

Taparia Overseas (P) Ltd. and Another Vs Union of India (UOI) and Others

Court: Bombay High Court

Date of Decision: Jan. 7, 2003

Acts Referred: Customs Act, 1962 "Section 46

Citation: (2003) 1 ALLMR 846 : (2003) 2 BomCR 7 : (2003) 161 ELT 47 : (2003) 2 MhLj 532

Hon'ble Judges: V.C. Daga, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: M. Jaykar and S.R. Garud, instructed by Gagrat and Co. in W.P. Nos. 3343, 3501 and 3603 of 1987, Shiraj Rustomji and T.N. Tripathi, in W.P. No. 3695 of 198, for the Appellant; M.I. Sethna, R. Asokan and K.R. Chaudhari, instructed by T.C. Kaushik, for the Respondent

Final Decision: Allowed

Judgement

V.C. Daga, J.

The legal debate raised in these conjoint petitions centers around common saying from law books, that fraud vitiates

everything. This debate is raised in the petitions filed under Article 226 of the Constitution of India, challenging the action of the Revenue, the

Custom Authorities in withholding the clearance of the goods described as "Polyester Filament Yarn" imported by the petitioners under the licences

acquired and held by them as transferees for value without notice of the alleged fraud.

2. The petitioners are different but the issues involved are identical so a single judgment will dispose of all these writ petitions. We propose to

discuss the facts drawn from Writ Petition No. 3343 of 1987, Taparia Overseas (P.) Ltd. v. Union of India, as the facts involved in all other

petitions are more or less similar except with some minor variations which have no bearing on ultimate decision of these petitions.

3. Brief background facts sketched from the above petition are as under :

BACKGROUND FACTS :

The petitioners had acquired 2 licences both dated 2nd March, 1987 issued under the provisions of Import (Control) Order, 1955 (the "Order"

for short) in favour of one M/s Suraj Textiles Traders, New Delhi, in terms of Appendix 21 of Import/Export Policy, Vol. 1, 1985-88 by the

Deputy Chief Controller of Import/Export, New Delhi, for import of "Polyester Filament Yarn". It had been acquired by the petitioners in terms of

paras 225 and 226 of the Import Export Policy 1985-88 ("the import export policy" for short).

4. The petitioners before acquiring these two licences had written a letter dated 9th April, 1987 furnishing full particulars to the Joint Chief

Controller of Import and Export, Delhi and informing him that they have negotiated for the purchase of the same and sought confirmation as to

whether the licences were issued as per ITC Regulations. It was also made clear that in the event of no reply within 7 days they would finalise

transactions and proceed to open letter of credit. The correspondence made in this behalf is not in dispute.

5. The petitioners did not hear anything contrary from the Joint Controller of I. & E., New Delhi, for quite a long time. Consequently, the

petitioners went ahead and purchased the said licences from M/s Suraj Textile Traders, New Delhi, and got the same transferred in their name.

6. The office of the Joint Chief Controller of Imports and Exports, New Delhi vide its letter dated 31st July, 1987 confirmed the issuance of the

licences as per Appendix 21 of the Import Export Policy 1985-88. By other letters dated 29th June, 1987 and 10th August, 1987 the office of the

Joint Chief Controller of I. & E., New Delhi, expressly confirmed that two licences were issued to M/s Suraj Textile Traders, New Delhi, for

import of Polyester Filament Yarn. These letters and contents thereof are not in dispute.

7. The petitioners had placed orders with foreign suppliers and opened letter of credit in their favour through their bankers Central Bank of India.

The said suppliers caused 3 consignments of 8000 Kgs., 2400 Kgs. and 445 Kgs. of Polyester Filament Yarn and shipped the same on the board

of two vessels under the different Bills of Lading issued by the Shipping Companies. The said vessels arrived at Bombay sometime in the month of

July 1987. The petitioners filed prior IAM along with three prior bills of entry dated 12th and 13th July, 1987 in respect of the three consignments.

8. The goods remained to be unloaded for sometime but ultimately goods were unloaded somewhere in the month of August 1987. The Customs

Authorities inspected these goods on 26th August, 1987 and 7th September, 1987, but did not clear the same, though they found that the goods

imported were as per specification.

9. On 18th September, 1987 the petitioners came to be served with the copy of the order dated 11th September, 1987 addressed to the original

licence holders; whereby the Deputy Chief Controller of I & E, New Delhi had informed suspension of the operation of the licences issued to the

original licence holder in exercise of powers conferred under Clause 9(3) of the Order (as amended).

