REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 9766-9775 OF 2003

WIPRO LTD. .....APPELLANT(S)

VERSUS

ASSISTANT COLLECTOR OF CUSTOMS & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO(S). 1950-1951 OF 2004

J U D G M E N T

A.K. SIKRI, J.

These appeals are preferred by the appellant challenging the validity of judgment dated 11.10.2002 passed by the Division Bench of the High Court of Judicature at Madras. The High Court has, vide the said judgment, disposed of few writ petitions filed under Article 226 of the Constitution of India as well as certain writ appeals which were filed against the orders of the single Judge. All the aforesaid writ petitions and writ appeals were preferred by the appellants herein.

2) The subject matter of those writ petitions/writ appeals was the constitutional validity of proviso (II-i) of Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (hereinafter referred to as the "Valuation Rules"). This proviso has been inserted by Notification No.39/90 dated 05.07.1990 issued by the Ministry of Finance, Department of Revenue, Union of India. As per the appellant, this proviso is not only ultravires Section 14(1) and Section 14(1-A) of the Customs Act, 1962 (hereinafter referred to as the 'Act') but is also violative of Article 14 and Article 19(1)(g) of the Constitution of India. The challenge, however, stands repelled by the High Court in the impugned judgment leading to dismissal of writ petitions and writ appeals. This is how these appeals have come up in this Court, via special leave petition route, in which leave was granted.

3) In order to understand the controversy, purpose would be served in taking note of the facts from the Writ Appeal No.1079/2000 which was filed by the appellant in the High Court. The appellant is engaged in the manufacture and marketing of Mini and Micro Computer Systems and peripheral devices like printer, drivers etc. It, *inter alia,* imported various components including software from time to time. The appellant presented a Bill of Entry No.15020

dated 15.04.1993. The chargeable weight of the consignment was 315 kgs and the actual loading, unloading and handling charges amounted to Rs.65.40 paisa as per the tariff of the International Airport Authority of India, Madras (now Chennai). However, the Customs Authorities, on the basis of the impugned notification added a sum of Rs.15,214.69 paisa to the value of the goods as handling charges as the impugned provision entitles the authorities to add 1% of the F.O.B. value of goods on account of loading, unloading and handling charges. The actual duty charged, as a consequence of addition of the notional handling charges, amounted to Rs.16,209.20 paisa instead of Rs.69.98 paisa.

4) At this juncture, instead of proceeding further with the factual narration, we would like to deviate a bit and take note of the relevant valuation rules and the amendments made therein from time to time. These rules are made in exercise of powers conferred under Section 156 of the Customs Act, 1962, read with Section 22 of the General Clauses Act, 1897. The purpose of these rules is to arrive at the valuation of the imported goods to enable the customs authorities to levy duty thereupon, on the basis of the value so arrived at. Rule 2 is the "definition" clause

whereunder certain terms are defined. Rule 2(f) defines "transaction value" to mean the value determined in accordance with Rule 4 of these Rules. This is to be read along with Rule 3. We, therefore, reproduce Rule 3 and relevant portion of Rule 4 hereunder:

> "3. **Determination of the method of valuation-**
> For the purpose of these rules, -
> (i) the value of imported goods shall be the transaction value;
> (ii) if the value cannot be determined under the provisions of Clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.
>
> 4. **Transaction Value** – (1) The transaction value of 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.
>
> (2) The transaction value of imported goods under sub-rule (1) above shall be accepted.
> Provided that ….."

5) A conjoint reading of the aforesaid two provisions would make it clear that the value of the imported goods has to be the transaction value and in those cases where transaction value cannot be determined, such a value is to be determined by resorting to Rules 5 to 8 thereof in a sequential order. Therefore, first attempt has to ascertain the transaction value. As per the formula contained in sub-rule (1) of Rule 4, the authorities are to

find out the **price actually paid or payable** for the goods when sold for exports to India, to arrive at the value of the goods. Once this value is arrived at, it is to be adjusted in accordance with the provisions of Rule 9 of the said Rules. The final outcome, after such an adjustment made, is to be treated as transaction value to attract the import duty thereupon. As per sub-rule (2) of Rule 4, the transaction value of the imported goods under sub-rule (1) is to be accepted, except in certain circumstances mentioned in proviso to sub-rule (2). If any of those circumstances exists, then the value is to be determined as per sub-rule (3) of Rule 4. However, we are not concerned with such a situation in the present case.

