Commissioner Of Customs, Kandla vs M/S Essar Oil Limited & Ors on 7 October, 2004

Equivalent citations: AIRONLINE 2004 SC 931

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Bench: Arijit Pasayat, C.K. Thakker

CASE NO.:
Appeal (civil) 4299-4305 of 2003

PETITIONER:
Commissioner of Customs, Kandla

RESPONDENT:
M/s Essar Oil Limited & Ors.

DATE OF JUDGMENT: 07/10/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:

J U D G M E N T ARIJIT PASAYAT, J.

These appeals by the Revenue are directed against the common judgment passed by the Customs Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai (in short the 'CEGAT'). By the impugned judgment the CEGAT set aside the imposition of duty, redemption fine, interest and penalty levied under the Customs Act, 1967 (in short the 'Act') levied/imposed on respondent no.1 M/s Essar Oil Limited (hereinafter referred to as the 'assessee'), its officers (Respondents nos. 2 to 4) and officials of the Customs Department (Respondent nos. 5 to 7).

Backgrounds facts as projected by the appellant are as follows:

> Sometime during 1997 respondent no.1 imported plants and machineries worth Rupees 600 crores for its refinery project. These imported goods were stored in private bonded warehouses, one of which is closed. The licences for the warehouses were valid upto 24.11.1999. General bond of Rs.120 crores was executed by respondent no.1 under Section 59(2) of the Act to secure payment of customs duty. Between 18 and 23.2.1999 respondent no.1 submitted 84 ex-bonds bills of entry which were assessed to customs duty at the prevalent rate and corresponding TR-6 Challans for payment of duty were handed over to the assessee.

On 24.2.1999 assessee-respondent no.1 wrote to ICICI Ltd. stating that there was possibility of imposition of duty on refinery goods and requested them to immediately release funds to avoid project cost over- run. On the same day inter office memo was issued by Shri S.R. Aggarwal (respondent no.2) to Shri P.R. Ashok (respondent no.3) stating that ICICI Ltd. had indicated their desire to disburse a sum of Rs.100 crores so that the Countervailing Duty (in short 'CVD') amount to be paid before pronouncement of the Union Budget, 1999. The memo pointed out that the necessary documentation was in process and remittance of the funds by telegraphic transfer to the State Bank of India (SB) Jamnagar would be done immediately thereafter. Respondent no.3 was requested to complete the paperwork with customs authorities.

On 25.2.1999 respondent no.3 wrote a letter to the Superintendent of Central Excise Bonded Warehouse, Jamnagar, requesting him to pass necessary order for "out of charge" for the goods concerned. This letter is of considerable importance in the present dispute. This letter has to be considered along with letter of same date (i.e. 25.2.1999) written by respondent no.3 to Assistant Chief Accounts Officer (Excise & Customs) Rajkot. The controversy in the present matter basically revolved round this document. In the first letter reference was made to the challans issued for payment of duty on the bonded goods and the original acknowledgement of the Assistant Chief Accounts Officer towards payment of customs duty with applicable interest. The details of goods with relevant challans were also enclosed. The payment was made by cheque no.1175298 dated 25.2.1999 for Rs.60,03,85,603 in favour of Assistant Chief Accounts Officer SBECNC in line with the trade notice no.73/85, copy of which was enclosed. It was indicated that action was being taken as per direction of Assistant Commissioner (Technical) at Rajkot. It was further indicated that the payment had to be made at Rajkot office due to banks strike. In the letter dated 25.2.1999 addressed to the Chief Accounts Officer, Excise and Customs, Rajkot, it was indicated that due to banks strike on that day they were depositing the customs duty on the goods at the regular bank. Therefore, they had enclosed cheque no.1175298 dated 25.2.1999. A declaration was made that respondent no.1 had "sufficient bank balance" in its account in State Bank of Saurashtra, Jamnagar on whom the cheque was drawn and same shall be honored and cleared by the bankers "as and when presented by the concerned office". On 25.2.1999 the application was endorsed for acceptance by the Assistant Commissioner and were accepted and processed. Consequently, the warehousing licence was cancelled on the strength of the cheque payment though the goods were not physically moved from the warehouse.