10. In view of the aforesaid development, the Customs Authorities did not process the Bill of Entry for home consumption. They did not pass any

order u/s 47 of the Customs Act. In other words, the Customs Authorities had decided to withhold the clearance of the said "Polyester Filament

Yarn" imported by the petitioners holding a view that the import was without valid licence. The aforesaid action on the part of the Custom

Authorities withholding clearance of goods imported by the petitioners resulted in invoking writ jurisdiction of this Court under Article 226 of the

Constitution of India, contending that the goods having been validly imported under validly issued licences could not affect the imports made by

them much before the suspension of the licences in question; since suspension would only operate prospectively.

11. This Court whilst granting rule, relying upon para (35) of the judgment of the Apex Court in the case East India Commercial Co. Ltd., Calcutta

and Another Vs. The Collector of Customs, Calcutta, and Chemicolour Agency v. Chief Controller of I.E., 1986 E.C.R. 495 (Cal), prima facie,

finding that the licences were good till the date of suspension and imports being prior to the date of suspension permitted by interim order dated

29-10-1987 clearance of the goods imported by the petitioners subject to petitioners furnishing bank guarantee for CIF value of the goods. The

goods were accordingly allowed to be cleared on the petitioners furnishing bank guarantee.

12. On being noticed, though respondent had promptly appeared but filed their affidavit-in-reply on 13th February, 2002 i.e. after about 15 years.

The main thrust of the contention raised on behalf of the Revenue is that the licences having been obtained by making misrepresentation and

misleading statements by original licence holder which led to the suspension there by order communicated vide letter dated 11-9-1987, passed by

the Joint Chief Controller of I & E, New Delhi. It, ultimately, resulted in issuance of show cause notice dated 11-9-1987 and cancellation of

licences obtained by M/s Suraj Textile Traders, New Delhi, vide order dated 30-11-1987.

13. The revenue in support of their action relied upon judgment of the Apex Court in the case of Fedco (P) Ltd. and Another Vs. S.N. Bilgrami

and Others, . In defence it was pleaded that the entire scheme of control and regulation of imports by licences is on the basis that the licences were

granted on the correct statement of the relevant facts. That basis disappears, if the grant of licence is found to be induced by fraud or

misrepresentation, whether by the licence himself or some other party, in such a case, the basis of grant of licence disappears. Consequently, such

licence cannot be allowed to continue. That the licence obtained by fraud cannot create any legal right in favour of anybody much less in favour of

the transferees for value without notice. That the petitioners cannot be allowed to take advantage of the tainted import licences purchased by them.

That they could not get better title or right than what the original licence holder had. Consequently, it was prayed that all the petitioners be

dismissed with costs and petitioners be directed to pay full import duty at the rate prevailing at the time of import.

SUBMISSIONS :

14. Mr. M. Jayakar learned Counsel opened arguments on behalf of the petitioners and submitted that the petitioners had acquired licences in

question for valuable consideration by paying heavy premium without notice of any fraud alleged to have been played by original licence holder.

The revenue is not disputing that the petitioners, were the bona fide transferees for value. The licences, though were suspended on 11-9-1987, but

prior to that petitioners had filed Bill of Entry for home consumption on 12th and 13th July, 1987 as such their imports cannot be said to be without

licence. In his submission, suspension cannot be retroactive. Reliance was placed on Clauses (9) and (10) of the Order in support of his

contention.

15. Clause (9) thereof provides that the Central Government and Chief Controller of I & E may cancel licence if the same is found to have been

obtained by fraud or misrepresentation. Clause 10 of the said Order provides that no such action of cancellation can be taken against importer or

any other person unless he has been given a reasonable opportunity of being heard. In his submission, the Joint Chief Controller ought to have

given an opportunity of being heard since he was well aware that the petitioners were transferees of the licences, in view of the two letters

addressed by the petitioner to the office of the Joint Chief Controller on 9th July, 1987 and their reply vide their letters dated 29th June, 1987 and

31st July, 1987 confirming the genuineness of the licences in question. The copy of the order of suspension issued by the Deputy Chief Controller

of I & E, New Delhi was marked to the petitioners who were transferees. In the wake of these facts, learned Counsel for the petitioners

emphasised that the authorities passing the suspension order was well aware of the licences of the fact that the petitioners were transferees of the

licences. In spite of this, no notice was given to the petitioners, so as to comply with the provision of Clause (10) of the Order.

