IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1729 OF 2001

M/S. BPL DISPLAY DEVICES LTD. APPELLANT(S)

VERSUS

COMMNR. OF CUSTOMS, MUMBAI RESPONDENT(S)

O R D E R

The appellant entered into a collaboration agreement with two Japanese companies namely, M/s.Toshiba Corporation (for short 'M/s.Toshiba') and M/s.Mitsubishi Corporation (for short 'M/s.Mitsubishi') to manufacture colour T.V.picture tubes in India. The agreement was entered into in July, 1985. Broadly speaking, it provided for M/s.Toshiba to make available designs to M/s.Mitsubishi which would then manufacture various items to enable the setting up of

a plant in India to manufacture colour T.V.picture tubes. For this purpose, M/s.Toshiba was entitled to the price not only of the goods

supplied but also for the technical know-how given to run the plant. The question is whether the cost of the fees payable on account of the technical know-how was includible in the value of the imported goods.

The technical know-how fees was paid by the appellant in five yearly installments. The first three installments were paid prior to 16th August, 1988. Two installments were paid thereafter. The relevance of the date 16th August, 1988 lies in the fact that the Customs Valuation Rules, 1988 came into force with effect from that date replacing the earlier rules then holding the field. The customs authorities sought to add on the value of these two installments to the value of the imported goods under Rule 9(1)(b)(iv) of the 1988 Rules. The rule provides :

> "9. Cost and services - (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -
>
> (a) the following cost and services, to the extent they are

incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely :-

(i) commissions and brokerage, except buying commissions;

(ii)the cost of the containers which are treated as being one for customs purposes with the goods in question;

(iii)the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in

connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii)tools, dies, moulds and similar items used in the production of the imported goods;

(iii)materials consumed in the production of the imported goods;

(iv)engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

© royalities and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable,

(d)the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(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."

Analysed, the rule enables the addition of the value of the goods and services supplied by the buyer in connection with the production and sale for export of the imported goods. The addible value can only be "to the extent that such value has not been included in the price actually paid". The goods and services include those specified in Clause (4). Here again, it must be noted that the design work, plans, sketches etc.

should have been undertaken elsewhere than in India.

The Assistant Collector was of the view that the price of the technical know-how was not includible in the value of the imported goods for setting up of a plant. The Commissioner, however, on appeal by the Department, reversed that finding. The ground, as far as we have been able to decipher, was that the agreement between the parties showed that M/s.Mitsubishi was to manufacture the goods in

accordance with M/s.Toshiba's designs. The Commissioner concluded that, in effect, the equipments and parts were being supplied by M/s.Toshiba and M/s.Mitsubishi was only a via media. Article 5.1 of the agreement was also referred to, to say that the technical documents were necessary and were relatable to the value of the equipments supplied. Therefore, according to the Commissioner, the value of the technical documents had to be added to the value of the equipments. The reasoning is incoherent, illogical and unsustainable. None of the factors referred to by the Commissioner fulfill the requirements of Rule 9 (1)(b)(iv).

Similarly, the Tribunal, which affirmed the Commissioner's order, appears to have overlooked the basic elements of the Rule. The Tribunal held :-

> ".....In the present case, the proprietary equipment of M/s.Toshiba manufactured by M/s.Mitsubishi and other contractors, was part of the plant and machinery installed in the manufacture of colour picture tubes. These equipments were the proprietary items of M/s.Toshiba and were manufactured according to the drawings etc. supplied by M/s.Toshiba. The know how

agreement covered all know how including the know how for the proprietary equipment. The various clauses relied upon by the Revenue make it clear that the proprietary equipment of M/s.Toshiba was part of the know how transfer. These were made according to the drawings, specifications etc. of M/s.Toshiba and those drawings were required to be approved by M/s.Toshiba, the appellants and M/s.Mitsubishi before manufacture. In these circumstances, the only conclusion that can be drawn is that the payment for know how made by the appellants included the payment for drawings, designs etc. of the proprietary equipment of M/s.Toshiba and manufactured by M/s.Mitsubishi. Thus, this is a case of indirect supply to the manufacturer of the imported goods of design, drawing etc. which had been developed abroad at the cost of the importer....."

There is nothing to show that the drawings etc. were supplied by the appellant at all, within the language of Rule 9(1)(b)(iv).

We have been taken through the clauses of the agreement to show that in any event the know-how did not cover the know-how for the proprietary equipment and indeed the proprietary equipment of M/s.Toshiba did not cover the know-how transferred at all. On the contrary, Clause (4) of the agreement listed under the heading Exclusion of technical information, reads :

"4.5 Information and data for the manufacture of machines, apparatuses and dies for PRODUCT and for components (including COMPONENT) thereof."

The basis of the reasoning given by the Tribunal is, therefore, not at all in keeping with the fact and records and was perverse.

The appeal is accordingly allowed and the order of the Assistant Collector is set aside. There shall be no order as to costs.

.....J.
(RUMA PAL)

.....J.
(DALVEER BHANDARI)

NEW DELHI;
3RD MAY, 2006.

ITEM NO.107 COURT NO.2 SECTION III

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(s). 1729 OF 2001

M/S. BPL DISPLAY DEVICES LTD. Appellant (s)

VERSUS

COMMNR. OF CUSTOMS, MUMBAI Respondent(s)

(With office report)

Date: 03/05/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE RUMA PAL

HON'BLE MR. JUSTICE DALVEER BHANDARI

For Appellant(s) Mr.R.Parthasarathy, Adv.

Mr.M.P.Devanath,Adv.

Mr.Alok Yadav, Adv.

For Respondent(s) Mr.Ashok K.Panda, Sr.Adv.

Mr.Rudreshwar Singh, Adv.

For Mr. P. Parmeswaran,Adv.

UPON hearing counsel the Court made the following

O R D E R

The appeal is allowed, in terms of the signed order. No costs.

(G.V.Ramana) (Madhu Saxena)

Court Master Court Master

(Signed order is placed on the file)