UNION OF INDIA AND ORS. A

v.

MAHINDRA AND MAHINDRA LTD., BOMBAY

MARCH 8, 1995

[J.S. VERMA, S.P. BHARUCHA AND K.S. PARIPOORNAN, JJ.] B

Customs Act, 1962/Customs Valuation Rules:

S.14(1)(b)/Rule 8—Foreign Collaboration agreement—Value of imported packs—Price shown in the invoices—Whether reflects the true sale price—Taking into consideration the lumpsum payment made under the collaboration agreement, the value of imported packs raised by applying provisions of s.14(1)(b)—Held: Invalid and unjustified. C

The Respondent, a Public Limited Company, has been carrying on business in the manufacture of different types of automobile vehicles. It entered into a technical know-how agreement for ten years with a French Company in respect of a diesel engine manufactured by it. As per the agreement, respondent remitted the amount in three instalments. Respondent imported CKD packs and service components from 1982 onwards from the said French Company. The Assistant Collector, Central Excise took the view that the lump sum paid under the agreement included on element of price to be settled in regard to the supply of CKD components, and would have included an element of royalty also for the products. He held that the invoice value of CKD parts set out in the invoices is not the sole consideration for the sale of the goods. Invoking the provisions under s.14(1)(b) r/w Rule 8 of the Customs Valuation Rules, he held that the value of the imported packs should be raised by 1.5%. This was affirmed by the Collector of Customs (Appeals). D E F

Respondent filed a Writ petition before the High Court. The Single Judge before whom it was listed, quashed the impugned orders and ordered refund of excise duty recovered from the respondent. On appeal a Division Bench confirmed the order. G

In appeal to this Court, Union of India contended that the price mentioned in the invoices was not the sole consideration; and that the price should have been determined by taking into consideration the lump sum H

A of 15 million French Francs paid by the respondent to the foreign Collaborator under the agreement and on that basis Section 14(1)(a) was excluded and Section 14(1)(b) was resorted to.

Respondent contended that there was no material to indicate any nexus or connection between the lump sum payment of 15 million French
B Francs and the supply of CKD packs to the Respondent; that it cannot be said that the price fixed in the invoices is not the price of the goods obtained later and was reckoned or reflected in the lumpsum payments made, long before; and that the parties never had in mind the nature and extent of the spare parts that might be required later, when the Collabora-
C tion agreement was entered into.

Dismissing the appeal, this Court

HELD : 1. The collaboration agreement entered into between the parties is clear and it is not open to the revenue to construe it differently
D by reading into it something which is not there. [609-A]

2. The crucial aspects appearing in the case are that the parties were dealing at arm's length; that the seller and the buyer have no interest in the business of each other; that, ordinarily, the technical know-how of the machine can take in 'the assembly' thereof, that the CKD packs and spares
E were supplied to the respondents by the collaborator not at a concessional price but at the price at which they were sold to others; that, as agreed to by the respondents, the option was entirely with the respondents to order the parts as per their requirements; that there was *no obligation* on the respondents to purchase CKD packs at all; that long before the supply of
F the CKD packs and spares, the royalty due to the collaborators was paid; and that there is no material to show that the supply of the CKD packs or spares weighed with the parties in fixing the payments under the collaboration agreement but, on the other hand, the collaboration agreement for the technical know-how and the supply of CKD packs and spares are independent commercial transactions. In other words, there existed no nexus
G between the lumpsum payment under the agreement for the technical know-how and the determination of the price for supply of CKD packs or spares. It is by highlighting the above aspects that the single Judge and the Division Bench rightly concluded that resort to section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules was clearly incorrect and
H unsustainable. The reasoning and conclusion of the Judges of the High

Court are justified and valid in the facts and circumstances of the case and no interference is called for. [608-B-H] A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1886 (NM) of 1993.

From the Judgment and Order dated 7/8.3.91 of the Bombay High Court in A.No. 237/87 in W.P. No. 3167 of 1986. B

D.P. Gupta, Solicitor General, K. Swamy, V.K. Verma and P. Parmeshwaran for the Appellants.

