SYNDICATE BANK

v.

ESTATE OFFICER & MANAGER, A.P.I.I.C. LTD. & ORS.

AUGUST 30, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Transfer of Property Act, 1882:

ss. 54 and 58—Mortgage of land by allottee—Necessity of showing complete/good title and depositing of all the documents of title—Land allotted to a Company for setting up an industrial unit—Allotment letter issued to Company—50% of the total cost deposited by company—Agreement between the Industrial Corporation and the Company stipulating that on full payment of entire consideration amount, sale deed would be executed and registered in the name of company—Company permitted to mortgage the land to any scheduled bank to obtain financial assistance to the project—Company obtaining loan by mortgaging land with the bank on the basis of allotment letter and the said permission—Validity of mortgage—HELD: There is no clear authority on the question as to whether in absence of any title deed, the property can be a subject matter of mortgage—Besides, the effect of an admission by an authorized representative of the State having regard to the rules of executive business or otherwise **vis-a-vis** *the appellant-Bank also requires consideration—Keeping in view the importance of the issues, the questions: whether for satisfying the requirement of s.58(f) of the Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited; and whether in all such cases, the property should have been acquired by reason of a registered document, require consideration by a larger bench so that an authoritative pronouncement can be made thereupon.*

Bank of India **v.** *Abhay D. Narottam and Ors.*, **[2005] 11 SCC 520;** *Alapati Venkataramiah* **v.** *Commissioner of Income Tax, Hyderabad*, **[1965] 3 SCR 567;** *K.J. Nathan* **v.** *S.V. Maruty Reddy and Ors.*, **[1964] 6 SCR 727;** *Angu Pillai and Ors.* **v.** *M.S.M. Kasiviswanathan Chettiar and Ors.*, **AIR (1974) Mad. 16;** *M.M.T.C. Ltd.* **v.** *S. Mohamed Gani and Anr.* **AIR 2002 Mad. 378 and** *Amulya Gopal Majumdar* **v.** *United Industrial Bank Ltd. and Ors.*, **AIR (1981)**

A **Cal. 404, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7824-7828 of 2004.

From the final Judgment and Order dated 6.8.2003 of the High Court of
B Andhra Pradesh in Writ Petition Nos. 14174, 24502, 36133 and 24060 of 1998 and 17443 of 1999.

WITH

C.A. Nos. 7833-7837 of 2004.

C

Adarsh B. Dial, Sumati Anand and Rajiv Nanda for the Appellant.

Vahanavati, Solicitor General, A.K. Ganguli, K. Ramamurthy, H.S. Gururaja, Devdath Kamath, T. Anamika, Guntur Prabhakar, S. Madhusudhan Basu, Mukesh K. Giri, Manoj Saxena, Rajnish Kumar Singh, Rahul Shukla, T.V.
D George, Jayant Muthuraj (for C.K. Sasi), Manik Karanjawala and Anil Kumar Tandale for the Respondents.

The Order of the Court was delivered by

ORDER

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On or about 19.03.1969, United Auto Tractor Ltd. (for short, 'the Company') filed an application before the State Government for allotment of 100 acres of land in the industrial area for setting up an industrial unit for the purpose of manufacture of agricultural tractors and implements. The Government of Andhra Pradesh pursuant to or in furtherance thereof made
F allotment of 51 acres of land in the Industrial Development Area, Nacharam, Andhra Pradesh to the Company for the aforementioned purpose in terms of an order dated 18.07.1972. On 03.08.1972, an agreement was entered into by and between the Government of Andhra Pradesh and the Company in relation thereto; some of the terms and conditions whereof are as under :

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"6. Only on the completion and full payment of the entire consideration amount, the sale deed shall be executed and registered in the name of the Company.

xxx xxx xxx

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8(a) Without prejudice to the rights of the State Bank of India or any

other financing agency approved by the Government as first mortgagees, Government have a second charge on the land, buildings, plant and machinery which shall be converted into a first charge when the obligation of the financing agencies are liquidated.

8(b) If the Financing Institutions were to advance more than 60% of the value of the land, building, machinery and structure, prior agreement of the Government will be required.

xxx xxx xxx

13. The company shall bear, pay and discharge all existing and further amounts, duties, imposing and out-going of whatsoever rates, taxes imposed or charged upon the premises or upon the occupier in respect thereof from the date of taking possession.

*** *** ***

(s) Till such time as the ownership of the property is transferred to the Company in the manner mentioned above the property shall continue to remain the property of the Government.

16. The Government shall have right to resume the land, if the Company do not use the land for the purpose for which it was allotted within the period specified above, the period to be reckoned from the date of which the company was placed in possession of the land.

17. In case the Company shall become bankrupt or proceedings of insolvency or for winding up are filed by or against the Company the sale shall forthwith stand determined and the Government shall be entitled to re-enter the premises or any part thereof in the name of the whole, without prejudice to the rights of the Government to seek any available remedy against the company for recovery of the loss.

xxx xxx xxx

21. All payments due to the Government under this agreement shall carry interest at 8 1/2%. All payments made/instalments paid after the due dates carry penal interest at 12% per annum."

In terms of clause 2 of the said agreement the Company indisputably had made initial payment of 50% of the total cost of the allotted land.

A On the said date, the Government of Andhra Pradesh also issued a letter to the Company, permitting it to mortgage the said 51 acres of land to any scheduled bank to obtain financial assistance to the project, which the Company sought to establish, stating :

> "In the circumstances stated in your letter second cited, you are
> B hereby permitted to mortgage the 51 acres of land allotted in the Ncharam Industrial Development area to any Scheduled Bank to obtain financial assistance to your project.
>
> The agreement executed by you is returned herewith duly signed."

C Relying on or on the basis of the said purported sanction, the Company mortgaged the said land in favour of Appellant Bank, pursuant whereto and in furtherance whereof moneys were advanced to it on the said security from time to time. Indisputably, the Government of Andhra Pradesh transferred all the industrial estates and development areas to M/s Andhra Pradesh Industrial Infrastructure Ltd. (for short, 'A.P.I.I.C') with effect from 01.01.1974. Accounts
D Officer of A.P.I.I.C. informed the Director of Industries that amount of incentive to the extent of Rs.78,860/- sanctioned to the borrower had been adjusted against a sum of Rs.91,840/- against the balance cost of the land sold to borrower on outright sale basis.