6) Thus, normally, the value of imported goods has to be the transactional value which means the price "actually paid" or "payable" for the goods imported. Moreover, the value as specified in sub-rule (1) is to be generally accepted with the exception of certain contingencies stipulated in proviso to sub-rule (2) of Rule 4. Only when such a value cannot be determined, one has to resort to Rules 5 to 8, in a sequential manner which would mean that the authorities would first refer to Rule 5 and in case it is inapplicable, then Rule 6 and so on. As per Rule 5, in those

cases where the transaction value is indeterminable, transaction value of "identical goods" is to be taken into consideration. Rule 6 mentions about transaction value of "similar goods". If this also inapplicable then "deductive value" is to be arrived at in terms of formula contained in Rule 7. If that is also inapplicable, residual method is provided in Rule 8 which prescribes that the value shall be determined using "reasonable means" consistent with the principles of general provisions of these Rules and sub-section (1) of Section 14 of the Customs Act and on the basis of data available in India. At the same time, sub-rule (2) of Rule 8 excludes certain methods which are not to be applied to determine the value under these Rules. Precise language of sub-rule (2) of Rule 8 is reproduce as under:

> "2. No value shall be determined under the provisions of these rules on the basis of -
> (i) the selling price in India of the goods produced in India;
> (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
> (iii) the price of the goods on the domestic market of the country of exportation;
> (iv) the price of the goods for the export to a country other than India;
> (v) minimum customs values; or
> (vi) arbitrary or fictitious values."

7) Once the transaction value is arrived at by applying the formula applicable in a given case in terms of aforesaid provision,

exercise is still incomplete. Adjustments to this value are still to be made in accordance with the provision of Rule 9. Only thereafter, exact "transaction value" gets determined on which customs duty is to be paid. It is so stated in Rule 4 itself. So, at this stage, Rule 9 comes into play, with which we are concerned in the present case. It deals with "cost of services". It lays down that in determining the transactional value, cost of certain services is to be added to the price actually paid or payable for the imported goods, as mentioned in clauses (a) to (e) of sub-rule (1) of Rule 9. We would like to reproduce this Rule, as it originally stood, in its entirety:

> "9. **Cost of 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 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;
(c) royalties 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.

2. For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -
(a) the cost of transport of the imported goods to the place of importation;
(b) **loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation;** and
(c) the cost of insurance :

Provided that in the case of goods imported by air, the cost and charges referred to in clauses (a), (b) and (c) above,-
(i) where such cost and charges are ascertainable, shall not exceed twenty per cent of the free on board value of such goods,
(ii) where such cost and charges are not

ascertainable such cost and charges shall be twenty per cent of the free on board value of such goods;

Provided further that in the case of goods imported other than by air and the actual cost and charges referred to in clauses (a), (b) and (c) **above are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods.**

(3) Additions to the price actually paid or payable shall be made under this rule on the **basis of objective and quantifiable data.**

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

8) Rule 9 was amended in the year 1989 vide Notification dated 19.12.1989. With this amendment, the provisos appearing below sub-rule (2) of Rule 9 were substituted with the following proviso:

"Provided that -

(i) Where the cost mentioned in clause (a) are not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) Where the charges mentioned at clause (b) are not ascertainable, such charges shall be one per cent of the free on board value of the goods;

(iii) Where the cost mentioned at clause (c) are not ascertainable, such cost shall be 1.125% of free on board value of the goods.

Provided further that in the case of goods imported by air, where the cost mentioned in clause (a) are ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods."

9) In the year 1990 i.e. vide amendment Notification dated 05.07.1990, the said provisos underwent further modification with

the substitution of following provisos:

> "Provided that -
> (i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;
> (ii) **the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport refered to in clause (a) plus the cost of insurance referred to in clause (c)**;
> (iii) Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;
> Provided further that in the case of goods imported by air, where th cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods;
> Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (I) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above."

10) Clause (ii) of first proviso, as is clear from reading thereof, mandated addition of one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c).

