along and there is no earthly reason why the Department should have changed its stand.

7. The defence taken by the Department is that the Imports (Control) Order, 1955, has been amended in 1964 by adding Clause (e) to the definition Clause (2). If this definition is read along with the provisions of Section 14(1) and para 300 of the Handbook of instructions, the Customs Officers are authorised to assess the value of the goods for the purpose of levying Customs duty and of the same valuation now becomes the assessed c.i.f. value by the Customs for the purpose of debiting on the licence. The learned single Judge came to the conclusion, after going through all the relevant provisions and after considering the arguments addressed on either side, that the amended definition has not made any change in the law, nor was it ever intended to do so. It has only clarified the responsibility of the importer who is permitted by the Government to import goods so that the value as defined in Section 14(1) should be honestly disclosed by the importer himself. These changes are made to insist upon full disclosure of information by the importer to the best of his knowledge and a certificate for the purpose is prescribed which he is required to sign. The learned Judge, therefore, allowed the writ petition, quashed the policy decision as well as the entry which was the result of the policy decision. Being aggrieved, the Customs authorities and the Union of India have filed this appeal.

8. As we find the area of dispute is very limited. After going through all the relevant provisions and the arguments addressed to us, we find no substance at all in this appeal. On the contrary, we are left wondering why the Department should have raised such a dispute which only gives rise to fruitless litigation. The entire dispute has its origin perhaps in the misunderstanding of the provisions by the Customs authorities.

9. The import policy of the Government of India always depends upon the availability of foreign exchange. When limited foreign exchange is available, the policy makers have no choice but to determine the priority between the various articles required by the country and also apportion the quantity amongst the various importers. The industries which import raw materials are divided into two categories. One being a priority industry and the respondent in this case is a priority industry being drug manufacturers. In order to appreciate how a licence should be debited with a certain value, the manner in which an import application is required to be made requires to be noted in the first instance. Clause 3 of the Imports (Control) Order, 1955, lays down restrictions on import of certain goods. It says that -

"Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II".

The same Imports (Control) Order requires an importer to make an application.

The form of application is incorporated in these instructions, though it does not appear to be in a prescribed form. If the various columns of this form given in Appendix 3 as Form "C" at page 308 of the Import Trade Control Handbook of Rules and Procedure, 1971, is seen, the intention of the Government of India would be very clear. The importer, who is a manufacturer, has to indicate in the first instance the nature of the articles of the commodities which are being manufactured. A detailed data must be given of the earlier production and where the production is on the basis of imported material, figures must be supplied of the raw materials consumed and the balance thereof. The application form then requires the manufacturer to indicate in the application the estimated production in the next calendar year. When such detailed information is made available to the Union of India, they examine the real demand or the requirement of the particular industry and accordingly sanction the licence on the basis of the quantity of the imports required. Not only the applicant has to supply those details, but in a tabular form, which is a part of the application form, the particulars indicate what precisely must be stated for the information of the licensing authority. Column 4 of the tabular form requires the applicant to state the quantity (Weight/No. or other appropriate accounting unit). This means that depending upon the nature of the commodity to be imported, one has to indicate the weight or the number, as the case may be, and this facilitates the Government to determine the quantity that may be required for the next year's consumption. Column 5 relates to value. That value is required to be stated as c.i.f. value in rupees based on proforma invoice or other evidence from suppliers showing the correct c.i.f. value of goods to be imported. We need not refer to other details as they are not relevant for deciding this dispute.

10. It is, therefore, amply clear that at the stage when the application for raw material for manufacturing process for granting import licence, which is primarily in terms of quantity, is taken into account the value which may have to be paid for that much quantity on the basis of the proforma invoice or other evidence from the suppliers are also required to be produced. Taking these two items into account and considering the foreign exchange available, licence is granted to the applicant so as to cover his needs of the next year. At this stage it is important to remember that the prices quoted on the basis of a certain invoice may be the ruling prices at that time, but they are liable to change, since a licence covers some reasonable period of six months or a year. During this period of the licence the prices may go up. Government of India may permit the importer to import goods at whatever price during the licence period. It has made a positive estimate of the goods required and this being so, the licence is always made in terms of rupees, representing the foreign exchange for a particular article. This means that the Government of India makes a commitment that it will spare so much foreign exchange for a particular item at the current rupee exchange to cover up the rupee value of the licence. This being so, the licensee has now to operate the licence and import the goods. It is not incumbent upon a licensee to import all the goods covering the full value of the licence at once. He can import

the material in batches, but within the period of the licence. Each time a shipment arrives the Customs not only recover the duty on the basis of Section 14(1), to which we will presently refer, but are also required to debit the licence by the c.i.f. value of the goods. What this c.i.f. value of the goods for the purpose of debiting the licence is or should be is the only disputed question.