E The allotted land allegedly was being utilised by the borrower for the purpose for which the same was allotted. It is stated that the borrower paid the entire cost of the land to the Government on or about 31.07.1980 being a sum of Rs. 2,03,304/-, which was acknowledged by A.P.I.I.C. After, a long time, however, A.P.I.I.C. purported to have cancelled the allotment of 25 acres out of 51 acres of land allotted to the Company. The balance 26 acres of land
F was designated as Plot No.A-27/1, which is the disputed property in this case.

Appellant-Bank filed O.A. No. 425 of 1995 against the Company and the guarantor for recovery of a sum of Rs.2,57,10,393/- before the Debt Recovery Tribunal, Bangalore. In the said application, the Bank intended to enforce its charge on the property which had been created.

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The said application was allowed by an order dated 18.10.1996, whereafter a recovery certificate was issued on 01.07.1997.

A notice for sale of the entire 51 acres of land by public auction was proposed to be held by the Recovery Officer on 08.03.1998. An objection
H thereto was made by A.P.I.I.C. on or about 21.03.1998, stating that it had no

objection for sale of 26 acres of land. A writ petition was thereafter filed before the High Court questioning the validity of the said proposed auction before the Andhra Pradesh High Court by A.P.I.I.C., *inter alia*, praying for the following reliefs :

> "(g) Sale of 26-00 acres of land which is allowed to be retained by the 3rd Respondent company would secure more than the decreetal amount passed in O.A. No. 425 of 1996 and therefore, inclusion of 25-00 acres of land i.e., plot no. A-27/2 belonging to the IInd Petitioner Corporation in the proposed sale by the 1st Respondent herein by way of public auction is unwarranted, arbitrary, and opposed to the principles of Natural Justice."

During pendency of the said writ petition, A.P.I.I.C. resumed possession of 25 acres of land and decided to hold auction in respect thereof only, which was questioned by the appellant-Bank by filing a writ petition before the Andhra Pradesh High Court, which was marked as W.P. No. 24060 of 1998. By an order dated 12.08.1998, the claim petition filed by A.P.I.I.C. before the Debt Recovery Tribunal was dismissed. A.P.I.I.C. being aggrieved by and dissatisfied therewith filed a writ petition before the Andhra Pradesh High Court on or about 01.09.1998.

A sale proclamation for the entire 51 acres of land proposing to sell the said land by public auction was issued by the Recovery Officer on or about 10.12.1998. Yet again a writ petition was filed by A.P.I.I.C. and the operation of the said for holding auction was stayed.

On or about 24.08.1998, one Nacharam Industries Association also filed a writ petition questioning the auction in respect of 25 acres of land. The Company also filed a writ petition, which was marked as Writ Petition No. 25056 of 1998 questioning the auction-cum-sale notice dated 06.08.1998 held by APIIC. No stay, however, was granted therein. During pendency of the aforementioned writ petition, APIIC issued a show cause notice dated 18.12.1998 upon the Company directing it to show cause as to why the allotment of balance 26 acres of land should not be cancelled on the following grounds that : (a) it had failed to set up an industry much less the proposed industry for which the land was allotted, except constructing some structures on Plot No.A.27/1; and (b) the Company had failed to pay the balance cost of the land, property tax and maintenance charges etc. amounting to a sum of Rs.27,19,366/-.

A No cause, however, was shown by the Company. It had merely been asking for time for submitting the explanation. On or about 14.07.1999, allotment in favour of the Company in respect of the balance 26 acres of land was also cancelled, the agreement dated 03.08.1972 was determined and the amount already paid by the Company was forfeited. The Company was directed to surrender the vacant possession of the land.

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As noticed hereinbefore, the grounds of cancellation of allotment *inter alia* were : (i) the outstanding amount as payable in accordance with the terms and conditions of the agreement had not been paid; and (ii) the land was not utilised for the purposes for which it was allotted.

C Appellant filed a writ petition questioning the said order dated 14.07.1999 before the Andhra Pradesh High Court, which was marked as Writ Petition No. 17443 if 1999.

A Division Bench of the High Court took up for considerations all the D writ petitions as well as contempt proceeding initiated for the alleged violation and disobedience of the order dated 22.05.1998 passed in W.P. No. 14174 of 1998 being C.C. No. 2065 of 1998.

The High Court by reason of the impugned judgment, *inter alia*, held :

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(i) The Company having obtained the allotment of land failed to utilise the same for industrial purposes.

(ii) The Company had taken APIIC as well as the Syndicate Bank for a ride.

F (iii) The Syndicate Bank did not initiate any coercive steps against the Managing Director and Directors for realisation of the amounts.

(iv) The most singular and remarkable feature was the non performance of the Company and its abstentious silence.

G (v) This, however, was not to certify that the Syndicate Bank acted diligently in the matter and in advancing huge financial assistance to the Company on the strength of a letter of no objection purported to have been issued by the Director of Industries. What was surprising was that Syndicate Bank equated that letter H to that of a title deed and accordingly advanced monies without

taking proper care and caution. A

(vi) APIIC by its proceedings dated 17.08.1993 cancelled the allotment of land to an extent of 25 acres of land. The said order remained unquestioned.

(vii) The Estate Officer under the Public Premises Act could not have filed an affidavit for and on behalf of APIIC stating that the sale of 26 acres of land could be permitted. B

(viii) A reading of all the covenants clearly reveals that the Government merely granted permission by putting the Company in possession of the land. The ownership always remained with the Government until the recovery. No sale deed was executed by the Government C in favour of the Company.

(ix) Admittedly, no such sale deed was executed by the Government in favour of the Company.

In regard to the interpretation of clause 8 of the agreement, the High D Court while opining that there was absolutely no dispute whatsoever that the Appellant-Bank advanced more than 60% of the value of the land, building, machinery and structures in favour of the Company posed a question which, according to it, fell for its consideration, namely, as to whether the Company as well the Syndicate Bank obtained prior consent of the government in the matter as was required under clause 8(b) of the agreement. The High Court E having opined that no prior consent of the Government was taken by the Appellant-Bank before advancing more than 60% of the value of the land came to the conclusion that the letter dated 03.08.1972 of the Director of Industries could not be treated as a document of title enabling the Company to create a charge against the properties belonging to APIIC. It was held that F there was nothing on record to show that the said letter had been issued by the Director of Industries with the prior approval of the government. It was observed :

> "...There is nothing on record suggesting that the so-called no objection of the Director of Industries binds the Government. There G is nothing on record to show that the said letter has been issued by the Director of Industries with the prior approval of the Government. The agreement requires prior consent of the Government expressing no objection if the financing agencies were to advance more than 60% of the value of the land. The said letter by no stretch of imagination H

A could be characterized and treated as a prior agreement of the Government enabling the Syndicate Bank to advance more than 60% of the value of the land. The actual mortgage deed executed by way of deposit of title deeds is not made available for the perusal of the Court by the Syndicate Bank."