11) Reverting to the facts of the present case, it is on the strength of this proviso, even when the actual handling charges were shown as Rs.69.98 paisa, that too as fixed by the International Airport

Authority, the customs authorities added further sum of Rs.15,214.69 paisa to the value of goods of handling charges, being one per cent free on board value of the goods. Obviously, the appellant was aggrieved by this addition and handling charges on notional basis pursuant to the aforesaid proviso whereby the charges for loading, unloading and handling associated with the delivery of imported goods at the place of importation had been fixed at one per cent free on board value of the goods plus the cost of the transport of the imported goods to the place of importation plus cost of insurance.

12) This became the reason for filing the writ petition in the High Court to question the validity of the said proviso by way of impugned amendment. In brief, the case set up by the appellant was that such a notional fixation of the handling charges with the addition of one per cent of free on board value of the value of goods, irrespective of the nature of goods, size of the cargo, was in total disregard to the total handling charges, even when such actual handling charges could be ascertained. It was also the submission of the appellant that the said one per cent so fixed without reference to the nature of the goods, size of the cargo and value of the goods is irrational, in the sense, high value items like

components of computer, involving little or no expenses by way of handling, whereas heavy weight items like machinery, hardware might involve substantial expenditure for loading, unloading and handling. It was submitted that the handling services are rendered by the sea port and airport authorities. The handling charges are levied on the basis of either the gross weight or chargeable weight, whichever is higher. Both these weights are incidentally available in the air bill accompanying the consignment. The international Airport Authorities and the port trust are having schedule of tariff and the appellant have from time to time been paying the handling charges to the authorities as per the tariff. On this basis, it was argued that such an addition was totally irrational and arbitrary, thus violative of Article 14 of the Constitution and was also ultravires Section 14(1) and Section 14(1)(A) of the Customs Act.

13) The respondents defended the aforesaid amendment by pointing out that over last number of years, it was found impossible to ascertain the actual amounts incurred towards loading, unloading and handling charges while making the assessment as they varied depending upon the quantities and place of import. Finding this difficulty in actual practice and in order to achieve

certainty, one per cent of the F.O.B. value was fixed to be included in the assessable value. It was argued that once this uniformity is achieved with the aforesaid provisions, merely because some would be getting the benefit while others would suffer certain detriment, is no reason for invalidating the provision when many others would be getting the benefit thereof as well. The percentage had been fixed by the rule making authority after taken into consideration the overall picture.

14) The High Court, in the impugned judgment, after referring to various decisions of this Court, accepted the plea of the Government holding that rule making authority had the requisite power to make a provision of this nature by including landing charges for the purpose of valuation as valuation on such a basis was held to be valid by this Court in ***Garden Silk Mills Ltd.*** v. ***Union of India***[1]. The justification for adding one per cent of F.O.B. value in determination handling charges can be discerned from paras 17 and 18 of the impugned judgment which read as under:

> "17. We are not able to uphold the contents of the learned counsel for the petitioner for the reason that prior to the impugned notification, the same one percent of F.O.B. value was taken by the authorities as loading, unloading and

1 (1998) 8 SCC 744

handling charges for determination of the assessable value of the goods, when the actuals are not assessable. Even prior to that, 3/4th of the F.O.B. value has been added to the value of the goods as loading, unloading and handling charges for the purpose of assessment pursuant to the GATT agreement. The one per cent **F.O.B. value would be very nominal to the importers and that the percentage has been fixed on the basis of objective and quantifiable data taking onto consideration of the experience gained by the authorities and the difficulties in ascertaining the actuals.**

18. The method of collection or the manner of collection may be prescribed either under the Act or under the rules framed by the delegated authority. In the case on hand, instead of actuals, rules have prescribed a fixed percentage which in some cases may be too harsh where the value of the goods imported is much more and the weight of the commodity is less. There may be number of other items where the value of the imported goods are less and weight of the commodity is very much. The machinery provision so provided for collection of duty, taking into consideration the administrative convenience cannot be considered beyond the scope of the rule making power and it cannot be said to be levying duty on amount which is not within the purview of the Customs Act or Section 14(1) simply because the rule making authority have prescribed a fixed percentage based on experience instead of actual.

Section 14 of the Customs Act itself made it clear the value of such imported goods shall be deemed to be the price at which such goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation in the course of international trade and the price referred to shall be determined in accordance with the rule made in this behalf. For the purpose of determination of the value, rules have been made and taking into consideration the difficulties experienced in the past in fixing the handling charges on the actuals, it is fixed at one percent of the CIF value of the goods. When the statute confers the power to make rules for

> determination of the value, such determination of the value by imposition of the same as a percentage cannot at any stretch of imagination be considered as repugant to Section 14(1) or discriminatory."

