SUPREME COURT OF INDIA

Commissioner of Customs (Port), Kolkata

Vs.

J.K Corporation Limited

C.A.No.4663 of 2006

(S.B.Sinha and Markandeya Katju,JJ.)

02.02.2007

JUDGMENT

S.B.Sinha, J.

1. The Revenue is in appeal before us aggrieved by and dissatisfied with the judgment and final order dated 15th May, 2006, passed by the Customs Excise and Service Tax Appellate Tribunal, Kolkata, in Appeal No.C-259 of 2002. The fact of the matter is not in dispute. M/s. Orissa Synthetics Limited is a division of the respondent herein. It, being desirous of undertaking manufacture of Polyester Oriented Yarn and Flat Yarn, entered into a collaboration agreement with M/s. Samsung Company Limited and M/s. Chiel Synthetics Inc., both of Korea, on 18th November, 1999. M/s. Cheil Synthetics Inc. is said to be an associate company of M/s. Samsung group under the laws of Republic of Korea. The said Agreement is in two parts; Part-A provides for licence, knowhow and technology, while Part-B provides for supply of equipment as a part of necessary plant and machinery and equipment for manufacture of polyester oriented yarn. Part-A stipulates lumpsum payment of US $14, 00, 000 by the respondent to the said companies for supply of licence, knowhow and technology. Under Part-B of the said Agreement, however, price of foreign equipments are said to be US $34, 86, 000.00 + DM 12, 00, 000.00 + J. Yen 88, 50, 00, 000.00.

2. Pursuant to and in furtherance of the said collaboration Agreement, the respondent herein had imported plant and machinery manufactured by the said companies. The Assistant Commissioner of Customs, Special Valuation Branch, in its order dated 28th May, 1999, opined that the amount of consideration mentioned in both parts of the Agreement should be added together, having regard to the fact that the same forms part of an integrated contract, the value of knowhow estimated at US $ 40, 00, 000.00 must be added to the value of the equipment, on the premise that payment thereof was a pre-condition for sale of the equipments under Part-B. An appeal was preferred there against by the respondent before the Commissioner of Customs. The appellate authority, by reason of its order dated 31st May, 2000, dismissed the said appeal. However, the Customs Excise and Service Tax Appellate Tribunal [CESTAT], on a further appeal preferred by the respondent, allowed the same and remitted the matter to the authority below for a de novo decision in the light of a decision of

this Court in *Tata Iron and Steel Company Limited vs. Commissioner of Central Excise and Customs Bhubaneswar, Orissa* [1] . The Deputy Commissioner of Customs, however, held that the decision of this Court in TISCO (supra) is distinguishable stating that both parts of the Agreement, Part-A and Part-B, are complimentary to each other and one part thereof cannot be implemented without complying with the conditions of the other part of the Agreement. The original authority, therefore, upheld its earlier order. The Commissioner of Customs, however, in the appeal preferred by the respondent herein, set aside the said order dated 24th June, 2002, holding that the decision of this Court in TISCO (supra) is squarely applicable to the facts of the case and that *Collector of Customs (Prev.), Ahmedabad vs. Essar Gujarat Limited*[2] is not applicable. The Tribunal dismissed the appeal preferred there against by the Revenue

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3. Mr. K. Radhakrishnan, learned senior counsel appearing on behalf of the Appellant, would take us through various clauses of the said Memorandum of Understanding dated 18th November, 1999, entered into by and between M/s. Orissa Synthetics Limited and M/s. Samsung Company Limited and submit that supply of technical knowhow and purchase of licence and supply of equipments was a condition of sale. According to the learned counsel, as the conditions laid down in both parts of the said Agreement are complimentary to each other, Part-B cannot exist without Part-A thereof. Our attention in this behalf has been drawn to Rule 9(1)(e) of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 (for short the Rules] to submit that the same is a broad based
one.

4. Mr. S. Ganesh, learned senior counsel appearing on behalf of the respondent, on the other hand, would support the judgment under appeal. Customs Act, 1962, was enacted to consolidate and amend the law relating to customs. Chapter-V of the Customs Act, 1962 [for short, "the Act"] provides for levy of and exemption from, customs duty. Customs duty in terms of Section 12 of the Act is to be levied at such rates as may be specified under the Customs Tariff Act or any other law for the time being in force on the goods imported into, or exported from, India. Section 14 of the said Act provides for valuation of goods for purposes of assessment in respect of duty of customs chargeable on any goods by reference to their value. A legal fiction is created in relation to the value of such goods stating that,

> "the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where:
>
> (a) the seller and the buyer have no interest in the business of each other; or
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> (b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale."

