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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1939 OF 2004

GlaxoSmithKline Pharmaceuticals Limited
(Formerly known as SmithKline Beecham
Pharmaceuticals (India) Limited) ... Appellant

Versus

Union of India & Ors. ...
Respondents

WITH

CIVIL APPEAL NO.1940 OF 2004
WITH
CIVIL APPEAL NO.1941 OF 2004
WITH
CIVIL APPEAL NO.1942 OF 2004
AND
CIVIL APPEAL NOS._10901-10902__OF 2013
(ARISING OUT OF SLP (CIVIL) NOS.27241-27242 OF 2010)

JUDGMENT

R.M. LODHA,J.

Leave granted in SLP(C) Nos.27241-27242 of 2010.

2. This is a group of six appeals, by special leave, four arising from the judgment of the Karnataka High Court and two from the Delhi High Court.

3. The two High Courts, Karnataka and Delhi, have taken diametrical opposite view on the question whether the prices fixed under the Drugs (Prices Control) Order (for short, 'DPCO') in respect of drugs/formulations would be operative in respect of all sales subsequent to 15 days from the date of the notification by the Government in the official gazette/receipt of the price fixation order by the manufacturer.

4. The Drugs (Prices Control) Order,1995 (for short, 'DPCO,1995') was under consideration before the Karnataka High Court whereas the Drugs (Prices Control) Order,1987 (for short, 'DPCO,1987') fell for consideration before the Delhi High Court. Although, the sequence of the relevant paragraphs in the two DPCOs differ but the relevant provisions are almost identical. The view of the Karnataka High Court has not been accepted expressly by the Delhi High Court. Since the common arguments have been advanced in this group of matters and the question of law is identical, all these six appeals were heard together and are disposed of by the common order.

5. The facts in civil appeals from Karnataka High Court are these: The appellant, in the year 1998, was manufacturer of Furoxene Tablets and was also the sole distributor for Dependal-M Tablets and Dependal Suspension manufactured by Kanpha Labs, Bangalore. Dependal-M and Dependal Suspension and Furoxene are formulations of Furozolidine and Metronidazole. On 09.03.1998, a notification was issued by the National Pharmaceutical Pricing Authority (NPCA) under the DPCO,1995, whereby the ceiling price in

regard to several formulations consisting of Furozolidine and/or Metronidazole was fixed exclusive of excise duty and local taxes. The notification was gazetted on 09.03.1998 itself.

6. On 10.03.1998, NPCA issued an explanatory notice clarifying that the notification reduces the existing prices and the manufacturers must make effective the prices so fixed/revised, within 15 days (from the date of the notification in the official gazette or receipt of the order of the NPCA) as required under para 14(1) of the DPCO,1995 and also issue necessary revised price lists as required under para 14(3) of that Order.

7. On 14.07.1998, the Inspector of Drugs, Varanasi issued a letter addressed to the appellant-Company that it has not given the effect to the notification dated 09.03.1998.

8. On 22.07.1998, the appellant-Company responded to the letter received from the Inspector of Drugs and brought to his notice that the notification dated 09.03.1998 has been given effect to from the first batch manufactured on the expiry of 15 days from the date of the notification which is permissible under para 14 of the DPCO,1995.

9. On 30.07.1998, Inspector of Drugs sent another letter to the appellant-Company stating therein that under paragraph 16 of DPCO,1995, all sales of the subject formulations would have to be made at the new ceiling price fixed on 09.03.1998 irrespective of the date of manufacture of the subject formulations. The plea of the appellant-Company was, accordingly, rejected by the Inspector of Drugs and he proposed to initiate the prosecution against the appellant-Company under the Essential Commodities Act,1955 ('EC Act'). This was reiterated by the Inspector of Drugs in his further communication dated 16.11.1998.

10. The appellant-Company then challenged the notices/letters dated 14.07.1998, 30.07.1998 and 16.11.1998 by filing a writ petition before the High Court. The writ petition was contested by the Central Government and its functionaries.

11. The Karnataka High Court by its judgment dated 12.11.2002 dismissed the writ petition. The principal reasoning is reflected in paragraph 9 of the judgment which reads as follows:

> "9. Having regard to the provisions of para 14 of DPC Order, petitioner who is a manufacturer of Furoxene tablets, ought to carry into effect the revised price fixed as per Notification dated 09.03.1998 within 15 days from the date of the said Notification or receipt of the Order of the Government. There is no dispute that the Notification dated 09.03.1998 was published in the Gazette of India on the same date. While sub-para (2) of para 14 requires the retail price of the formulation as notified by the Government being displayed on the label of the container of the formulation and the minimum pack offered for retail sale, sub-para (3) thereof requires the manufacturer to issue a price list and supplementary price list to the dealers and other persons specified therein indicating reference to price fixation/revision from time to time. Para 16 of DPC Order prohibits all persons including manufacturers/distributors/retailers from selling any formulation at the price exceeding the price specified in the current price list indicated on the label of the pack whichever is less. Thus, a combined reading of these provisions make it clear that every manufacturer and distributor is duty bound to issue a revised price list within 15 days from the date of the notification issued by the Government under para 9 of the DPC Order. It is also clear that manufacturers, distributors and retailers will be liable to sell formulations from the date of such revised price list (which is required to publish within 15 days from the date of notification) at the revised prices and not the prices mentioned on the label of the container or pack. In view of it, the contention of the Petitioner that revised prices will not apply to the existing stocks but only to new batches of drugs and formulations to be manufactured after 15 days of the notification cannot be accepted. The provisions of the DPC Order are clear that prices should be revised within 15 days even in regard to the formulations which were manufactured prior to the date of notification or those manufactured within 15 days from the date of notification."