After the banks strike was over, the cheque was deposited for collection at the Rajkot, on 27.2.1999. On the same day at the close of office hour the rate of customs duty was enhanced from nil basic duty to 5% on the Union Budget.

On 1.3.1999 respondent no.1 wrote to his bank that they were arranging for transfer of funds from Mumbai by 2.3.1999. As the funds were not received in the revenue accounts, respondent no.1's

banker at Saurathtra prepared an inter office memo advising appellant's bank at Rajkot that the cheque issued by respondent no.1 had been returned unpaid. However, the memo was not sent to the bank, as respondent no.1 wrote several letters to their banks at Jamnagar requesting that cheque be withheld till funds were arranged by them. On 16.3.1999 finally respondent no.1 arranged funds to cover the cheque amount which was honored and credited to the Government's account on 17.3.1999.

Investigations were carried out by various governmental agencies and respondents 2 to 4 were arrested on 6.5.1999. Their bail application was rejected by concerned magistrate. On 17.5.1999 the Gujarat High Court granted bail to them on the unconditional undertaking by their counsel appearing before the High Court that the amount of enhanced customs duty will be paid in three instalments by 31st July, 1999. On 22.8.1999 a show-cause notice was issued to the respondent no.1-assessee proposing to levy duty on the imported goods under Section 15(1)(c) of the Act. It was alleged that fraud was practised by respondent no.1 in connivance with the other respondents and an attempt was made to defraud revenue and evade duty. Reference was made to the background facts as highlighted above. It was also pointed out that Mr. J.K. Singh, Director of the respondent no.1- company stated that there was no requisition for imported goods in February, 1999. Statement of respondent no.2 recorded on 5.5.1999 showed that funds were expected to be arranged, respondent no.1 decided to make payment by cheque. Respondent no.2 admitted that discussions were held with ICICI Ltd. on 3.2.1999. Funds were not provided by the said financial institution and ultimately the funds were arranged from the Punjab National Bank. Statements of Nitin Bhatt and P.R. Ashok i.e. respondent nos. 4 and 3 respectively were recorded which, inter alia, indicated that respondent no.1 wanted to avoid any adverse impact of the budget. Investigation further revealed that sufficient fund was not there in respondent no.1's account till evening of 24.2.1999. False declaration was made regarding sufficiency of funds on 25.2.1999. Investigation also revealed that one of the departmental officials i.e. respondent no.6 A.K. Thaker had manipulated dates and instead of the actual date of 26.2.1999, he had indicated that the action was taken on 25.2.1999. Statement of Shri L. Ghosh, Chief Manager of State Bank of Saurashtra at Jamnagar indicated that the cheque as issued by respondent no.1 was intended to be returned to the clearing bank at Rajkot and telephonic information to this effect was given to the Chief Manager of the bank at Rajkot. A written notice was prepared. The same was not sent at the request of respondent no.1 and contrary to the established practice and procedure of the bank and governing regulations cheque was not dishonored. The instructions of State Bank of Saurashtra Manual, inter alia, provides and requires that non- payment of clean demand bill must be advised to the purchasing office and advice must be sent by telegram. The advice is to be sent not later than the close of the day following the close of the day following the presentation of the Bill. A departure was made in the present case. The concerned Bank was requested not to dishonour the cheque. As late as on 3rd March, 1999 oral information was given to Customs officials about non-availability of funds. Thereafter on several dates the assessee requested the Banks to delay action at their ends. The trade notice referring to which letter was written to accept cheque was not applicable to the Banks strike as the same was a pre- notified strike and was for two days.