16. For the petitioners, it was contended that the Bill of Entry for home consumption was filed with the Customs Authorities much before the

suspension order was served on them. That, as a matter of fact, the order dated 30th November, 1987 purported to be under Clause (9)

cancelling the licences was never served on the petitioners. According to them, it was made known to them for the first time through their counter

affidavit filed on 13-2-2002. Thus, the respondents cannot be allowed to rely upon the order of cancellation which is clearly in breach of principles

of natural justice as such ab initio void. It has got to be ignored for all purposes.

17. Per contra the learned Counsel appearing for the Revenue relied upon judgment of the Apex Court in the case of Fedco (P.) Ltd. urged that if

grant is induced by fraud or misrepresentation, whether by licence holder himself or some other party, then the fact remains that in such a case very

basis of grant disappears and consequently, the licence cannot be allowed to continue. In other words, his submission is that once licence is held to

be obtained by licence holder by fraud, such licence will have to be treated non est right from the date of its grant. It would be ab initio void. Such

licence obtained by fraud cannot create any legal right in favour of anybody much less in favour of the transferees, may have the same for value

without notice of fraud. For the revenue, it was contended that the petitioners cannot be allowed to claim protection or any right if the licences have

been obtained by fraud or misrepresentation. He relied upon common saying that the fraud vitiates everything. He, thus prayed for dismissal of the

petition with costs.

18. In rejoinder, the learned Counsel for the petitioners contends that the judgment in case of Fedco (P.) Ltd. (supra), is not applicable to the facts

of the present case. In his submission in that case, petitioners M/s Fedco (P) Ltd. (supra) itself was involved in practising fraud on the concerned

authorities while obtaining licences. In that view of the matter, the Apex Court observed that whether licensee himself or some other party is

responsible for fraud or misrepresentation, the facts remain that basis of grant of licence disappears. In that light the observation was made that it

would be unreasonable to allow such licences to continue. In other words, continuation thereof was snapped by the Supreme Court but till the

date, it was snapped, it was allowed to operate. The submission is that the judgment of Fedco (P) Ltd. cannot be read out of context.

19. On behalf of the petitioners, it was pointed out that in judgment of Fedco (P) Ltd. (supra), the Apex Court has categorically ruled that if

reasonable opportunity against proposed cancellation of licence has not been given, the order would be an unjustified interference with the

petitioner's right. He further pointed out that Fedco's judgment (para 9) specifies how an action has to be reasonable and how the fair chance is to

be given to the concerned affected party. In the instant case, none of these principles were followed. Admittedly, no notice was given to the

petitioners despite knowledge of the respondents that petitioners were the transferees of the licences in question. In his submission, Clause (9)

does not deal with rendering of any licence void ab initio but merely permits the licence to be cancelled or rendered ineffective. It has no

retroactive operation. Both the cancellation of licence and/or rendering it ineffective can only operate prospectively. It cannot operate

retrospectively.

20. The learned Counsel for the petitioners fairly submitted that the petitioners are not really concerned with cancellation of licence as their imports

have been completed much prior to the suspension of the licences or for that matter cancellation thereof. The learned Counsel for the petitioners

submitted that no doubt Clause (9) of the Order, empowers the Joint Controller of Imports and Export to cancel any licence or to render the same

ineffective; if the same was found to be obtained by fraud or misrepresentation but until passing of such order of cancellation or rendering it

ineffective, the licences have to be treated as good and any bona fide action done prior to the order of suspension or cancellation could not be held

to be bad and illegal. A licence was good till it was avoided. The petitioners while relying upon judgment of the Apex Court in the case of East

India Commercial Co. v. The Union of India (supra) in support of their proposition pointed out that this judgment has been consistently followed

by the Apex Court in all subsequent judgments including that of Union of India and another Vs. Sampat Raj Dugar and another, and the Collector

of Customs v. Sneh Sales Corporation 2000(121) E.L.T. 577. The Apex Court in all the cases have categorically ruled that even a licence

obtained by fraud is at the best voidable and is good until avoided. The contention, therefore, canvassed is that the order in question dated 30th

November, 1987, purports to cancel licence ab initio is not permissible under Clause 9(l)(a) of the Order. In the submission of the petitioners, the

contention canvassed by the respondents, that since the licences were held to be void ab initio, there was no necessity of giving a show cause

notice, is contrary to the principles of natural justice as there is no such concept of any licence being declared void ab initio under the scheme of the

order in general or under Clause (9) thereof in particular.

