PRIVY COUNCIL.

FORD MOTOR COMPANY OF INDIA LTD. APPELLANT *v.* THE SECRETARY OF STATE, RESPONDENT.

J. C.*
1937
November 19

[On Appeal from the High Court at Bombay]

Sea Customs Act (VIII of 1878,) section 30 (a)—Price of goods—No sales of other goods of like kind and quality—Applicability of section 30 (a).

If there is an actual price for the goods imported themselves at the time and place of importation and if it is "a wholesale cash price less trade discount", clause (*a*) of section 30 of the Sea Customs Act is not inapplicable for want of sale of other goods of the like kind and quality.

That the wholesale price obtainable for goods was higher than it would otherwise have been by reason of the importer's organisation and business methods is not a ground for exemption from the application of clause (*a*). That post-importation charges should be excluded in arriving at the price of goods need not be doubted, but the phrase "place of importation" must be taken in a practicable and reasonable sense and cartage charges for the journey from the boundary of the port to the Railway Station are not necessarily to be eliminated in arriving at the price of the goods.

Vacuum Oil Co. v. *Secretary of State for India*[1] and *Vacuum Oil Company* v. *The Secretary of State for India*,[2] referred to.

Decree of the High Court, 60 Bom. 551, confirmed.

APPEAL (No. 114 of 1936) from a decree of the High Court in its Appellate Jurisdiction (October 4, 1935) which modified a decree made in its Ordinary Original Civil Jurisdiction (April 5, 1935).

The material facts and the contentions of the appellants are stated in the judgment of the Judicial Committee.

The respondent was not called on to reply.

Sir William Jowett, K. C., and *Sir Thomas Strangman*, for the appellants.

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Dunne, K. C., *St. J. Field* and *McDonnell*, for the respondent.

**Present :* Lord Thankerton, Lord Wright and Sir George Rankin.

(1) (1932) L. R. 59 I. A. 258 at p. 266, s. c. 56 Bom. 313 at p. 322.

(2) (1921) 47 Bom. 174.

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The judgment of the Judicial Committee was delivered by SIR GEORGE RANKIN. The appellants are the Ford Motor Company of India, Limited. They import Ford motor vehicles into India from Canada, and the questions raised by this appeal relate to the amount of customs duty payable upon 256 Ford motor cars consigned to the appellants which arrived in Bombay by the s.s. "Algic" on or about January 9, 1929.

The facts are not in dispute. The appellants have a monopoly of the supply of Ford vehicles to India. Save that they sometimes sell direct to their own employees or to Government, they sell in India only to authorised dealers or distributors. Each distributor has a particular district within which he is the sole agent for or retail seller of Ford vehicles. The appellants obtain from the distributors information as to their future requirements and place consolidated orders accordingly once or twice a month with the manufacturers in Canada. The evidence of the appellants' director (Mr. Gordon Edward Corey), the only witness called at the hearing of the suit, was as follows :—

"Our orders are placed normally once a month. That order covers our requirements for one month—two or three months following our order. After they [Ford (Canada)] receive the order they must build the car and a month is required for passage time. We sell to the dealers in large quantities Ford vehicles and all parts relating thereto. We sell to the dealers all over India, Burma and Ceylon."

The appellants issue from time to time a price list; and the terms of business are that the retail price to be charged by the distributor to the public is that stated in the price list current at the time of arrival of the vehicles in India, and the price payable by the distributor to the appellants is the same price less a discount of 20 per cent. The distributor has to pay this price before obtaining delivery. Delivery is given by the appellants "free on rail," save in the case of the authorised dealers for the district of Bombay itself—viz., Ford Automobiles (India), Limited—to whom delivery is made at their own warehouse in Bombay. The price mentioned in the price list is in all

cases for a vehicle in running order, and the same is true of the contract between the appellants and the distributors. Each of the cars now in question arrived in India packed in a case, but incompletely assembled in respect that the battery had to be charged and fixed, the wheels, mudguards, and running boards to be fixed, and other items of work done to put the vehicle in running order. Having no facilities for doing such work in Bombay, the appellants gave delivery of the cars in the state in which they had arrived, making an agreed allowance to their distributors against the price. For each car the allowance was 13 rupees 8 annas.

Under the Second Schedule to the Indian Tariff Act (VIII of 1894) as it stood in 1929, motor cars were chargeable with a customs duty calculated at 20 per cent. of the "real value" as defined by section 30 of the Sea Customs Act (VIII of 1878). The section is as follows :—

"30. For the purposes of this Act the real value shall be deemed to be—

"(*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."