Atul Setalwad, D. Shroff, Ravinder Narain, Ms. Punita Singh and Ms. Sonu Bhatnagar for the Respondents. C

The Judgment of the Court was delivered by

PARIPOORNAN, J. The Union of India, the Collector of Customs, Bombay and the Assistant Collector of Customs, Special Valuation Branch, Bombay are the appellants in this appeal. M/s. Mahindra and Mahindra Limited, Bombay are the respondents. The matter herein arises under the Customs Act, 1962. The respondents filed Writ Petition No. 3167 of 1986 in the High Court of Bombay and assailed the order dated 20.9.1985, passed by the Assistant Collector of Customs, evidenced by Ext. K and the appellate order dated 2.9.1986 passed by the Collector of Customs (Appeals) affirming the said order, evidenced by Ext. M. A learned Single Judge by Judgment dated 27.7.1988 quashed the aforesaid orders and also ordered refund of excise duty recovered from the respondents during the period from June, 1984 onwards, after verifying the particulars submitted by the respondents. The appellants herein filed Appeal No. 237 of 1987 before a Division Bench of the Bombay High Court. The Division Bench, by Judgment dated 7th and 8th of March, 1991, affirmed the decision of the learned Single Judge. The prayer for the issue of a certificate to appeal to this Court was also declined. Thereafter, the appellants moved this Court in S.L.P. (Civil) No. 3203 of 1993 and this Court by Order dated 19.4.1993 granted leaves to the appellants in the following terms: D E F G

> "Learned Solicitor General submits that he does not assail the judgment of the High Court insofar as it relates to the finding on the question 'that the seller and the buyer have no interest in the business of each other' but he assails the judgment on the other H

question so far as it relates to the question that *'the price is the sole consideration for the sale or the offer for sale'* in Section 14(1)(a) of the Customs Act.

Leave granted."

2. We heard Sri Dipankar P. Gupta, Solicitor General who appeared for the appellants and Sri Atul Setalvad, Senior Advocate, who appeared for the respondents. The respondents are a public limited company carrying on business in the manufacture of different types of automobile vehicles. Their factories are situated at Bombay, Igatpuri and Nasik. They entered into a technical know-how agreement with M/s. Automobile Peugeot, a French company, in respect of a diesel engine manufactured by Peugeot and known as IDP 4.90. The original agreement is dated 6.11.1979, Ext.B (Page 98-109 of the Paper Book), and the supplemental agreement is dated 6.3.1980 (pages 112-114 of the Paper Book).

3. The period of agreement was for a duration of 10 years from the date of securing the consent of the Government of India to the agreement. The respondents agreed to pay to the foreign collaborator in Paris a sum of 15 million French Francs in three instalments. It is common ground that the respondents remitted the amount so agreed to Peugeot in three instalments on 27.5.1980, 15.4.1981 and 18.9.1981, amounting to Rs. 95,27,448, Rs. 84,17568 and Rs. 81,83,058, respectively. Article F in the agreement dealt with the subject of supply of CKD packs and service parts. The respondents imported CKD packs and service components for Peugeot from the year 1982 onwards. In June, 1984, the Customs Appraising Group referred the question as to the valuation of a consignment of crankshafts imported, to the Special Valuation branch of the Custom Department. The Assistant Collector, after hearing the company, issued an order dated 20.9.1985, holding that out of the lumpsum payment made to the respondents-M/s. Peugeot 15% is attributed towards designs, patents and trade marks, and the circumstances under which CKD packs are imported warrant valuation under Rule 8 of the Customs Valuation Rules, 1963 read with section 14(1)(b) of the Customs Act and excludes section 14(a) of the Act before assessment. He took the view that the composite agreement envisaged supply of CKD packs of components for 5 years, and it is obvious that the price of CKD packs set out in the invoice value is determined after bearing in mind the lumpsum payment made under the agreement. In other

words, the lumpsum paid by the respondents under the agreement included an element of price to be settled in regard to the supply of CKD components under the agreement, and the lumpsum must have included an element of payment of royalty also for the products. Finally, he held that the invoice value of CKD parts set out in the invoices is not the sole consideration for the sale of the goods and calling in aid the provisions of section 14(1)(b) read with Rule B of the Customs Valuation Rules, he held that the value of the imported packs shall be raised by 1.5%. This was affirmed by the Collector of Customs (Appeals) by order dated 2.9.1986. Thereupon the respondents-company filed Writ Petition No. 317 of 1987 under Article 226 of the Constitution of India in the High Court of Bombay and assailed the aforesaid orders successfully.

4. In order to adjudicate the controversy raised in this appeal it will be useful to quote the relevant statutory provisions and also the important terms contained in the main agreement dated 6.11.1979 and the supplemental agreement dated 6.3.1980, executed between the respondents and the foreign collaborator, stressed by counsel.

