

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CUSAC No.2/2010 and CUSAA Nos.4, 5 & 6/2011**

% Date of Decision : 7th February, 2011

1. CUSAC No.2/2010

RAHULJEE & COMPANY LTD. ...APPELLANT

Through : Mr. C. Hari Shankar, Advocate

Versus

**COMMISSIONER OF CUSTOMS,
NEW DELHI** ...RESPONDENT

Through : Mr. Mukesh Anand, Advocate.

2. CUSAA No.4/2011

VIKRANT GUPTA ...APPELLANT

Through : None.

Versus

**COMMISSIONER OF CUSTOMS,
NEW DELHI** ...RESPONDENT

Through : Mr. Mukesh Anand, Advocate.

3. CUSAA No.5/2011

**R.B. KHURANA
PROP.
M/S R.S. TRADE LINK** ...APPELLANT

Through : None.

Versus

**COMMISSIONER OF CUSTOMS,
NEW DELHI**

...RESPONDENT

Through : Mr.Mukesh Anand, Advocate.

4. CUSAA No.6/2011

**SANJAY GOYAL
PROP.
M/S ASHOKA METAL INDUSTRIES**

...APPELLANT

Through : None.

Versus

**COMMISSIONER OF CUSTOMS,
NEW DELHI**

...RESPONDENT

Through : Mr.Mukesh Anand, Advocate.

**CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

M.L. MEHTA, J. (*Oral*)

1. By this common order, the aforementioned four appeals are being disposed. At the outset, it may be noted that in the case of Rahuljee & Company (CUSAA No.2/2010), the appeal was admitted on 10th November, 2010, but the substantial question of law remained to be framed. The question of law, as framed in the remaining three appeals as noted hereinafter, shall also be the same in the appeal filed by Rahuljee & Company.
2. It is this question of law which arises in these appeals:
 - (i) In the facts and circumstances of the case, whether the impugned order dated 30th March, 2010 passed by CESTAT confirming the order in Original of the Adjudicating Authority imposing the penalty upon the appellants is sustainable in law?
3. All these four appeals are filed by the importers who got the goods cleared on the basis of licences purchased by them through one, Gautam Chaterjee and these licences had ultimately turned out to be forged and fabricated licences purported to be issued in the names of different licence holders. Therefore, the Department initiated the proceedings against Gautam Chaterjee and his other associates including initiation of proceedings of levy of duty with interest and penalty against the appellants.

4. It was admitted by all the appellants that the advance licences against which they got their goods released were bogus. Consequently, appellant Rahuljee and Company paid the liable duty in respect of the goods imported. However, the liable duty was not paid by the other appellant. Vide the order dated 17th March, 2009, the Adjudicating Authority imposed penalty on the appellants and also other perpetrators.
5. The appellants had filed appeals against the order of the Adjudicating Authority before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) (hereinafter referred as Tribunal). The Tribunal dismissed the appeals of the appellants vide the impugned order of CUSAA No.6/2011.
6. It is against this order of the Tribunal that the appellants have preferred the present appeals. No one appeared for the appellants, Ashok Metal Industries, Kavery Enterprises and R.S. Trade Link. Mr. C. Hari Shankar, learned counsel appeared for the appellant, Rahuljee & Company whereas none appeared for other appellants despite the matter was kept in waiting and called repeatedly during the day. Since the question involved in all these appeals is common, with the consent of the counsel present, we proceed to dispose of the appeals finally.

7. The learned counsel present for the appellant, Rahuljee & Co., has pressed the challenge only in respect of the penalty imposed on the appellant. The main contention of the learned counsel was that appellant was a bona fide purchaser of the advance licence which was issued in the name of Vindas Chemicals Industries Pvt. Ltd. (hereinafter referred as 'Vindas'). Further, he submitted that it was also registered with M/s Nhava-Sheva Custom House, and that before issuing Transfer Release Advice (TRA) by the Customs House, it was obligatory upon them to have verified the genuineness of advance licences. He submitted that since TRA was issued by the Customs House for permitting duty free import of goods under the said advance licence, appellant had no reason to doubt the genuineness of the advance licence and the TRA. Thereafter, he submitted that entire deal was materialized through Gautam Chaterjee who had represented the appellant that the licence had earlier been transferred to Uno Enterprise and therefore at the instance of Mr. Chaterjee, the demand draft representing the commission was made in the name of Uno Enterprise. The additional ground of challenge in the other three appeals is also regarding liability to demand import duty.