21. The learned Counsel for the petitioners further brought to our notice that paragraph 226 of the Handbook of Import & Export Procedure

which provides that a transfer of a licence does not require any endorsement or permission from the licencing authority i.e. such transfer is to

govern by the ordinary law. He further pointed out that imports against replenishment were governed by Handbook on Import Export Procedure

1985-88, which were in the nature of administrative instructions issued by the Central Government. As such transfer of the licence was not to be

governed by any statutory provisions but, it was to be governed by common law. It was thus pointed out that as a fact the principles of Law of

Contract were applied by the Apex Court in the case of East India Commercial Co. (supra). In that view of the matter, the submission is that the

licences were good till they were avoided. He, therefore, submitted that a contract or other transaction induced or tainted by fraud is ipso facto not

void, but only voidable at the election of the party defrauded. Until it is avoided, the transaction is valid, so that third party without notice of the

fraud may in the meantime acquire rights and interest in the matter which would be enforceable in accordance with law.

22. The learned Counsel for the petitioners further submitted that imports against replenishment licences were permitted duty free if the importers

produced an Import Replenishment licence when the goods or the materials were imported into India. In the instant case, when the goods were

imported into India, and/or even when the Bills of Entry was filed, neither the licence was suspended nor was the same cancelled.

23. The petitioners further urged that Section 46 of the Customs Act enjoins upon an importer a duty to file a bill of entry for home consumption

upon the import of goods. The importer is required to produce all documents along with the entry made for home consumption. Section 47 of the

Customs Act, the Custom Authorities are required to ascertain that the goods in question are not prohibited and then to make the order for

clearance of the goods. On 12th and 13th July, 1987 the petitioners had filed the Bill of Entry and furnished all the documents relating to the

imports in question including the 2 licences. Right up to 11th September, 1987, there was neither a whisper nor any allegation that the licences

were in any way tainted. In fact, after filing of the Bill of Entry the Joint Chief Controller of Imports & Exports on 31st July, 1987 had informed the

Customs Authorities about the genuineness of the issuance of the 2 licences issued to M/s Suraj Textile Trader. It was further pointed out that on

29th June, 1987 and 10th August, 1987 the Joint Chief Controller of Imports & Exports Office had also confirmed to the petitioners about the

issuance of such licences. As such u/s 47 the proper officer after being satisfied that the goods entered for home consumption were not prohibited

goods (were covered by a licence) and had paid the required duty, out to have made an order directing clearance of goods.

24. The learned Counsel for the petitioners further submitted that satisfaction of the proper u/s 47 is in fact administrative in nature and that the

officer has only to see that the goods in question are not prohibited and that duty is paid thereon. Such an order permitting the goods to go out of

the customs charge does not in any way render the Customs Authorities helpless, if any action is to be taken in future. In his submissions not only

the provisions of Section 28 is available for demanding duty but a notice u/s 124 could be issued not only for confiscating goods but also for

levying penalty u/s 112. He therefore, submitted that although there is no time limit stipulated, but, it is expected that order is to be passed within a

reasonable time. In this case, since at the time when the goods were imported and the import was complete, that too of the goods of which the

import was not of prohibited, as such a subsequent cancellation of the licence could not make the import bad.

25. The learned Counsel for the petitioners at the cost of repetition submitted that for want of show cause notice or an opportunity of hearing to the

transferees the petitioners, order cancelling licence will have to be treated as ab initio void being in breach of principles of natural justice. Though,

he fairly conceded that said issue could be of no relevance in the present case as the order of cancellation was made much after the import, but in

his submission, at any rate, order ab initio cancelling of licences which is clearly in breach of principles of natural justice cannot be allowed to be

put in defence. He placed reliance on the judgment of the Apex Court in *Sinha Govindji Vs. The Deputy Chief Controller of Imports and Exports*

and Others, and *S.L. Kapoor Vs. Jagmohan and Others*, , in support of his contention.

26. Shri Rustomji, learned Counsel appearing for the petitioners in Writ Petition No. 3695 of 1987 adopted all the contentions advanced by Shri

Jayakar, and further submitted that the petitioners in his case are also purchasers of import licences for valuable consideration without notice of the

alleged fraud. He submits that import made by the petitioners in all these petitions have got to be held as legal and valid for the reasons put forth by

Mr. Jayakar, as such all the petitions are liable to be allowed declaring and holding that the action of the Customs Authorities withholding clearance

of the goods was bad and illegal.