12. It is from the above judgment that four appeals arise at the instance of the manufacturer/distributor.

13. The two appeals from the judgment of the Delhi High Court are

at the instance of the Central Government. The facts in these two appeals in brief are these: For the period 01.04.1979 to 25.08.1987, Drugs (Prices Control) Order,1979 (for short, 'DPCO,1979') was in operation. The bulk drug Ranitidine and its formulation were not subject to price control under DPCO,1979, and, consequently, there was no price fixation at all in respect of Zinetac tablets.

14. On 26.08.1987, DPCO,1987 came into force whereby the bulk drug Ranitidine was included and, accordingly, Zinetac tablets (its formulations) were subjected to price control.

15. On 17.03.1988, the price fixation order was issued under para 9(1) of the DPCO,1987 fixing the retail price of Zinetac tablets. The price fixation order is said to have been received by the manufacturer (Biotech Pharma) on 21.03.1988.

16. The respondent is distributor of the Zinetac tablets in the strength of 150 mg and 300 mg per tablet manufactured by Biotech Pharma. Zinetac is a formulation of the bulk drug Ranitidine. On 04.04.1988, the Biotech Pharma sent the supplementary price list effective from 04.04.1988 in form V. It is the case of the respondent that the price fixed by the price fixation order dated 17.03.1988 is applicable with effect from 04.04.1988 (on expiry of 15 days from 21.03.1988, i.e., the date of receipt of the price fixation order dated 17.03.1988).

17. On 23.05.1988, seizures were made of 300 mg Zinetac tablets from Batch No.3104. The respondent's case is that Batch No.3104 is prior to Batch No.3115 mentioned as the effective batch number in the manufacturer's letter dated 04.04.1988.

18. The respondent-Company challenged the seizure of goods by filing a writ petition before the Delhi High Court. The writ petition was contested by the Central Government before the Delhi High Court and the judgment of the Karnataka High Court was also cited. However, Delhi High Court did not agree with the view adopted by the Karnataka High Court. The Delhi High Court heavily relied upon a circular dated 28.04.1979 issued by the Ministry of Petroleum, Chemicals and Fertilizers, Department of Chemicals and Fertilizers, Government of India. The said circular though was issued in the context of paragraph 19(2) of DPCO,1979 but the Delhi High Court was of the view that the said circular was identical to paragraph 16(3) of DPCO,1987, and, therefore, the position explained in respect of the DPCO,1979 would continue to hold the field in respect of the very same provisions in DPCO,1987. The Delhi High Court, accordingly, by its judgment dated 22.10.2009 allowed the writ petition and quashed the seizure memo whereby the goods were seized. The Union of India is aggrieved by the judgment and the two appeals arise therefrom.

19. We have heard Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor and Ms. Indira Jaising, learned Additional Solicitor General for the Union of India.

20. It is appropriate at this stage to reproduce the few relevant paragraphs of DPCO,1987 and DPCO,1995 side by side.

DPCO, 1987	DPCO, 1995
16(3) Every manufacturer or importer shall give effect to the price of a bulk drug or formulation, as the case may be, as fixed by the government from time to time within 15 days from the receipt by such manufacturer or importer of the communication in this behalf from the government and issue a supplementary price list in this regard to the dealers, state drugs controllers and the government and indicate necessary reference to such price fixation.	14(1) Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer.
17. Every manufacturer importer or distributor of	14(2) Every manufacturer, importer or distributor of a

a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the maximum retail price of that formulation with the words "retail price not to exceed" preceding it, and "local taxes extra" succeeding it. Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata price of the main pack rounded off to the nearest paisa.	formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation notified in the Official Gazette or ordered by the Government in this behalf, with the words "retail price not to exceed" preceding it, "local taxes extra" succeeding it, and "under Government Prices Control" on a red strip, in the case of scheduled formulations: Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa.
21. Prices to the traders:- (1) A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any other made thereunder, at a price equal to the retail price (excluding excise duty, if any) minus 16% thereof in the case of price controlled drug. (2) Notwithstanding anything contained in sub-paragraph (1), the Government may by a general or special Order fix, in public interest, the price to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.	14(3) Every manufacturer or importer shall issue a price list and supplementary price list, if required, in form V to the dealers, State Drugs Controllers and the Government indicating reference to such price fixation or revision as covered by the order or Gazette notification issued by the Government from time to time. 15(1) Every manufacturer, importer or distributor of a non-scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation with the words "retail price not to exceed" preceding it and the words "local taxes extra" succeeding it, and the words "Not under

	Price Control" on a green strip:
	Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa.
	(2) Every manufacturer or importer shall issue a price list and supplementary price list, if required of the non-scheduled formulation in Form V to the dealers, State Drugs Controllers and the Government indicating changes from time to time.
	(3) Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same.
	19(1) A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any order made thereunder, at a price equal to the retail price, as specified by an order or notified by the Government (excluding excise duty, if any), minus sixteen per cent thereof in the case of scheduled drugs.
	(2) Notwithstanding anything contained in sub-paragraph (1), the Government may by a general or special order fix, in public interest, the price of formulation sold to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.

21. The comparative statement of the above provisions indicates that para 14(1) of DPCO,1995 is identical to para 16(3) of DPCO,1987. Para 14(2) of DPCO,1995 is identical to para 17 of DPCO,1987. Para 14(3) of DPCO,1995 is identical to para 16(3) of DPCO,1987 and para 15(1) of DPCO,1995 is identical to para 17 of DPCO,1987.

