

(2009) 02 SC CK 0049

In the Supreme Court Of India

Case No : Civil Appeal No. 2447 of 2007

Commr. of Customs (Preventive)

APPELLANT

Vs

Aafloat Textiles (I) Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 16-02-2009

Acts Referred:

Contract Act, 1872 — Section 17

Customs Act, 1962 — Section 111, 114A, 28, 28(1), 28AB

Citation : (2009) AIRSCW 5627 : (2009) 235 ELT 587 : (2009) 5 JT 276 :
(2009) 4 SCALE 94 : (2009) 11 SCC 18 : (2009) 2 SCR 490

Hon'ble Judges : Mukundakam Sharma, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : P.V. Shetty, Arvind K. Shukla, S.N. Terdol, P. Narasimhan, B. Krishna Prasad and B.V. Balaram Das, for the Appellant; S. Ganesh, S. K. Bagaria, V.M. Doiphode, Rajesh Kumar, Tarun Gulati, Jaiveer Shergill, Kishore Kunal, Rony John, Praveen Kumar, M.P. Devnath, Kumar Rajesh Singh, Manish Panda, Praveen Kumar, Himanshu Shekhar, Arunabh Chowdhury, Arijit Bhaumik, Ruby Singh Ahuja and Anupam Lal Das, for the Respondent

Final Decision : Disposed Of

Judgement

Arijit Pasayat, J.—Challenge in this appeal is to the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (in short the 'CESTAT'). Challenge before the CESTAT was to the order of Commissioner of Customs who confirmed the duty demand of Rs. 6,69,40,149/- on 9 consignments of gold and silver imported by M/s Aafloat Textiles (India) Ltd. (Formerly known as M/s Akai Impex Ltd.) u/s 28 alongwith appropriate interest u/s 28AB of the Customs Act, 1962 (in short the 'Act'). The benefit of exemption in terms of Notification No. 117/94-Cus. Dated 27.4.1997 was denied and liability of the goods to confiscation u/s 111(d) and (o) of the Act was upheld. But since the goods were not available, confiscation was not ordered. Penalty equal to duty amount on the importer u/s 114A of the Act was imposed and Rs. 50 lakhs was imposed on Shri Mahendra Shah and Rs. 25 lakhs each on four other appellants

before the CESTAT.

2. Case of the department that the Special Import License (in short 'SIL') purchased by the importer from brokers for clearance of gold and silver was forged and, therefore, was not valid for the consignments in question.

3. Background facts as emerging from the Commissioner's order are that the office premises of one M/s. Gazebo and M/s. Mahavir Corporation, were searched by officers of DRJ and copy of SIL No. 3536539 dated 6.8.1997 issued to M/s. Track Industries, Kanpur, was recovered. The Joint Director General of Foreign Trade, Kanpur informed that no such licence had been issued and that the signature and security seal of their Foreign Trade Development Officer had been forged. The proprietor of M/s Gazebo, Shri R.T. Shah stated on 19.1.1998 that he had purchased the above bogus SIL from one Shri Sushil Kumar Lohia who, in turn admitted that the SIL was given to him by one Shri Manoj Kumar Jain and that he had obtained several bogus SILs from one Naresh Sheth and Shri Dinesh Buchasia, whose residential premises were searched and certain documents were recovered and his statement was recorded, wherein he stated that he had only dealt in 7 SILs which he bought at low premium from one Rajesh Chopra and that the SILs were forged. Shri Shinivas Pannalal Kalantri, General Manager of the importer company stated that gold/silver had been imported under SIL during the year 1996-97 and 1997-98, that one M/s. Lalbhai Trading Co. and two others were the clearing agents; that Shri Prakash Mohta of Finance Department looked after the purchase of SILs. The Chairman of the importer company stated that he looked after negotiation and purchase of bullion and sale of bullion; that Shri Prakash Mohta looked after purchase of licences, clearance of goods, delivery, payment to supplier etc. and that licence brokers through whom SILs were purchased and whom he knew, were Mr. Pachisia and Mr. Ketan Shah. The statement of Shri Prakash Mohta, was also recorded in which he confirmed that he was looking after purchase of SILs for import of bullion and subsequently selling them in the local market. Shri Mahendra Shah stated that he had sold bogus SILs to the importer company. Shri Rasiklal Mehta stated that he and one Atul Garodia met one Shri D.R. Gulati in Bombay who told that he could provide bogus SIL for which he would charge 3% to 4% premium, that Shri Gulati used to provide bogus SILs and Shri Garodia used to sell them in market and give them a premium of 3%.