CONSIDERATION:

27. Having heard the parties at length and having examined the facts involved in these petitions, it is not in dispute that all the petitioners are

transferees for value without notice of the alleged fraud. The main issue which requires consideration is : to what extent the fraud committed by the

original licence holders have affected the validity of the licences which were in the hands of the transferees for consideration, without notice. At the

relevant time, licences were issued under the provisions of the order, however, transfers thereof were to be governed by the terms of Import

Export Policy of 1985-88, which had no statutory force. Thus, though the grant of licence was to be governed by Statute, but transfer thereof was

to be governed by ordinary law. At the relevant time, under Import Export Policy of 1985-88, the transfers of all the licences were subject to the

compliance of Clauses 225 and 226 thereof, the contents of which are reproduced hereinbelow :

Utilisation of REP licences.

225. The REP licence will be issued in the name of the Registered Exporter only and will not be subject to "Actual User" conditions, Except for

cases covered by paras 195(2), 204, 263(2) and 265(1), a licence holder may transfer the licence in full or part in favour of any other person. The

licence holder or such transferee may import the goods permitted therein but the facility of paragraphs 195(2), 196 and 202 shall not be available

to any transferee, unless the transferee is himself a registered exporter and can satisfy the customs authorities at the time of clearance of the goods,

of his bona fides.

226. The transfer of the licence will not require any endorsement or permission from the licensing authority i.e., it will be governed by the ordinary

law. Accordingly, clearance of the goods covered by a REP licence issued under this policy, will be allowed by the customs authorities on

production by the transferee of only the document of transfer of the licence concerned in his name. Whenever an REP licence is transferred, the

transferor should give a formal letter to the transferee, giving full particulars regarding number, date and value of licence transferred and the name

and address of the transferee, and complete description of the import items for which the licence is transferred. A copy of the transfer letter should

be endorsed to the licensing authority who issued the REP licence, for record. This procedure will also apply to subsequent transfers of the same

licence.

The bare conjoint reading of the above clauses makes it clear that the licences were allowed to be transferred freely without any endorsement or

permission from the licensing authority. Such transfers were to be governed by common law subject to the compliance of the conditions laid down

under Clause 226 referred to above.

28. It is not in dispute that the above procedure was followed by all the petitioners while getting the licences transferred in their respective names.

It is, therefore, clear that transfer of licence was to be governed by ordinary law. The Apex Court, cases had an occasion to deal with one of such

similar issues sought to be raised in these petitions. In the leading case of East India Co. (supra), the Apex Court inter alia, observed as follows :

..... Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable

: It is good till avoided in the manner prescribed by law.

The aforesaid observations of the Apex Court would show that while dealing with the cancellation of licence principles of law of contract were

invoked.

29. In the seventh edition of ""Keer on law of Fraud and Mistake"" in Chapter-I dealing with contract induced by fraud said that such contract is

voidable but not void and observed as under:

It further goes on to say that when the subject matter of transaction is to be governed by the contract, no man is bound by a bargain into which

has been induced by fraud to enter, because assent is necessary to a valid contract, and there is no real assent when fraud and deception have

been used as instruments to control the Will and influence the assent. But a contract or other transaction induced or tainted by fraud is not valid,

but only voidable at the election of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud

may in the meantime acquire rights and interests in the matters which they may enforce against the party defrauded.

The fact that the contract has been induced by fraud does not make the contract void, or prevent the property passing, but merely gives the party

defrauded the right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm to contract and resume

the property. If it can be shown that "the party defrauded" has at any time after knowledge of the fraud either by express words or by unequivocal

acts affirmed the contract, "his election is determined for ever. The party defrauded may keep the question open so long as he does nothing to

affirm the contract." The question always is, has the person on whom the fraud has been practised, having notice of the fraud, elected not to avoid

the contract?, or, has he elected to avoid it? or, has he made no election? As long as he has made no election he retains the right to determine it

either way, subject to this that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in

consequence of his delay the position even of the wrongdoer is affected, he will lose his right to rescind.

