

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2958 OF 2020

Essel Propack Limited ... Petitioner
Vs.
Union of India and others ... Respondents

Mr. Prasad Paranjape a/w. Mr. Mihir Mehta and Mr. Jas Sanghavi i/b.
PDS Legal for Petitioner.

Mr. Swapnil Bangur a/w. Mr. J. B. Mishra and Ms. Maya Majumdar for
Respondents.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.**

Reserved on : MARCH 12, 2021

Pronounced on: MARCH 25, 2021

Judgment and Order : (Per Ujjal Bhuyan, J.)

Heard Mr. Prasad Paranjape, learned counsel for the petitioner and
Mr. Swapnil Bangur, learned counsel for the respondents.

2. This case was heard on 24.02.2021 whereafter the case was reserved for pronouncement of judgment on 15.03.2021. But as this Bench was not available from 15.03.2021, the case was listed on 12.03.2021 under the caption 'for direction'. Since the matter was heard, the same was reserved for delivery of order on 12.03.2021.

3. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 28.08.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (CESTAT) rejecting the Miscellaneous Application filed by the petitioner. Be it stated that in the appeal filed by the petitioner before CESTAT being appeal No.E/85319/2018, CESTAT *vide* order dated 27.09.2018 had held that petitioner had made mis-statement and thus practised fraud; therefore the appeal filed by the petitioner was

dismissed. It was for recalling of finding of mis-statement or of fraud by CESTAT in the order dated 27.09.2018 that miscellaneous application was so filed by the petitioner which was not only dismissed by CESTAT *vide* the impugned order dated 28.08.2019 but it also imposed cost of Rs.10,000.00 on the petitioner.

4. Case of the petitioner as pleaded is that it is a company incorporated under the Companies Act, 1956 engaged in the business of manufacturing multi-layered plastic flexible laminated collapsible tubes and multi-layered plastic flexible laminated web classifiable under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985. In the course of excise audit of the petitioner's record carried out during February, 2013 for the period from October, 2010 to September, 2012, the auditors took the view that petitioner had availed ineligible credit of service tax paid on certain input services on the strength of documents not covered under Rule 9(2) of the CENVAT Credit Rules, 2004 (briefly 'the CENVAT Credit Rules' hereinafter). This led to issuance of show cause-cum-demand notice dated 23.12.2015 by the Joint Commissioner of Central Excise, Thane-1 Commissionerate. Amongst other allegations made it was alleged that petitioner had availed wrongful credit of service tax amounting to Rs.36,224.00 for the period from October, 2011 to July, 2012 in respect of labour services used for civil work, shifting of machinery, etc. It was alleged that as the services for which CENVAT credit was availed of was not connected with manufacturing activities of the petitioner, the same could not be termed as input service and hence not admissible.

5. Petitioner replied to the show cause-cum-demand notice on 16.03.2016. In so far the above allegation was concerned, petitioner contended that the credit taken by the petitioner on the disputed labour charges was correctly availed of by the petitioner. A personal hearing was also granted to the petitioner on 16.02.2017.

6. By the order-in-original dated 24.03.2017 passed by the Assistant Commissioner of Central Excise, out of Rs.36,224.00 allegedly wrongly availed of by the petitioner as service tax credit in respect of labour services, adjudicating authority held that petitioner was eligible for CENVAT credit of service tax in respect of three payments i.e., Rs.494.00, Rs.968.00 and Rs.5212.00. Thus, it was held that an amount of Rs.6674.00 was the admissible CENVAT credit out of the claim of the petitioner of Rs.36,224.00 making Rs.29,550.00 as inadmissible CENVAT credit. By the order-in-original, the adjudicating authority also imposed penalty of Rs.4,61,048.00 on the petitioner in addition to levy of interest.

7. Aggrieved by the said order-in-original, petitioner preferred appeal before the Commissioner (Appeals) to the extent the order-in-original was adverse to the petitioner. By the order-in-appeal dated 30.10.2017, Commissioner (Appeals) upheld the order of the adjudicating authority by holding that CENVAT credit on labour charges beyond what was allowed by the adjudicating authority was not admissible to the petitioner. The appeal was partly allowed on other aspects. Appellate authority also held that interest and penalty were rightly levied.