22. In light of the similarity of the above provisions, for the sake of convenience, we shall refer henceforth to the provisions contained in DPCO,1995.

23. Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor argues that on a plain reading of para 14(1) of

the DPCO,1995, a manufacturer is given fifteen days from the date of notification of a price fixation by the Government in the official gazette or receipt of the price fixation order by the manufacturer for carrying into effect the price of the bulk drug or formulation. Under para 14(2) of the DPCO,1995, the manufacturer is required to print indelibly the retail price of the formulation on the label of the container of the formulation with the words "retail price not to exceed" preceding it and "local taxes extra" succeeding it. Therefore, upto the expiry of the fifteenth day from the date of the notification, the price fixation order in the official gazette or receipt of the price fixation order by the manufacturer, the manufacturer is at liberty to manufacture the formulations and print on them the pre-notification prices and clear the same from his factory after paying excise duty on the basis of such provided price.

24. Mr. S. Ganesh, learned senior counsel relies upon the Circular dated 28.04.1979 issued by the Central Government wherein it was clarified that all reductions in the prices of formulations effected from time to time by the Central Government would be applicable to the stocks cleared on and after the date of effectuation of reduction. The clarificatory Circular further says that price list shall state clearly the batch numbers from which the reduction is effective. It is, thus, the submission of Mr. S. Ganesh that the formulations which are manufactured and cleared prior to the date of effectuation of reduction (the 15th day after the date of notification in the official gazette or the date of receipt of price fixation/reduction order) are not subject to the price reduction and, accordingly, the said pre-effective batch products can be sold at the previously existing and operating prices which would be printed on them.

25. It is argued by Mr. S. Ganesh that the said circular has not been withdrawn and it has been continuously observed by the trade as well as by the Central Government for several decades. It is his submission that if the interpretation as above is not accepted, the consequence will be that the period of 15 days expressly allowed by para 14(1) of the DPCO,1995 and the specific provision in Form V regarding the effective batch number to which the price reduction/fixation would apply, will all be rendered completely meaningless and otiose. With reference to practical problems, it is submitted that the manufacturer pays excise duty on the basis of the printed price at the time of the manufacture and clearance from his factory and also on the payment of sales tax on the sale price charged by the manufacturer to the distributor/wholesalers, which again will be on the basis of the printed price. The payment of excise duty and sales tax having become final, the differential amount cannot possibly be refunded and re-assessed. Moreover, if a distributor/wholesaler/retailer has already paid a higher price on the basis of the previously prevailing price, he cannot possibly be required to sell the formulation at the newly reduced price. According to Mr. S. Ganesh, learned senior counsel such an interpretation will be contrary to and in fact destructive of the provisions of para 19 of the DPCO,1995.

26. Mr. S. Ganesh, heavily relied upon the judgment of this Court in Ranbaxy Laboratories Limited[1] which interpreted an exemption notification. Drawing analogy from that judgment, it is argued that just as the exemption notification which was issued under para 25 of the DPCO,1995 was addressed to the manufacturer, similarly, price fixation/revision notification is also addressed to the manufacturer who is required to effectuate the same by printing the revised price on all products manufactured and cleared by him from the 15th day after the date of notification/receipt of the order, and also issuing the revised price list declaring the effective batch number from which revised price will operate.

27. Mr. S. Ganesh, learned senior counsel submits that the manufacturer/distributor having acted as per circular dated 28.04.1979, cannot be lawfully prosecuted/penalized since the circular constitutes the contemporanea expositio of the Central Government which framed the DPCO. In this regard, learned senior counsel places reliance upon the decision of this Court in Desh Bandhu Gupta[2]. His submission is that under the DPCOs, every price list is in respect of "effective batch number". The clarification made with regard to DPCO,1979 is equally applicable for interpretation of 1995, DPCO, since para 14(1) and 14(3) of DPCO, 1995 is identical to DPCO,1979.

28. Mr. S. Ganesh, learned senior counsel argues that there is no allegation of any act or omission by the manufacturer/distributor during

the period of 15 days allowed by para 14 of DPCO,1995. He further submits that the interpretation of DPCO,1979, DPCO,1987 and DPCO,1995 is no more a relevant issue as with effect from June, 2013, DPCO, 2013 has come into operation and its scheme and provisions are entirely different from the earlier DPCOs.

29. Relying upon the decision of this Court in Usha Martin[3], it is submitted by the learned senior counsel that the issuance of 1979 circular shows that two views are possible and, therefore, the view beneficial to the subject must be adopted, particularly, to a case of criminal prosecution/penalty.

30. It is argued by Mr. S. Ganesh that there is no provision in DPCO or in the EC Act which nullifies or sets aside past lawfully completed transaction for sale of goods by the manufacturer to the distributor or by the distributor to the retailer. There is also no provision which requires the manufacturer to reprint products already in the market with the new price. The printing of the price is covered by Section 3(f) of the Drugs and Cosmetics Act, 1940 and, therefore, the reprinting of the price can be done only by the manufacturer in his licence manufacturing premises. The manufacturer has no privity whatsoever with the retailer and may not even know his identity. It is absolutely impossible for the manufacturer to get possession of the goods from large number of retailers, bring them back to his factory, reprint the lower price and then send them back to the retailer with a lower price printed on it, so that the retailer who paid the higher price to the distributor is then compelled to sell the goods at a loss at the lower price. The retailer who has already paid for the goods would never part with them; especially only for having them reprinted with a much lower price. He submits that such an interpretation of the DPCO will be utterly unworkable and impossible to comply with and any interpretation other than what has been stated in the circular must be summarily rejected.