> "Agreement made this 6th day of November, 1979 by and between AUTOMOBILES PEUGEOT, 75 avenue de la Grande Armee, PARIS FRANCE, (hereinafter referred to as 'PEUGEOT') on the one hand, and MAHINDRA AND MAHINDRA LIMITED, Gateway Building, Appollo Bunder, Bombay 400 039, India (hereinafter referred as to 'M & M'), on the other hand.
>
> WHEREAS M&M is engaged in the manufacture of motor vehicles of various types fitted with internal combustion engines,
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> and WHEREAS M&M is desirous of improving the utility of the said vehicles by fitting them with an engine manufactured on the basis of latest technology:
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> and WHEREAS PEUGEOT as a result of long experience and extensive and continuous research and development in the business of manufacture of motor vehicles, has developed or acquired and possesses designs and technical knowledge in the manufacture of an engine designated XDP 4.90 (hereinafter referred to as the Engine) which is identified in Exhibit A attached hereto and has industrial property rights consisting of designs, engineering, *tech-*

nological and all other information with respect to the Engine;

and WHEREAS M&M desires, for the purpose of carrying on its business as a manufacturer of motor vehicles, to obtain the right to manufacture, *assemble and use the Engine* and use *the technical knowledge* of PEUGEOT and also to have continuing technical assistance from PEUGEOT during the period of the Agreement;

and WHEREAS PEUGEOT is willing to grant the use of its technical knowledge and to assist M&M in *the manufacture and assembly of the Engine* in the manner hereinafter provided;

Therefore, it is hereby agreed between PEUGEOT and M&M as follows:

A - *SUPPLY OF PEUGEOT ENGINE TECHNOLOGY*

1. As soon as practicable after the effective date of this Agreement PEUGEOT shall furnish to M&M *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 by PEUGEOT in the manufacture of the Engine* (hereinafter referred to as the PEUGEOT Engine Technology) so as to enable the manufacture of the Engine by M&M in India and to this intent, will furnish to M&M two copies, one of which will be in the form of tracings and/or films, of all of the documentation of the PEUGEOT Engine technology as follows .

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4. *The PEUGEOT Engine Technology* referred to herein shall be such as will enable M&M progressively *to manufacture the Engine with up to hundred per cent indigenous content in India.*

5. The PEUGEOT Engine Technology referred to herein shall be delivered by PEUGEOT to M&M, or its designated representatives, in PARIS, or, at the latter's request, be mailed in PARIS to M&M.

6. PEUGEOT shall not furnish or make available directly or indirectly the *PEUGEOT Engine Technology necessary to manufacture, assemble and sell the Engine in India, to any other person.*

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B - *RIGHT TO MANUFACTURE, ASSEMBLE AND SELL*

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(b) *to assemble in India the Engine from parts, components and other elements delivered by PEUGEOT and/or manufactured locally or supplied by Indian suppliers;*

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C - *MODIFICATIONS, QUALITY, INDUSTRIAL PROPERTY, SECRECY*

1. During the period of Five (5) years from the effective date of this Agreement.

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(i) M&M shall permit PEUGEOT's *representative access at all reasonable times to M&M's premises to inspect all the operations* associated with the *manufacture and assembly of the Engine.*

4. (a) PEUGEOT expressly retains its ownership and its exclusive possession of all the industrial property rights relating to the Engine and to the PEUGEOT Engine Technology such as processes and manufacturing secrets as well as licences, patents, trade marks and brand names;

(b) To enable implementation of the objectives of this Agreement, PEUGEOT expressly grants to M&M the exclusive rights *to use in India all the said industrial property rights* including applicable patents, trade marks, registered designs and design copyrights relating to the Engine or *any parts, components or other elements thereof;*

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(e) PEUGEOT hereby grants the right to M&M to use the trade marks and applications therefor contemplated by this Agreement in the Union of India and outside India, subject to the Agreement of PEUGEOT in relation to the Engine, all parts, accessories, components and other elements thereof to be manufactured or procured by M&M and to this end PEUGEOT and M&M shall cause to be executed as occasion may required such applications, affidavits, declarations, agreements and other papers as may be necessary or desirable to ensure M&M's due resignation in India as a registered user of all PEUGEOT's Indian trade marks contemplated by this Agreement;

5. (a) *Unless otherwise agreed, during the period of five (5) years* from the effective date of this Agreement, M&M shall apply to all engines and parts thereof manufactured, assembled and sold under this Agreement the trade mark INDENOR, in the *same dimensions* and with the same characters and symbols as those carried by original Engines and parts in Franc. Each Engine shall bear an apparent insignia with the marking "PEUGEOT Diesel ENGINE, type INDENOR, made by M&M.

