

(1991) 03 BOM CK 0022

In the Bombay High Court

Case No : Appeal No. 237/87 in Writ Petition No. 3167/86

Union of India

APPELLANT

Vs

Mahindra and Mahindra Ltd.

RESPONDENT

Date of Decision : 08-03-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(4)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 130B, 14(1), 46, 50
Customs Rules, 1962 — Rule 8

Citation : (1991) 34 ECC 1 : (1991) 55 ELT 15

Hon'ble Judges : S.M. Jhunjhunwala, J; M.L. Pendse, J

Bench : Division Bench

Advocate : Shri K.H. Bhabha, Mr. S.M. Shah and Mr. M.S. Sanklecha, for the Appellant; Shri A.M. Setalved and Shri C.N. Korde, instructed by M/s Little and Co., for the Respondent

Judgement

Pendse, J.—This is an appeal preferred against the judgment dated July 27, 1988 delivered by Mrs. Justice Manohar and the question for determination is whether the Assistant Collector of Customs, Special Valuation Branch, was justified in loading amount by 1.5% on the invoice value of CKD components of the engines imported by Mahindra and Mahindra Limited (hereinafter referred to as the "Mahindra") by exercising powers u/s 14(1)(b) of the Customs Act, 1962 read with Rule 8 of the Customs Valuation Rules, 1963. The facts which gave rise to the passing on the order are as follows :

2. Mahindra Limited are a public Company carrying on business amongst others of manufacture of different types of automobile vehicles. The vehicles the manufactured at their factories situated at Kandivali and Ghatkoper in Bombay and at Igatpuri and Nasik. On November 6, 1979, Mahindra entered into a technical know-how agreement with M/s. Automobile Peugeot, a French Company. The technical know-how agreement was in respect of a diesel engine manufactured by Peugeot and known as XDP 4.90. The agreement recites that as

a result of long experience and extensive and continuous research and the development in the business of manufacture of motor vehicles, the foreign collaborators had developed or acquired and possesses designs and technical knowledge in the manufacture of an engine designated XDP 4.90. The foreign collaborators had industrial property rights consisting of designs, engineering technological and all other information with respect to the engine. Mahindra desired for the purpose of carrying on business as a manufacturer of motor vehicles to obtain the right to manufacture, assemble and use the engine and use the technical knowledge and also to have continuing technical assistance from the foreign collaborators. The period of agreement was for a duration of 10 years from the date of securing the consent of Government of India to the agreement.

3. Article "A" of the agreement refers to supply of Peugeot engine technology and, inter alia, provides that foreign collaborators shall furnish to Mahindra the complete technical know-how which shall include specifications, drawings, designs, design data and calculations, techniques, facilities, trade secrets and processes and manufacturing control procedures and methods, used in the manufacture of the engine. The Article further provides that the engine technology to be furnished by the foreign collaborators shall be such as will enable Mahindra to manufacture progressively the engine with upto hundred per cent. indigenous content in India. The Peugeot agreed not to furnish or make available directly or indirectly the engine technology necessary to manufacture, assemble and sell the engine in India to any other person. Article "3" of the agreement deals with right to manufacture, assemble and sell and confers exclusive right on Mahindra to use the engine technology. The Article prescribes that during the period of five years from the effective date of this agreement, the production of the engines shall be limited to maximum of 25,000 units per year. Mahindra were prohibited from assigning or otherwise transferring the rights under the agreement to any party. Article C(2)(a) of the agreement, inter alia, provides that during the subsistence of the agreement either the foreign collaborator or Mahindra receives any information relating to any improvement or improved manufacturing techniques relating to the engine, then the same shall be communicated to the other party. Article C(4)(a) provides that the foreign collaborator retains ownership and exclusive possession of all the industrial property rights relating to the engine and to the engine technology such as processes and manufacturing secrets as well as licenses, patents, trade marks and brand names. By clause 4(b), Peugeot expressly granted to Mahindra the exclusive rights to use in India of the industrial property rights including applicable patents, trade marks, registered designs and design copy rights relating to the engine or any parts, components or other elements thereof. Clause 5(a) provides that during the period of five years from the effective date of the agreement, Mahindra shall apply to all engines and parts thereof manufactured, assembled and sold the trade mark "INDENOR" in the same dimensions and with the same characters and symbols as carried by the original

engines and parts in France. It also provides that each engine shall bear an apparent insignia with the marking "Peugeot Diesel Engine, type INDENOR, made by Mahindra and Mahindra."