4. The demand was confirmed under the proviso to Section 28(1) of the Act. The stand of the revenue that since the licenses were forged and were void, the buyer cannot have better title than the seller. CESTAT in appeal was of the view that the appeal could be disposed only on the ground of limitation without going into the merits of the matter. It was observed that there was no evidence to show that the importer had knowledge about the SIL being non- genuine.

5. It was also stated that the period of limitation is not to be reckoned from the date of discovery of the forgery. Accordingly, the demands including the penalty imposed were cancelled.

6. In support of the appeal, learned Counsel for the appellant submitted that since the SIL involved was established to be forged there was no question of denying the extended period of limitation.

7. Learned Counsel for the respondents on the other hand submitted that the department has not established that the buyer had knowledge about the forgery. The mens rea being one of the ingredients to avail extended period of limitation the CESTAT was justified in its conclusions.

8. As noted above, the CESTAT has not gone into the question whether the SIL involved was genuine or not. It was of the view that the department has not established that buyer had knowledge that there was any forgery involved.

9. "fraud" means an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. See *Dr. Vimla Vs. Delhi Administration*, and *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.*, .

10. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. See *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, .

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine

including *res judicata*. See *Ram Chandra Singh Vs. Savitri Devi and Others*, .

12. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. *Perry and Ors. v. Peek* (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in *Khawaja v. Secretary of State for Home Deptt.* (1983) 1 All ER 765, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades.

It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive. See Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, .

1.3. In that case it was observed as follows:

Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to, him or' surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of the fact with knowledge that it was false. In a leading English case William Derry, J. C. Wakefield, M. M. Moore, J. what constitutes fraud was described thus: (All Er p. 22 B-C)

Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false.

14. This aspect of the matter has been considered by this Court in Roshan Deen

Vs. Preeti Lal, ; Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others, ; Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another, .

15. Suppression of a material document would also amount to a fraud on the court. see Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust and Others, and S.P. Chengalvaraya Naidu's case (supra).

16. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav's case (supra).

17. In Lazarus Estates Ltd vs. Beasley , Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (page 722)

18. These aspects were highlighted in the State of Andhra Pradesh and Anr. v. T. Suryachandr Rao 2005 (5) SCALE 621 and Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others,

19. It was for the buyer to establish that he had no knowledge about the genuineness or otherwise of the SIL in question.

20. The maxim caveat emptor is clearly applicable to a case of this nature. As per Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. 2005 at page 721: Caveat emptor means "Let the purchaser beware." It is one of the settled maxims, applying to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased, which is obvious, or which might have been known by proper diligence.

21. "Caveat emptor does not mean either in law or in Latin that the buyer must take chances. It means that the buyer must take care." See Wallis vs. Russell .

22. "Caveat emptor is the ordinary rule in contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist." (See William R. Anson, Principles of the Law of Contract 245 (Arthur L. Corbin Ed.3d. Am. ed.1919) Applying the maxim, it was held that it is the bounden duty of the purchaser to make all such necessary enquiries and to ascertain all the facts relating to the property to be purchased prior to committing in any manner.

23. Caveat emptor, qui ignorare non debuit quod jus alienum emit. A. maxim meaning "Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another. Hob. 99; Broom; Co., Litl: 102 a: 3 Taunt. 439.

24. As the maxim applies, with certain specific restrictions, not only to the quality of, but also to the title to, land which is sold, the purchaser is generally

bound to view the land and to enquire after and inspect the title-deeds; at his peril if he does not.

25. Upon a sale of goods the general rule with regard to. their nature or quality is caveat emptor, so that in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is no warranty of quality arising from the bare contract of sale of goods, and that where there has been no fraud, a buyer who has not obtained an express warranty, takes all risk of defect in the goods, unless there are circumstances beyond the mere fact of sale from which a warranty may be implied. *Bottomley and Another vs. Bannister and Another* ; *Ward v. Hobbs* 4 App Cas 13. (Latin for Lawyers)

26. No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.

27. Whether the buyer had made any enquiry as to the genuineness of the license within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he was purchasing. If he has not done that consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission or commission on his part so as to render silver or gold liable for confiscation.

28. As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation.

29. In view of this finding the other issues raised by the respondent are of academic interest.

30. The appeal is allowed. There shall be no order as to costs.