1969 *Present :* **H. N. G. Fernando, C.J. and Wijayatilake, J.**

THE QUEEN, Appellant, *and* HIRDARAMANI (INDUSTRIES) LTD., Respondent

S. C. 435/66 (F)—D. C. Colombo, 61546/M

Customs Ordinance (Cap. 235)—Section 167—" True wholesale market value ".

Where a person is permitted to import textiles on condition that he must use the textiles only in the course of his business of the manufacture of garments and must not sell the imported textiles in their unsewn state, the import duty properly leviable is by reference to paragraph (*a*), and not paragraph (*b*), of the definition of " true wholesale market value " in section 167 of the Customs Ordinance.

APPEAL from a judgment of the District Court, Colombo.

H. Deheragoda, Deputy Solicitor-General, with *Ian Wikramanayake*, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *J. A. L. Cooray, Mark Fernando* and *L. W. Athulathmudali*, for the plaintiff-respondent.

Cur. adv. vult.

December 21, 1969. H. N. G. FERNANDO, C.J.—

This is an action for the recovery of a sum of money which the plaintiff claims was levied as customs duty on certain textiles imported into Ceylon in excess of the duty properly leviable thereon.

It appears from the evidence that the Controller of Imports imposed certain conditions applicable to textiles imported on what are described as " actual user licences " authorising the importation of textiles by persons engaged in the manufacture of garments. The particular condition relevant in the present case is a condition that such an importer must use the imported textiles only in the course of his business of the manufacture of garments and must not sell the imported textiles in their unsewn condition. In order to discourage breaches of this condition, the textiles are required before importation to be stamped along the selvedge with the name of the importer and with the words " not for sale ". In accordance with this requirement, the textiles which are the subject of the present dispute bore along their selvedge the words " Hirdaramani Ltd.—not for sale ".

1*—J 14330—2,255 (6/70)

By reason of the provisions of the Customs Ordinance, import duty is levied on "the true wholesale market value" of imported goods, and this expression is declared by s. 167 of the Customs Ordinance to mean—

> "(*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 without any abatement or deduction whatever except 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 of the duties as aforesaid;"

The precise dispute in this case turns on the question whether it is paragraph (*a*) of this definition, or else paragraph (*b*), which is applicable to the textiles which were imported by the plaintiff. It was proved at the trial that the Association of textile dealers which is known as the Sindi Merchants Association of Ceylon furnishes regularly to the Customs authorities wholesale cash price lists of piece goods textiles. At the time of importation by the plaintiff of the textiles to which this action relates, the current price lists included statements of the wholesale cash prices of the various descriptions of textiles which were imported by the plaintiff, and it is not disputed that textiles of these several descriptions were in fact available for sale in Ceylon at the relevant times. Accordingly the Customs authorities levied import duties on these imports by reference to the prices stated in the relevant lists.

The contention for the plaintiff however has been that the duty was wrongly levied in terms of paragraph (*a*) of the definition, and should instead have been levied in terms of paragraph (*b*), for the reason that these textiles did not have an ascertainable "wholesale cash price". The basis of this contention is that because of the marking on the selvedge, these textiles cannot in fact be sold whether to a wholesaler or a retailer, and that because they are thus unsaleable there cannot attach to them the wholesale cash price of other textiles, which, although they are of the same description, are in fact saleable in the open market. The learned trial Judge upheld this contention and gave judgment for the plaintiff.

Paragraph (*b*) of the definition in s. 167 applies in relation to any goods only if the wholesale cash price described in paragraph (*a*) is not ascertainable. Thus the first question for the Customs authorities in every case is whether the price so described is in fact ascertainable, and what is so described is "the wholesale cash price ..... 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 referring to the price lists upon the basis of which the Customs levy duty in this case, I have thus far mentioned only that the lists contained the prices of textiles *of the description* of the textiles which were imported by the plaintiff. But

at this stage it is necessary to consider whether those lists did contain the prices of textiles of *the like kind and quality* as the textiles which the plaintiff imported.

The argument of Counsel for the plaintiff has been that although the various descriptions in those lists do fit these textiles, nevertheless these textiles are not of the like kind and quality as those described in the lists because the stamping on the selvedge renders these textiles of a different kind and quality. Counsel relied in this connection on the decision in *Niblett v. Confectioners' Materials Co.*[1] holding that the expression "merchantable quality" in s. 12 of the Sale of Goods Act includes the state or condition of goods. In fact this meaning attaches to that expression by reason of a definition clause in the Act itself. In the case just cited, a seller had supplied to his buyer condensed milk in tins so labelled that they were unsaleable by reason of the fact that the sale would have involved an infringement of trade mark rights. I agree entirely with the proposition that a contract of sale of goods is ordinarily subject to the implied condition that the goods must be saleable, and that if the goods are in fact not saleable they are then not merchantable. But I cannot agree that the decision assists the plaintiff in the present case. Paragraph (*a*) of the definition with which we are here concerned contains the word "quality", which can be construed to mean "merchantable quality" only if there are present considerations which establish that the Legislature intended the word to have that meaning.

It is in my opinion significant that paragraph (*a*) of the definition refers, not to the price at which a particular consignment of goods is capable of being sold, but instead to the prices at which goods of a like kind and quality are sold or capable of being sold. In other words, the true wholesale market value of a particular consignment is to be ascertained by reference to the price of *other goods*, being of a like kind and quality to those in the consignment. There is here an indication that the Legislature was not concerned with the question whether a particular consignment of goods is or is not to be sold or consumed or even destroyed by the importer. For the purpose of the levy of customs duty, the Legislature has attached to imported goods a value which is determined by reference to the selling price of similar goods in the actual market. Thus the fact that the wholesale cash price of a particular consignment is not ascertainable because the goods in the consignment are not saleable, does not by itself have the consequence of excluding the application of paragraph (*a*) of the definition.

I suggested during the course of the argument an example which illustrates the consequences which might flow from a construction different from that which I have just stated. Let me suppose that an individual shop-keeper imports a dozen cigarette lighters : suppose also that he intends to keep one of these lighters for his own personal use and for that reason instructs the Manufacturer to engrave his own initials or family crest on the one lighter, and that it is proved that no purchaser would be willing to buy that lighter. In such a case, if it be correct

[1] [1920] 3 K. B. 387.

that the engraving constitutes an element in the quality of a lighter, the importer will pay duty on eleven lighters determined by reference to paragraph (*a*) of the definition, but will pay a lower duty on the single lighter. One can envisage many other devices by which importers can contrive to take imported goods outside the scope of paragraph (*a*). If a large engineering firm which imports various tools, both for use at his own factories and also for sale in the open market, has its name or initials incorporated into some tools which are intended for its own use, will these tools be subject to the lower duty which paragraph (*b*) of the definition attracts, while the tools imported for sale are dutiable by reference to paragraph (*a*) ?

It seems to me that the intention in the definition is that duty should be levied on imported goods at their value to the importer himself, and that this value is to be ascertained whenever possible by reference to the price in the open market of similar goods ; the fact that the particular goods imported are not saleable does not bring the goods within paragraph (*b*) of the definition unless similar goods are not in fact sold or capable of sale in the open market.

I hold for these reasons that the import duty in this case was properly levied by reference to paragraph (*a*) of the definition. The appeal is allowed and the plaintiff's action is dismissed with costs in both Courts.

WIJAYATILAKE, J.—I agree.

Appeal allowed.