8. The learned counsel relied upon the cases of ***Commissioner, Customs v. Leader Values Ltd.*** 2007 (218) ELT 349, ***Commissioner v. Birla VXL Ltd.*** 2008 (227) ELT (A 29), ***H. Kumar Gadecha v. C.C. Ahmadabad*** 2009 (243) ELT 248 and ***Afloat Textiles (India) Ltd. v. Union of India*** 2004 (170) ELT 138 Bombay.
9. We have gone through the record including the grounds of the appeals filed by the appellants. We have seen that cases of all the appellants were decided by the Adjudicating Authority and also by the Tribunal by a common order. The grounds of appeal as taken by the appellants are also common and mainly based on the fact that they were all bona fide purchasers of their respective advance licences through Gautam Chaterjee for consideration which was admittedly paid in the name of Uno Enterprises.
10. It is an admitted case of the appellants that the advance licences in pursuance of which they got TRAs through Gautam Chaterjee were all forged and bogus. We have perused the detailed order of the Adjudicating Authority and also the impugned order of the Tribunal. It is a matter of record that, Manikchand Lalchand Tarker alias Raju and Gautam Chaterjee were apprehended by the officers of the DRI at the Customs House on 1st February, 2000.

Their statements were recorded on different dates. However, Gautam Chaterjee stated that the licences were given to him by one, Manoj Shah and Bipin Shah, and that all these licences are forged and he was aware about these being bogus and since importers were getting benefited because of releasing of the goods without payment of basic Customs duty and he was also benefited, so he acted as a middle-man.

11. Based on the enquiries as conducted by the Department and also the statements of Manikchand Lalchand Tarker and Gautam Chaterjee and others, the Adjudicating Authority came to the conclusion that there were as many as 12 bogus advance licences registered at the Custom House against which TRAs had been issued in favour of number of importers including the appellants. The submission of the learned counsel for the appellants that the appellants had no reason to suspect the genuineness of the licences inasmuch as the TRAs were issued by the Custom House was rightly considered and rejected by the Adjudicating Authority, as also by the Tribunal. Before the Tribunal also, while not disputing that the advance licences were forged, counsel for the appellants submitted that the appellants had no reason to suspect the genuineness of the licences. The Adjudicating Authority

rightly relied upon the un-retracted statement of Gautam Chatterjee under Section 108, Customs Act which was duly corroborated by the statements of Manikchand Lalchand Tarker and also Bipin Shah. The learned Tribunal after discussing the entire factual matrix and the findings of the Adjudicating Authority, in the light of the laws laid down by different judgments, held as under :

“6.1.3 In this case, not only M/s Ashoka Metal Industries, M/s Rahuljee & Co., M/s R.S. Trade Links and M/s Kaveri Enterprises did not take the precaution of ascertaining the genuineness of the advance licence from DGFT’s licence bulletin or DGFT’s website, the following facts indicate that they were aware of the forged nature of the licences

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- (a) The import licences have been purchased through Shri Gautam Chatterjee, an employee of a CHA. No prudent importer would purchase such high value advance licences through a petty employee of a CHA instead of a regular licence broker ;
- (b) Licence premium was paid by demand draft in favour of M/s Uno Enterprises, while the licence holder were different persons – like M/s Super Abrasive Tooling, M/s Supric Chemicals, M/s Oriental Containers etc. which should have raised suspicion.
- (c) The licence premium in these cases is 50% to 75% as against normal premium of around 98% of the duty foregone. The premium was payable only after the clearance of the goods.

In view of the above, we hold that not only extended period under proviso to Section 28(1) is available to the Department for recovery of duty, the importers being guilty of deliberate evasion of duty, are also liable for penalty under Section 114(A) of the Customs Act.”

12. After considering the submissions of the learned counsel for the appellant and the entire material on record, we do not find any illegality or perversity in the findings recorded by the Adjudicating Authority or by the Tribunal. All these findings which have been recorded are based on the inquiry conducted by the department. We cannot appreciate as to why the appellants chose not to verify from the concerned department as regard to the names and particulars of the licence holders. It was also unbelievable that they would have bonafidely or ignorantly chosen to strike a deal with small-time employee, Gautam Chaterjee, who involved in lakhs of rupees. Their bona fides become doubtful in view of the fact that they knew that the licences were in the names of others, whereas the payments were made by drafts of huge amounts representing purchase prices of the advance licences in the name of Uno Enterprises with whom admittedly they had no dealing of any kind whatsoever. Not only this, the payments by way of drafts, cheques, etc. in the name of Uno Enterprises were given to the same person, Gautam Chaterjee