11. The above discussion clearly brings out one fact that for granting an import licence, the manufacturer's actual needs in the industry and the country's requirement of that product are taken into account. But while granting licence it is expressed in terms of rupees, the equivalent value of which in foreign exchange could be borne by the Government of India. A balance is being struck as if between the availability of the foreign exchange and the possibility of accommodating the industry for supplying the needs of the community. It may at once be stated that for the purpose of debiting Customs' copy of the licence it has to maintain an account as to how much foreign exchange is already utilised and how much is still available under the licence. This entry is required to be made in rupees, so that the balance rupees under the licence are known for calculating them in terms of foreign exchange.

12. If this is the scheme of granting licences, it is equally logical that an entirely different valuation cannot be introduced for the purpose of debiting licence. So far as the recovery of customs duty is concerned, it appears to us that Section 14(1) always required the prices at which the like goods are ordinarily sold or offered for sale. The substantive section uses the word "price". The addition of the definition sub-clause (c) to Clause 2 of the Imports (Control) Order a new word is now suggested for describing this "price". They call it "value", and "value" is defined as having the same meaning as in sub-section (1) of Section 14 of the Customs Act, 1962. What is described in Section 14(1) as price of the goods at the time and place of importation in the international market is now being described as "value". No new concept is introduced by adding the definition of "value". Paras 286 and 300 of the Import Trade Control Handbook of Rules and Procedure, 1971, are now relevant for the purpose of the disputed question before us. No arguments are raised, nor is the respondent doubting the right of the Department to take into account the international price of the disputed goods for the purpose of customs duty. In fact, they have voluntarily disclosed the international price to be Rs. 4,47,105/-. If this price were to be debited to the licence, it would mean that the basis for granting the licence is one, whereas the basis for debiting the licence indicating the utilisation of the same is entirely different. To be precise, the imports are permitted on the representation by the respondent that the invoice price on the importation would be Pounds 11 per kilogram. Taking the need of the industry in terms of kilograms but considering the foreign exchange that would be required on the basis of Pounds 11 the face value of the licence is determined by the Union of India. In other words, for the purpose of para 286 of these Instructions, which deal with valid licence, it would be a valid licence if this article "Griscofulvin, is imported, which is the correct description valued at Pounds 11 per kilogram so as to cover the entire value of

the licence, viz Rs. 8 lakhs odd. The import would be valid, the recovery of the customs duty would be on the basis of Pounds 25/30 per kilogram. In terms of rupees the value would be almost Rs. 18 to 19 lakhs. It is to be said that if the entire value of the licence is covered by one shipment so as to answer the description of the goods, as also the actual c.i.f. price to be within the fact value of the licence, the licensee is already committing a breach of conditions of the licence, simply because the international price is much more than Rs. 8 lakhs. If such interpretation by the Customs is permitted, wherever there are genuine sales for less price for good reasons and which less price is already accepted by the Government of India while granting the licence, the Customs authorities would be the second policy makers who would disagree with the Government of India. This is an impossible situation to be accepted. The only function of the Customs authorities is to see that goods of the proper description answering the one mentioned in the licence are imported within the value of the licence and that whatever the mutual arrangement between the suppliers and the importers in India and the issuance of licence by the Government of India, the real price has to be ascertained on the basis of the international market price and the Customs duty to be charged on such price. In other words, because of some other consideration which may weigh with Government of India for granting licence, the utilisation of the licence must be on some other basis, viz. the prevalent international market price. Thus allowing the Customs authority to substitute their decision would be permitting them to cut down the licence, which is neither in their purview nor authority to do so. The possible consequence would be that in terms of this calculation of the international value it will render a valid import invalid since the value would invariably increase wherever such arrangement, as is to be found in the present case, exists.

13. The Customs authorities have obviously fallen into an error in interpreting the provisions of para 300 of the Instructions from the Handbook. It is well known that the same word is many times required to be used for conveying different meaning. The word "value" for instance which is the cause of all this trouble has been used to connote different meanings in the context of imports and exports. Where the price u/s 14(1) was to be taken into account by the Customs authorities for the purpose of customs duty that price is described by the word "value" by way of definition in Clause 2(e) of the Imports (Control) Order. Where we otherwise speak of the face value of the licence, the same word "value" is used but this has an ordinary meaning in the English language and does not carry with it that special meaning. Para 300 of the Instructions has to be read bearing in mind the different meaning that has been assigned to the word. In the first clause of para 300 the relevant portion speaks of the value shown in an import licence is always the c.i.f. price of the goods to be imported, and it includes commission allowed by the supplier/manufacturer to the importer or agent. Can there be any doubt that this "value" which is spoken of in the above clause is the actual price charged by the supplier plus the commission and nothing more ? This actual price of supply which we would assume is a genuine