B In the aforementioned premise the High Court held that the order of cancellation of allotment of 25 acres of land dated 17.08.1993, having not been challenged, the same became final. It was also held that as a clear and categorical finding had been arrived at by APIIC in its order dated 14.07.1999 that the Company had failed to utilise the land for the purpose for which the C same had been allotted, the order of cancellation of allotment was also valid in law, stating :

"...The Company failed to submit any explanation to the show cause notice and after providing innumerable opportunities, the APIIC passed final order dated 14.7.1999 canceling the allotment of remaining extent D of land also. The first order dated 17.8.1993 canceling the allotment of Ac.25-00 of land remained unchallenged. This order dated 14.7.1999 canceling the allotment of remaining extent of Ac.26-00 of land, in our considered opinion, is not vitiated for any reason whatsoever. There is a clear and categorical finding in the said order that the Company failed to utilize the land for the purpose for which it was allotted. The E APIIC was well within its limits to cancel the remaining extent of fund..."

In regard to the question as to whether the recovery certificate dated 30.12.1996 issued by the Debt Recovery Tribunal to recover the amount by sale of mortgaged property, it was held that despite the fact that in the F recovery certificate the schedule of the properties attached and sold was shown to be nil, stating :

"Be it as it may, the finding, recorded by the DRT as against the APIIC, in no manner, effects the title since the lands in question remained under the ownership of the APIIC as there is no transfer of G title as such in favour of the company. Admittedly, no sale deed has been executed by the APIIC in favour of the company."

It was further held :

"In the circumstances, we hold that the proclamation of sale H notice dated 21.1.1998 issued by the Recovery Officer proposing to

auction the lands belonging to the APIIC is ultra vires. Such a proclamation has been issued without putting the APIIC on any proper notice." A

In regard to the purported concession made by APIIC in regard to 26 acres of land, it was opined that the same had been made inadvertently by the APIIC as it did not have a copy of the recovery certificate. It was B observed that in any view of the matter, the consent on the part of the parties did not confer any jurisdiction on the authorities concerned, stating :

"It is well settled that the consent of the parties does not by itself confer any jurisdiction upon the authorities. Nor such consent can take away the jurisdiction if otherwise conferred under the provisions C of the Act. It is not open to the parties to confer, by their agreement, jurisdiction on a court, which it does not possess..."

It was further held that the letter of the Director dated 03.08.1972 cannot be said to be in terms of clause 8(b) of the agreement and, *thus, the appellant* cannot be allowed to say that the land had been completely utilised for D industrial purposes, in absence of any such assertion and proof furnished by the Company itself. It was also opined :

"(a) That the letter dated 3.8.1972 purported to have been issued by the Director of Industries, by no stretch of imagination, could be E characterized as a document of title so as to enable the Company to mortgage these same by way of deposit of title deeds in order to secure financial assistance from the Syndicate Bank. The Director of Industries cannot be equated to that of the Government and it is the only government, which could have agreed to the company raising money on the property. Such letters voluntarily F issued by an individual officer of the Government, in no manner, bind the Government unless it is clearly pleaded and established that the Director of Industries has been authorised and delegated with the power to accord permission to the company raising money on the property;

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(b) that the Syndicate Bank admittedly advanced more than 60% of the value of the land but without prior agreement of the Government as is required in terms of clause 8(b) of the agreement. Therefore, the APIIC, being the successor in interest of the Government, is not bound by the advances so made by the H

A Syndicate Bank. Therefore, the Syndicate Bank cannot have the first charge over the property in question;

(c) that there is no specific agreement as such by the Syndicate Bank agreeing to pay the government on behalf of the company so much of the amount advanced as loan to the company will
B remain due on the promissory note executed by the Company. In the absence of any specific agreement, the APIIC is not bound to accept the demand draft for a sum of Rs.3,366.35 paise purporting to be due from the company towards the land cost and the same has been rightly rejected by the APIIC;

C (d) that the order of cancellation of allotment of land dated 17.8.1993, which remained unchallenged, has not only become final, but also does not suffer from any legal infirmities requiring any interference;

(e) that the order dated 14.7.1999 cancelling the allotment of remaining
D extent of Ac.26-00 of land which is challenged by the Syndicate Bank in W.P. No.17443 of 1999, is not vitiated for any reason whatsoever. It is a composite order passed by the APIIC canceling the allotment of land both on the ground of failure to pay the balance sale consideration by the Company and also on the ground that the Company failed to utilize the land for the purpose
E for which it has been allotted to it. The orders of cancellation of allotment of land have duly taken into account the admissions made by the Company that it has failed to utilize the land for the purpose for which it has been allotted to it. The company has admitted that it was in red and could not establish any industrial
F unit for the purpose of manufacture of agricultural tractors for which purpose the land has been allotted to it;

(f) that the order dated 12.8.1998 passed by the Recovery Officer rejecting the claim petition of the APIIC is vitiated. The Recovery Officer could not have proceeded with the sale of the land
G. belonging to the APIIC in the absence of any specific authorization and permission by the Presiding Officer of DRT. In the schedule of the recovery certificate, there is no mention of the details of the lands in question enabling the Recovery Officer to proceed against the same for recovery and realization of the decreetal amount; and

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(g) that the sale notifications issued by the APIIC do not suffer from any legal infirmities." A

Mr. Rajiv Nanda, learned counsel appearing on behalf of the Appellant-Bank, would submit :

(i) The High Court committed a factual error insofar as it proceeded on the basis that the mortgage was created merely by deposit of consent letter, whereas in fact the same was created by deposit of allotment letter, original counter part of the agreement dated 03.08.1972 and letter dated 03.08.1972. B

(ii) The High Court erred in so far as it failed to notice that the order of the Debt Recovery Tribunal dated 18.10.1996 became final as the same had not been challenged by any party to the lis. C

(iii) APIIC having categorically made a statement before the Recovery Officer that 26 acres of land should be allowed to be retained by United Auto, which was more than sufficient to recover the bank dues and, thus, it was estopped and precluded from cancelling the letter of allotment in relation to the said land. D