The 256 Ford motor cars [Model A Vehicles] which arrived by the s.s. "Algic" in January, 1929, were assessed to customs duty by the Collector of Customs upon the view that clause (*a*) of section 30 applied to the case, and that the price charged by the appellants to the distributors, excluding therefrom the allowance of Rs. 13-8-0, was such a wholesale cash price as is specified therein. The appellants disputed this assessment, contending that for the motor cars in question there was no such wholesale cash price

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ascertainable, that the duty should have been assessed under clause (*b*) of section 30, and that in any event the appellants' price to their distributors was attributable in part to work done or services rendered after the importation of the goods. On September 12, 1929, the appellants, having on March 22, 1929, paid under protest the sum of Rs. 81,986-9-0 claimed by the Customs authorities, sued the Secretary of State in Council in the High Court of Bombay for a return of Rs. 15,118-11-0 as duty over-paid and for certain declarations as to the correct basis of assessment. The learned trial Judge Tyabji J. held (January 21, 1935) that the motor cars were in the circumstances assessable under clause (*a*) of section 30, but that duty was only payable upon the basis of the appellants' price to the distributors provided that deductions therefrom were made so as to reduce it to an " ex ship " price. With this object he reduced the figure by making two deductions—(*a*) for the cost of carriage from the dock to the place of delivery and (*b*) for the appellants' overhead charges in respect of the assembling of the cars after importation. The parties agreed that upon the view taken by the learned Judge the amount of customs duty overpaid was Rs. 454-9-0. Upon appeal by both parties to a Division Bench it was held that the assessment made by the Customs authorities was correct and the appellants' suit was dismissed with costs (October 4, 1935).

On behalf of the appellants stress has been laid upon certain features of their business. They have from the first insisted that Ford cars are in a class by themselves and cannot be regarded as of the like kind and quality as other cars. To the fact that the appellants are the sole importers of such cars they attribute important consequences, contending that in such a case the only wholesale price is the f.o.b. price at the port of shipment plus the charges for freight and insurance—in effect the price c.i.f. Bombay. It is further said that they have at any given time ascertained

beforehand the whole requirements of the distributors, so that each consignment from Canada brings the Indian market to saturation point, with the result that the price given for the goods actually imported affords no indication of the price at which any other Ford cars could be sold. The exact prices obtainable by the appellants are, it is contended, accounted for in part by the appellants' system of price control through " sole agents " for different districts and their sales to their distributors are not in the circumstances evidence of any market value or any general wholesale price obtainable for a Ford car as soon as it has been landed in Bombay. It is accordingly maintained that while there may be cases in which the fact that certain cars are sold for a given price is good ground for inferring that similar cars would fetch the same amounts, no such inference can here be made. The wholesale cash price of clause (*a*) is meant, it is said, to be a price for hypothetical goods and to be independent of particular circumstances affecting the goods imported : so that the clause can operate only in the case of staple articles for which there is a market price or price current ascertainable from day to day. In support of this view the observations of Lord Blanesburgh delivering the judgment of the Judicial Committee in the case of *Vacuum Oil Co.* v. *Secretary of State for India*,[1] are called in aid (p. 266) :—

" The wholesale cash price primarily in view is . . . that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles."

It is for these reasons denied that in January, 1929, there was for Ford cars any wholesale selling price in Bombay which could be taken as the basis of assessment, and it is objected that to assess the cars upon the appellants' price to the distributors is to exact customs duty upon the appellants' profits and to put Ford cars at a disadvantage as against cars which are sold retail by the importers.

[1] (1932) L. R. 59 I. A. 258, s. c. 56 Bom. 313.

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These are formidable contentions and they must be tested by the language of the statute. It is reasonably plain *in limine* that if such a wholesale price as satisfies the description contained in clause (*a*) of section 30 is ascertainable the goods cannot be dealt with under clause (*b*), and the statute is not consistent with the view that the importer's profit should in that case be excluded from the assessable value. The price to be ascertained is "a 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". In the application of section 30 to the facts of a given case, something may depend upon the exact force attributed to the requirement that the price must be "ascertainable". The word imports more than could be satisfied by the result of a mere estimate. On the other hand the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by clause (*a*) upon the basis of an actual price, though some adjustment may be needed to eliminate the difference, e.g., between cash and a month's credit.

If the facts of the present case and the terms of clause (*a*) be placed side by side for comparison, several points of exact agreement become clear. The appellants' price to their distributors is a wholesale price within the meaning of the section as declared in *Vacuum Oil Co.* v. *Secretary of State for India* (*supra*). It is a cash price: payment was made before delivery and delivery was within a few days of the arrival of the goods. The only discount has been deducted. It is not now contended that the cars were sold at the time (September or October, 1928), when the distributors made known their requirements to the appellants. The cars were invoiced a few days before arrival of the ship and the price became fixed then and not before. The sales were therefore sales at the time of importation in every reasonable sense. The question whether the price which they fetched relates to a sale "at the place of importation" gave rise to a