Section 14(1A) provides that price referred to in sub-section (1) of Section 14 in respect of imported goods shall be determined in accordance with the Rules made in this behalf.

5. The Central Government, in exercise of its powers conferred upon it under Section 156 of the Act, made the said Rules. The transaction value determined in terms of the said Rule was to be the value of the imported goods. What would be a transaction value is stated in Rule 4 i.e. the price actually paid or payable on the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of the 'Rules'. Rule 9, inter alia, provides for determination of transaction value in terms whereof the price actually paid or payable on the imported goods, the factor enumerated therein shall be added, clause (e) whereof reads as under:

> "(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable."

6. The sole question which, therefore, arises for consideration in this appeal, is as to whether customs duty would be payable on the purchase price of the goods by adding the value of licence and technical knowhow, etc. to the value of the imported goods.

7. The basic principle of levy of customs duty, in view of the afore- mentioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is complete, inter alia by way of transfer of licence or technical knowhow for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post-importation service or activity, would not, therefore, come within the purview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rules have been framed for the purpose of carrying out the provisions of the Act. The wordings of Sections 14 and 14(1A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind. Rule 12 of the Rules provides that the interpretative notes specified in the Schedule appended thereto would apply for construction thereof. They are statutory in nature being integral part of the Rules themselves. The relevant portion of Interpretative Note to Rule 4 reads as under:

> "The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:
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> (a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;

(b) The cost of transport after importation;

(c) Duties and taxes in India."

8. What would, therefore, be excluded for computing the assessable value for the purpose of levy of custom duty, inter alia, has clearly been stated therein, namely, any amount paid for post-importation activities. The said provision, in particular, also apply to any amount paid for post- importation technical assistance. What is necessary, therefore, is a separate identifiable amount charged for the same. On the Revenue's own showing, the sum of US $ 14, 00, 000.00 was required to be paid by way of remuneration towards services to be offered by the companies in respect of matters specified in Part-A of the said Memorandum of Agreement. The said sum represents amount of licence or amount to be paid by the respondent for the licence for the manufacturing process for production of goods which were covered by the patents held by M/s. Samsung as also for technical knowhow. In the said Memorandum of Agreement, it was provided that;

"The SELLER shall provide to the BUYER the TECHNICAL DOCUMENTATION containing, inter alia, the KNOW-HOW and the same shall be delivered by the SELLER to the BUYER in Republic of Korea or such other place or places as may be mutually agreed by and between both the parties thereto."

The technical documentation comprises of : (1) process, (2) mechanical, (3) electrical, and (4) instrumentation in respect of grant of licence. The Memorandum of Understanding provides:

"4.1. The SELLER hereby grants to the BUYER a non-exclusive and non-transferable right and licence including rights to use existing patents of SELLER to manufacture the PRODUCT in the PLANT with the KNOW-HOW including the PROCESS and to sell and market the PRODUCT worldwide. For exports to Republic of Korea and Japan, the first option shall be given to the SELLER.

4.2 The BUYER shall be entitled to and shall have the right to use and practice the KNOW-HOW and to manufacture therewith the product in the PLANT."

9. No part of the knowhow fee was to be incurred by the respondent herein either for the purpose of fabrication of the plant and machinery or for any design in respect whereof M/s. Samsung held the patent right.

10. It may be noticed that the said Memorandum of Agreement specifically contemplates that the plant and machinery to be supplied there under may be procured from other independent manufacturers and suppliers who might not have anything to do with the knowhow or licence provided thereunder by Samsung as would appear from the following stipulation contained in the said agreement.

"5.6. The SELLER hereby agrees to provide their cooperation to the BUYER to purchase spares from the SELLER directly from the suppliers notwithstanding the expiry or earlier termination of the AGREEMENT and in case of purchase from the SELLER, the SELLER shall provide such spares at fair market prices within a reasonable period of time.

8.1. SELLER shall cause such manufacturers to test and inspect the main items of Equipment at its works and/or the works of its manufacturers, quality, quantity, workmanship, finishing, and packing in accordance with the inspection method deemed as proper and authentic for Equipment."