Statement of Mr. Rak Hashiya, of State Bank of Saurashtra, Rajkot was to the effect that normal procedure was to return the cheque on the day it is presented if the funds were not there. His further

statement was to the effect that he had advised N.C. Goplani that the cheque may be retained for two to three days only after both the customs authorities and the respondent no.1 give consent letter, failing which the cheque was to be returned. He was informed on 5.3.1999 that there was no written consent of the customs authorities. The show cause notice referred to the correspondences between respondent no.1 and the bankers. It was alleged that the undertaking in the letter of respondent no.1 dated 25.2.1994 clearly shows fraudulent attempt to misuse the bonafide facilities given in terms of trade notice as the respondent no.1 was fully aware that they had not received the funds at Jamnagar. After referring to the various aspects the investigating authority came to conclude that the duty rate on February 1999 was effectively nil and hence any variation could only be upwards. Though no funds were transferred to the respondent's bank in the evening of 24.2.1999, a letter was issued containing clear mention about availability of funds. The accusations in essence were that there was deliberate mis-declaration to ensure evasion from rate changes. Since the rate of duty was enhanced prior to encashment of cheque, there was liability to pay enhanced rate of duty. The clearance of goods was effected without payment of appropriate duty. There was no requirement of the imported goods by respondent no.1 which created a fiction of deemed duty payment and deemed removal, with the full knowledge that there was non-availability of funds. There was no scope of clearance in terms of Section 68 in the absence of duty being paid. The cancellation of warehousing licence was obtained by fraud as duty had not been deposited. Hence duty payable is covered under Section 16(1)(c) of the Act. Action was taken against the customs officials i.e. respondent nos. 5 to 7 for their alleged abatement in the action and the act of collusion as established by manipulation of records. They had done or omitted to do acts which acts or omissions rendered the goods liable for confiscation. Accordingly, respondent no.1 was required to show cause as to why goods removed contrary to terms of the permission for such removal should not be confiscated under Section 111(j), and since goods were removed on cancellation of licence based on false declaration without payment of duty at the rate prevalent on 17.3.1999, duty shall not be demanded and it was proposed in addition, to levy penalty on respondents 2 to 7 and interest on respondent no.1. The Commissioner framed six issues. They are as follows:

> (i) Whether duty could be treated to have been paid on the 25th February, 1999 (the date of presentation of the cheques by M/s. EOL) in the facts and circumstances of the case;
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> (ii) The date for determination of rate of duty, and whether the Warehouse License could be treated as cancelled as detailed in the impugned show cause notice;
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> (iii) Whether the charge of evasion of duty by malafide intent of wilful misdeclaration, suppression of facts with an intent to evade the payment of duty, etc. as alleged in the show cause notice is established;
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> (iv) Whether the goods are liable to confiscation under Section 111(j) of the Customs Act, 1962;
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> (v) To determine the appropriate penal clause invokable whether penalty against the noticee M/s. EOL is leviable under Section 114 A or Section 112(a)/(b) of the Customs

Act, 1962;

(vi) The extent of involvement of the individual persons vis-

`-vis evidence on record to sustain the charge of collusion on the part of the employees of notice viz. M/s. EOL and the officers of the department as detailed in the show cause notice.

After considering show-cause reply filed by respondent no.1 the Commissioner Customs House, Kandla (in short 'Commissioner') confirmed the demand of duty and also directed confiscation of goods and imposition of penalty. It is to be noted that respondent no.1, inter alia, contended that there was no certainty that the rate of duty will be enhanced and that they acted under a bona fide belief that the funds would be available on 25.2.1996. They also claimed bona fide error of judgment and lack of collusion with officers. The stand was not accepted by the Commissioner. Appeals were filed before CEGAT by the present respondent.

So far as Issue no.1 is concerned, the Commissioner held that the duty could not be treated as paid on 25.2.1999 in view of the mis- declaration about availability of funds. The fact that funds were not available was not disclosed till 3.3.1999, even though concerned respondents had definite and specific knowledge. Commissioner relief upon Banks' specific instructions regarding return of cheques in case of non-availability of funds. Reference was made to the cheque dishonour memo which was prepared but not issued due to request of the assessee. It was concluded that had the assessee correctly disclosed the facts, the application dated 25.2.1999 would not have been accepted.