31. Ms. Indira Jaising, learned Additional Solicitor General, on the other hand, argues that the scheme of the two DPCOs, 1987 and 1995 is very clear and that scheme is that once the price is notified for a formulation, the sale to the consumer can only be at the notified price. Learned Additional Solicitor General submits that para 16 of the DPCO,1995 imposes an absolute obligation on all persons not to sell any formulation to any consumer at a price exceeding the price specified in the "current price list" or price indicated on the label of the container or back thereof, "whichever is less".

32. With reference to the definition of the expression ’price list’ in para 2(u) of DPCO,1995 learned Additional Solicitor General submits that the price specified in the current list is nothing but the currently notified price of the bulk drug or formulation under the DPCO. For purpose of interpreting the expression "price specified in the current price list", it is essential that the manufacturer has not defaulted in its obligation to issue price list or supplementary price list. The ’current price list’ is, therefore, simply the price list reflecting the currently operating notified price under the DPCO. Moreover, price specified in the current price list is nothing but the MRP reflected in column 11 of Form V. Thus, regardless of the entry in column 11, "effective batch number" the price specified in column 11 is the price specified in the current price list, for the purposes of para 16. Batch number is not relevant for the purpose of identifying this price. It is the submission of the learned Additional Solicitor General that batch number is altogether different concept which may be traced to Rule 96 of the Drugs and Cosmetics Rules, and the reference to effective batch number in Form V is only for internal record related purposes. There is no reference to batch numbers in either, DPCO, 1987 or DPCO, 1995. Such reference can only be found in Form V and Form V does not give any definition of effective batch number.

33. Learned Additional Solicitor General submits that the plain meaning suggests that revised price must be carried into effect within 15 days. The words "carried into effect" read with "within 15 days" mean that the prices of the drugs are fixed "with effect from" fifteen days from the date of notification. The expression "within 15 days" indicates the outer limit.

34. The contention of the learned Additional Solicitor General is that there cannot be two different prices in the distribution chain. Each of the DPCOs, i.e., DPCO,1979, DPCO, 1987 and DPCO,1995 contains a provision where the benefit of the price reduction will mandatorily have to be passed on to the consumer from the moment the reduction became

operative. While there may be several persons in the distribution chain, there is an embargo in the DPCO preventing any person from selling to the end-point consumer at anything above the notified price (once such price became operative). That being the position, there cannot be one price that is operational at the end-point of the distribution chain and another price upstream in the distribution chain. The emphasis by the learned Additional Solicitor General is that DPCOs ensure that consumer is given the benefit of the notified price, upon its notification. The consumer gets the benefit of the notified price, irrespective of batch numbers since the formulation be interpreted with the object of the DPCO as the guiding principle. Reliance is placed on Cynamide India Limited[4].

35. It is also argued by the learned Additional Solicitor General that no prejudice is caused to the manufacturer/distributor as the revised price is also based on a cost plus methodology. The reduction in the price is only to reflect reduced cost and it simply prevents the manufacturers from making windfall gains by charging high prices even though costs have reduced. As regards distributors or others in the distribution chain, it is submitted that it is possible that certain stock has been purchased at the higher and revised price and is lying with the distributor or wholesaler or retailer but once the revised price comes into effect, this stock becomes unsellable at the higher price, and the losses or reductions need to be absorbed somewhere in the distribution chain. How the manufacturers/distributors and dealers, inter-se, make arrangements for these losses to be absorbed, depends on the specific contractual and credit arrangements. It is possible to work out an arrangement where the stock is recalled or necessary adjustments are made to reflect the lower price. The fact that the Chemists and Druggists Federation advocates such a mechanism shows that it is entirely within the realm of possibility. It is emphasised that paramount consideration of the Central Government is that the revised price must be carried into effect insofar as the consumer is concerned. It is for the manufacturers and distributors to make appropriate arrangements how the unsold stock is dealt with.

36. As regards the circular of 28.04.1979, the submission of the learned Additional Solicitor General is that DPCO,1979 stands repealed and the so-called circular is not saved by the saving clause as it is not a thing done or action taken under the DPCO. Rather it is clarification of the DPCO itself and it cannot survive once the DPCO is repealed. The circular of 28.04.1979 was in the context of interpretation of DPCO,1970 and DPCO,1979 whereas the present matters are concerned with DPCO,1987 and DPCO,1995. Relying upon a decision of this Court in M/s. G.S. Dall and Flour Mills[5], it is argued that an executive instruction issued in a certain context cannot govern a later notification. Moreover, it is submitted that if a circular provides an interpretation that runs contrary to the provisions of DPCO, the Court may examine the provisions and interpret them in their proper perspective. The circular is not binding on the court. The circular is not issued under any statutory authority and cannot be used to interpret the provisions of the statute.

37. It is submitted that the circular is, in any event, inconsistent with the provisions of DPCO,1987 and DPCO,1995. It only represents the department’s view at the time which may have been erroneous. There is no estoppel against statute. In this regard, the decision of this Court in Bengal Iron Corporation and Another[6] is relied upon.

38. It is also argued by the learned Additional Solicitor General that a circular which is contrary to the statutory provisions has no existence in law. Ratan Melting & Wire Industries[7] is pressed into service in this regard. In any case, it is submitted that the manufacturer/distributor have not relied on the circular in good faith. In 1988, there is correspondence in the Glaxo between appellant and respondent where appellant was clearly put to notice that it was required to comply with notified price. Despite this correspondence, the appellant elected not to comply with the notified price. Thus, the appellant can hardly rely on the circular once the respondent has put forward a certain interpretation in 1998. The appellant was fully aware of the interpretation taken by the respondent and willfully elected to act in contravention of the DPCO. That being the case, the appellant cannot now act oblivious of correspondence in 1988 and place reliance on 1979 circular.