price in that deal can vary from the international market price which is the "value" for the purpose of Customs taxation. The next sentence in the same clause of para 300 says "The value debitable to an import licence for Customs purposes will be c.i.f. value of goods imported assessed by the Customs authorities". This is the only sentence which has created all the trouble. The primary thing which seems to have been forgotten is that whatever the figure the Customs want to debit, they must necessarily debit as "c.i.f. value" and never "value" as defined in Clause 2(e) of the Imports (Control) Order. The Customs are charged with a duty to assess the c.i.f. value and to debit the same to the licence. The c.i.f. value for the purpose of the licence as per the first clause of that instruction is inclusive of the commission allowed by the supplier. Now, the item of commission to be allowed to an importer is not relevant when foreign exchange payable to the exporter is to be ascertained. After deducting commission, the balance price is alone relevant for calculating the foreign exchange. There is, therefore, one kind of valuation for the purpose of assessment to Customs duty but another for the purpose of c.i.f. value which is to be debited to the licence. This value to be debited consists of the items, viz. the price of goods and the commission allowed, and where the commission is not apparent on the surface it is the duty of the Customs authorities to find out and add it to the said price so that the price of the goods plus the commission, and undoubtedly always the freight and insurance would constitute the c.i.f. price for the purpose of debiting the licence. This is all the duty and responsibility and also the authority of the Customs Officers to make inquiries and debit the licence. To equate c.i.f. value with "value" as defined in Clause 2(e) which is equal to Section 14(1) is to fall in an obvious error unwarranted by the language of Instructions, apart from the fact that the instructions could not override the substantive provision. Read in the light of what we have said, the Instructions are consistent with the substantive provision. The whole difficulty arises because of the misinterpretation of the word "value". They properly acted on those Instructions between 1965 and 1971. The addition to the definition of the word "value" by Clause 2(e) came into effect by the Amending Imports (Control) Order in 1964. For the first time the new pricing system between the principals and the subsidiary began, so far as the respondent is concerned from October 1965. For all the six years they were properly assessed to Customs duty though Clause 2(e) existed in the Imports (Control) Order. We wonder why suddenly the Department changed its stand and now debit the licence on the basis of the international market price for the purpose of recovery of Customs duty. We may immediately point out that the Imports (Control) Third Amendment Order, 1964, which was issued on 17th March 1964 introduced a number of changes in the Imports (Control) Order. It is not proper to read the definition in Clause 2(e) in isolation. It must be read along with the Clause 10A, which was introduced by the same amending Order. This Clause 10A has the title "Declaration as to value, sort, quality, etc. of imported goods." Under this caption it is stated -

"On the importation into any customs port of any goods whether liable to duty or

not, the owner of such goods shall in the Bill of Entry or any other documents prescribed by rules, state the value, sort, quality and description of such goods to be best of his knowledge and belief and shall subscribe a declaration of the truth of such statement at the foot of each Bill of Entry or documents."

This clause uses the word "value on importation" and that "value" has now been defined by Clause (e). The importer is, therefore, under a statutory duty to declare the real price at international level where the transactions take place only on the consideration of the price and without any interests between the buyer and seller. This value has to be shown on the Bill of Entry or similar documents as may be prescribed. The very purpose and function of introducing a change in the definition is to bind the importer with his own honest declaration of what he knows u/s 14(1) of the price, apart from what the Customs authorities are required to find out as price on importation. Instruction 300 read in this light is capable of vesting the Customs authorities with the power to investigate the real purchase price between the vendor and vendee, where any doubt arises. That question, however, does not arise in this case, as we find that the parent Company in England has agreed to reduce the price of the raw material in question for the benefit of this country. A drug for the treatment of skin diseases is being manufactured here with the use of the raw material imported. The need of that drug in the market could not be fulfilled or satisfied by the reduced quantity of raw material on the basis of the international price of Pounds 25-30 per kilogram, as converted into rupee value on the basis of the licence issued. If the same quantity was required and must be permitted to come into this country to serve the need of a priority industry, the only alternative was to reduce the selling price. The Glaxos in England have done the same, so that on the basis of the same face value of the licence in terms of rupees, in the context of the foreign exchange crisis and the subsequent devaluation of rupee, nearly the same quantity of a raw material was still available to this country as before. With the full disclosure of this fact to the Government of India, they have issued a licence with the avowed intention that as against a certain face value of the licence a larger quantity of raw material could come into this country on the basis of the reduced price. If this is the obvious intention of the licensing authority, we wonder how the Customs authorities, which are primarily a tax collecting authority, could interfere with a policy decision of the Government of India on the pretext of the Instructions contained in the Handbook which has not even the status of the statutory rule. Whatever such instructions or provisions are in any way inconsistent with the substantive provision, in this case with the provisions of Section 14(1), the provisions of the substantive section will prevail. This is the view taken by the learned single Judge and we are in complete agreement with that view.