(iv) Allotment letter dated 18.07.1972, agreement dated 03.08.1972 as also the consent letter dated 03.08.1972 being documents of title within the meaning of Section 58(f) of the Transfer of Property Act, the High Court committed a mistake in opining otherwise. E

(v) Consent letter dated 03.08.1972, which is in conformity with clause 8(b)of the agreement dated 03.08.1972 was misconstrued by the High Court, inasmuch as by reason thereof, the State agreed that the allottee may raise loan mortgaging the lands agreed to be sold as well as the buildings constructed thereupon. F

(vi) Clause 8(b) supersedes other clauses to the contrary in the agreement, which provides for prior agreement of government before creating charge/mortgage only if more than 60% of the value of the land was to be advanced and a consent letter of the government was to be issued therefor. G

(vii) Clause 8(b) having provided that the charge of the financial institution would be the first charge and that the government having provided that the second charge, the obligation of the financial institution was required to be liquidated at the first instance. H

A (viii) It is borne out from the records that the entire cost of the land being Rs.4,93,680/- stood paid. In any event the value of the entire land having been adjusted for 25 acres of land which had been cancelled, the APIIC did not make it clear as to on what basis further cost of the land towards 26 acres was being made. APIIC was not only estopped and precluded from raising the aforementioned contentions and its order would be wholly inequitable if the bank is left with no remedy when it had acted on the basis of its consent.

(ix) The schedule of the recovery certificate having been shown nil, the Recovery Officer could not have determined as to which properties were to be attached or sold; the finding of the High Court is clearly contrary to the provisions of Section 19(20), 19(22) and Section 25 of the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 and in that view of the matter the High Court committed an error in holding that the auction of land by the Recovery Officer was ultra vires as the mortgaged property was not specified in the recovery certificate.

(x) If the consent made by the Manager (Law) did not bind APIIC, it is difficult to conceive as to how the writ petitions which were filed by the said parties could be entertained.

(xi) The finding of the High Court that the letter dated 03.08.1972 issued by the Director of Industries was not binding on the government and APIIC was wholly without any basis as all the orders of the government had been communicated only through the letters issued by the Director of Industries.

(xii) The purported finding of the High Court that the Company had failed to utilise the land for the purpose of allotment is clearly erroneous as there is nothing to show that the conditions precedent therefor existed and in any event, clause 8(b) of the agreement dated 03.08.1972 would override clauses 13, 15 and 16 thereof, in terms whereof interest of the bank would prevail over that of APIIC.

(xiii) The High Court should not have entertained the writ petition filed by the APIIC as it did not prefer any appeal against the order of the Debt Recovery Tribunal.

The learned Solicitor General and Mr. A.K. Ganguli, learned Senior

Counsel, appearing on behalf of the State and APIIC, on the other hand, would submit :

(i) The agreement dated 03.08.1972 being not registered, no title was conferred on the Company, pursuant whereto or in furtherance whereof the Company had not derived any assignable title.

(ii) It is not a case where a mortgage could be created by reason of deposit of title deed as contemplated under Section 58 of the Transfer of Property Act.

(iii) Mere deposit of allotment letter or the agreement dated 03.08.1972, thus, did not create any charge in favour of the Bank. The letter dated 03.08.1972 issued by the Director of Industries being not a document of title, the judgment of the High Court cannot be assailed.

(iv) Appellant-Bank having not questioned the orders of cancellation of allotment dated 17.08.1993 and 14.07.1993 respectively, it must be held to have waived its right, if any, to question the same. The sale proceeds in terms of the judgment and order dated 22.02.1977, therefore, should be directed to be paid to APIIC.

The principal question which arises for consideration is as to whether in absence of any execution and registration of deed of sale by the Government of Andhra Pradesh or by A.P.I.I.C. in favour of the Company, any interest in the land has been and could be created. Our attention has been drawn by the learned counsel for Appellant to a large number of decisions of different High Courts to show that for the purpose of creating mortgage by depositing title deeds in terms of Section 58 of the Transfer of Property Act, it is not necessary that the mortgagor would have forfeit complete title over the property. Even if the mortgagor derives some interest which can be subject-matter of mortgage, a mortgage by deposit of title deeds can be created. It is not in dispute that whereas a deposit of title deeds by itself does not require a document in writing, but in the in event a mortgage is created thereby, it will require registration. It is furthermore not in dispute that complete title over a property can be acquired by a vendee only when a deed of sale is executed and registered by the vendor in terms of Section 54 of the Transfer of Property Act. In this case, it has not been disputed that apart from the letter of allotment, an agreement coupled with the letter dated 03.08.1972, no deed of sale was executed or registered by the Government of Andhra Pradesh or by A.P.I.I.C. in favour of the Company.

A As would appear from the following, we are of the opinion that the issues raised herein are of some importance and as any decision thereupon would have serious impact on similar transaction in future, it should be heard by a larger bench.

We may, however, make some general observations.

B

Section 58 of the Transfer of Property reads as under :

"Section 58 - "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined

C (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

D The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.-Where, without delivering possession of the
E mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage
F and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on
G a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer
H the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage.-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds.-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.-A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

The requisites of an equitable mortgage are : (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage. The principal question, which, therefore, requires consideration is as to whether for satisfying the

A requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A' fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document.

B

Each case will have to be considered on its own facts. A jurisprudential title to a property may not be a title of an owner. A title which is subordinate to an owner and which need not be created by reason of a registered deed of conveyance may at times create title. The title which is created in a person may be a limited one, although conferment of full title may be governed upon fulfilment of certain conditions. Whether all such conditions have been fulfilled or not would essentially be a question of fact in each case. In this case a right appears to have been conferred on the allottee by issuance of a valid letter of allotment coupled with possession as also licence to make construction and run a factory thereon, together with a right to take advances from banks and financial institutions; subject, of course, to its fulfilment of condition may confer a title upon it in terms of Section 58(f) of the Transfer of Property Act, but the question would be whether such a right is assignable.

C

D

In Mulla's Transfer of Property Act, a large number of cases have been noticed where even a patta of land has been considered to be a document of title depending of course on the circumstances under which it had been given.

E

Moreover, if insistence on the original document of title is laid, it may give rise to the conclusion that once the document of title is lost, no mortgage of deposit of title deed can be created at all.

F

It is, however, one thing to say that a person cannot convey any title, which he himself does not possess; but it is another thing to say that no mortgage can be created unless he obtains a title by reason of a registered conveyance.