39. It is the submission of the learned Additional Solicitor General that the relabeling is permitted under law. Earlier, issue of printing prices was governed by the Standards of Weights and Measures Act,

1976. Now it is governed by Legal Metrology Act, 2009. Legal Metrology (Packaged Commodities) Rules, 2011 (for short, '2011 Rules') contains an exemption for pharmaceuticals being cognizant of the fact that Government can fix prices at any time and such prices would need to be given effect to within the statutorily prescribed period. Therefore, relabeling may be required where there is a revision in price, and prevailing law specifically permits that by exempting price from the rigors of 2011 Rules.

40. The Central Government is empowered by Section 3 of EC Act to make an order providing for controlling the price at which the essential commodity may be bought or sold.

41. A Committee on Drugs and Pharmaceuticals Industry (known as the Hathi Committee) was appointed by the Central Government to examine the various facets of the drug industry in India including the measures taken so far to reduce prices of drugs for the consumer, and to recommend such further measures as may be necessary to rationalize the prices of basic drugs and formulations. The Hathi Committee in its Report observed that there was no justification for the drug industry charging prices and having a production pattern which is based not upon the needs of the community but on aggressive marketing tactics and create demand.

42. Following the Hathi Committee Report, the Government first framed the statement on drug policy and then issued DPCO,1979. The DPCO,1970 was accordingly repealed. DPCO,1979 is repealed by DPCO,1987 and DPCO,1987 is repealed by DPCO,1995.

43. In order to have the proper perspective of the matter, it is necessary that certain provisions of the DPCO,1995 are surveyed. Paragraph 2 is an interpretation clause, it defines certain expressions occurring in DPCO as under:

> "2. .....
> (a) "bulk drug" means any pharmaceutical, chemical, biological or plant product including its salts, esters, stereo-isomers and derivatives, conforming to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act, 1940(23 of 1940), and which is used as such or as an ingredient in any formulation;
> . . . . . .
> (d) "dealer" means a person carrying on the business of purchase or sale of drugs, whether as a wholesaler or retailer and whether or not in conjunction with any other business and includes his agent;
> (e) "distributor" means a distributor of drugs or his agent or a stockist appointed by a manufacturer or an importer for stocking his drugs for sale to a dealer;
> . . . . . .
> (m) "manufacturer" means any person who manufactures a drug;
> . . . . . .
> (r) "price list" means a price list referred to in paras 14 and 15 and includes a supplementary price list;
> (s) "retail price" means the retail price of a drug arrived at or fixed in accordance with the provisions of this Order and includes a ceiling price;
> (t) "retailer" means a dealer carrying on the retail business of sale of drugs to customers;
> (u) "scheduled bulk drug" means a bulk drug specified in the First Schedule;
> . . . . . .
> (y) "wholesaler" means a dealer or his agent or a stockist appointed by a manufacturer or an importer for the sale of his drugs to a retailer, hospital, dispensary, medical, educational or research institution purchasing bulk quantities of drugs. . . . . ."

44. Under paragraph 3, the Central Government is empowered to fix price of the bulk drugs for regulating the equitable distribution of indigenously manufactured bulk drugs and the maximum price at which the bulk drug shall be sold. Such fixation of maximum sale price of bulk drugs specified in the First Schedule has to be done by notification in the official gazette. Once the Government exercises the power and fixes maximum sale price of bulk drugs specified in the First Schedule, there is ban to sell a bulk drug at a price exceeding the maximum sale price so

fixed plus local taxes, if any. It is the obligation of the manufacturer, if he commences production of the bulk drug after the commencement of the order, to furnish the details to the Government in Form I and any such additional information as may be required by the Government within 15 days of the commencement of the production of such bulk drug. If any manufacturer desires revision of the maximum sale price of a bulk drug fixed under sub-paragraph (1) or (4) or as permissible under sub-paragraph (3), it is permitted to make an application to the Government in Form I.

45. Insofar as a retail price of scheduled formulations is concerned, under paragraph 7, the Central Government is empowered to fix the same in accordance with the formula laid down therein. The method of calculation of retail price of formulation is clearly provided in paragraph 7. With a view to enable the manufacturers of similar formulations to sell those formulations in pack size different to the pack size for which ceiling price has been notified under sub-paragraphs (1) and (2) of paragraph 9, manufacturers have to work out the price for their respective formulation packs in accordance with such norms as may be notified by the Government from time to time. The manufacturer is required to intimate the price of formulation pack, so worked out, to the Government and such formulation pack can be released for sale only after the expiry of 60 days after such intimation. However, Government may, within its power, revise the price so intimated by the manufacturer and upon such revision the manufacturer is not permitted to sell such formulation at a price exceeding the price so revised.

46. Under paragraph 13, the Government has been conferred with the overriding power requiring the manufacturers, importers or distributors to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the DPCO,1987 and so also under DPCO,1995.

47. One finds, therefore, that the price fixation by the Central Government under DPCO is in the nature of legislative measure and the dominant object and purpose of such price fixation is the equitable distribution and availability of commodities at fair price. The whole idea behind such price fixation is to control hoarding, cornering or artificial short supply and give benefit to the consumer. The regulation of drug price being ultimately for the benefit of the consumer, we must now consider the effect of paragraph 14(1),(2) and (3), paragraph 16 (3), paragraph 19 and Form V.