30. The aforesaid well settled principle of Law of Contract was applied to the licence obtained by fraud or misrepresentation by the Apex Court in

the case of East India Commercial case (supra) in the following words:

A licence obtained by misrepresentation does not make the licence non est, with the result that the goods should deemed to have been imported

without licence in contravention of the order issued u/s 3 of the Act so as to bring the case within Clause 8 of Section 167 of the Sea Customs Act.

Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable; it is good

till avoided in the manner prescribed by law.

The decision in East India Co. (supra) has been followed in several cases by this Court and also by other High Courts readily available cases are

Chemi Colour Agency and Another Vs. Chief Controller of Imports and Exports and Others, , Bansilal Jesasingh Vs. Union of India and others, ,

K Uttamlal (Exports) Pvt. Ltd. Vs. Union of India, .

31. The view taken in the East India Commercial case has also been followed by the Apex Court in the case of Union of India and another Vs.

Sampat Raj Dugar and another, . In that case, the import licence under which goods had been imported was cancelled before the clearance of the

goods and the goods were sought to be confiscated, inter alia on the basis that there was no valid licence for clearance of the same. The Apex

Court rejected this contention inter alia observing as follows:

The next question is whether the import of the said goods was contrary to law in any manner and whether the said goods is liable to be

confiscated under the Customs Act. The only provisions relied upon by the appellants are Clauses (d) and (o) in Section 111 of the Customs Act.

In our opinion none of these clauses are attracted in the present case. Clause (d) contemplates an import which is contrary to any prohibition

imposed either by the Customs Act or any other law for the time being in force. No such prohibition can be pleaded in this case since on the date

of the import the said goods were covered by a valid import licence. The subsequent cancellation of licence is of no relevance nor does it

retrospectively render the import illegal. (East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta,).

The ratio in the East India Commercial (supra) case was also followed by the Supreme Court in the another recent case of Collector of Customs v.

Sneha Sales Corporation 2000(121) E.L.T. 577 (SC), the facts of which are similar to the facts involved in the present petition. It also involved

import of Polyester Filament Yarn by the transferee of an REP licence. The contention that the cancellation of the licence by the Controller of

Imports and Exports rendered it ab initio void was categorically rejected by the Apex Court in the following words :

Shri Aroop Choudhary, the learned Senior Counsel appearing in support of the appeal, has urged that the Tribunal was in error in interfering with

the order passed by the Collector regarding confiscation of the goods as well as the imposition of penalty. As regards confiscation u/s 111(d) of

the Act the submission of the learned Counsel is that since the licences have been cancelled by Deputy Controller of Imports and Exports ab initio

the Collector was right in holding that there was no valid authorisation for the import of goods and goods have been imported in contravention of

the provisions of the Import (Control) Order, 1955 read with Imports and Exports (Control) Act, 1947. We are unable to accept this contention

of the learned Counsel in view of the law laid down by this Court in East India Commercial Company Ltd. v. Collector of Customs, Calcutta

(supra).

On the above canvas of settled law; recognised by the Apex Court and catena of decisions of the various High Courts including of this Court, it is

clear that a licence obtained by fraud is not void ab initio and is merely voidable. It is good till avoided in the manner prescribed by law.

32. With the aforesaid backdrop, let us now turn to another judgment of the Apex Court in *Fedco (P) Ltd. v. S.N. Bilgrami* (supra) upon which

heavy reliance was placed by Mr. M. I. Sethna learned Senior Counsel for the Revenue. In that case, one of the questions involved was with

respect to the cancellation of licence on the ground that it was obtained by fraud. Before any of the goods could be cleared by the company, the

licence holder, there were served with a notice stating that whereas there was a reason to believe that five licences had been obtained fraudulently,

as such the Government proposed to cancel said licences unless sufficient cause was furnished within stipulated period. In that case, the petitioner

company itself was a licence holder. The petitioner company, the licence holder itself was proved to be a party to the fraud. It was proved that the

licences were obtained fraudulently. Thus, the licences in question were cancelled after giving reasonable opportunity of hearing to the licensee. In

that context the Apex Court observed as under :

..... The entire scheme of control and regulation of imports by licences is on the basis that the licence is granted on a correct statement of

relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licensee himself or some other

party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licence has disappeared. It will

be absolutely unreasonable that such a licence should be allowed to continue.