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In *Angu Pillai and Ors.* v. *M.S.M. Kasiviswanathan Chettiar and Ors.*, AIR (1974) Madras 16, a Division Bench of the High Court reversed the decision of the Trial Judge, holding that the said document did not constitute a valid mortgage by deposit of title, stating :

H "13. The only question, in these circumstances, is whether, by

depositing Exs. A.23 to A.26 a valid equitable mortgage was created in favour of the plaintiff. Section 58 of the Transfer of Property Act *inter alia* provides that where a person in any of the towns mentioned therein delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. It would be seen from this provision that three essentials are required for an equitable mortgage, namely, (1) a debt, (2) deposit of title deeds and (3) the intention that the delivery should be security for the debt. In the instant case, the first and third essentials are satisfied. The only question is whether Exs. A.23 to A. 26 are documents of title within the meaning of S. 58. The trial Court, relying upon the decisions of the Rangoon High Court in V.E.R.M.A.R. Chettiar firm v. Ma Joo Teen, AIR 1933 Rang 299 held that the said documents were not documents of title and that, therefore, no valid equitable mortgage was created. We are clearly of the opinion that this conclusion cannot be sustained. The expression 'documents of title' occurring in Section 58 has been the subject of consideration in some decisions. The law in regard to equitable mortgage is precisely the same in England as it is in India..."

It was further noticed :

"15. In Indian law, deposit of patta has been held to constitute a valid equitable mortgage, though patta is not in itself a deed of title, but is only an evidence of title. This Court has consistently taken the view that the main object of tender of patta is merely to give information of the land revenue payable and the details of the property and that the exact weight to be given to the patta would depend upon the circumstances of the case. In *Dohganna* v. *Jammanna,* AIR (1931) Mad 613 it is pointed out that in case of pattas in respect of a land in Zamindari, if the land be at the disposal of the landlord at the time of granting the patta, *prima facie* such patta would not be mere bill of rent but something more and that if it is not so it would not create any rights in the pattadar in derogation of the rights of a person who would be entitled to the land subject to the proper and regular payment of rent. The question directly arose before a Bench of this Court *in Official Assignee* v. *Basudevadoss,* AIR (1925) Mad 723, as to whether a deposit of patta is enough to constitute an equitable mortgage. The Bench answered the question in the affirmative. Srinivasa Aiyangar, J. who delivered the leading judgment in that case, has pointed out

A that the answer to the question as to whether the pattas in respect of a land is a document which would be sufficient, by being deposited, to evidence the intention required for an equitable mortgage would vary according to the conditions of the country and the consciousness on the part of the members of the community and that though a patta is not a document of title still a deposit of the same with intent to create an equitable mortgage would create an equitable mortgage."

In *M.M.T.C. Limited* v. *S. Mohamed Gani and Anr.*, AIR (2002) Madras 378, a learned Single Judge opined :

C "The plaintiff has sought for a mortgage decree specifically alleging that the first defendant in respect of the advances made by the plaintiff to his business has offered the immovable property of his wife viz., the second defendant herein as security and has created an equitable mortgage. Both the counsel have made elaborate submissions in that regard. Hence, a question would arise whether an equitable mortgage by deposit of title deeds was created. What is mortgage by deposit of title deed is defined under Section 58(f) of the Transfer of Property Act, as follows :

> 'Where a person in many of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent, documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.'

F It is called in English law an equitable mortgage. Lord Cairns defined the same as 'It is well established rule of equity that a deposit of a document of title without more, without writing, without word of mouth, will create Equity a charge upon the property referred to.' In order to prove the existence of an equitable mortgage, the following requisites are necessary :--(1) a debt; (2) a deposit of title deeds, and G (3) an intention that the deeds shall be security for the debt. The debt may be an existing debt or a future debt. Insofar as the deposit of title deeds is concerned, physical delivery of document is not the only mode of deposit and even the constructive delivery has been held sufficient. It is sufficient if the deeds deposited *bona fide* relate to the property or are any material evidence of title and are shown to have H

been deposited with an intention to create a security thereon. The essence of the whole transaction of euitable mortgage by deposit of title deeds is the intention that the title deeds shall be the security for the debt. Whether the said requisite intention is available in a given case is a question of fact and has to be ascertained after considering the oral, documentary and circumstantial evidence. It is true the mere fact of deposit does not raise the presumption that such an intention existed. Such an intention cannot be presumed from the possession since the mere possession of the deeds is not enough without evidence as to the manner in which the possession originated so that an agreement may be inferred. Even the mere possession of the deeds by the creditor coupled with the existence of a debt need not necessarily lead to the presumption of a mortgage. The mere fact that the documents were coming from the custody of the plaintiff is not by itself sufficient to prove an ntent to create a security. But in a given case unless and until the defendants satisfactorily explain how the documents came to the plaintff's custody, the said fact would be significant and have a great bearing."

In *Amulya Gopal Majumdar* v. *United Industrial Bank Ltd. and Ors.*, AIR (1981) Calcutta 404, a Division Bench of the Calcutta High Court held that possessory title itself can be a subject-matter of mortgage, opining :

"...Therefore, at the time when the disputed transaction was entered into the mortgagor Eagle Plywood Industries Private Limited had entered into lawful possession of the Behala property on the basis of an agreement for sale dated July 18, 1950. Such possessory title could very well in law be furnished as security for the mortgage. On this point we are in respectful agreement with the view taken by M.M. Dutt and R.K. Sharma, JJ. in the case of *Usha Rice Mills Company Limited* v. *United Bank of India,* (1978) 82 Cal WN 92, since the view taken by their Lordships is based on high authorities."

We may notice that that a Division Bench of this Court in *Bank of India* v. *Abhay D. Narottam and Ors.*, [2005] 11 SCC 520, did not think it fit to consider the correctness thereof having regard to the provisions contained in Section 125 of the Companies Act, 1956.

Some decisions of this Court in this connection may also be noticed.

In *Alapati Venkataramiah* v. *Commissioner of Income Tax Hyderabad,*

A [1965] 3 SCR 567, while considering the provisions of Section 12B of the Indian Income Tax Act, 1922, this Court repelled a contention that a possessary title in terms of Section 53-A of the Transfer of Property Act would not subserve the requirements of an effective conveyance of the capital assets, as delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property.

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However, in terms of Section 12B of the Income Tax Act, title must pass by any of the modes mentioned therein, namely, sale, exchange or transfer. It did not contemplate any other mode of transfer.