It is required to be stated at this juncture that the parties entered into a supplemental agreement on March 6, 1980 and Clause 5(a) of the main agreement was substituted by providing that unless otherwise agreed, during the period of five years from the effective date of the agreement Mahindra shall apply to all engines and parts thereof manufactured, assembled and sold under the agreement the marketing "Manufactured by Mahindra and Mahindra with Peugeot technology." Clause 5(c) provided that at the expiry of period of five years Mahindra shall cease use of the words PEUGEOT" and shall apply to all engines and parts thereof manufactured, assembled and sold a trade mark belonging to Mahindra in such a way that there can never be any confusion with "PEUGEOT" trade marks.

4. Article "E" of the agreement deals with subject of payments and sets out that as consideration for providing the use of PEUGEOT technology, Mahindra shall pay to foreign collaborators in Paris a sum of 15 Million French Francs in three instalments. It is not in dispute that the amount was remitted to Peugeot in three instalments paid on May 27, 1980, April 15, 1981 and September 18, 1981. The rupee equivalent was Rs. 95,27,448/- Rs. 84,17,568 and Rs. 81,83,058/- respectively. Article "F" deals with the subject of supply of CKD packs and service parts and it is necessary to set out Clauses 1 to 3 of this Article as the the controversy in the appeal centers round on the varied import of CKD packs :

"F. - Supply of CKD packs and Service parts :

"1. During the period of five (5) years from the effective date of this Agreement, PEUGEOT agrees to supply CKD packs in the rough or finished state as may be required by M & M and agreed by PEUGEOT for the production of the Engine. Such packs are to be of the current PEUGEOT design. PEUGEOT also agrees to supply such service parts as may be required by M & M.

2. The price of a complete Engine in CKD form shall be PEUGEOT's ex-works price of the Engine as exported in CKD from the other parts of the world and as notified by PEUGEOT to M & M from time to time and as agreed to by M & M.

3. PEUGEOT shall prepare a Bill of Material for the Engine according to the specifications agreed upon with M & M which shall show individual part numbers."

The only other relevant clause in the agreement is Article I(8) and it provides that this agreement is a single agreement indivisible and non-severable. It further provides that any refusal or failure to perform a substantial part thereof or any substantial breach of any part thereof shall, unless the parties otherwise agree, entitle the other to terminate the whole of this agreement without prejudice to rights already accrued.

5. Mahindra imported CKD packs and components from Peugeot from the year

1982 onwards. Sometimes in June 1984, the Customs Appraising Group which was concerned with the assessment and clearance of a consignment of CKD packs and components imported by Mahindra referred the question as to the valuation of a consignment of crankshafts imported to the Special Valuation Branch of the Customs Department. On November 6, 1984, the Assistant Collector of Customs, Special Valuation Branch, served notice on Mahindra communicating the tentative decision taken for loading the invoice price mentioned in respect of the imported goods. The communication, inter alia, recites that the payment as lump sum amount of 15 Million French Francs amounting to Rs. 3 Crores approximately is considerably large amount and the agreement provides for facilities not only of technical know-how but also the right to use designs, patents and trade marks which are properties of the collaborators. It further recites that technical know-how fees are not chargeable to duty and cannot form part of the value of the goods imported from the collaborator but payments made for designs, patents and trade marks form part of the assessable value of the goods for calculation of customs duty. The communication further recites that out of the lump sum amount paid to the Peugeot, 15% is attributed towards designs, patents and trade marks. The Assistant Collector further claims that the circumstances under which CKD packs are imported warrant the application of valuation under Rule 8 read with Section 14(1)(b) of the Customs Act before assessment. The Assistant Collector informed the Company that tentatively he had decided to load the invoice of CKD components at the rate of 2.5%; 1.5% on account of patent, trade marks and designs, and 1% on account of royalty. The Company entered into a large correspondence with the Assistant Collector controverting the claim that the provisions of Section 14(1)(b) of the Customs Act are attracted to the import of CKD components. The Assistant Collector, after giving hearing to the Company, issued order dated September 20, 1985 holding that the invoice value of CKD packs shall be raised by 1.5% u/s 14(1)(b) of the Customs Act read with Rule 8 of the Customs Valuation Rules, 1963.