who had arranged for purchase of advance licences for them. Further, the Adjudicating Authority and the Tribunal had rightly recorded that the licence premium paid in these cases was 50%–75% as against the normal premium of around 98% of the duty forgone. The fact that no enquiry regarding the normal premium was made by the Department cannot justify the appellant's stand of having purchased the advance licences bonafide at such a low price. They being the importers are supposed to be knowing about the prevailing normal premium of such licences in the market. Above all, the premium on goods were also paid after clearance of the goods. That itself would have been enough for them to doubt the genuineness of the deals being arranged by Gautam Chatterjee. The importers are invariably supposed to be knowing that the licence premiums are paid in the trade before the clearance of the goods, and that it may be otherwise in some exceptional cases where the parties may be knowing each other or having business dealings, which is not in the case of the appellants.

13. We have considered the aforementioned judgments cited by the learned counsel for the appellant. It may be noted that the cases of ***Commissioner v. Birla VXL Ltd.*** (*supra*) and that of

Commissioner, Customs v. Leader Values Ltd. (*supra*) are entirely distinguishable from the present case inasmuch as those cases related to purchases of licences from the open market on full price in *bonafide* belief of these being genuine. In these cases both the authorities below had recorded, as a matter of fact, that there was nothing to suggest the purchasers having purchased in any manner other than *bonafide*. Similarly, the case of ***Afloat Textiles (India) Ltd.*** (*supra*) was also entirely distinguishable and not applicable to the facts of the present case. This case related to fulfilling of certain export obligations under the licence and it was recorded, as a matter of fact, that the raw materials imported by the licence holders were sold before fulfilling the export obligations under the licence and that even the export proceeds had not been realized. That was a case based on its own facts. Likewise, the case of ***H. Kumar Gadecha*** (*supra*) is also entirely distinguishable from the present case inasmuch as in that case the importers had verified about the licences from the website of the department which appeared as valid thereon and also that they had purchased the licences on the market price. In these circumstances, it was held that the purchasers were *bonafide*. That being so, we do not see that the learned counsel

for the appellant Rahuljee and Company and for that matter other three appellants can derive any benefit from these authorities.

14. With regard to the challenge to this order of Tribunal regarding liability to pay duty by other three appellants, we may note that in the given facts and circumstances as discussed above this cannot be disputed that these appellants were liable to pay import duty as per law.
15. We do not find any illegality in the reasoning recorded by the Tribunal in this regard which is as under :-

“6.1.1 As regards the duty liability, since there is no dispute about the fact that the advance license against which duty free imports of copper/brass scrap have been made by these importers, are forged and had never been issued by DGFT, in view of –

- (a) Hon’ble Madras High Court’s judgment in case of East West Exporters vs. AC, Customs reported in 1993 (68) E.L.T. – 319 (Mad.)
- (b) Hon’ble Calcutta High Court’s judgment in case of ICI India Limited vs. CC, Calcutta reported in 2005 (184) E.L.T. -339 (Cal.), the SLP to Hon’ble Supreme Court against which has been dismissed vide order reported in 2005(187) E.L.T.A-31(S.C), and
- (c) Judgment of Hon’ble Punjab & Haryana High Court in case of CC, Amritsar vs. ATM International reported in 2008 (222) E.L.T. -194 (P&H), the imports would have to be treated as if made without any advance licence and accordingly the customs duty exemption would not be available and since the goods had been cleared by availing full duty exemption, the imports would be liable to pay the duty.

6.1.2 As regards the applicability of extended period for recovery of duty under proviso to Section 28(1) of the Customs Act, 1962, the legal position on this point is now very clear in view of Hon'ble Supreme Court's judgment in case of **CC (P) vs. Aafloot Textiles (I) P. Ltd.** reported in **2009 (235) E.L.T. 587-S.C.** wherein invoking the principle of Caveat Emptor the Apex Court has held that in such cases the extended period for recovery of duty under Section 28 (1) of the Customs Act would be applicable. In this regard, para 23, 24, 25, 26, 27, 28 and 29 of this judgment are reproduced below:-

"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.

24. As the maxim applies, with certain specific restorations, 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 to defect in the goods, unless there are circumstances beyond to mere fact of sale from which a warranty may be implied.

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 licence 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 of 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”

16. In view of the above discussion, we do not find any infirmity or perversity in the findings of the learned Tribunal. Consequently, the question as framed is answered in the affirmative in favour of the Department and against the appellants.

17. These appeals are being decided accordingly.

**M.L. MEHTA
(JUDGE)**

**A.K. SIKRI
(JUDGE)**

FEBRUARY 07, 2011
'Skw/Dev'