difference of opinion between the Indian Courts. The trial Judge was much influenced by what Lord Blanesburgh in the case already cited has said as to the price being "relieved of the loading representing post-importation expenses". He held that only a sale "ex ship" satisfies the exact requirements of clause (*a*). On the other hand both Judges of the Appellate Bench held that a sale at Bombay with delivery f.o.r. Bombay complied fully with a reasonable interpretation of the clause. Their Lordships are in agreement with the Appellate Bench. It is difficult to suppose that if the legislature had intended anything so precise as "ex ship" it would have used the more general phrase "at the place of importation". The phrase "f.o.r. at the main ports of entry"—quoted from the appellants' price lists—comes within the meaning of the statutory phrase. This is the force given to the words "at the place of importation" by Macleod C.J. and Shah J. in *Vacuum Oil Company* v. *The Secretary of State for India*.[1] Before the Board the appellants' learned counsel did not contend for "ex ship" but suggested that "ex wharf" might not be too narrow and that in any case "place of importation" would not extend beyond the limits of the port. That the cartage charges should be analysed so as to eliminate the proportionate cost of the journey from the boundary of the port to the railway station in Bombay is not in their Lordships' view necessitated by the phrase "place of importation," still less could they regard it as a reasonable ground for holding that the sales in the present case were not within the terms of clause (*a*). That the legislature intended to exclude post-importation expenses need not be doubted, but it had to do this in a practicable manner without undue refinement, and it must be taken to have regarded the phrase which it employed as sufficient for the purpose if taken in a reasonable sense.

[1] (1921) 47 Bom. 174.

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The fact that the motor cars were incompletely assembled at the time of their arrival in Bombay gives rise to no difficulty; because, although the car, according to the price lists, had to be in running order, the allowance in respect of this defect was an agreed allowance, and reduced the sum payable by the distributor to a price referable to the car in the condition in which it arrived in Bombay. The allowance was deducted by the Customs authorities from the price to the distributors before arriving at the price upon which duty was calculated. The trial Judge thought it necessary to set on foot calculations as to the appellants' overhead expenses in respect of assembling, but in their Lordships' view this has no bearing upon any matter arising under clause (*a*) of section 30 and the Division Bench rightly set aside this direction.

The price upon which customs duty has been charged appears therefore to be a wholesale cash price less trade discount for which the goods under assessment were in fact sold at the time and place of importation. On this footing their Lordships must now consider the more general arguments for the appellants against the application of clause (*a*) to the shipment in question. "Goods of the like kind and quality" is a phrase which suggests other goods than those under assessment. Upon this is based the argument that one must either disregard the price fetched by the goods themselves or should look to it only to see what price other similar goods would have realised. Unless that is ascertainable, it is contended that the conditions of clause (*a*) are not satisfied. If for example one may assume that there were in Bombay no Ford Model A vehicles left undisposed of from previous shipments, then on this view the correct test is to ask oneself whether apart from and in addition to those which arrived by the s.s. "Algic," further cars could

have been sold in Bombay on or about January 9, 1929, and, if so, would they have fetched the same prices ? If this be the true interpretation of the statutory test there is difficulty in holding it applicable to the present case, and colour is certainly lent to the contention that clause (*a*) is intended only to have effect in the case of goods for which there is at the place of importation a market in the strict sense applicable only to staple commodities. But in their Lordships' view this is a misinterpretation of clause (*a*). The application of the clause does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily at the time of making out the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of clause (*a*). As a rule therefore the price appropriate to the goods under assessment will under the clause be deducted, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a " wholesale cash price less trade discount " the clause is not inapplicable for want of sales of other goods. The clause can be applied distributively to each of the motor cars in this consignment and even if they are regarded collectively the clause is not defeated. A particular car may be sold at a price which having regard to other transactions in such cars or to other circumstances is too high or too low. In that sense the actual price in a particular instance does not necessarily or finally establish a wholesale price to satisfy clause (*a*) whether the particular car or cars sold be part of the shipment in question or not. But the goods under assessment may under clause (*a*) be considered as members of their

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own class even although at the time and place of importation there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. In the present case a number of sales have been made to different distributors in the ordinary course of an extensive importing business. It is difficult to think that the appellants' practice to find out their distributors' requirements in advance, and to place monthly orders with the manufacturers accordingly, would result in a perfect saturation of their "market"; but if it did, clause (*a*) of section 30 does not require the customs duty to be calculated upon any supposition that would involve over-supply or any additional supplies. Without assuming that for Ford cars there was any perfect "market" in Bombay at the time in question, it is quite reasonable to ask what such cars were fetching wholesale at that time and place, and quite reasonable to answer it by taking the prices fetched by the cars under assessment. That the wholesale price obtainable was higher than it would otherwise have been, by reason of the appellants' organisation and business methods is not a ground of exemption under clause (*a*) though doubtless their methods of business have improved the demand. That it was higher than it would have been had not the appellants as monopolists carefully controlled the supply may be equally true, but this again affords no escape from the clause if the case be otherwise within it.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: Messrs. *Sanderson Lee & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

C. S. S.