6. The Assistant Collector held that the collaboration agreement is a composite agreement and the lump sum payment is made not for securing only the technical know-how but also for obtaining designs, patents, right to use trade marks, etc. It was further held that as the collaboration agreement consists of clause for supply of CKD packs of components for five years, it is obvious that the price of CKD packs set out in the invoice value is determined after bearing in mind that the lump sum bill covers the part of the price of CKD packs. The Assistant Collector felt that the lump sum paid by Mahindra included an element of price to be settled in regard to the supply of CKD components under the agreement. The Assistant Collector held that the price set out in the invoices is not the sole consideration for the sale of CKD components and, therefore, the provisions of Section 14(1)(a) of the Customs Act are not applicable and the valuation is required to be determined in conformity with Section 14(1)(b) of the Customs Act read with Rule 8 of the Customs Valuation Rules. The Assistant

Collector also held that there is no provision for royalty payment on products, in the agreement and, therefore, the lump sum paid by Mahindra must have included an element of payment of royalty also. In consequence of the finding, the Assistant Collector loaded the invoice value of the CKD packs by 1.5% of the value mentioned.

Mahindra carried an appeal before the Collector of Customs (Appeals) Bombay but the appeal ended in dismissal by order dated September 2, 1986. The Company thereupon preferred Writ Petition No. 3167 of 1986 under Article 226 of the Constitution of India, and the petition succeeded before learned Single Judge.

7. The learned Single Judge by the impugned judgment held that the order passed by the Assistant Collector and confirmed by the Appellate Authority is not sustainable. It was held that the payment of lump sum of 15 Million French Francs has no connection whatsoever to the supply of CKD packs in rough and finished state by Peugeot for the production of the engine. The learned Judge held that there is separate provision in the agreement relating to fixation of price of CKD packs and that fixation has no nexus whatsoever to the lump sum payment made for obtaining technical know-how. The learned Judge held that the provisions of Section 14(1)(a) of the Act are not excluded because the parties have no interest in the business of each other and consequently, the Assistant Collector was not justified in resorting to the provisions of Section 14(1)(b) of the Act and the Customs Valuation Rules. In consequence of the finding, the learned Single Judge quashed the order passed by the Assistant Collector and the Appellate Authority and issued the injunction restraining the respondents from loading any amount in the invoice value for CKD components imported by Mahindra. The learned Single Judge gave further direction to finalise the provisional assessments on the basis of the invoice values of the CKD components and without loading any amount to the invoice value of the said components and also directed the respondents to refund to the petitioners the excess duty recovered by loading the invoice value of the components together with interest at the rate of 12% per annum. The respondents were directed to make refund after verifying the particulars submitted by Mahindra within a period of three months from the date of furnishing of the materials. The decision of the learned Single Judge is under challenge.

8. Shri Bhabha, learned counsel appearing on behalf of the appellants, submitted that the learned Judge was in error in disturbing the conclusion recorded by the Assistant Collector and confirmed by the Appellate Authority by holding that the Customs Authorities were duty-bound to accept the valuation referred to in the invoice while importing the CKD components. Shri Bhabha submitted that Section 14(1)(a) of the Act has no application because the seller and buyer had interest in the business of each other and the price for supply of CKD components mentioned in the invoice was not the sole consideration for the sale thereof. The learned counsel urged that the collaboration agreement was