In *K.J. Nathan* v. *S.V. Maruty Reddy and Ors.*, [1964] 6 SCR 727, this C Court held :

"10. The foregoing discussion may be summarized thus: Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment D of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt, (ii) deposit of title deed; and (iii) an intention that the deeds shall be security E for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deed s constitutes a mortgage, for no such presumption has been laid down either in the F Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the G title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be

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considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the titledeeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction."

The question which arose therein was that what would be the extent of subject-matter of mortgage; the entire property forming the subject-matter of mortgage or a part thereof.

There cannot be any doubt whatsoever that in absence of a registered deed of sale, the title to the land does not pass, but then what would not be conveyed is the title of the estate and not the allotment and possession itself.

It would, therefore, appear that there is no clear authority on the question as to whether in absence of any title deed in terms whereof the mortgagee obtained title by reason of a registered deed can be a subject-matter of mortgage. Section 58 of the Transfer of Property Act does not speak of mortgage of an owner's interest. If any interest in property can be created by reason of a transaction or otherwise which does not require registration, in our opinion, it may not be necessary to have a full title before such a mortgage is created by deposit of title deeds. A person may acquire title to a property irrespective of the nature thereof by several modes e.g. a lease of land which does not require registration; (ii) by partition of a joint family property by way of family settlement, which does not require registration.

In a case of this nature where valuable right is created which may or may not confer an assignable right, the question requires clear determination having regard to the equitable principle in mind, and would have far reaching consequences, as a large number of banks and financial institution advance a huge amount only on the basis of allotment letters. If such allotment letters are to be totally ignored, the same may deter the banks in making advances which would in effect and substance create a state of instability.

Apart from the said question, the effect of an admission by an authorized

A representative of the State having regard to the rules of executive business or otherwise vis-à-vis the Appellant-Bank also requires consideration.

We, therefore, are of the opinion that keeping in view the importance of the questions raised at the Bar, as noticed hereinbefore, and in the context of the factual matrix involved in the matter, the questions require consideration
B by a larger bench so that an authoritative pronouncement can be made thereupon.

R.P. Referred to Larger Bench.

COMMISSIONER OF CUSTOMS, CHENNAI

v.

M/S. HEWLETT PACKARD INDIA SALES (P) LTD.

AUGUST 30, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Customs Tariff Act, 1985; Headings 84.71 and 85.24 and Notification No.21/2002-Cus. Dated 1.3.2002 issued thereunder:

Classification—Import of Laptops with Hard Disc Drives—CTH 84.71 or 85.24—Assessee claiming duty exemption—Exemption Notification—Applicability of—Held: Assessee imported Laptops containing preloaded Hard Disc Drives preloaded with operating systems which control the working of the Computer—Value of Laptops depend on the operating system, which is preloaded—A preloaded operating system recorded on Hard Disc Drives is an integral part of the Laptop—Assessee not only imported Laptops but also imported Hard Disc Drives on which operating system recorded—Software is classifiable u/CTH 85.24 and Laptop is classifiable u/CTH 84.71—Hence, Revenue rightly classified the Laptops, so imported, as a Unit classifiable u/CTH 84.71 and giving the benefit of deduction for the value of software classifiable u/CTH 85.25.

Words and Phrases:

'Hard disc', 'platter' and ' software'—Meaning of.

Revenue had demanded certain amount of customs duty from the respondent-assessee by classifying the goods imported by them as Laptop liable for duty under Heading 84.71 of the First Schedule of the Customs Tariff Act and denying them benefit of exemption Notification No.21/2000-Cus.dated 1.3.2002. Assessee filed an appeal before CESTAT, the Tribunal, against the demand so raised by the Revenue, which was allowed by the Tribunal. Hence the present appeal.

The question which arose for determination in this civil appeal was as to whether the imported goods, the operating systems (software) which controls the working of the computer and which is preloaded in the laptop (notebook),

A is classifiable as a separate entity under CTH 85.24 at 'nil' rate of duty or as an integral part of the laptop under CTH 84.71 at the appropriate rate of duty.

Allowing the appeal, the Court

B HELD: 1.1. The Revenue has classified the laptop as a machine under CTH 84.71 of the Customs Tariff Act, 1985 and has demanded duty on the assessable value determined by deducting the software value from the total value of the laptop whereas the assessee has classified the software loaded Hard Disk Drive under CTH 85.24 separately from the laptop and has claimed the benefit of Notification No.21/2002-Cus dated 1.3.2002.

C [Para 7] [647-A]

1.2. The assessee imported laptops containing preloaded Hard Disc Drives (HDD). The said drives were preloaded with operating systems (software) which controls the working of the computer. The value of the laptop depends on the operating system, which is preloaded. The computer cannot D open without the operating system. [Para 9] [648-D]

1.3. It may be clarified that the operating system can also be imported as a packaged software which is like an accessory and which is classified by the Revenue under CTH 85.24. However, a preloaded operating system recorded on HDD is an integral part of the laptop (unit). E

[Para 9] [648-E]

1.4. A laptop is a stand alone unit classifiable under CTH 84.71. A laptop is a small portable Personal Computer. It runs either on battery or electricity. Laptop has a screen and a small key board. [Para 9] [648-F]

F

1.5. The preloaded operating system recorded in HDD in the laptop, the imported item, forms an integral part of the laptop. What was imported in the present case was a laptop as a stand alone item (unit). Present dispute relates to the transaction value of the unit. An importer who buys a laptop containing an operating system pays for the laptop as a unit. Without the G operating system, the laptop cannot work. The computer cannot open without operating system. The respondent has not only imported laptops, it has also imported HDDs on which the operating system was recorded (packaged software) which has been classified by the Revenue under CTH 85.24. However, when a laptop is imported with in-built preloaded operating system recorded on HDD the said item forms an integral part of the laptop (computer H

system) and in which case the Revenue is right in treating the laptop as one single unit imported by the assessee. The Revenue has rightly classified the laptop as a unit under CTH 84.71. [Para 10] [648-G; 649-A, B]

2. Revenue has rightly taken the value of the laptop as a unit and it has given the deduction for the value of the software. There is no error in the computation, particularly, when the assessee has refused to give the value of the software to the adjudicating authority despite being called upon to do so. The imported laptops were classifiable under CTH 84.71 whereas operating software recorded on HDD imported as packaged software were classifiable under CTH 85.24. [Paras 11 an 12] [649-C, D, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5854 of 2006.

From the Final Order No. 441/2006 dated 26.05.2006 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai in Appeal Nos. C/PD/34/2006 and C/46/2006.

Vikas Singh, ASG, K. Radhakrishnan, Binu Tamta and B. Krishna Prasad for the Appellant.