The comparative dissection of two cases of the Apex Court i.e. *East India Commercial* and *Fedco (P) Ltd.* (cited supra) would reveal that in the

East India Commercial the Court was dealing with the rights of the transferee, who had obtained licence from transferor for value without notice

and was not a party to the fraud or misrepresentation, whereas in *Fedco (P) Ltd.* the Apex Court was dealing with the rights of the licence holder,

who was a party to the fraud proved against it. The Court ruled that the person who himself is guilty of fraud shall never be permitted to avail

himself any benefit of it. The same is a principle of law of contract. If the contract founded in fraud be questioned between the parties to the

contract, in that event, as against a person who has committed fraud and who endeavours to avail himself any benefit of it, the contract is to be

considered as null and void but it does not lay down that fraud intended by one man shall overturn a fair and bona fide contract or transaction with

others. As a matter of fact, this question did not germane in the case of Fedco (P) Ltd. (supra). That was a case between the licensing authority

and the licence holder and the grant of licence was governed by the provisions of the statute. No transfer of licence in favour of third person was

involved. The person holding the licence itself had fraudulently obtained licences. In other words the person holding licence itself was a party to the

fraud and such person could not have been allowed to rely upon principles of Law of Contract, because no contract was involved. The grant was

to be governed by statute since the fraud practised was a legal fraud, consequently, the Apex Court rightly held that once the fraud is established,

whether the licensee himself or some other party is responsible for the fraud or misrepresentation is immaterial but the fact remains that in such

cases the basis of grant of licence disappears.

33. The question involved in the present petitions did not arise for consideration in Fedco's case. The issue whether or not the licence was ab initio

void or was voidable was neither raised nor considered by the Apex Court. It is well settled law that a judgment cannot be read as laying down a

proposition which was never raised before it or considered in rendering its decision.

34. Having regard to the facts of the Fedco's case, we are of the opinion that the decision cited by the learned Counsel for the revenue has no

application in the instant cases.

A decision, as is well-known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well-settled that a

little difference in facts or additional facts may make a lot of difference in the precedential value of a decision see Smt. Ram Rakhi Vs. Union of

India (UOI) and Others, , Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal, , Haryana Financial Corporation and Another Vs.

Jagdamba Oil Mills and Another, and Dr. Nalini Mahajan, Ram Lal Mahajan Charitable Trust, Shri Rakesh Mahajan, Pan Foods Ltd. and Others

and Mahajan Industries Pvt. Ltd. and Others Vs. Director of Income Tax (Inv.) and Others,

35. For the aforesaid reasons, the reliance sought to be placed by the Revenue on the Fedco's case is misplaced, considering the facts involved in

the cases at hand. In our opinion, Fedco's case will not be relevant for decision of these petitions.

36. It is true that legal fraud vitiates everything even judgments and orders of the Court, but the question is : as to what extent this concept can be

imported in commercial transactions, where question of transfer of properties is life and soul of trade. In a mercantile transaction, as well as in

those connected with real properties, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself

possesses. The rule of caveat emptor spells out two exceptions to the rule, one in cases for encouragement of commerce such as sales in market

overt, and other to the transfer of negotiable instruments. Take for example, if the seller has endorsed and delivered to the buyer the Bill of Lading

or any other documents of title to the goods and the buyer has endorsed and delivered it to his sub-buyer, then the sub-buyer, provided he has

taken the document in good faith, as well as for valuable consideration, is entitled to the goods free from any right in the original seller to stop them,

and thus his position is better than that of the original buyer, same is a position of sales in market-overt.

Without attempting to enumerate the various rights which are assignable, either by the express act of the parties, or by the operation of law, we

may observe, generally, the maxim assignatus utitur jure auctoris, i.e. an assignee is clothed with the rights of his assignor is subject to many

restrictions, shortly enumerated hereinbelow. (See Broom's Legal Maxims, Tenth Edition P. 302) assignatus utitur iure auctoris (Hal. Max. p. 141-

-An assignee is clothed with the rights of his assignor.

This maxim applies generally to all property, real and personal, and refers to assigns by act of parties, as where the assignment is by deed; and to

assigns by operation of law, as in the case of an executor. All rights of the assignor in the thing assigned must pass from him to the assignee by

virtue of the assignment, for duo non possunt in solido unam rem possidere. It should be observed, also that the thing assigned takes with it all the

liabilities attached to it in the hands of the assignor at the time of the assignment, except in cases for the encouragement of commerce, such as sales

in market overt, negotiation of promissory notes, bills of exchange, etc., and, in the case of enquiries, where the assignee is a bona fide purchaser

for value without notice.

