REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1908 OF 2006

M/S CHAUDHARY SHIP BREAKERS — APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS, AHMEDABAD — RESPONDENT

J U D G M E N T

D.K. JAIN, J.:

I.A. Nos.3 and 4 of 2005

1. In the absence of any resistance, both the applications are allowed and the additional documents are taken on record. Applications stand disposed of.

2. Delay condoned.

3. This civil appeal under Section 130E of the Customs Act, 1962 (for short "the Act") is directed against order dated

2nd February 2005, passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "the Tribunal"), whereby the appeal preferred by the appellant herein has been dismissed, confirming the levy of additional customs duty by virtue of the final assessment order passed by the Deputy Commissioner (Customs), Bhavnagar on 28th August 2000.

4. Shorn of unnecessary details, the facts, material for the adjudication of the present appeal, may be stated as follows:

M/S Chaudhary Ship Breakers, the appellant before us, imported an old vessel for demolition purpose under Memorandum of Agreement (for short "MOA") dated 19th November 1997 with Standard Marine Trading Inc., New York on "as is where is" basis. As per the said MOA, the total purchase price of the vessel was agreed at US $ 992887.20 at the rate of US $ 172 per long ton. The Light Displacement Tonnage (LDT) of the vessel was shown at 5772.6 LDT. As per Clause 12(B) of the MOA, the buyer was given an option to seek proportionate reduction in

purchase price if the vessel suffered any partial damage so as to affect the vessel's LDT. Clause 15 contained the description/ specifications of the vessel wherein the ballast tanks of the vessel were described as "double bottom tanks, fore peak tank, AFT peak tank and wing tank." Further, Clause 16 provided that any dispute relating to the interpretation of the said MOA would be referred to arbitration. Clause 25 gave seller the option to repudiate the agreement if there was any dispute in relation to the description of the vessel.

5. The vessel arrived at the Alang Anchorage on 21st November 1997. The surveyors carried out inspection on 22nd November 1997, and submitted their report on 7th July 2000. The said report stated that "since the side tanks are meant for the receipt/carriage of sea water ballast for the ship's stability, the plating over the years undergo heavy corrosion (wastage.) Accordingly, the ship breaker is bound to suffer additional (illegible) loss on this account."

6. It seems that in light of the afore-quoted observations by the surveyors, fresh negotiations took place between the seller and the appellant, which resulted in a fresh agreement in the form of an addendum dated 8th December 1997 to the original MOA. In the said addendum, the price of the vessel was reduced to US $ 929388.60. The addendum mentioned that the price reduction was due to the "double skin." The bill of entry was filed on 19th December 1997 at the reduced price of the vessel.

7. A provisional assessment was made at the reduced price mentioned in the addendum, and differential duty of ` 6,76,415/- was sought to be levied. The final assessment order was passed by the Deputy Commissioner of Customs, Bhavnagar on 28th August 2000, at the original transaction value of the vessel at US $ 992887.20.

8. The appeal filed by the appellant against the said order of adjudication was dismissed by the Commissioner of Customs (Appeals) on 5th November 2003 on the ground that the importer had not produced any evidence to show

that the vessel was not the same as was offered to them under the MOA, as was required to be demonstrated by the importer in light of the decisions of the Tribunal in ***Commissioner of Customs, Ahmedabad*** *Vs.* ***Atam Manohar Ship Breakers Pvt. Ltd.***[1] and ***Commissioner of Customs, Ahemdabad*** *Vs.* ***Guru Ashish Ship Breakers***[2]*.* The Commissioner (Appeals) observed that:

> "10. The description does not show that the vessel, which was contracted, was Single Skin or Double Skin. The Survey Reports of M/s. Erison & Richards dated 22.1.97 does not mention anything about the discrepancy claimed by the appellant.... ....
> 11. I rely on the observation of the Tribunal in the case of Atam Manohar (supra)and hold that the appellant has not produced any evidence to show that the vessel was not the same as was offered to them vide MoA dated 19.11.97. They have failed to produce any cogent reason for reduction in price from the MoA."

9. Aggrieved by the said order, the appellant carried the matter in further appeal to the Tribunal. Distinguishing the decision of the Tribunal in the case of ***Atam Manohar*** (supra), on which reliance was placed by the

[1] 2003 (156) E.L.T. 151 (Tri.-Mumbai)
[2] 2003 (157) E.L.T. 277 (Tri.-Mumbai)

appellant, the Tribunal dismissed the appeal, holding thus:

> "In the present case there is no provision in the Memorandum of agreement for reduction of price on any account. We find that Tribunal in the case of Guru Ashish Ship Breakers (supra) held that in absence of any provision in the memorandum of agreement regarding variation in price, the reduction in price after import is not sustainable. In the present case as discussed above, the price was revised after import and in the absence of any provisions regarding price variation in the memorandum of agreement, we find no merit in the appeal."