indivisible and non-severable and, therefore, it is not permissible to read Article "F" of the agreement dealing with supply of CKD pack and service parts by ignoring that the price to be determined for supply of such packs has no element to the payment of lump sum of 15 Million French Francs by Mahindra. Shri Bhabha submitted that reliance by the learned Single Judge on the decision of the Supreme Court in the case of Union of India and others v. Atic Industries Limited reported in 1984 (17) Exc LT 323 was not correct as the decision deals with the ambit of Section 4 of the Central Excises and Salt Act, 1944 and that section is not comparable to the provisions of Section 14(1)(b) of the Customs Act. The learned counsel also urged that the Assistant Collector was justified in loading the invoice value by 1.5% in accordance with the best judgment rule prescribed under Rule 8 of the Customs Valuation Rules, 1963. Shri Setalvad, learned counsel appearing on behalf of Mahindra, on the other hand, urged that the decision of the learned Judge does not suffer from any infirmity and the plain reading of the collaboration agreement would establish that there is no nexus whatsoever between the lump sum paid by Mahindra for securing technical knowledge and determination of price for supply of CKD packs under Article "F" of the agreement. Shri Setalvad urged that Article F(2) clearly provides that the price of CKD packs is to be settled by the parties and Mahindras were not bound to purchase the CKD packs or any service parts from foreign collaborators. Shri Setalvad also submitted that there was no mutuality whatsoever between Mahindras and foreign collaborators, and there is nothing on record to indicate that the price was not the sole consideration for the sale of CKD packs. Shri Setalvad alternatively contended that even assuming that the Assistant Collector was entitled to rely upon the provisions of Section 14(1)(b) of the Act, still loading of invoice value by 1.5% by resort to best judgment doctrine is totally arbitrary. The Assistant Collector, claims Shri Setalvad, has no material whatsoever to indicate that the invoice value does not reflect the true price of the CKD packs.

9. Before examining the submission urged by the learned counsel, it is necessary to set out the relevant provision of Section 14(1)(a) and (b) as it stood at the relevant time and prior to the amendment :

"14(1) For the purposes of the Customs Tariff Act, 1975, or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such good shall be deemed to be -

(a) 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 the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale :

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented u/s 46, or a shipping bill or bill of export, as the case may be, is presented u/s 50;

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf."

For the purpose of ascertaining the value of the goods chargeable to customs duty, the price at which such goods are ordinarily sold at the time of importation in the course of international trade is relevant provided the seller and the buyer have no interest in the business of each other and the price is a sole consideration for the sale. In other words, the Customs authorities are bound to accept the invoice value of the goods unless it is found :

(a) that the seller and buyer have interest in the business of each other, and

(b) the price is not the sole consideration for the sale.

The Assistant Collector proceeded to resort to the provisions of Section 14(1)(b) of the Customs Act and to Customs Valuation Rules on the basis that the foreign collaborators and Mahindra had interest in the business of each other and the price mentioned in the invoice is not the sole consideration for the sale of CKD packs. The question which, therefore, arises for determination is whether the foreign collaborator and Mahindra had any interest in the business of each other and whether the price for sale of CKD packs by foreign collaborator to Mahindra is not the true price because the price was determined by taking into consideration the lump sum of 15 Million French Francs paid by Mahindra under the collaboration agreement. The first question as to whether foreign collaborator and buyer had interest in the business of each other can be answered after determining what exactly the expression "interest in the business of each other" connotes. The question need not detain us any longer because the Supreme Court examined somewhat parallel expression while examining the expression "related person" as defined u/s 4(4)(c) of the Central Excises and Salt Act. The expression "related person" is defined u/s 4(4)(c) of the Central Excises and Salt Act as under :

"related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other.

x x x x x"

The Supreme Court in *Atic Industries*" case (supra) observed :

"What the first part of the definition requires is that the person who is sought to be branded as "related person" must be a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality

and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect in the business of the other."