The CEGAT on the Issue no.1 observed that Commissioner failed to notice about non-applicability of Trade Notice. It was held that there was finding recorded that facility of cheque payment was not available because of false declaration. It was concluded that duty was paid on 25.2.1999 since payment of cheque relates back to the presentation and the cheque was not dishonored.

With regard to Issue no.2, it was observed by the Commissioner that cancellation of warehousing license was obtained by fraud. Reference was made to the undertaking given before the High Court accepting liability to pay duty. Consequently it was held that there was no cancellation under Section 68. Therefore, provisions of Section 15(1)(c) were applicable.

CEGAT held that as duty shall be treated to have been paid on 25.2.1999, requirements of Section 68 were complied with and, therefore, Section 15(1)(b) and not Section 15(1)(c) was applicable. As regards Issue no.3, Commissioner held that charge of evasion of duty by mala fide intent, wilful mis-declaration, suppression of facts was clearly established.

CEGAT held that there was no willful mis-declaration, no evasion or short levy. The declaration was held to have been made under bona fide belief.

Answering Issue no.4, Commissioner held that goods were liable for confiscation under Section 111(j) as deemed removal was contrary to the permission and fraudulent intention was clearly established. However, redemption fine of Rs.20 crores was imposed. CEGAT held that there could

not be any confiscation as goods had been cleared under a permission.

As regards applicability of Section 114A, under Issue no.5, it was held said provision was not invokable. However, penalty of Rs.10 crores was imposed under Section 112(b).

Commissioner held that respondents 2 to 7 were involved in the fraud, in answering Issue no.6. They were held liable to penalty under Section 112(a).

CEGAT set aside the penalties holding that respondent nos.2 to 7 had not committed any breach.

So far as Issue no.3 is concerned, in view of the operative portion of the order of the Commissioner was to the effect that the goods valued at Rs.599,26,00046 was to be confiscated under Section 111(j) of the Act as the imported goods except good worth Rs.73.93 crores which were covered by corporate guarantee. Redemption fine of Rs.20 crores in view of confiscation was imposed. Total demand of Rs.96,26,91.711/- was confirmed under Section 28(1) proviso of the Act as also in terms of statement made on behalf of respondent no.1 before the Gujarat High Court on 17.5.1999. The duty was worked out on the basis of computation in the show cause notice. Penalty of rupees ten crores was imposed on respondent no.1 under Section 112(b) of the Act. Penalty of rupees one crore was levied on respondent no.2 under Section 112(a). Penalty of rupees 25 lakhs and rupees 10 lakhs was imposed on respondents 3 and 4 respectively under Section 112(a) of the Act. Penalty of rupees 5 lakhs was imposed on Shri A.C. Sharma, Deputy Commissioner of Central Excise. Rupees 50,000/- and rupees 25,000/- were imposed as penalty respectively on customs officials i.e. S.P. Chaudhary and Shri K.N. Thakar under Section 112(a) of the Act. Recovery of interest leviable under Section 17(2) and Section 28AB of the Act was directed. Direction was given that deposits made towards duty were to be adjusted against duty and interest liability as determined. As noted above appeals were filed before CEGAT by the present respondents. Their basic stand was that Section 15(1)(c) had no application and it was Section 15(1)(b) of the Act which applied. It was submitted that when the cheque has been cleared and honored payment had to be treated to have been made on the date on which the cheque was handed over to the authority. There was no fraudulent intention involved. Respondent no.1 and its officials acted bona fide on the assurance given by ICICI Ltd. Negotiations for funds were going on since long. Therefore, the order of the Commissioner is not tenable.

The revenue supported the order of the Commissioner. As noted above CEGAT held that the Commissioner had not recorded any finding regarding non-applicability of the trade notice. There was no findings recorded by the Commissioner that the cheque payment facility was not available because of false declaration. The Commissioner only decided the issue as to what constitutes the date of payment. Since the cheque was honored it was to be held that date of payment was on 25.2.1999 though, in fact, it was cleared on 17.3.1999. Requirements of Section 58 were complied with and, therefore, Section 15(1)(b) was applicable and not Section 15(1)(c) as held by the Commissioner. There was no willful declaration and the declaration about availability of funds was made under bona fide belief. The direction regarding confiscation was set aside. The penalties on respondent no.1 and its officials and the customs officials were set aside. It is to be noted that the Tribunal referred to Rules 79 and 80 of the Central Treasury Rules (in short 'Treasury Rules') to

conclude that when the cheque is honored is the date on which cheque was received by the concerned authorities is the date of payment.