It is thus no doubt true that as a general rule, if a transaction has been originally founded on fraud, the original vice will continue to taint it, and not

only is the person who has committed fraud is precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has

been some consideration moving from himself. In the cases at hand, it is not in dispute that all the petitioners had obtained licences for valuable

consideration without any notice of the fraud alleged to have been committed by the original licence holders while obtaining licences. If that be so,

the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice

arising out of mercantile transactions, governed by common law and not by provisions of any statute.

In this behalf, we are reminded of the observation of Kings Bench in the case of Master v. Miller 4 T.R. 320 (See English Report Vol. 100 pg.

1042) made by Justice Buller, J., while dealing with the case arising out of contract.

I hold that in this case there is no fraud either express or implied and that, as the plaintiffs have proved that they gave a valuable consideration for

the bill, and that it was endorsed to them by those through whose hands it passed, their case is open to no objection whatever.

But I will suppose for a moment, though the case does not warrant it, that Wilkinson and Cook did mean a fraud; still I am of the opinion that

would not affect the case between the plaintiffs and the defendants. It is a common saying in our law books, that fraud vitiates everything. I do not

quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we

must recollect that the principle which I have mentioned is always applied ad hominem.

He who is guilty of fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that

contract. I agree that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be

considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two

others. Even as between the parties themselves we must not forget figurative language of Lord Chief Justice Wilmot, who said that "that statute law

is like a tyrant; where he comes he makes all void; but a common law is like a nursing father, and makes void only that part where the fault is, and

preserves the rest.

On the above canvas, having examined the well settled established and well recognised concept of law that the effect of fraud is not to render the

transaction void ab initio but renders it voidable at the instance of the party defrauded and transaction continues valid until the party defrauded has

decided to avoid it.

37. Alternatively, let us consider it from another angle assuming that licence comes to an end upon it is suspension and/or cancellation, in catena of

cases, it is laid down that the date of import of goods would be the date on which the bill of entry was presented u/s 46. This legal position is clear

from the decision of the Apex Court as laid down in Union of India and others Vs. Apar Private Ltd. and Others, and Garden Silk Mills Ltd. and

Another Vs. Union of India and Others, The same is the view taken by the Apex Court in Sampat Raj Dayar's case (cited supra). Imports against

replenishment licences were permitted duty free if the importers produced an import replenishment licence the goods or the materials were

imported into India. In the instant cases when the goods were imported into India, and even when the bills of entry were filed, neither were the

licences suspended nor the same cancelled. In all these cases, bills of entry were filed by the petitioners well before the suspension and/or

cancellation of the licences in question, thus the imports were made under valid licences, the goods could not be subjected to levy of customs duty

in the peculiar facts and circumstances of the cases in hand.

In the circumstances, we hold that in all cases at hand, the goods were imported, under valid licences. The goods imported were neither prohibited

nor restricted by or under the Customs Act, as such, it was not open for the Customs Authorities to withhold clearance thereof.

38. Before closing we may briefly notice few more contentions raised by the petitioners. It is canvassed that principles of natural justice and

reasonable opportunity of being heard within the meaning of Clause 10 of the Order have not been extended to the petitioners while suspending the

operation of the licences or rendering them ineffective, especially when the same were held by them as transferees in good faith for value without

notice as such the impugned action of suspension and/or cancellation of licences is not only bad, illegal but ab initio void. We do not think on the

canvas of the view taken by us, this issue canvassed by rival parties needs any consideration in the facts and circumstances of the cases in hand.

We do not propose to dwell on this issue, but we need not be understood to have rejected the contention of the petitions in this behalf. In our

opinion, it is not necessary to consider this issue as the imports in all these cases are much prior to making the licences ineffective. We, therefore,

do not express any opinion on this question canvassed before us.

So far as the exercise of powers u/s 47 are concerned, we only express that the same required to be exercised in a reasonable period depending

upon the facts and circumstances of each. No hard and fast rule in this behalf can be laid down. Other questions raised need no consideration in

the light of the view taken by us in these petitions.

In the result, all the petitions are allowed. Action of respondents, the revenue in all these petitions withholding clearance of goods imported by the

petitioners is declared as bad and illegal, consequently, all imports are held to be legal and valid. There will be an order of prohibition against the

Customs Authorities from proceeding against the petitioners. Rule in all the petitions is made absolute in terms of this judgment with no order as to

costs.