10. Turning to the facts of the present case, it is obvious that neither the foreign collaborators nor Mahindra had any interest, direct or indirect, in the business of each other. The foreign collaborator had sold the technical know-how and other proprietary rights for a fixed duration of Mahindra for a consideration and Mahindra had secured the rights under the agreement. Neither parties had any interest in the business carried on by the others. It is difficult to appreciate how it can even be suggested that Mahindra and foreign collaborators had interest in each other's business. Shri Bhabha submitted, with reference to Article C(2)(a) of the agreement, that it was agreed between the parties that both the parties shall communicate all information relating to any improvement or improved manufacturing techniques relating to the engine and this indicates that both the parties had interest in the business of each other. It is difficult to find any merit in the submission. The agreement must be read as a whole and then it is obvious that Mahindra had entered into the agreement for securing the know-how of the engine and with an object to manufacture the engine with 100% indigenous contents in India. The foreign collaborators had no interest in the business of Mahindra, nor Mahindra in the business of foreign collaborators. Merely because the parties agreed that during the subsistence of the agreement, the parties should communicate all information relating to the improvement or improved manufacturing techniques relating to the Engine, that cannot lead to the conclusion that the parties had interest in the business of each other. The test of mutuality referred by the Supreme Court in *Atic Industries*" judgment (supra) is not, at all, applicable to the facts of the present case and consequently the contention of Shri Bhabha that the parties had interest in the business of each other cannot be accepted. Shri Setalvad, in this connection referred to the decision of the Supreme Court in the case of *Collector of Customs, Bombay v. Maruti Udyog Limited* report in 1989 24, E.C.C.349. In the case before the Supreme Court, Maruti Udyog Limited had entered into collaboration agreement with Suzuki Limited, Japan and under the agreement, Suzuki acquired 26% equity shares in Maruti as also proportional representation on the Board of Directors of Maruti. The Maruti Udyog Limited imported CKD packs from Suzuki and the Assistant Collector loaded invoice prices at 1% for the purpose of assessment of customs duty. In appeal, the Collector held that the loading was not called for and thereupon the department went in appeal before the Central Excise and Gold Control Appellate Tribunal. Before the Tribunal, it was contended that Maruti Udyog Limited and Suzuki Company had interest in the business of each other, but the contention was turned down as there was no mutuality of interest and one-sided interest of Suzuki could not lead to the conclusion that Maruti Udyog Limited and Suzuki had business interest in each other. The

decision of CEGAT was upheld by the Supreme Court and the appeal preferred u/s 130B(b) of the Customs Act was dismissed. Shri Setalvad submitted with reference to the decision in Maruti's case that the principle that there should be mutuality between the seller and the buyer to exclude the application of provision of Section 14(1)(a) of the Act is reiterated by the decision of the Supreme Court and the reliance on the decision in Atic's case by CEGAT was found to be proper.

11. Shri Bhabha countered the submission by urging that the decision of the Supreme Court in Maruti's case does not reflect various points agitated by the Department because the appeal was dismissed by merely observing that the Tribunal was right in the conclusion, on Supreme Court examining the provisions of the Act and the facts. Shri Bhabha submitted that the two members of the CEGAT had differed on the application of Section 14(1)(a) of the Act though both the members concurred in the final conclusion that the loading of invoice value was not justified. The differing judicial member held that the value was loaded without any rationale and material available to the Assistant Collector. Shri Bhabha submitted that the decision in Maruti's case does not assign any reasons and, therefore, non est and ratio in Atic Industries' case should not be applied while examining the ambit of Section 14(1)(a) of the Act. The learned counsel urged with reference to the decision of the Supreme Court in the case of MSCO. Pvt. Ltd. Vs. Union of India (UOI) and Others, that it is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject. The learned counsel urged that Section 4(4)(c) of the Central Excises and Salt Act and Section 14(1)(a) of the Customs Act are not *pari materia* and being the provisions of two different statutes, it is not proper to determine the scope of Section 14(1)(a) by resort to decision in Atic Industries' case. It is not possible to accede to the submission of the learned counsel. The expression "interest in the business of each other" finds place in both the statutes and it is impossible even to suggest that the two statutes are not dealing with any cognate subject. Both the Statutes are enacted for levy of duty. Shri Bhabha submitted that examination of provisions of the two Acts would reveal that the wordings are neither identical nor similar. The expressions "wholesale trade" and "related person" defined in Section 4(4)(c) of the Central Excises and Salt Act do not figure in the Customs Act and instead of "wholesale trade" the concept of "International trade" is referred to in the Customs Act. The provisions in the Central Excises and Salt Act state that for determination of normal price, the buyer should not be a related person, while, on the other hand, the provisions of the Customs Act state that the value should be ordinary price. In our judgment, the distinction suggested by the learned counsel is of no consequence and the crucial words "interest in the business of each other" are identical in both the statutes. While defining the expression "related person" under the Central Excises and Salt Act, it is positively mentioned that the person must be associated with the assessee and having interest directly or indirectly in

the business of each other, while under the Customs Act u/s 14(1)(a), the expression is couched in the negative form. In our judgment, the learned Single Judge was perfectly justified in relying upon the decision of the Supreme Court in Atic's case to conclude that there was no mutuality between Mahindra and foreign collaborators, as they had no interest in the business of each other and consequently, the Assistant Collector was not right in excluding application of Section 14(1)(a) of the Act.