48. Paragraph 14 of DPCO,1995 makes provision for carrying out the effect of the price fixed or revised by the Government. Sub-paragraph (1) of paragraph 14 provides that every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as fixed by the Government, within fifteen days from the date of notification in the official gazette or receipt of the order of the Government by such manufacturer or importer. Does it mean that during this period of 15 days, it is open to the manufacturer to manufacture and clear the bulk drug or formulation at pre-notification prices? We do not think so. In our view, sub-paragraph (1) of paragraph 14 does not deserve to be given a construction which is derogatory to the object and scheme of DPCO,1995. It is important to bear in mind that under paragraph 14(2), the manufacturer is required to print the retail price of the formulation on the label of the container of the formulation. This is expressed by the words "retail price not to exceed" preceding it "local taxes extra" succeeding it. In our view, sub-para (2) of para 14 does not, in any manner, support the contention of the manufacturer/distributor that upto to the expiry of the fifteenth day from the date of notification of the price fixation order in the official gazette or receipt of the price fixation order by the manufacturer, the manufacturer is at liberty to manufacture the formulation and print on them the pre-notification prices.

49. The true import of paragraph 14(1) is that once the price notification is gazetted, it takes effect immediately though its enforcement is postponed by fifteen days to enable the manufacturers and others to make suitable arrangements with regard to unsold stocks. We agree with learned Additional Solicitor General that the period of 15 days is simply a grace period or cooling period allowed to manufacturers to adjust their business in a manner where appropriate arrangements are made with regard to the unsold stocks in the distribution chain. The argument of the manufacturer or distributor, if accepted, that the stocks cleared by the manufacturer before the fifteenth

day can be sold to the consumer at the higher unrevised price then, in our view, that may result in same formulation being offered for sale to a consumer at two different prices. This must be avoided and, therefore, we do not think that the interpretation put forth by Mr. S. Ganesh is reasonable. It does not deserve acceptance.

50. Then, the interpretation to sub-paragraph (1) of paragraph 14 urged on behalf of the manufacturer/distributor may also result in misuse by the manufacturer inasmuch as the manufacturer may increase manufacture of the bulk drugs during fifteen-day period of notified price and clear that stock at the unrevised/higher price. We are afraid, this interpretation will also lead to frustrating the regulatory regime which is sought to be put in place by DPCO.

51. The senior counsel for the manufacturer contends that under paragraph 15 of DPCO,1995, it is incumbent to print the maximum retail price on the product and that too indelibly. There is no provision for reprinting of the labels or of return of drugs once they leave the factory premises. Thus, the batches which have been manufactured and stamped with old prices can continue to be sold at those prices. We do not find any merit in the argument. The DPCO defines 'dealer', 'distributor', 'manufacturer', 'retailer' and 'wholesaler'. The provisions contained in paragraphs 3,8, 9 and other relevant provisions clearly show that DPCO effectively covers the chain from manufacture of the bulk drug by the manufacturer to sale of formulation to consumer though there may be several persons in the distribution chain. The ultimate object of the DPCO is that there is no deception to a consumer and he is sold the formulation at a price not exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof, whichever is less. Logically it follows that there cannot be two prices at the end point of the distribution chain depending on the batch number. A consumer approaching a chemist/retailer can hardly be offered two prices for the very same product based only on the difference in batch numbers. Consumer must get the benefit of the notified price. That is the ultimate objective of DPCO. The batch number cannot override the benefit to which a consumer is entitled on price reduction of a formulation. A fair reading of DPCO leaves no manner of doubt that a formulation cannot be sold to the consumer at the higher price (for earlier batch numbers). In this view of the matter, we find merit in the submission of the learned Additional Solicitor General that the provisions of DPCO requires not just the end point sale to be at the notified price, but also every sale within the distribution chain must be at the notified price, if such sale is made after the date on which sale price is operative.

52. Paragraph 16 of DPCO,1995 bans sale of bulk drug or formulation to a consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less, plus all taxes, if any payable. The expressions 'current price list' and 'whichever is less' in paragraph 16 are significant expressions. We find ourselves in agreement with the submission of the learned Additional Solicitor General that the current price list is simply the price reflecting the currently operating notified price under the DPCO. Once a price is notified for a formulation, it takes effect immediately and sale of the formulation to the consumer has only to be at the notified price. This is the plain and ordinary meaning of paragraph 16. The expression, 'whichever is less' further makes it an absolute obligation on all concerned not to sell any formulation to any consumer at a price exceeding price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less.

53. The requirement of issuance of a price list in Form V by the manufacturer to the dealers, State Drugs Controllers and the Government which mentions mandatorily effective batch number and the date thereof is of no real help in construction of paragraph 14. Moreover, if the argument of Mr. S. Ganesh with reference to Form V that every price list is in respect of "effective batch number" only, is accepted, it may have effect of overriding the entire scheme of DPCO. In our view, this cannot be done.

54. In Cynamide India Limited4, though the Court was concerned with challenge to the notifications issued by the Central Government fixing the maximum prices at which various indigenously manufactured bulk drugs could be sold under the DPCO,1979 but the prefatory statement made by this Court in paragraph 2 is worth noticing. In paragraph 2

of the Report, the Court observed:

> "2. Profiteering, by itself, is evil. Profiteering in the scarce resources of the community, much needed life-sustaining foodstuffs and life-saving drugs is diabolic. It is a menace which has to be fettered and curbed. One of the principal objectives of the Essential Commodities Act, 1955 is precisely that. It must be remembered that Article 39(b) enjoins a duty on the State towards securing 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good'".