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D - *TRAINING, TECHNICAL ASSISTANCE*

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E - *PAYMENTS*

1. As consideration for providing the use of PEUGEOT Engine technology pursuant to this Agreement, M&M shall pay PEUGEOT in PARIS a sum of *fifteen million (15,000,000) French Francs as follows:*

a) Five million (5,00,000) French Francs on the effective date of this Agreement ;

b) Five million (5,00,000) French Francs at the date of supply of the PEUGEOT Engine Technology or within a period of nine (9) months from the effective date of this Agreement, whichever occurs firsts;

c) Five million (5,00,000) French Francs on commencement of commercial production.

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F - *SUPPLY OF CKD PACKS AND SERVICE PARTS*

1. during the period of five (5) years form the effective date of this Agreement, PEUGEOT agreed 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 to 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 form to 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 cost of each such part shall be expressed as a percentage or the complete engine price in CKD form as defined in Clause F.2 hereinabove so that the *total sum of all the said percentages shall be one hundred (100).* Such Bill of Material shall be revised as necessary from time to time as may be mutually agreed. *M&M shall have complete discretion in its selection of items to be purchased from such Bill of Material provided that adequate notice shall be given to PEUGEOT sufficiently in advance and taking into consideration PEUGEOT's production programme and control requirements, and provided further that the equivalent local item has previously met PEUGEOT's quality specifications.*

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G - *PUBLICITY AND NEGATIVING ANY PRESUMPTION OF AGENCY*

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A H - *DURATION OF THE AGREEMENT - TERMINATION*

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I - *MISCELLANEOUS CLAUSES*

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8. *This Agreement is a single Agreement indivisible and nonseverable. Any refusal or failure to perform and 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 C Agreement without prejudice to rights already accrued hereunder."

Supplemental Agreement dated 6th March, 1980 between the parties provided thus :

"Supplemental Agreement made this 6th day of March 1980 by and D between AUTOMOBILES PEUGEOT, 75 avenue de la Grandle Armee, Paris 16e, FRANCE (hereinafter referred to as PEUGEOT) on the one hand, and MAHINDRA AND MAHINDRA LIMITED, Gateway Building, Apollo Bunder, Bombay 400 039, INDIA (hereinafter referred to as M&M), on E the other.

WHEREAS PEUGEOT and M&M have entered into an Agreement dated the 6th day of November 1979 (hereinafter referred to as the Main Agreement) for the manufacture in India of the PEUGEOT XDP 4.90 Diesel Engine;

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and WHEREAS the Government of India have suggested certain modifications to the Main Agreement;

Therefore, it is hereby agreed between PEUGEOT and M&M as follows:

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4. Clause C.5(a) of the Main Agreement shall be substituted by the following:

H Unless otherwise agreed, during the period of five (5) years from

the effective date of this Agreement M&M shall apply to all Engines and parts thereof manufactured *and assembled* and sold under the Agreement the marking 'Manufactured by M&M with PEUGEOT technology'."

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We shall now set out the relevant statutory provisions. Section 14(1) (a) & (b) of the Customs Act, 1962, are to the following effect :

"14. (1) For the purpose 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 goods 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 under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50;

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

5. The main thrust of the arguments of the learned Solicitor General before us was that the price for the sale of CKD packs by the foreign collaborator to the respondents is not the true price. In other words, the price fixed or mentioned in the invoices was *not* the sole consideration for the sale of CKD packs, for the various reasons stated by the Assistant Collector in his order. According to the learned Solicitor General, the price mentioned in the invoices was (or should have been) determined by taking into consideration the lumpsum of 15 million French Francs (nearly

A three crores of Rupees) paid by the respondents to the foreign collaborator under the agreement. It is on this basis section 14(1)(a) was excluded and resort to section 14(1)(b) of the Customs Act was sought to be justified by the revenue. In appreciating the above plea we have to bear in mind certain basic principles. The bargain between the respondents and the foreign collaborator is evidenced by written agreements. (dated 6.11.1979 & B 6.3.1980). There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. Ordinarily the Court should proceed on the basis that the apparent tenor C of the agreements reflect the real state of affairs. It is, no doubt, open to the revenue to allege and prove that the apparent is not the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million D French Francs. The short question is whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price and so section 14(1)(b) of the Act was properly invoked.