12. Shri Bhabha then submitted that the decision of the Supreme Court in Atic's case proceeded apart from the test of mutuality on the basis that Atul Products Limited was a shareholder of the assessee to the extent of 50% of the share capital. Shri Bhabha urged that Atic's case dealt only with the shareholding and mutuality and that decision can have no application to the facts of the present case where the collaboration agreement discloses that the parties had interest in the business of each other. We have already held that the claim of Shri Bhabha on this cannot be acceded to. We are unable to find any evidence in the collaboration agreement to reach the conclusion that either parties had any interest in the business of each other.

13. Shri Bhabha submitted that even assuming that the parties had no interest in the business of each other, still the Assistant Collector was justified in resorting to the provision of Section 14(1)(b) of the Customs Act because the price mentioned in the invoice was not the sole consideration for the sale of CKD packs. In support of this submission, strong reliance is placed upon the fact that the collaboration agreement recites that the agreement is a single agreement indivisible and non-severable. The learned counsel urged that supply of CKD packs is agreed between the parties in the composite agreement and while fixing the price of the CKD packs, the parties had in contemplation the lump sum amount of 15 Million French Francs paid in accordance with Article "E" of the agreement. Shri Bhabha submits that the collaboration agreement did not merely provide for transfer of technical know-how but also industrial property rights including the applicable trade marks, registered designs and design copy rights relating to the engine. The learned counsel urged that the foreign collaborator granted the right to Mahindra to use the trade marks and while ascertaining the price of supply of CKD packs special concessional benefit must have been conferred on Mahindra, in view of the lump sum payment made under the agreement. Shri Setalvad controverted the submission, and, in our judgment, with considerable merit. The plain reading of Article "F" establishes that the foreign collaborator had agreed to supply CKD packs in rough or finished form as required by Mahindra during the period of five years from the effective date of the agreement. What is crucial is Clause (2) of Article "F" which provides that the price of a complete engine in CKD form shall be Peugeot's ex-works price of the engine as exported in CKD from other parts of the world and as notified by Peugeot to Mahindra from time to time and as agreed by Mahindra. The plain reading of Clause (1) and (2) of Articles "F" establishes that there was no obligation on Mahindra to purchase CKD packs and service parts, though there

was an obligation on the foreign collaborators to supply such parts during the period of five years on demand made by Mahindra. The clauses also establish that the prices of CKD packs shall be the price of the engine exported in CKD form by the foreign collaborator but the Mahindra was not bound to accept the said price. Mahindra was entitled to import CKD packs provided Mahindra accepts the price quoted by the foreign collaborator, Clause (3) of Article "F" clearly provides that Mahindra shall have complete discretion in selection of items to be purchased from foreign collaborators. The foreign collaborator was required to furnish the bill of materials from time to time indicating revised prices of CKD packs and also break up price of various components. Mahindra asserted before the Assistant Collector that the foreign collaborator supplied the engine and CKD packs or other service parts only after the price was settled by the parties by mutual negotiations from time to time. Mahindra further claimed that efforts were made by the foreign collaborators to extract higher price while Mahindra tried to have it reduced and in case where Mahindra was not satisfied, several components were imported from other suppliers. Mahindra claimed that fuel injection pumps were imported from CAV Roto Diesel, France and also from Bosch, Germany since the prices offered by them were considerably lower than charged by the foreign collaborator. This claim made by Mahindra was not disputed by the Department at any stage and, therefore, Shri Setalvad is right in claiming that the import price of CKD packs had no nexus whatsoever with the lump sum amount of 15 million French Francs paid by Mahindra at the time of entering into collaboration agreement. Shri Setalvad also points out that the import of CKD packs commenced only in the year 1982, while the amount of the consideration of 15 million French Francs was paid by September 1981. Shri Bhabha relied upon the certificate dated June 20, 1984 issued by the foreign collaborator to urge that the import of CKD packs commenced in April 1980. The submission has no merit whatsoever. The certificate merely recites that the foreign collaborators commenced export from date when the agreement became effective, i.e., April 1980 but the statement has no relevance because the Assistant Collector in the order by which the invoice value was loaded has clearly stated that the import commenced only from the year 1982. We, therefore, find considerable merit in the submission of Shri Setalvad that there is no relationship whatsoever between the payment of lump sum of 15 Million French Francs and settlement of price by negotiations between the parties for supply of CKD packs. We are in agreement with conclusion of the learned Single Judge that Article "F" of the Collaboration agreement dealing with supply of CKD packs and the determination of price thereof is de hors independent of the consideration of 15 Million French Francs paid by Mahindra to foreign collaborators for supply of technical know-how. In our judgment, there is nothing in the collaboration agreement to suggest that the price of CKD packs was to be determined by the parties by taking into consideration the amount of 15 Million French Francs paid under the collaboration agreement. As mentioned here in above, the price of CKD packs was to be quoted by the foreign collaborator and Mahindra was not bound to accept the price and purchase the CKD packs unless the price was found to be