8. Petitioner carried the matter in further appeal before the CESTAT to the extent the appellate order was adverse to the petitioner. It is stated that in the course of the hearing before the CESTAT, counsel for the petitioner submitted two sample invoice copies on the basis of which petitioner had availed CENVAT credit on labour services. Authorized representative of the department raised objection as to the two invoices by contending that those were produced as evidence without permission of CESTAT further pointing out that the words 'labour charges' were inserted in the invoices subsequently. Therefore, an allegation was made that petitioner had practised fraud in converting transportation bill to labour charge bill. This contention of the authorized representative was

accepted by CESTAT and *vide* the order dated 27.09.2018, the appeal was dismissed by holding that filing of the two invoices should be considered as mis-statement or fraud practised by the petitioner and therefore petitioner was not entitled to any relief.

9. Petitioner filed miscellaneous application for expunging the findings of CESTAT on fraud. The miscellaneous application was heard by CESTAT whereafter by the impugned order dated 28.08.2019, the same was dismissed with cost of Rs.10,000.00.

10. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

11. When the writ petition was moved, learned counsel for the petitioner had informed the Court that in so far the tax demand is concerned, petitioner had availed the amnesty scheme called *Sabka Vishwas* (Legacy Dispute Resolution) Scheme, 2019 (briefly 'the scheme' hereinafter) and thereafter the tax dispute has been settled. Grievance of the petitioner was limited to the finding recorded by CESTAT that petitioner had played fraud. When the petitioner had filed rectification application for expunging such remark, the same was dismissed with cost. This Court *vide* the order dated 17.09.2020 thereafter took the view that since the tax liability of the petitioner stood settled under the amnesty scheme, Court would confine its examination to the finding of fraud recorded by CESTAT and the rejection of the rectification application on this point. Relevant portion of the order dated 17.09.2020 reads as under:-

“2. This writ petition has been filed assailing the order dated 28th August, 2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai ('CESTAT' for short) rejecting the rectification application filed by the petitioner.

3. Petitioner had sought for rectification of the order dated 27th September, 2018 passed by CESTAT in Appeal No.E/85319/2018 filed by the petitioner wherein a finding was recorded by CESTAT that Ex.A, B and C filed by the appellant

i.e., the petitioner should be considered as mis-statement or fraud, whereafter the appeal was dismissed.

4. Learned counsel for the petitioner submits that in so far the tax demand is concerned, petitioner has availed the amnesty scheme and the matter has been settled. Grievance of the petitioner is only limited to the finding recorded by the CESTAT that petitioner had played fraud on the court. Against such finding recorded by the CESTAT its application for rectification was rejected by the impugned order with costs.

5. We make it clear that having regard to the settlement of tax liability of the petitioner through the amnesty scheme, we would not examine the grievance or otherwise as to the ultimate decision of the CESTAT. We are issuing notice only on the limited issue on the finding recorded by CESTAT that petitioner in the appeal had played fraud and the rejection of the rectification application on this point.

6. Issue notice, returnable within six weeks.”

12. Mr. Eishvaryesh Bhardwaj, Deputy Commissioner, Division-VI, Central Goods and Services Tax (CGST) and Central Excise, Thane Rural has filed affidavit on behalf of the respondents. After commenting on the merit of the claim of the petitioner it is stated that against the order of CESTAT dated 27.09.2018 whereby the appeal of the petitioner was dismissed, petitioner had filed an appeal before this Court which was registered as Central Excise Appeal (L) No.114 of 2019. However, petitioner withdrew the said appeal on 15.01.2020 on the ground that petitioner had sought settlement under the scheme.

12.1. It is stated that petitioner had filed declaration under the above scheme on 31.12.2019, which was accepted by the designated committee whereafter the discharge certificate was issued to the petitioner on 17.02.2020 for full and final settlement of the tax dues.

12.2. Respondents have contended that petitioner had filed appeal before this Court on 15.10.2019 after passing of the impugned order dated 28.08.2019. When the appeal was withdrawn, the litigation between the parties stood finally concluded. Therefore, nothing survives

in the matter. Filing of the present writ petition after issuance of discharge certificate is not justified as the issue has become purely academic. As such, the writ petition is liable to be dismissed.