15) The High Court in support of the aforesaid view, referred to certain judgments of this Court touching upon the principle that when a power is conferred on the Legislature to levy a tax, that power itself must be widely construed. Reliance upon the judgment in *Garden Silk Mills* is placed by the High Court in the following manner:

> "19. The Supreme Court in Garden Silk Mills Ltd. v. Union of India reported in AIR 2000 Supreme Court 33 has observed that Section 14 is a deeming provision. The legislative intent is clear that the actual price of imported goods viz., the landing costs cannot alone be regarded as the value for the purpose of calculating the duty. The language of Section 14 clearly indicates that though the transaction value may be relevant consideration, the value for the purpose of custom duty will have to be determined by the customs authority, which value can be more and at times even less than what is indicated in the document of purchase or sale."

16) Questioning the correctness of the aforesaid view taken by the High Court, Mr. Dushyant Dave, learned senior counsel appearing for the appellant in all these appeals, submitted that prior to the impugned notification dated 05.07.1990, the Rule in this regard was to the effect that the handling charges were reckoned on the

actuals and only where the actual cost could not be ascertained, one per cent of the F.O.B. of the goods was to be added as charges on this account. However, with the impugned amendment in the Rules, the actual cost incurred and or ascertainable is totally ignored in the matter of "handling charges" and is to be arrived at fictionally by adding one per cent of the F.O.B. value of the imported goods and its transportation and insurance charges. It was pointed out that the appellant is engaged in the manufacture and marketing of computer systems and peripherals, and in the course of its business, imports various components worth crores of rupees, which are of high value but of low weight and dimensions. Further, the actual cost incurred towards the handling charges in accordance with the prescribed charges by the international Airport Authority of India was not even a fraction of the "notional handling charges" arrived at by applying the formula contained in the amended Rule. In nutshell, it was pointed out that in the present case, where actual cost could be ascertained, the same had to be taken into consideration to determine the valuation of the goods for the purpose of custom duty and it is only in those cases where actual cost could not be arrived at the fictional formula should be made applicable. Making such a provision, it was argued, even where the actual

cost was known was clearly ultravires Section 14(1) and Section 14(1A) of the Customs Act. It was also argued that there was no rationale in adding one per cent of the F.O.B. value in such cases and this smacked of arbitrariness making it violative of Article 14 of the Constitution as well. Mr. Dave also referred and relied upon the judgment of this Court in ***Indian Acrylics*** v. ***Union of India and Anr.***[2] in support of his aforesaid submissions. He also referred to the provisions of the General Agreement on Tariffs and Trade (GATT) which *inter alia* laid down the yardsticks/methodology for arriving at cost of transport and the prescription therein is the actual cost of transport of the imported goods to the port or place of importation plus the handling charges and cost of insurance.

17) Mr. Radhakrishnan, learned senior counsel appearing for the respondents, on the other hand, defended the judgment by adopting the reasoning given by the High Court sustaining the validity of the impugned provision.

18) We have given our due consideration to the submissions of the learned counsel for the parties with reference to the material on record as well as various statutory and other provisions, placed at

2 (2000) 2 SCC 678

our disposal.

19) In order to arrive at the answer to the issue raised, we shall have to go through the scheme of customs duties as payable under the Act. Chapter V is the relevant chapter which deals with "Levy of, and Exemption from, Customs Duties". It contains the provisions from Section 12 to Section 28BA. Section 12 which talks of "dutiable goods", provides that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from, India. Thus, the rates at which the customs duties is to be imposed are specified in the Customs Tariff Act, 1975. That rate is on the value of goods imported or exported, as the case may be. Therefore, there is a need to determine the value of the goods imported and exported. The yardsticks for arriving at this value are contained in Section 14 of the Act. This provision as originally stood and was prevalent at the relevant time with which we are concerned, reads as under:

> "14. Valuation of goods for purposes of assessment.- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 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-
> 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

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or ofer 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;

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A) if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section-

(a) "rate of exchange" means the rate of exchange-

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

20) This provision was amended in the year 2007. Though, we are

not concerned with this amended provision, we are taking note of the same in order to examine as to whether any change, in principle, is brought about or not. The amended provision reads as follows:

> "14. Valuation of goods.- (1) For the purposes of the the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:
>
> Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:
>
> Provided further that the rules made in this behalf may provide for,-
>
> (i) the circumstances in which the buyer and the seller shall be deemed to be related;
>
> (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also 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 of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value."