14. We may point out that this has already been covered by a Division Bench decision of this Court, though at the time when present Clause 2(e) was not there in the Imports (Control) Order, with the introduction of sub-clause (e) nothing tangible is brought about so as to change the policy of debiting the

licence with the c.i.f. value. The earlier judgment of this Court is certainly good law, it binds us and we respectfully follow the same. In *Parmar & Co. v. V. R. Gupte*, : (1959)61BOMLR1482, a Division Bench of this Court was called upon to consider similar provisions under the Sea Customs Act, 1878. They point out that expression "value" in Section 167(37)(c) of the Sea Customs Act, 1878, means "real value" of the goods as required to be stated u/s 29 of the Act and as defined in Section 30 of the Act. Where the import or export licence speaks only c.i.f. value of the goods, it is the c.i.f. value of the goods and not the real value of the goods that is relevant for the purpose of the offence alleged to have been committed u/s 167(8) of the Sea Customs Act, 1878. That was a case on the allegation of mentioning lower import price of goods. The present interpretation put by the Customs authorities would lead to the same result, viz. that all valid imports would automatically become invalid when the last consignment exceeds the face value of the licence, owing to the value based on the international market price being debited to the licence instead of the c.i.f. value.

15. We may also point out that a similar view has been taken by the Madras High Court in *S. Narayanan v. The Collector of Customs, Madras*, (1962) 2 Mad LJ 421. The learned Judge points out that in cases of licences issued under the Imports Control Order, 1955, the limiting factor for the purposes of clearance through customs is the value of the goods imported which is the approximate c.i.f. value, where the c.i.f. value is within the limit permitted under the licence the importer has a right to import the goods under his licence. The learned Judge further points out :-

"But where the price is really what is agreed under the contract between the parties, the mere fact that the importer got the goods at a bargain price will not enable the authorities to fix the price of goods imported on the basis of Section 30 of the Sea Customs Act. If a seller is willing to sell his goods for considerably lower value than its market price the c.i.f. price cannot be said to be anything other than what is stipulated by the parties as the price."

We refer to this case particularly because it has facts which are otherwise glaring. A consignment arrives in the port of Madras worth Pounds 215-12-0. As it was brought beyond the period of licence, the importer refused to accept it. The petitioner was an enterprising person who had himself a licence to import similar goods for the value of Rs. 500/- covering that period. For a very paltry amount of Pounds 36-15-0 he had offered to buy the goods. The exporter in distress agreed to sell the goods for Pounds 36-15-0. Thus, this being the c.i.f. price for the petitioner, he got the invoice prepared and approached the Customs authorities for delivery of the goods armed with his licence, and while doing so, he informed the authorities of the market value of the goods as Pounds 21-15-0. The Collector of Customs held otherwise that the goods imported being of the value higher than the licence in favour of the petitioner, directed confiscation as it was in contravention of the licence. The Court held that in the circumstances there was a valid licence for the petitioner to import and clear the goods at

Pounds 36-15-0. The bargain price was the c.i.f. value of the importer and that alone could be debited to the licence. Since this is forgotten by the Customs authorities, such wasteful litigation is created.

16. We thus see no substance in this appeal, which deserves to be dismissed. However, before parting with the case we want to indicate what we think about litigation of this type. The present appeal relates to the interpretation of the word "value"; a point which is covered by the two authorities, of this Court and the Madras High Court. The so-called amendment of the rule has nothing to do with the point in question. Even then the Customs authorities raised the dispute, which we consider as utterly wasteful. A logical consequence of the attitude adopted by the Customs authorities would be directly against the interest of the country. On their interpretation much less quantity of the raw material could be imported into the country by the priority industry. When an order like this is passed and the party points out the obvious error in arriving at such a decision, it is well to examine the implication of that representation and not drive the party to Court to seek redress of its grievance. Nobody seems to take any responsibility of making a proper determination, and the party is driven to Court, when the point is already covered by a decision of the Court. This leads to sheer waste of public time and money. The sooner some machinery is provided to stop such waste, the better.

17. In the result, the appeal fails and is dismissed with costs. We fix the costs at 2,500/- (Twenty-five hundred) payable by the appellants to the respondents.

18. Appeal dismissed.