V. Lakshmikumaran, Alok Yadav and M.P. Devanath for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the order passed by the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (in short 'CESTAT') allowing the appeal filed by the respondent. By the impugned judgment CESTAT held that the Software-loaded Hard Discs are classifiable under Heading 85.24 of the First Schedule to Customs Tariff Act, 1985 (in short 'Tariff Act'). It was further held that respondent will be eligible for duty exemption under Notification No.21/2002-Cus as amended. It was held that rest of the machine would be classified under Heading 84.71.

2. Background facts in a nutshell are as follows:

The Department had demanded customs duty of about Rs.5.9 crores from the respondent by classifying goods imported by them under Heading 84.71 of the First Schedule of the Act and denying them benefit of exemption Notification No.21/2000-Cus. dated 1.3.2002 (as amended). Demand was questioned before CESTAT. An application seeking waiver of pre-deposit and

A stay of recovery in respect of this amount of duty was filed. After examining the records and hearing both sides, CESTAT found *prima facie* case for the assessee in view of the Tribunal's decision in the case of *Barber Ship Management (I) Pvt. Ltd.* v. *Commissioner,* (2000) 117 ELT 456 (Tri.) as well as the decision in the assessee's own case reported in 2005 (126) ECR 124 (Tri-Del) and, accordingly, CESTAT have dispensed with pre-deposit of the duty B amount. Further, having heard both sides at length and having regard to the high stake involved in the case, the appeal was taken up for final disposal.

The respondents are engaged in the manufacture of, and trading in, computers including Laptops (otherwise called 'Notebooks') falling under Heading 84.71 of the CTA Schedule. They imported Notebooks (Laptops) C with Hard Disc Drivers (Hard Discs, for short) preloaded with Operating Software like Windows XP, XP Home etc. These computers were also accompanied by separate Compact Discs (CDs) containing the same software, which were intended to be used in the event of Hard Disc failure. The Bills of Entry filed by the importer declared the value of Laptop and the value of D Software separately, the software value including the Hard Disc value also. The Bills of Entry classified the Software-loaded Hard Discs under Heading 85.24 of the CTA Schedule and claimed exemption in terms of Sl. No.157 of Notification No.21/2002-Cus ibid. These Bills of Entry were filed with the Chennai Air Customs Authorities in July 2005. Long before this, by a letter dated 7.10.2003 the respondents had informed the Addl. Commissioner of E Customs, Chennai that they would be filing Bills of Entry for separate assessment of Computers and Software-loaded Hard Discs in view of the Tribunal's decision in *Barber Ship Management's* case (supra). It was also informed that they would claim duty exemption under Sl. No.157 of Notification No.21/2002-Cus. ibid. Subsequently, under cover of letter dated 11.10.2003, F the respondents had also supplied to the Addl. Commissioner the OEM pricelist for the various models of 'Notebooks' imported by them. They had also provided a worksheet indicating separately the value of Hard Disc, value of Operating Software and the CD & replicating charges.

In the meantime, at Delhi, they had imported Laptop computers with G Hard Discs preloaded with Software and claimed classification of the Software-loaded Hard Disc Drives under Heading 85.24. The department issued a show-cause notice for demanding duty on these goods in terms of Heading 84.71. This demand was confirmed by the original authority, against which appeal before the Commissioner (Appeals) was preferred, who sustained the decision of the lower authority. But the appeal preferred to the Tribunal was allowed H

and it was held that the Hard Disc Drives preloaded with software required to be assessed separately in terms of 85.24 of the CTA Schedule by virtue of Note 6 to Chapter 85 of the said Schedule vide Final order No.380/2005-NB-A dated 11.10.2004 reported in 2005 (126) ECR 124 (Tri-Del). A

However, the Appraising Officer at Chennai Air Customs, dealing with the goods in question, queried the respondents as to why the value of the Hard Discs should not be included in the value of the 'Notebooks' for the purpose of assessment under Heading 84.71. The respondents replied by pointing out that, in terms of the Tribunal's decision in *Barber Ship Management's* case (supra) which had been upheld by this Court as reported in 2002 (144) ELT A293, the Software-loaded Hard Discs could only be classified under Heading 85.24. They also cited, in support of their stand, Final Order No.380/2005-NB-A dated 11.10.2004 (supra) passed by the Tribunal in their own case. Their arguments, however, did not weigh with the assessing authority, which proceeded to assess the Bills of Entry on a provisional basis. The jurisdictional Asst. Commissioner of Customs, after hearing the party and considering their submissions, found Hard Disc as integral part of Notebook-computer and accordingly passed Order-in-Original dated 31.10.2005 classifying the Notebooks together with the Hard Discs assembled therein, under Heading 84.71 as 'automatic data processing machines'. This order was upheld by the Commissioner (Appeals) as per Order-in-Appeal dated 25.11.2005. It is on the basis of the appellate Commissioner's order that the assessments were finalized. Hence the demand of duty which is on the assessable value comprising the value of the Notebook computers with Hard Discs excluding the value of Software. Appeals were preferred against the appellate Commissioner's order. B C D E

3. Stand of respondent before the Tribunal revolved round decision in *Barber Ship Management's* case (supra) which was affirmed by this Court in [202 (144) ELT A 293]. It was pointed out that, in their own case involving import of similar goods at Delhi, the Tribunal had classified Software-loaded Hard Disc Drives under Heading 85.24. It was argued that the issue arising in this case had already been conclusively decided by this Court in the case of *Barber Ship Management's* case (supra) and, therefore, there was nothing further to be examined in this case. It was submitted that Software-loaded Hard Disc, being "recorded media for sound or other similarly recorded phenomena...excluding products of Chapter 37" was to be classified under Heading 85.24. The department had no objection to classifying Software-recorded Hard Disc Drive, if imported without any other apparatus, under Heading 85.24. Hence the lower authorities should have been taken the aid F G H

A of Note 6 to Chapter 85 for classifying the Software-loaded Hard Disc Drives under heading 85.24. Reference was also made to the HSN Notes under Heading 85.24. It was submitted that the authorities below had failed to note the clear distinction between Computer and Software despite decisions of this Court on the point. In this connection, reference was made to this Court's judgment in *CCE* v. *PSI Data Systems,* (1989) 39 ELT 692 and *Commissioner* B v. *Acer India Ltd.,* (2004) 172 ELT 289. The ratio of the Supreme Court's decision in the case of Sprint *RPG India Ltd.* v. *Commissioner,* (2000) 116 ELT 6 SC was wrongly applied to the facts of the case by the lower appellate authority.