21) A reading of the unamended provision would show that the earlier/old principle was to find the valuation of goods "by reference to their value". It introduced a deeming/fictional provision by stipulating that the value of the goods would be the price at which such or like goods are "ordinarily sold, or offered for sale". Under the new provision, however, the valuation is based on the transaction price namely, the price "actually paid or payable for the goods". Even when the old provision provided the formula of the price at which the goods are ordinarily sold or offered for sale, at that time also if the goods in question were

sold for a particular price, that could be taken into consideration for arriving at the valuation of goods. The very expression "ordinarily sold, or offered for sale" would indicate that the price at which these goods are actually sold would be the price at which they are ordinarily sold or offered for sale. Of course, under the old provision, under certain circumstances, the authorities could discard the price mentioned in the invoice. However, that is only when it is found that the price mentioned in the invoice is not the reflection of the price at which these are ordinarily sold or offered for sale. To put it otherwise, the reason for discarding the price mentioned in the invoice could be only when the said price appeared to be suppressed one. In such a case, the authorities could say that generally such goods are ordinarily sold or offered for sale at a different price and take that price into consideration for the purpose of levying the duty. It could, however, be done only if there was evidence to show that ordinarily the price at which these goods are ordinarily sold or offered for sale is higher than the price mentioned in the invoice. In fact, this fundamental concept is retained even now while introducing the concept of "transaction value" under the amended provision. More importantly, the rules viz. Valuation Rules, 1988 had incorporated this very principle of "transaction value" even under the old

provision. No doubt, as per this provision existing today generally the price mentioned is to be accepted as it is the transaction value. However, this very provision stipulates the circumstances under which that price can be discarded. In any case, having regard to the question with which we are concerned in the present appeals, such a change in the provision may not have much effect.

22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the

sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case.

24) In contrast, in the unamended Section 14, we had provision like sub-section (1A) which stipulated that the price referred to in sub-section (1) in respect of imported goods shall be determined in accordance with rules made in this behalf. Therefore, rules can be made in determining the price. However, these rules have to

be subject to the provisions of sub-section (1), the underline principle whereof, as stated above, is to taken into consideration actual price of the goods unless it is impermissible because of certain circumstances stipulated therein. Keeping in mind this fundamental aspect, we have to examine the scheme of the Valuation Rules, 1988.

25) It can very well be seen from the Valuation Rules, 1988 that these Rules are made to facilitate arriving at the valuation of goods in all the contingencies provided in sub-section (1) of Section 14. We have already reproduced the relevant Rules and indicated the scheme thereof. To recapitulate in brief, Rule 3 echoes the principle enshrined in sub-section (1) of Section 14 by mentioning that value of the imported goods would be the transaction value[3]. Likewise, Rule 4 again reproduces the concept behind sub-section (1) of Section 14 by stipulating in no uncertain terms, that the transaction value shall be the price actually paid or payable for the goods when sold for exports to India. The adjustments which are made in accordance with the provisions of Rule 9 are nothing but the costs and services, as specified in first proviso to

3 It is interesting to note, which is somewhat strange, that though concept of transaction value was introduced in sub-section (1) of Section 14 by amendment in the year 2007, which before that in the Valuation Rules, 1988, the expression "transaction value" is incorporated. This also lends credence to our observations that the concept of unamended provision was also to arrive at to take into consideration the actual value wherever it was available and was not excluded by any of the circumstances mentioned therein.

Section 14(1) of the Act. It is only in those cases where value of the imported goods i.e. transaction value cannot be determined, that we have to resort to Rules 5 to 8 of the said Rules. The purpose of these Rules is to fix the transaction value of the goods notionally. However, even when the fiction is applied, the scheme and spirit behind Rules 5 to 8 would amply demonstrate that the endeavour is to have closest proximity with the actual price. That is why Rules 5 to 8 are to be applied in a sequential manner, meaning thereby we have to first resort to Rule 5 and if that is not applicable only then we have to go to Rule 6 and in the case of inapplicability of Rule 6, we have to resort to Rule 7 and even if that is not applicable, then Rule 8 comes into play. In order to find out as to what would be the closest real value of the goods, Rule 5 mentions that transaction value of "identical goods" is to be taken into consideration. Thus, wherever the value of identical goods is available, one can safely rely upon the said value in the event transaction value of the goods in question is indeterminable. Value of the identical goods is most proximate. If that is also not available, next proximate value is provided in Rule 6 which talks of value of "similar goods". In the absence thereof, we come to the formula of applying the "deductive value" as contained in Rule 7. In those cases, where even deductive value