10. Hence, the present civil appeal by the importer.

11. Mr. Pawan Shree Agrawal, learned counsel appearing for the appellant, while assailing the impugned order, strenuously urged that since under Section 14 of the Act the value of the goods is deemed to be the price at which such or like goods are ordinarily sold in the course of international trade, the price that was actually paid by the appellant in terms of addendum dated 8th December 1997, is to be adopted as the "transaction value" in terms

of Rule 3 read with Rule 4(1) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (for short "the 1988 Rules") for the purpose of levy of customs duty under the Act. Learned counsel commended us to the GATT Customs Valuation Code, which, *inter-alia,* contemplates that if the parties agree upon a price adjustment promptly, even if there is nothing in writing between them on the subject, the Customs should accept the adjusted price as the basis for transaction value.

12. *Per contra*, Mr. V. Shekhar, learned senior counsel appearing for the revenue, supported the order of the Tribunal. Learned counsel emphasised that in the absence of any stipulation in the MOA for reduction in the agreed price, the revised price mentioned in the addendum is of no consequence for the purpose of Section 14 of the Act.

13. At the outset, we may note that the decision of the Tribunal in ***Atam Manohar*** (supra) was questioned by the revenue before this Court in Civil Appeal No.146 of

2004. While allowing the appeal and setting aside the order of the Tribunal primarily on the ground that the addendum was a self-serving document, the Court observed thus:

> "We may also point out that in this case we are basically concerned with the genuineness of the addendum to the MoA dated 13th April, 1999. If one looks at the said addendum, we find that the date on which the said addendum stood executed is not given. Further, when did the addendum stand incorporated in the MoA. We do not find the date on which the clause stood inserted in the MoA. Further, the said addendum does not give any reason for reduction in the price from US $ 9,70,960.23 to US $ 8,70,960.23. Further, the most clinching factor to be seen is that the said addendum appears to have been executed at the request of the buyer. In our view, this is a self-serving document. In this connection, it may also be noted that the MoA dated 13th April, 1999 states that the vessel is bought on "as is where is" basis. If that be the case, we do not know on what basis the value of the vessel stood reduced from US $ 9,70,960.23 to US $ 8,70,960.23. Lastly, it is stated on record that one of the items was not in a working condition and by way of damages, the price stood reduced. It is not so stated in the addendum. If it is the case of damages, then, surely it would have been so stated in the addendum."

14. It is manifest that the Court expressed the view that where the price of the vessel had been reduced by way of an addendum to the original agreement, the acceptance

of the revised price would depend on the genuineness of the said addendum. In other words, the Court laid greater emphasis on the genuineness or otherwise of the addendum and not on the factum of absence of a provision in the original agreement for reduction of price for the reasons stated in the addendum, as held in the case of ***Guru Ashish Ship Breakers*** (supra), relied upon by the Tribunal in the present case.

15. According to Section 14(1) of the Act, assessment of customs duty under the Customs Tariff Act, 1975 is to be made on the value of the goods imported. Unless the value of the goods is fixed under the sub-section (2) of Section 14, the value has to be determined under sub-section (1) of the said Section. The value, as per Section 14(1), as it stood prior to its amendment with effect from 10th October 2007, shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation – in the course of international trade. The word "ordinarily" is clarified in the Section itself, which

describes an “ordinary” sale as one “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…”. According to Section 14(1A) price of imported goods is to be determined in accordance with the Rules framed in this behalf. Under Rule 3(i) of the 1988 Rules, the value of the imported goods shall be the “transaction value”. Transaction value has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1), in turn, states that “the transaction value of the imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these Rules.” It is clear from a conjoint reading of Rule 3(i) and Rule 4(1) that the adjudicating authority is bound to accept the price actually paid or payable for the goods as the transaction value, except where exceptions enumerated in Rule 4(2) are attracted, which is not the case here. It is, therefore, manifest that both Section 14(1) and Rule 4 provide that in the absence of any of the

special circumstances indicated in Section 14(1) and particularised in Rule 4(2) of the 1988 Rules, the price paid by an importer to the seller in the ordinary course of commerce is to be taken as the transaction value for the purpose of valuation of goods.

16. Having regard to the afore-stated legal position, the controversy at hand narrows down to the question whether the transaction value of the vessel is to be price mentioned in the original MOA or the reduced price indicated in the addendum. We are of the opinion that in light of the statutory provisions, the factum of actual payment of the price in terms of the addendum cannot be ignored while determining the value of the vessel under Section 14 of the Act. We may, however, hasten to add that in such a situation the genuineness and the necessity of reduction in the price are required to be scrutinised very carefully.

17. As afore-stated, in the instant case, the Tribunal has not examined the genuineness of the addendum, and has proceeded to reject the appeal of the appellant on the

short ground that there was no provision for price variation in the original MOA. We may, however, add that the Commissioner (Appeals) did examine the cogency of the reasons for price reduction though he was not convinced to accept the same.

18. For all these reasons, we are of the opinion that the Tribunal needs to examine the matter afresh. Accordingly, the appeal is allowed; the impugned order is set aside, and the matter is remitted back to the Tribunal for fresh consideration, particularly in relation to the genuineness of the addendum entered into between the appellant and the supplier on 8th December 1997.

19. Parties to bear their own costs throughout.

.....J.
(D.K. JAIN)

.....J.
(H.L. DATTU)

NEW DELHI;
OCTOBER 22, 2010