C 4. While issuing notice this Court noted that the matter appeared to be covered by 3-Judge Bench's decision of this Court in *Commissioner of Central Excise, Pondicherry* v. *ACER India Ltd.,* [2004] 8 SCC 173. But it was contended by learned Additional Solicitor General that the question whether Hard Discs fitted to the Computer would be treated as a Software was not specifically dealt with in the said case. Notice was issued and the matter was listed for D final hearing.

5. A short question which arises for determination in this civil appeal is : Whether operating systems (software) which controls the working of the computer and which is preloaded in the laptop (notebook) is classifiable as a separate entity under CTH 85.24 at 'nil' rate of duty or as an integral part E of the laptop under CTH 84.71 at the appropriate rate of duty.

6. To answer the above question CTH 85.24 and CTH 84.71 need to be quoted:

CTH 85.24:

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"Media recorded with sound or similar recording, whether or not presented together with the apparatus for which they are intended or assembled with constituent parts of machines of heading 84.69 to 84.72 (e.g. disc packs) are in all cases to be classified in this heading."

G *CTH 84.71*

"Automatic data processing machines and units thereof; magnetic or optical reader, machines for transcribing data on to data media in coded form and machines for processing such data, not elsewhere specified or included."

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7. The Department has classified the laptop as a machine in CTH 84.71 and has demanded duty on the assessable value determined by deducting the software value from the total value of the laptop whereas the assessee has classified the software loaded Hard Disk Drive (for short, 'HDD') under CTH 85.24 separately from the laptop and has claimed the benefit of Notification No.21/2002-Cus dated 1.3.2002.

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8. To answer the above controversy meaning of the words software, hard disk and platter need to be noted (See: Computer Dictionary by Microsoft - Fifth Edition at pp.489, 246 and 408 respectively):

> "Hard disk. A device containing one or more inflexible platters coated with material in which data can be recorded magnetically, together with their read/write heads, the head-positioning mechanism, and the spindly motor in a sealed case that protects against outside contaminants. The protected environment allows the head to fly 10 to 25 millionths of an inch above the surface of a platter rotating typically at 3600 to 7200 rpm; therefore, much more data can be stored and accessed much more quickly than on a floppy disk. Most hard disks contain from two to eight platters. See the illustration. Also called: hard disk drive.
>
> Hard disk drive n. See hard disk
>
> Platter. One of the individual metal data storage disks within a hard disk drive. Most hard disks have from two to eight platters. See the illustration. See also hard disk.
>
> Software. Computer programs; instructions that make hardware work. Two main types of software are system software (operating systems), which controls the workings of the computer, and applications, such as word processing programs, spreadsheets, and databases, which perform the tasks for which people use computers. Two additional categories, which are neither system nor application software but contain elements of both, are network software, which enables groups of computers to communicate, and language software, which provides programmers with the tools they need to write programs. In addition to these task-based categories, several types of software are described based on their method of distribution. These include packaged software (canned programs), sold primarily through retail outlets; freeware and public domain software, which are distributed free of charge; shareware,

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A which is also distributed free of charge; although users are requested to pay a small registration fee for continued use of the program; and vaporware, software that is announced by a company or individuals but either never makes it to market or is very late. See also application, canned software, freeware, network software, operating system, shareware, system software, vaporware, Compare firmware, hardware, B liveware."

9. On the basis of the above dictionary meanings it becomes clear that a software is a computer programme. It consists of instructions that make hardware work. There are two types of softwares, namely, system software C which controls the working of the computer and application software such as word processing programmes, databases etc., which perform the tasks for which we use computers. In addition, we now have network software which enables groups of computers to communicate, and language software which provides programmers with the tools with which they write programmes. We also have what is called as packaged softwares which are sold through retail D outlets. In the present case, the respondent imported laptops containing preloaded HDD. The said drives were preloaded with operating systems (software) which, as stated above, controls the working of the computer. The value of the laptop depends on the operating system, which is preloaded. The computer cannot open without the operating system. The laptop without an E operating system is like an empty building. At this stage, it may be clarified that the operating system can also be imported as a packaged software which is like an accessory and which in the present case is classified by the department under CTH 85.24. However, a preloaded operating system recorded on HDD is an integral part of the laptop (unit). Such preloaded operating system on the HDD forms an integral part of the laptop. It is important to note F that laptop as a stand alone unit is classifiable under CTH 84.71. A laptop is a small portable Personal Computer (in short 'PC'). It runs either on battery or electricity. Laptop has a screen and a small key board. Most of the laptops run on the same software as their desk top counterparts. Most of the laptops accept floppy disks, CD ROM Drives, External or Internal Modem etc. A notebook computer is a laptop. It is a machine. A CD or a floppy disk is a G peripheral.

10. Applying the above tests to the facts of the present case, we are of the view that preloaded operating system recorded in HDD in the laptop (which is the item of import) forms an integral part of the laptop. What was H imported in the present case was a laptop as a stand alone item (unit). Present

dispute relates to the transaction value of the unit. An importer who buys a laptop containing an operating system pays for the laptop as a unit. As stated above, without the operating system, like Windows, the laptop cannot work. The computer cannot open without operating system. In the present case, the respondent has not only imported laptops, it has also imported HDDs on which the operating system was recorded (packaged software) which has been classified by the Department under CTH 85.24. However, when a laptop is imported with in-built preloaded operating system recorded on HDD the said item forms an integral part of the laptop (computer system) and in which case the Department is right in treating the laptop as one single unit imported by the respondent. The Department has rightly classified the laptop as a unit under CTH 84.71, quoted above.

A B C

11. Before concluding it may be pointed out that in none of the decisions cited on behalf of the respondent, the question raised in the present dispute was ever raised. Although laptop is similar PC, the former is more compact. It cannot be assembled as easily as PC. In the present case, the Department has rightly taken the value of the laptop as a unit and it has given the deduction for the value of the software. There is no error in the computation, particularly, when the respondent has refused to give the value of the software to the adjudicating authority despite being called upon to do so.

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12. For the afore-stated reasons, we are of the view that the imported laptops were classifiable under CTH 84.71 whereas operating software recorded on HDD imported as packaged software were classifiable under CTH 85.24 and accordingly Civil Appeal filed by the Department deserves to be allowed, and the impugned judgment of the Tribunal is set aside. There will be no order as to costs.

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S.K.S. Appeals allowed.

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