In support of the appeals learned Additional Solicitor General submitted that the Tribunal has lightly brushed aside the various points which had been taken note of by the Commissioner. Whether the date to be reckoned is the date of receipt of cheque by the department though it is cleared subsequently is really of no consequence in view of the fact that fraudulent mis-declaration was made about availability of funds, with the clear knowledge that funds were not available. Any act based on fraud vitiates the entire action taken. The CEGAT also failed to notice that the intention of respondent no.1 and its officials is clearly borne out from the fact that they managed to obtain declaration from respondent no.6 as if the documents were cleared on 25.2.1999, when the statements of the concerned witnesses clearly show that it was done on 26.2.1999. The proved manipulation of records further strengthened the department's view. It was pointed out that relevant factual aspects placed by the department before the CEGAT had not been considered. On the other hand it recorded some findings which were based on conjectures and/or surmises. The effect of fraudulent action and the mis-declaration were not considered. On the contrary it was observed that there was no mis-declaration and a bona fide mistake had been committed because of the assurance given by the financial institutions for providing funds. The established position is of manipulation of records to show as if action was taken on 25.2.1999, when in reality the action was taken on 26.2.1999. It not only kept out of consideration the fact that without sufficient funds cheque was given to the customs officials, but also gave a clean chit to the officials on purported ground of absence of practice prevailing in the division. It was, argued that the Tribunal's judgment suffers from non- consideration of relevant materials, consideration of irrelevant materials and recording of findings contrary to the materials on record both on issue of fact and law.

In response, Mr. Dushyant Dave, learned senior counsel appearing for respondent no.1 submitted that the declaration, if any, made about availability of funds was really not relevant in view of the Act, more particularly, Sections 17, 46, 58 and 55. With reference to sub-section (2) of Section 47 it was submitted that consequences for non-payment under Section 46 were laid down. Section 72 deals with the situation when the importer is unable to pay and consequentially interest becomes chargeable. This made the position clear that only consequence of non- payment of duty in time is levy of interest.

The show cause notice itself indicated that the goods were removed on 25.2.1999. There was no wilful mis-declaration. There was a special procedure available when the banks were on strike. Rule 79(1)(b) of the Treasury Rules clearly indicate the date which is to be reckoned for ascertaining the date on which amount is treated to be paid. The mis-declaration aspect is relevant only for the purpose of Section 28 and for considering whether extended period of limitation applies. That issue is not relevant in the present case and only issue is whether Section 15(1)(b) or Section 15(1)(c) is applicable. A factual finding has been arrived at by CEGAT to hold that there was no wilful mis-declaration.

Residually it was submitted that for any unintentional breach penalty is not to be levied. The view of the Tribunal is a possible view and, therefore, no interference is called for. Similar arguments were

advanced by respondent nos. 2 to 4 and the custom authorities (respondents 5 to 7). It was submitted that there was no question of any abetment and/or collusion.

The submissions need careful consideration. It is to be noted that the plea that in view of special statutory prescriptions reference to the trade notice was unnecessary does not appear to have been pleaded or considered by the CEGAT which proceeded only to determine the issue as to on which date the payment shall be reckoned to have been made. The entire case of the revenue was built around the alleged fraudulent acts of respondent no.1 and its officials and the customs officials. According to the revenue it was clearly a case where the declaration was done with fraudulent intention, with planned design to evade duty. Several aspects were highlighted to show that the respondent no.1 and its officials were acting with fraudulent intention. The Tribunal did not even consider the effect of those acts.

By "fraud" is meant 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 v. Delhi Administration (1963 Supp. 2 SCR 585) and Indian Bank v. Satyam Febres (India) Pvt. Ltd. (1996 (5) SCC 550).