13. Mr. Paranjpe, learned counsel for the petitioner submits that tax liability of the petitioner has been finally settled under the scheme and to that extent, petitioner has no grievance. Petitioner is only aggrieved by the finding recorded by CESTAT that it had not only made a mis-statement before it, but had practised fraud. He submits that it was never the case of the department that petitioner had fraudulently inserted the words 'labour charges' in the invoices under consideration at any stage. Claim of the petitioner to avail CENVAT credit on account of labour services was disallowed in part on merit by the adjudicating authority and not on the ground that there was interpolation in the invoices or that fraud was practised by the petitioner. Right from the show cause notice till the order of the Commissioner (Appeals), the related claim of the petitioner was contested and denied by the respondents on merit. As a matter of fact during the hearing before CESTAT it was the counsel for the petitioner who had produced the two invoices to highlight the contention of the petitioner. It was then that the authorized representative made an off the cuff remark that the said two documents were manufactured by the petitioner and acting on such submission, CESTAT held that petitioner had relied upon mis-statement which was a fraud. On that ground, the appeal was rejected. When petitioner sought for rectification of the above by filing miscellaneous application, the same was dismissed by the CESTAT *vide* the impugned order by imposing cost as well.

13.1. Learned counsel for the petitioner submits that no notice was given to the petitioner by the CESTAT before recording a finding on fraud. CESTAT could not have made out a new case of petitioner playing fraud. Without hearing the petitioner recording of finding of fraud by CESTAT is not justified.

13.2. Learned counsel for the petitioner has submitted a convenience compilation containing definition of fraud as appearing in different statutes as well as a number of decisions of the Supreme Court. He, therefore, submits that the finding of fraud recorded by the CESTAT against the petitioner may be deleted and / or expunged by this Court.

14. Mr. Bangur, learned counsel for the respondents on the other hand submits that the writ petition filed by the petitioner is totally redundant as the entire matter pertaining to tax liability of the petitioner has been settled under the scheme. As a requirement under the aforesaid scheme, petitioner had withdrawn the appeal filed by it before this Court against the order of CESTAT dated 27.09.2018. After withdrawal of the appeal whereby the order dated 27.09.2018 had attained finality and after settlement of the tax dues, it is not open to the petitioner to again assail the final findings of CESTAT collaterally by alleging that finding of fraud is not justified. The writ petition is nothing but an academic exercise and, therefore, should be dismissed. He also submits that nothing is on record to show as to whether petitioner has deposited the cost of Rs.10,000.00 as imposed by the CESTAT *vide* the impugned order.

15. Submissions made by learned counsel for the parties have received the due consideration of the Court.

16. Before advertng to the relevant facts, it would be apposite to first deal with the concept of fraud.

17. In Oxford Advanced Learner's Dictionary, 8th Edition, 'fraud' has been defined to mean the crime of cheating in order to get money or goods illegally.

17.1. Black's Law Dictionary, 9th Edition defines 'fraud' to mean a

knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment; a misrepresentation made recklessly without belief in its truth to induce another person to act.

17.2. Section 25 of the Indian Penal Code, 1860 has defined the word 'fraudulently'. It says that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

17.3. Under the Indian Contract Act, 1872, 'fraud' has been defined under section 17. As per this definition, fraud means and includes the acts mentioned thereunder committed by a party to a contract or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to enter into the contract. The acts mentioned in section 17 includes active concealment of a fact by one having knowledge or belief of the fact. While we are in the Contract Act, we may also mention that misrepresentation is separately defined thereunder. As per section 18, representation means and includes- (1) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which without an intent to deceive gains an advantage to the person committing it or any one claiming under him by misleading another to his prejudice or to the prejudice of any one claiming under him; and (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

17.4. In so far the Companies Act, 2013 is concerned, section 447 deals with punishment for fraud. It says that without prejudice to any liability including repayment of any debt under the Companies Act, 2013 or any other law for the time being in force, any person who is found to be guilty of fraud shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and

shall also be liable to fine which shall not be less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud. As per the first *proviso*, where the fraud in question involves public interest, the term of imprisonment shall not be less than three years. As per explanation (i), fraud in relation to affairs of a company or any body corporate includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner with intent to deceive, to gain undue advantage from, or to injure the interests of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

18. From a reading of the above meaning and definition of fraud, it is quite evident that fraud has serious civil as well as criminal consequences. To constitute the offence of fraud there must be intent to deceive. That apart, a finding of fraud is a stigma which is a reflection on the integrity of a person or of a corporate entity.

19. In *Bhaurao Dagdu Paralkar Vs. State of Maharashtra*, (2005) 7 SCC 605, Supreme Court dealt with the expression 'fraud' and its impact. It was held as under:-

“9. 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. ...