acceptable. There was no compulsion on the Mahindra to purchase CKD packs or any components thereof. The collaboration agreement leaves it to the discretion of Mahindra to accept the prices quoted by foreign collaborator for supply of CKD packs and components. The agreement also reflects that the prices were not static but were liable to be revised from time to time during the subsistence of agreement and price of CKD packs and components had no relation to the payment of 15 Million French Francs paid by Mahindra. The contention of Shri Bhabha that the price quoted in the invoices tendered by Mahindra does not reflect the correct price because a part of the value of the imported packs and components was already recovered by foreign collaborator while determining the consideration of 15 Million French Francs cannot be accepted. In our judgment, the collaboration agreement does not support the claim, nor there was any material available to the Assistant Collector to warrant such conclusion.

14. It is necessary to make reference to the certificate dated June 20, 1984 issued by the foreign collaborator and on which Shri Bhabha placed reliance. The certificate, inter alia, recites :

"Sub-paragraph 2 of paragraph F clearly provides that the price of a complete engine in CKD form shall be our export price of the engine as exported in CKD form to other parts of the world and as notified by us to Mahindra & Mahindra.

Shri Bhabha urged that it is not known whether the foreign collaborator had entered into a similar agreement with other buyers and, therefore, the prices quoted to other buyers may not also reflect the true value. It is not possible to find any merit in the submission. It is not open for the Assistant Collector to proceed to load the invoice value on imaginary grounds. The Assistant Collector had no material whatsoever to sustain the claim that the prices quoted in the invoices were not the true prices and the price was not the sole consideration for the sale. In our judgment, the exercise of loading carried out by the Asstt. Collector was without any authority. The conclusion of the Assistant Collector that the provisions of Section 14(1)(a) of the Act are not applicable and, therefore, resort is necessary to Section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules is clearly incorrect and unsustainable. The Assistant Collector was bound to accept the price mentioned in the invoices for the purpose of assessing the customs duty.

15. Shri Setalvad submitted that even assuming that the Assistant Collector was entitled to rely on provisions of Section 14(1)(b) and the Customs Valuation Rules, still the loading of invoice value by 1.5% by reference to best judgment under Rule 8 of the Customs Valuation Rules was not just and proper. It is rally not necessary to examine this question as, in our judgment, the Assistant Collector was not right in holding that the provisions of Section 14(1)(a) of the Act are not applicable. It is true that the Assistant Collector had loaded the price by 1.5% by some assumption for which there was no foundation. Shri Bhabha submitted that there is always an element of guesswork while arriving at best judgment. The submission is correct but the guesswork should not be arbitrary.

It is undoubtedly true that some discretion must be left with the authority reaching the best judgment and it is not possible for the Court exercising writ jurisdiction to interfere with the discretion, unless it is found to be totally arbitrary and unsustainable. We do not wish to express any opinion as to whether in the present case, the exercise of discretion was arbitrary in view of our finding that the Assistant Collector was not entitled to resort to provisions of Section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules. In our judgment, the conclusion reached by the learned Single Judge is correct and appeal must fail.

16. Accordingly, appeal is dismissed with costs.

Shri Bhabha orally applies for leave to file appeal to the Supreme Court. In our judgment, the matter does not involve substantial question of public importance and, therefore, leave is refused.