55. We are of the considered view that if an interpretation of paragraph 14(1),(2)(3), paragraph 16(3) and paragraph 19 of DPCO,1995 results in frustrating its object and leads to denial of the benefit of current notified price to the consumer, then such interpretation must be avoided. We, therefore, find it difficult to accept the construction put to the above provisions by Mr. S. Ganesh.

56. We may now deal with the circular dated 28.04.1979 upon which heavy reliance has been placed by Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor. It is true that the principle of contemporanea expositio guides that contemporaneous administrative construction, unless clearly wrong, should be given considerable weight and should not be lightly overturned but in light of the construction of the relevant provisions indicated by us above, the view in the circular cannot be followed and upheld.

57. In Usha Martin Industries3, while dealing with exemption notification issued under the Central Excises and Salt Act, 1944, this Court in paragraphs19 and 20 observed as follows:

> "19. No doubt the court has to interpret statutory provisions and notifications thereunder as they are with emphasis to the intention of the legislature. But when the Board made all others to understand a notification in a particular manner and when the latter have acted accordingly, is it open to the Revenue to turn against such persons on a premise contrary to such instructions?
> 20. Section 37-B of the Act enjoins on the Board a duty to issue such instructions and directions to the excise officers as the Board considers necessary or expedient "for the purpose of uniformity in the classification of excisable goods or with respect to levy of duty excised on such goods". It is true that Section 37-B was inserted in the Act only in December 1985 but that fact cannot whittle down the binding effect of the circulars or instructions issued by the Board earlier. Such instructions were not issued earlier for fancy or as rituals. Even the pre-amendment circulars were issued for the same purpose of achieving uniformity in imposing excise duty on excisable goods. So the circular, whether issued before December 1985 or thereafter should have the same binding effect on the Department."

58. In Indian Oil Corporation[8], this Court culled out the following principles in relation to the circulars issued by the Government under the fiscal laws (Income Tax Act and Central Excise Act) as follows:

> "1.Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that is not valid nor that it is contrary to the terms of the statute.
> 2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.
> 3. A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.
> 4. It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

59. The above legal position culled out in Indian Oil Corporation8 has been followed in Arviva Industries[9].

60. In our view, it is well settled that if the departmental

circular provides an interpretation which runs contrary to the provisions of law, such interpretation cannot bind the Court. 1979 circular falls in such category. Moreover, the 1979 circular is with reference to the DPCO,1979 whereas we are concerned with DPCO, 1987 and DPCO,1995. We are not impressed by the argument of Mr. S. Ganesh that in view of the saving clause in DPCO,1987, the circular is saved which is further saved by the saving clause in DPCO,1995.

61. Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor also relied upon a decision of this Court in Ranbaxy Laboratories1, wherein this Court had an occasion to interpret an exemption notification issued under paragraph 25 of the DPCO,1995. By the notification dated 29.08.1995, the exemption was granted to Ranbaxy in respect of Pentazocine and its formulations upto 31.10.1999. This Court held that the said exemption was available in respect of such products manufactured upto 31.10.1999, even though the same might be sold afterwards. It is argued that just as the exemption notification issued under Section 25 of the DPCO,1995 was addressed to the manufacturer, similarly, a price fixation/revision notification is also addressed to the manufacturer who is required to effectuate the same by printing the revised price on all products manufactured and cleared by him from the 15th day after the date of the notification/receipt of the order, and also issuing a revised price list declaring the effective batch number from which the revised price will operate. It is submitted that the reasoning of the Court in Ranbaxy Laboratories1 is directly applicable to the present situation because the conceptual issue arising in both the cases is same.

62. In Ranbaxy Laboratories1, the exemption notification dated 29.08.1995 is reproduced in paragraph 20 of the Report which reads as follows:

> "S.O. No. 7153 (E), in exercise of the powers conferred by sub-para (1) of Para 25 of the Drugs (Prices Control) Order, 1995, the Central Government having regard to the factors specified in clause (e) of sub-para (2) of Para 25 of the said Order and also having been satisfied for the need to do so in the public interest hereby exempts the bulk drug and formulations based thereupon specified in Column 2 of the Table below which is manufactured by the Company specified in the corresponding entry in Column 3 from the operation of price control stipulated in sub-para (1) of Para 3, sub-para (1) of Para 8 and sub-para (1) of Para 9 of the said Order, up to the period as indicated in Column 4 thereof.
>
> TABLE
>
> Sl. No. Name of the product Name of the company Period up to which the Exemption is granted
>
> 1 2 3 4
> 1. Pentazocine and its formulations M/s Ranbaxy Laboratories Ltd. 31-10-1999"

63. In paragraph 27 of the Report in Ranbaxy Laboratories1, this Court held as under:

> "27. The court while construing an exemption notification cannot lose sight of the ground realities including the process of marketing and sale. The exemption order dated 29-8-1995 is clear and unambiguous. By reason thereof what has been exempted is the drug which was manufactured by the Company and the area of exemption is from the operation of the price control. They have a direct nexus. They are correlated with each other. While construing an exemption notification not only a pragmatic view is required to be taken but also the practical aspect of it. A

manufacturer would not know as to when the drug would be sold. It has no control over it. Its control over the drug would end when it is dispatched to the distributor. The distributor may dispatch it to the wholeseller. A few others may deal with the same before it reaches the hands of the retailer. The manufacturer cannot supervise or oversee as to how others would be dealing with its product. All statutes have to be considered in light of the object and purport of the Act. Thus, the decisions relied upon by the learned Additional Solicitor General in Union of India v. Cynamide India Ltd.; Prag Ice & Oil Mills v. Union of India, Shree Meenakshi Mills Ltd. v. Union of India and Panipat Coop. Sugar Mills v. Union of India will have no application."