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. Changalvaraya Naidu v. Jagannath (1994 (1) SCC 1).

> "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 enures 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 v. Savitri Devi and

> Ors. (2003 (8) SCC 319). "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. Derry 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 Shrisht Dhawan (Smt.) v. M/s. Shaw Brothers, (1992 (1) SCC 534).

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 Derry v. Peek [(1886-90) ALL ER Rep 1: (1889) 14 AC 337 (HL)] 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'."

This aspect of the matter has been considered recently by this Court in Roshan Deen v. Preeti Lal (2002 (1) SCC 100) Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education (2003 (8) SCC

311), Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N. and Another (2004 (3) SCC 1).

Suppression of a material document would also amount to a fraud on the court. (see Gowrishankar v. Joshi Amba Shankar Family Trust (1996 (3) SCC 310) and S.P. Chengalvaraya Naidu's case (supra).

> "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).
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> In Lazarus Estate Ltd. v. Beasley (1956) 1 QB 702, 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) It is not open to respondent no.1 to contend that trade notice is of no consequences when the permission to pay by cheque on out-station bank was given with reference to the trade notice. The effect of the manipulation of records to show as if action was taken on 25.2.1999 and not on 26.2.1999 was also not considered by the CEGAT in the proper perspective.
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> Rules 79 and 80 of the Treasury Rules were relied upon overlooking the effect of the Central Government Account (Receipt and Payment Rules, 1983) (in short 'Receipt Rules') which clearly stipulates as to the relevant date of receipt. Rule 20 is relevant in this regard. Learned counsel for the respondent referred to Rule 8 of Central Excise Rules, 1944 (in short the 'Central Excise Rules'). It was submitted that a Full Bench of CEGAT considered effect of said Rule 8 in Commissioner of Central Excise, Jaipur -1 v. Genus Overseas Electronics Ltd. (2003 (155) ELT 541) and held that due date was the date of payment by cheque even if the cheque is encashed later. Rule 8 really operates in different field together. It has nothing to do with date of receipt. It only provides the mode of payment. It does not and cannot wipe out effect of Rule 20 of the Receipt rules. Otherwise Rule 20 will become dead letter. We need not go into that question in detail because clearly the Rules 70 and 80 of the Treasury Rules are not applicable as they are applicable to situations indicated in Rule 1(a), and have no application to present case.
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> Strong reliance was placed by learned counsel for respondent no.1 on Derry's case (supra). It was pleaded that respondent no.1 had acted with reasonable belief about availability of fund. Merely because funds were not actually released, it cannot be held to be a mis-declaration. It is to be noted that it has to be factually in each case concluded as to whether fraud is established. It would depend on the facts of each case. In the present case even if respondent no.1's stand is accepted at the most there was an assurance to provide funds. The same by no stretch of imagination, equated

with funds already available. There is a gulf of difference between assurance to provide financial assistance and in reality providing finance assistance. In the latter case only there is availability of funds.

The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact; whether a particular act is reasonable or not depends on the circumstances in a given situation. It is often said that "an attempt to give a specific meaning to the word "reasonable" is trying to count what is not number and measure what is not space". The author of "Words and Phrases"

(Permanent Edition) has quoted from In re Nice & Schreiber 123 F.987, 988 to give a plausible meaning for the said word. He says, "the expression "reasonable" is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined".

From the factual scenario described it is clear that respondent no.1 was aware that there was no fund available. In fact, from 3.3.1999 it accepted the position that there was no fund available and was asking for time to arrange funds. This according to us clearly indicated a fraudulent motive and the declaration given was certainly mis-declaration. Therefore, the CEGAT was not right in its conclusions about inapplicability of Section 51(1)(c) to the facts of the case. The demand of duty and order of confiscation by the Commissioner is clearly sustainable.