6. Certain aspects highlighted by the learned Solicitor General to E prove that the price of CKD packs mentioned in the invoices is not the true price are as follows: The collaboration agreement dated 6.11.1979 is an indivisible and composite one. The agreement should be read as a whole. The technology for the assembly of the engine is necessary and is included in the agreement. The price of technology 'to assemble' is really F a part of the bargain and is included in the composite agreement. The foreign collaborator who retained the industrial property rights relating to the engine exclusively permitted the respondents to use the same in India and the consideration therefor is also included; but for this, the respondents cannot use the property at all and the supply of CKD packs and service parts to the respondents was only one of the aspects covered by the G bargain, and the apparently sizeable amount paid (consideration shown) as per the agreements could only be by reckoning the supply of CKD packs and the service parts in the future. In the circumstances, the consideration mentioned in the agreement should cover, at least in part, the price of the CKD packs and spares that may be supplied later, though it is not expressly

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stated so. It may even include an element of payment of royalty for the products. A

7. On the other hand, counsel for the respondent Sri Setalwad laid emphasis on the following: The High Court has concurrently found that the respondent and the foreign collaborator had no interest in the business of each other and the said finding is not assailable in this appeal especially in view of the conditions under which special leave was granted by this Court. The CKD packs and spares were supplied by the foreign collaborator to the respondents at the same price at which they were sold to others and the agreements did not provide for any concession to the respondents - buyers. In other words, the price charged by the foreign collaborator for the supply of CKD packs and spares and other articles is uniform. The payments under the agreements were made by 1981, and the import of CKD packs and spares started later in 1982. It was only two years thereafter, for the first time on 12.6.1984, the customs authorities intimated the respondent that they will load the invoice value. Finally, more than 3 years after the import of the goods, the goods were loaded at 1.5%, arbitrarily and without any basis. The technical know-how of every machine (in the instant case, the engine) will include 'assembly' and there is nothing unusual in the collaboration agreement which provides for manufacture of the engine, for the supply of the necessary know-how for the assembly thereof. Indeed, Clause A(4) of the main agreement provides "for manufacture of an engine with 100% indigenous contents in India." What is more, under Clause F 1-3, the option vested with the respondents, to import the whole or any part of the materials, including CKD packs and spares etc. There is no material to indicate any nexus or connection between the lumpsum payment of 15 million French Francs and the supply of CKD packs to the respondents by Peugeot for the production of the engine. No material has been adduced by the Revenue to demonstrate that the price fixed in the invoices is not the true or the real price, or in other words, the apparent is not the real. In no sense, it can be stated that the price of the goods obtained later was reckoned or reflected in the lumpsum payments made, long before. The parties never had in mind the nature and extent of the spare parts that may be required later, when the collaboration agreement was entered into. The inference so suggested to be drawn is arbitrary, and ad hoc and has no foundation. B C D E F G H

A 8. On an evaluation of the relevant clauses in the collaboration agreements and the attendant circumstances, we are of the view that the concurrent Judgments of the High Court at Bombay do not merit interference in this appeal. The crucial aspects appearing in the case are that the parties were dealing at arm's length, that the seller and the buyer have B no interest in the business of each other, that, ordinarily, the technical know-how of the machine can take in 'the assembly' thereof, that the CKD packs and spares were supplied to the respondents by the collaborator not at a concessional price but at the price at which they were sold to others, that, as agreed to by the respondents, the option was entirely with the C respondents to order the parts as per their requirements, that there was *no obligation* on the respondents to purchase CKD packs at all, that long before the supply of the CKD packs and spares, the royalty due to the collaborators was paid, that there is no material to show that the supply of the CKD packs or spares weighed with the parties in fixing the payments D under the collaboration agreement but, on the other hand, the collaboration agreement for the technical know-how and the supply of CKD packs and spares are independent commercial transaction; in other words, there existed no nexus between the lumpsum payment under the agreement for the technical know-how and the determination of the price for supply of E CKD packs or spares. It is by highlighting the above aspects that the learned Single Judge and the Division Bench concluded that "the contention that the price quoted in the invoices tendered by Mahindra & Mahindra (respondents) does not reflect the correct price because a part of the value of imported packs and components was already received by foreign collaborator while determining the consideration of 15 million F French Francs cannot be accepted", and "the collaboration agreement does not support the claim nor was there any material available to the Assistant Collector to warrant such a conclusion", and, therefore, resort to section 14(1)(b) of the Act and Rule 8 of the Customs Valuation Rules is clearly incorrect and unsustainable and the "Assistant Collector was bound to G accept the price mentioned in the invoices for the purpose of assessing the customs duty".

9. We are of the view that the reasoning and conclusion of the H learned judges of the High Court are justified and valid in the facts and circumstances of the case. The collaboration agreement entered into be-

tween the parties is clear and it is not open to the revenue to construe it differently by reading into it something which is not there. In the result, we hold that the Judgment appealed against does not merit interference and this appeal deserves to be and is hereby dismissed with costs, which we quantify at Rs. 10,000. A

G.N. Appeal dismissed.