64. The issue before us is quite different and, in our view, the judgment of this Court in Ranbaxy Laboratories1 does not apply to the present controversy for more than one reason. First, in Ranbaxy Laboratories1, the Court was concerned with the exemption notification issued under paragraph 25 of the DPCO,1995 whereas in the present matters, the issue centres around paragraphs 14,16 and 19 of that DPCO. Second, the notification under consideration in Ranbaxy Laboratories1 was an exemption notification and not a notification for fixation of price. Third, the exemption notification is relatable to the manufacturer to the drugs whereas price fixation notification is related to sale of drug/formulation at a given price.

65. The Delhi High Court in the impugned order has relied upon 1979 circular and further held that 1979 circular was in the context of paragraph 19(1) of DPCO,1979, which is almost identical to paragraph 16(3) of DPCO,1987 and, therefore, the circular explaining the position in respect of the DPCO,1979 would continue to hold the field in respect of the very same provisions in DPCO,1987. We are unable to accept the view of the Delhi High Court for the reasons which we have already discussed above. Moreover, the Delhi High Court has gone more by practical difficulties which a manufacturer may suffer and completely overlooked the scheme of the DPCO which is intended to give benefit to the consumer of the reduced current price of the formulation. It is pertinent to notice that Delhi High Court distinguished the view of the Karnataka High Court and observed as follows:

"We agree with the submissions made by Mr. Ganesh that the Karnataka High Court decision did not consider Form 5 nor its reference to "Effective Batch No.". Nor did the said decision refer to the Circular of 1979 which we have already indicated to be applicable to the DPCO 1987 also. We, therefore, do not agree with the view adopted by the Karnataka High Court. In fact, the Supreme Court decision cited by Mr. Ganesh clearly recognizes the practical aspects of pricing in the context of time lags. Once the reality of time lags in the process of manufacture, clearance, distribution and sale is recognised, the importance of 'Effective Batch Nos.' as mentioned in Form 5 comes to the fore. The Effective Batch No. represents the cut-off for the new pricing. The seizure memo which is impugned herein relates to Batch No. BT 3104 (for 300mg tablets) which is prior to the "Effective Batch No. BT 3115". The said seizure was, thus, in respect of tablets which had been manufactured prior to the "effective" Batch No. BT 3115 which, we have explained above, is to be taken as the cut-off point insofar as the new prices are concerned."

66. The above view of the Delhi High Court is fundamentally flawed and clearly wrong in light of our foregoing discussion. The Karnataka High Court has taken the correct view and the same is upheld.

67. We, accordingly, dismiss the appeals preferred by the manufacturer/distributor and allow the appeals of the Union of India. The parties shall bear their own costs.

.....J.
(R.M. Lodha)

....J.
(Kurian Joseph)

New Delhi,
December 09, 2013

ITEM NO.1A COURT NO.3 SECTION IVA / XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 1939 OF 2004

GlaxoSmithKline Pharmaceuticals Limited
(Formerly known as SmithKline Beecham
Pharmaceuticals (India) Limited) Appellant(s)

Versus

Union of India & Ors. Respondent(s)

WITH

Civil Appeal No. 1940 of 2004

Civil Appeal No. 1941 of 2004

Civil Appeal No. 1942 of 2004

Civil Appeal Nos. 10901-10902 of 2013
(@ SLP(C) Nos. 27241-27242 of 2010)

Date: 09/12/2013 These matters were called on for Judgment today.

For Appellant(s)

M/S Gagrat & Co.

Mr. Prateek Jalan, Adv.
Mr. Aman Ahluwalia, Adv.
Mr. Shreekant N. Terdal, Adv.

Ms. Bina Gupta, Adv.

For Respondent(s)

Mr. Puneet Taneja,Adv.

Mr. Prateek Jalan, Adv.
Mr. Aman Ahluwalia, Adv.
Mr. Shreekant N. Terdal ,Adv

Mr. Rajan Narain, Adv.

M/S Gagrat & Co.

Hon'ble Mr. Justice R.M. Lodha pronounced the Judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Kurian Joseph.

Leave granted in S.L.P.(Civil) Nos. 27241-27242 of 2010.

The appeals preferred by the manufacturer/distributor are dismissed and the appeals of the Union of India are allowed in terms of the Judgment.

(Rajesh Dham) Court Master		(Renu Diwan) Court Master	

(reportable signed Judgment is placed on the file)

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[1] Union of India v. Ranbaxy Laboratories Limited and Others; [(2008) 7 SCC 502]

[2] Desh Bandhu Gupta and Company and Others v. Delhi Stock Exchange Association Ltd.; [(1979) 4 SCC 565]

[3] Collector of Central Excise, Patna v. Usha Martin Industries; [(1997) 7 SCC 47]

[4] Union of India and Another v. Cynamide India Limited and Another; [(1987) 2 SCC 720]

[5] State of Madhya Pradesh and another v. M/s. G.S. Dall and Flour Mills;[1992 Supp.(1) SCC 150]

[6] Bengal Iron Corporation and another v. Commercial Tax Officer and Others; [1994 Supp.(1) SCC 310]

[7] Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries; [(2008) 13 SCC 1]

[8] Commissioner of Customs, Calcutta and others v. Indian Oil Corporation Limited and Anr; [(2004) 3 SCC 488]

[9] Union of India v. Arviva Industries (I) Ltd.; [2007(209) E.L.T. 5 (S.C.)]