So far the respondents 2 to 4 are concerned, the Commissioner's findings were as follows:

(1) Respondent No.2- Sri S.R. Agarwal gave instructions from time to time for clearance of all imported goods before pronouncement of Union Budget 1999. There was no requisition from Essar Projects Ltd. (in short EPL) or the contractors for such goods. Incharge of finance portfolio was fully aware of the financial status of the assessee. In spite of his personal knowledge he instructed respondent No.3 (Sri P.R. Ashok) to complete the formalities. The intention to defraud is apparent from his fax message dated 24.2.1999 instructing to clear the goods at the current duty rate and not to expose to any change in the budget. His mala fide intents is apparent from the letters addressed by him to the Chief Commissioner and DRI authorities wherein he had significantly suppressed the fact that cheque had been tendered on the basis of a false declaration regarding availability of funds. All along he stuck to the plea that mere late realization was of no consequence and since cheque was not dishonored duty at post-budget rates cannot be levied.

(2) Respondent No.3-Sri P.R. Ashok was fully aware of the fact about non-availability of funds. But he made a false declaration about sufficiency of funds. The cheque was not on a Bank at Jamnagar, but at Rajkot. This was a part of a well planned plan to perpetuate fraud.

(3) Respondent No.4-Sri Nitin Bhat was in charge of Customs clearance related work. In his letters to the Customs authorities he clearly stated about availability of funds when moving for cancellation of warehouse licence. He also played active part in ensuring that the Bank does not return the cheque.

In view of the aforesaid, it was concluded by the Commissioner that in respect of the imported goods the aforesaid three persons have done or omitted to do acts which acts or omissions have rendered such goods liable for confiscation and they had also abetted in acts which they knew or had reasons to believe that the goods are liable to confiscation under Section 112 (j) of the Act and rendered themselves liable to action under Section 112 (a) of the Act. Accordingly penalties as noted above were levied on the respondents 2, 3 and 4.

As regards the Departmental Officials (respondents 5 to 7) the Commissioner took note of several factors.

(1) As regards Sri S.P. Chaudhuri it was noted that notwithstanding specific direction of Superintendent (Tech), Jamnagar to the effect that date of cancellation should be taken to be the date of "actual removal of goods from warehouse". It was concluded that Sri Chaudhuri failed to ensure "actual removal" for the purpose of cancellation of warehouse licence. All the three officers failed to take note that physical removal of approximately 20,000 Mts. Cargo covered under 84 Bills of Entry from the bonded warehouse could not have been possible in a short span of one day. The officers acted in undue haste and resorted to backdating as accepted by them in their statements. It was noted that the three officers were located far apart from each other. Therefore, processing the files at various stages and/or places on the same day is not practicable. The sequence of processing files confirmed the backdating of documents which was admitted by the officers. The prime responsibility for scrutinizing the relevant documents was on Sri A.C. Sharma who failed to do that. The other officers committed acts of omission under the overall guidance and supervision of Sri Sharma. The plea for protection under Section 155 of the Act was rejected. Penalty under Section 112(a) in respect of each of the officers was levied.

CEGAT did not consider the aberrations highlighted by the Commissioner and in a very cryptic manner dealt with the issues. No plausible reason has been indicated as to why the allegations which are quite serious in nature and the conclusions in relation thereto recorded by the Commissioner were not to be maintained. Only an abrupt conclusion was reached that Sri Thakur and Sri Chaudhuri had absolutely no connection with the acceptance of cheques. There was not even any reference to the allegations regarding accepted backdating or acting contrary to specific directions. Sri Sharma was given a clean chit in view of the finding recorded about the date on which receipt of payment has to be taken. Here again the allegations were not considered in the proper perspective. The findings regarding deemed removal are really inconsequential in the present dispute as the very foundation for removal was based on established fraud. Therefore, it is not necessary in the present dispute to go into the question regarding effect of deemed removal.

The manipulative roles of respondents 2 to 7 have been clearly established. They were clearly active participants in the well-planned deception and fraudulent acts leading to evasion of duty. They had

played major roles in the whole game of fraud and deception. There was clearly willful disregard and deliberate defiance of statutory provisions. Levy of penalty is clearly warranted. Impugned order of CEGAT is set aside and order of Commissioner is restored. The appeals are allowed with no order as to costs.