cannot be arrived at, one has to resort to residual method provided in Rule 8 which prescribes that the value shall be determined using "reasonable means". This would indicate adopting "Best Judgment Assessment" principle. However, even while having best judgment assessments, Rule 8 reminds the authorities that such reasonable means or best judgment assessments has to be in consonance with the principles of general provisions contained in the Rules as well as sub-section (1) of Section 14 of the Act and also on the basis of data available in India.

26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment,

as a last resort.

27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs though in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments **actually made or to be made** as the condition of the sale of imported goods".

28) Keeping in mind this perspective, we need to look into clause (b) of sub-rule (2) of Rule 9 which deals with loading, unloading and handling charges associated with the delivery of imported goods at the place of importation, which are to be included to arrive at

the value of such imported goods. It is these charges with which we are directly concerned with in the instant case.

29) The provision of sub-rule (2) of Rule 9, as originally stood, made it clear that wherever loading, unloading and handling charges are ascertainable i.e. actually paid or payable, it is those charges that would be added. Proviso to the said Rule contained the provision that only in the event the same are not ascertainable, it shall be 25% of the free on board value of such goods. In fact, sub-rule (3) of Rule 9 leave no manner of doubt when it mentions that additions are to be made on the basis of objective and quantifiable data.

30) It would be pertinent to mention here that sub-rule (2) talks of three kinds of charges. Apart from loading, unloading and handling charges which are mentioned in Clause (b), Clause (a) deal with cost of transport of imported goods to the place of importation and Clause (c) dealt with cost of insurance. All these costs were to be included on actual basis. Only when such costs were not ascertainable, proviso got attracted which stipulated that such costs and charges shall be 25% of the free on board value of such goods. Even when the aforesaid proviso was amended

vide notification dated 19.12.1989, the spirit behind the unamended proviso was maintained and kept intact. Only difference was that instead of addition of 25% of free on board value of goods in respect of all the three kinds of charges, under the amended proviso, this percentage fixed was different in respect of each of the aforesaid charges. As far as cost of transport is concerned, it was changed at 20% of the free on board value of goods. Insofar as loading, unloading and handling charges are concerned, it was reduced to 1% of the free on board value of goods and in case of insurance charges, the amended provision provided for such cost at 1.125% free on board value of goods. However, as mentioned above, the spirit behind this proviso continued to be the same viz. the proviso was to made applicable only when the actual cost was indeterminable.

31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of

these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the

Constitution.

32) We find that the High Court, instead of examining the matter from the aforesaid angle, has simply gone by the powers of the rule making authority to make Rules. No doubt, rule making authority has the power to make Rules but such power has to be exercised by making the rules which are consistent with the scheme of the Act and not repugnant to the main provisions of the statute itself. Such a provision would be valid and 1% F.O.B. value in determining handling charges etc. could be justified only in those cases where actual cost is not ascertainable. The High Court missed the point that *Garden Silk Mills Ltd.* case was decided by this Court in the scenario where actual cost was not ascertainable. That is why we remark that first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated vide notification dated 19.12.1989 would meet be justified. However, the impugned provision clearly fails the test.

33) We would like to refer to the judgment of this Court in ***Indian Acrylics*** (supra) at this juncture. Though, the issue in that case related to the rate of exchange touching upon the provision in respect whereof contained in sub-section (3) of Section 14

(unamended provision), the question of law decided therein would support the view we are taking in the instant case. A reading of sub-section (3) of Section 14 would make it clear that such rate of exchange can be determined by the Board or can be ascertained in such manner as the Board may direct, for the conversion of Indian currency into Foreign currency or Foreign currency into Indian currency. Thus, Board had been given power to determine the rate of exchange or stipulate the manner in which such rate of exchange is to be determined. Armed with this power, the customs authorities notified the rate of exchange for the purposes of Section 14 at one US dollar equal to Rs.31.44. Notification in this behalf was issued by the Board on 27.03.1992. On 29.04.1992, the Reserve Bank of India had notified the exchange rate of one US dollar equal to Rs.25.95. On the basis of this fixation by the Reserve Bank of India, the notification dated 27.03.1992 stipulating exchange rate of one US dollar equal to Rs.31.44 was challenged as arbitrary fixation of the exchange rate. This Court sustained the challenge in the following words:

> "5. The counter filed by the respondent before the High Court, as also before this Court, does not indicate why the rate was fixed at Rs.31.44. The affidavits do not indicate that the prevalent Reserve Bank of India rate had been taken into consideration. Strangely, the High Court, adverting to this contention, stated that "... In the absence of any other material brought on

> record, it cannot be held that the rate of exchange by the Central Government under Section 14(3)(i) is arbitrary" and it said this after noting the contention on behalf of the appellant that the Central Government rate was arbitrary being different from that fixed by Reserve Bank of India.
>
> 6. The exchange rate fixed by Reserve Bank of India is the accepted and determinative rate of exchange for foreign exchange transactions. If it is to be deviated from to the extent that the notification dated 27.03.1992 does, it must be shown that the Central Government had good reasons for doing so. Reserve Bank of India's rate, as we have pointed out, was Rs.25.95, the rate fixed by the notification dated 27.03.1992 was Rs.31.44, so that there was a difference of as much as Rs.5.51. In the absence of any material placed on record by the respondents and in the absence of so much as a reason stated on affidavit in this behalf, the rate fixed by the notification dated 27.03.1992 must be held to be arbitrary."

34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the

object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

35) In ***Kunj Behari Lal Butail*** v. ***State of H.P.***[4] this Court made following pertinent observation which are apt and contextual and, therefore, we are reproducing the same:

> "13. It is very common for the legislature to provide for a general rule-making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule-making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act. (See: Sant Saran Lal v. Parsuram Sahu, AIR 1966 SC 1852). From the provisions of the Act we cannot spell out any legislative intent delegating expressly, or by necessary implication, the power to enact any prohibition on transfer of land. We are also in agreement with the submission of Shri Anil Divan that by placing complete prohibition on transfer of land subservient to tea estates no purpose sought to be achieved by the Act is advanced and so also such prohibition cannot be sustained. Land forming part of a tea estate including land subservient to a tea plantation have been placed beyond the ken of the Act. Such land is not to be taken in account either for calculating area of surplus land or for calculating the area of land

4 (2000) 3 SCC 40

which a person may retain as falling within the ceiling limit. We fail to understand how a restriction on transfer of such land is going to carry out any purpose of the Act. We are fortified in taking such view by the Constitution Bench decision of this Court in Bhim Singhji v. Union of India, (1981) 1 SCC 166 whereby sub-section (1) of Section 27 of the Urban Land (Ceiling and Regulation) Act, 1976 was struck down as invalid insofar as it imposed a restriction on transfer of any urban of urbanisable land with a building or a portion only of such building which was within the ceiling area. The provision impugned therein imposed a restriction on transactions by way of sale, mortgage, gift or lease of vacant land or buildings for a period exceeding ten years, or otherwise for a period of ten years from the date of the commencement of the Act even though such vacant land, with or without a building thereon, fell within the ceiling limits. The Constitution Bench held (by majority) that such property will be transferable without the constraints mentioned in sub-section (1) of Section 27 of the said Act. Their Lordships opined that the light to carry on a business guaranteed under Article 19(1)(g) of the Constitution carried with it the right not to carry on business. It logically followed, as a necessary corollary, that the right to acquire, hold and dispose of property guaranteed to citizen under Article 19(1)(f) carried with it the right not to hold any property. It is difficult to appreciate how a citizen could be compelled to own property against his will though he wanted to alienate it and the land being within the ceiling limits was outside the purview of Section 3 of the Act and that being so the person owning the land was not governed by any of the provisions of the Act. Reverting back to the case at hand, the learned counsel for the State of Himachal Pradesh has not been able to satisfy us as to how such a prohibition as is imposed by the impugned amendment in the Rules helps in achieving the object of the Act.

14. We are also of the opinion that a delegated

> power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."

36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable.

37) As a result, judgment of the High Court is set aside and the appeals are allowed in the aforesaid terms with no order as to cost.

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
APRIL 16, 2015.