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. ...

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*."

20. It is a settled proposition of law that fraud vitiates every solemn act. An order or decree or benefit obtained by playing fraud is a nullity and such an order, decree or benefit can be challenged at any time in any proceeding.

21. However, in *Harjas Rai Makhija Vs. Pushparani Jain*, (2017) 2 SCC 797, Supreme Court highlighted that there must be a specific allegation of fraud. When there is an allegation of fraud, it must be enquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent would be stretching the principle to a vanishing point. Referring to the decision of the Supreme Court in **Bhaurao Dagdu Paralkar** (*supra*) and other cases, Supreme Court held that it is clear that fraud has a definite meaning in law. It must be proved

and not merely alleged and inferred.

22. Takeaway from the above decision is that to constitute fraud there must be an intent to deceive. When an allegation of fraud is made, it must be enquired into. Enquiry would necessarily mean granting reasonable opportunity of hearing to the party accused of committing fraud. Evidence must be led and thereafter fraud must be proved. No conclusion of fraud can be drawn on mere allegation and by way of inference.

23. Having discussed the above, we may once again refer to the relevant facts which have already been taken note of. The basic allegation against the petitioner pertaining to availing of CENVAT credit on account of labour services as could be discerned from the notice to show cause-cum-demand dated 23.12.2015 was that the services for which the CENVAT credit was availed of was not connected with the manufacturing activities of the petitioner. Therefore, such claim was held to be inadmissible. Relevant portion of the notice to show cause-cum-demand is as under:-

“(b) The assessee availed wrong credit of Service Tax amounting to Rs.36,224/- (Rupees Thirty Six Thousand Two Hundred Twenty Four Only) for the period October’11 to July’12 in respect of services labour used for civil work, shifting of machinery, etc. As the services for which the Cenvat Credit is availed is not connected with the manufacturing activities of the assessee, the same cannot be termed as input service and is not admissible. The details of availment of wrong credit are shown in Annexure-B attached to the SCN.”

24. From the above, it is clearly evident that petitioner’s availment of CENVAT credit was being denied by the adjudicating authority on merit and not on the ground that the invoices were manufactured or manipulated. In the order-in-original dated 24.03.2017, claim of the petitioner was partly allowed in the following manner:-

“14:1:a: Here I find that these trolleys and storage platforms are essential for the process of manufacturing and therefore the assessee is eligible for Cenvat Credit of Service

Tax paid of Rs.494/- in respect of these services.

14:2: Regarding fabrication of safety railings they have stated that safety railings are used to ensure the safety of workers around the machines. Section 21 of the Factories Act, 1948 makes it mandatory for the companies to fence any part of the machinery or machinery that is dangerous in kind. Thus usage of safety railings had become statutory requirement of the company. They have relied upon Gujrat High Court judgment in the case of M/s. Ferromatik Milacron India Ltd. Vs. Commissioner of Central Excise Ahmedabad-I (2011) (21) S.T.R.-8 (Guj.). So they have contended that when the service has been received to meet statutory requirement it is covered under the definition of input service and credit of Service Tax paid on the same is available.

14:2:a: Here also I find that this service is essential for manufacturing. Without these railings and safety of workers the manufacturing process cannot be undertaken. Therefore, these services are in or in relation to manufacturing and therefore Cenvat Credit of Rs.968/- in respect of Service Tax paid on these services is allowable to the assessee.

14:3: Regarding Site clearance service they have stated that the said service had been utilized to remove the mezzanine floor in passage. Mezzanine floor is a raised platform that creates a floor like space and can be used for storage of materials. Mezzanine floor in passage had been removed as it got rusted over a period of time and additional storage equipment had been brought in its place. They have thus concluded that this service is used in relation modernization, renovation or repairs of factory. They have further contended that this service is specifically included service in relation to storage upto the place of removal and therefore credit should not be denied.

14:3:a: Here also I agree with the assessee's contention that removing of unwanted and rusted part of the building can be taken as modernization and renovation of factory and therefore find specific mention in the definition of input service. Therefore, the credit of Rs.5212/- availed in respect of this service is admissible to the assessee."