11. Knowhow, being process knowhow, is covered by the patent held by M/s. Samsung. The payment of US $ 14, 00, 000.00 also entitles the respondent to sub-licence the knowhow to any other party, subject, of course, to the approval of M/s. Samsung.

12. Reliance has been placed by Mr. Radhakrishnan on a decision of this Court in Essar Gujarat Limited (supra). In that case, the licence fee was paid to the supplier of the plant and machinery for a licence to operate the plant which was in reality nothing but was held to be an additional price payable for the plant itself and was, therefore, held to be includible in its assessable value. It is in the afore-mentioned fact situation, this Court held:

"12. Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the pre-condition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to protect EGL. Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. This overriding clause was clearly a condition of sale. It was essential for EGL to have this licence from Midrex to operate this plant and use Midrex technology for producing sponge iron in India. Therefore, in our view, obtaining a licence from Midrex was a pre-condition of sale. In fact, as was recorded in the agreement, the sale of the plant had not taken place even at the time when the contract with Midrex was being signed on 4-12-1987, although the agreement with TIL for purchase of the plant was executed on 24th March, 1987. Therefore, we are of the view that the Tribunal was in error in holding that the payments to be made to Midrex by way of licence fees could not be added to the price actually paid to TIL for purchase of the plant."

13. The Court noticed several curious aspects of the Agreement stating that it started with the recital that "the Purchaser and the Seller have today respectively purchased and sold a Direct Reduction Iron Plant, on the following terms and conditions", which, according to this Court , indicated that the purchase and sale of the plant had taken place on 24th March, 1987, but in clause (2) it was stated that the purchaser would purchase the property from the seller at the stated price. Upon construing the terms of the conditions, it was opined:

"Therefore, the process licence fees of DM 2, 000, 000 was rightly added to the

purchase price by the Collector of Customs. The order of CEGAT on this question is set aside."

14. In *Mukund Limited vs. Commissioner of Customs*[3], ACC, Mumbai Â 1997 Indlaw CEGAT 2884, whereupon again reliance was placed by the learned counsel, the drawings related to basic design and drawing of the gas cleaning plant made by Davy Mckee and imported by Mukund Limited. In the afore- mentioned situation, the CESTAT opined:

"The payment of $ (sic) 6, 57, 900 noted above in the price schedule is towards the services indicated above in the Agreement and which is a necessary concomitant to the supply of Design and Engineering drawings for the gas cleaning plant made by Davy Mckee and imported by the appellants. The appellants have been entrusted with the setting up of gas cleaning plant, and this could only be achieved not only by purchasing the basic design and engineering drawings imported from Davy Mckee but also the whole engineering package of supervision of detail drawing, erection, commissioning and performance guarantee test. The payment made in foreign exchange towards supervision charges during design, erection and commissioning will necessarily have to form part of the assessable value of the imported goods and the value thereof will include not only the price paid for design and engineering but also for supervision charges. This will follow from Rule 9 of the Valuation Rules which provides for addition of certain costs and services to the transaction value. Rule 9(1)(e) covers all other payments actually made or to be made as a condition of sale of imported goods by the buyer to the seller."

15. However, TISCO (supra), this Court took note of interpretative note to Rule 4 and held:

"The part of the Interpretative Note to Rule 4 relied on by the Tribunal has been couched in a negative form and is accompanied by a proviso. It means that the charges or costs described in clauses (a), (b) and (c) are not to be included in the value of imported goods subject to satisfying the requirement of the proviso that the charges were distinguishable from the price actually paid or payable for the imported goods. This part of the Interpretative Note cannot be so read as to mean that those charges which are not covered in clauses (a) to (c) are available to be included in the value of the imported
goods."

16. The said decision is squarely applicable to the facts of the present case. We cannot, therefore, accept the contention of Mr. Radhakrishnan. More over, no case has been made out that the sale price of the imported plant and machinery had been under-stated.

17. For the reasons afore-mentioned, we do not find any merit in this appeal which is dismissed accordingly. In the facts and circumstances of the case, however, there shall be no order as to costs.

Judgment Referred.

[1]*(2000) 3 SCC 0472*
[2]*(1996) 88 E.L.T.609 (S.C.)*
[3]*(1999) 112 E.L.T. 0479*