25. Thus, we find that even the adjudicating authority did not make any comment or statement about the veracity of the invoices. The CENVAT credit were partly allowed on merit. Same is the position in the order-in-appeal dated 30.10.2017 passed by the Commissioner (Appeals). It was held as under:-

“6.2. Service of labour used for civil work, shifting machinery

The appellant during the period October, 2011 to July, 2012 availed Cenvat credit on labour services used for civil work of shifting of machinery. The appellant has stated that they availed cenvat credit for shifting of old machinery from its Vasind Unit to Goa Unit i.e. loading of the machinery in the vehicle within the factory premises of the Vasind Unit falls within the definitions of Rule 2(1) & Rule 2(qa)(i) of the Cenvat Credit Rules, 2004 which states as (i) a factory or any other place or premises of production or manufacture of the excisable goods.

I observe that outward transportation mentioned in the definition of input service is in respect of final products and not in respect of capital goods or machinery. The appellant's argument that the cenvat credit was availed in respect of modernization or renovation of factory does not appear to be correct because the same does not have any direct correlation with modernization or renovation of factory. Hence, the credit is not admissible to the appellants. Held accordingly.”

26. When the appeal of the petitioner was heard by the CESTAT, learned counsel for the petitioner furnished sample invoice copies to justify labour charges incurred. It was at that stage that the authorized representative of the department raised objection that such invoices could not have been produced before the CESTAT without permission. It was he who pointed out to the two invoices and alleged that there was insertion of words 'labour charges' to convert transportation bills to labour charge bills. Thus, he alleged that fraud was practised by the petitioner. We find that learned Member of CESTAT inspected the sample invoices whereafter he observed that labour charges were inserted in the two bills dated 06.09.2010 and 06.03.2011 by a different handwriting. Taking the view that it should be considered as mis-statement or fraud, CESTAT held that it would amount to fraud within the definition of the Indian Penal Code. Thereafter, the appeal was dismissed by relying on the judgment of the Supreme Court in *S. P. Chengalvaraya Naidu Vs. Jagannath*, **AIR 1994 SC 853** holding that a person whose case is based on a false suit has no right to approach the Court.

27. When the petitioner sought for rectification of the above finding of fraud by filing miscellaneous application, the same was dismissed by the impugned order dated 28.08.2019. In paragraph 5 of the said order, it is stated that respondent had made submission regarding tampering of the invoices and fraud being practised by the petitioner. Counsel for the petitioner was asked by the CESTAT to respond to such allegation but he did not respond. Therefore, relying on section 73 of the Indian Evidence Act, 1872, CESTAT compared the handwriting and signature on the two invoices and was satisfied that those were tampered with. Thereafter, it was observed that fraud was practised by the petitioner. Thus, the miscellaneous application was rejected with cost of Rs.10,000.00.

28. We have already discussed above the serious consequences which may follow following a finding of fraud. While there cannot be any two opinion that fraud vitiates everything and should be strongly dealt with particularly in a judicial or a quasi-judicial proceeding, Supreme Court in **Harjas Rai Makhija** (*supra*) had sounded a note of caution. Firstly, there must be a specific allegation of fraud being played by a party to the proceeding. When such an allegation is made, it must be enquired into. The party against whom the allegation of fraud is made has to be put on notice and heard. Evidence must be led wherefrom a conclusion can be drawn that there was intent to deceive by the party who is alleged to have committed fraud. It is only thereafter that a finding of fraud can be arrived at. Simply asking counsel for the party alleged to have committed fraud to instantaneously respond to such allegation certainly cannot be approved of. On such a haphazard and hurried basis without any conclusion having been reached as to the intent to deceive, no finding of fraud could have been reached by the CESTAT. Thus, fraud cannot be said to have been proved; it was merely alleged and an inference of fraud was drawn. Therefore, CESTAT was not justified in rejecting the application filed by the petitioner for recalling the finding of fraud and additionally in imposing cost.

29. We had already indicated in our order dated 17.09.2020 which we have extracted above that since the tax dues of the petitioner have been settled under the amnesty scheme, we would refrain from examining the ultimate decision of CESTAT in rejecting the appeal. The examination would be confined to the finding recorded by CESTAT that petitioner had played fraud and the consequential rejection of the rectification application on this point.

30. Having regard to the discussions made above, we are of the view that CESTAT was not justified in passing the impugned order dated 28.08.2019. Consequently, we set aside the said order in its entirety and also expunge the finding of fraud against the petitioner recorded by CESTAT in its order dated 27.09.2018.

31. Writ petition is accordingly allowed to the extent indicated above. However, there shall be no order as to cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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