(2012) 08 BOM CK 0033

In the Bombay High Court

Case No : Criminal Application Main No. 78 of 2012

Atchut Mucund Alornekar and Others APPELLANT

Vs

Central Bureau of Investigation/Anti Corruption Bureau RESPONDENT

Date of Decision : 29-08-2012

Acts Referred:

Central Vigilance Commission Act, 2003 — Section 8(1)(a)
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 197, 227, 482
Customs Act, 1962 — Section 108, 14, 14(1), 15(1)(b), 2(25)
Penal Code, 1860 (IPC) — Section 120B, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2), 19

Citation : (2013) ALLMR(Cri) 146 : (2012) BomCR(Cri) 477

Hon'ble Judges : Lavande A.P., J;Bakre U.V., J

Bench : Division Bench

Advocate : S.D. Lotlikar with H. Kankonkar, for the Appellant; Ejaj Khan, S.P.P., for the Respondent

Final Decision : Allowed

Judgement

Bakre U.V., J.—Rule. By consent heard forthwith. By this petition filed u/s 482 of the Code of Criminal Procedure, 1973 and Article- 226 of the Constitution of India, the petitioners have prayed to quash and set aside all proceedings in Criminal Case No. 2/S/2012/B pending before the Court of Judicial Magistrate, First Class at Vasco-da-Gama (Goa) along with the F.I.R. registered on 25/4/2008 by the CBI(ACB), Goa.

2. F.I.R. dated 25/4/2008 was lodged by Shri S.S. Harwalkar, the superintendent of Police, CBI/ACB/Goa. It was alleged that during the period from 2005 to 2006, M/s. Adani Exports Ltd, Ahmedabad imported two consignments of Naphtha and one Consignment of Fuel Oil at Goa Port. The petitioners and others named in the F.I.R. illegally allowed the warehousing of the said consignments in the private Bonded Tank of M/s. Ganesh Benzoplast Ltd., Mormugao, after expiry of licence No. 2/05 on 31/12/2005 and without permission of Assistant

Commissioner of Customs. They did not furnish mandatory joint duty bond, Debit Note, and Invoices of High-Sea Sales for sale of said Naphtha and Furnace Oil to various Indian firms. Thereby, the said Custom Officials and private firms violated Rules 58, 59 and 60 of Customs Act, 1962. The sale was fraudulently shown as on High-Sea Sale basis by M/s. Adani Exports Ltd. as they had imported and stored said consignment in Goa in their name and later on sold to different firms. M/s. Adani Exports Ltd. had declared total value of imported Naphtha as Rs. 15,02,31,759/-and declared this transaction, as "High-Seas Sale". The Retail Invoices and Debit notes prepared by M/s. Adani Exports Ltd. for sale of Naphtha amounted to Rs. 16,89,90,660/ The Customs and other duties should have been levied on total value of retail invoices and debit notes of M/s. Adani Exports Ltd. totaling to Rs. 16,89,90,660/-. Therefore, there had been under valuation of the duty to the tune of Rs. 1,89,65,118/-. It was further alleged in the said F.I.R. that, M/s. Adani Exports Ltd. had declared total value of imported Fuel Oil as Rs. 6,45,87,019/- and had also declared the transaction as "High-Seas Sale" whereas the retail invoices and the debit notes prepared by M/s. Adani Exports Ltd. for sale of Fuel Oil to the said six firms, amounted to Rs. 7,42,73,184/-. These sales were actually on Transfer of Ownership basis and therefore the Customs and other duties, had to be levied on the said total value of Rs. 7,42,73,184/-. Undervaluation of the duty was done to the tune of Rs. 96,86,165/ -. Thus, deliberate total undervaluation was done by the custom officials, to the tune of Rs. 2,86,51,283/- resulting in revenue loss of about Rs. 80 Lakhs, to the Customs Department, against said imported Naphtha and Fuel Oil and corresponding gain to the petitioners and others. The clearances were not supervised by these officials. The above facts reveal cognizable offences punishable u/s 120B r/w 420 of Indian Penal Code (I.P.C.) and section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (P.C. Act, 1988).

3. Charge-sheet which culminated into the Criminal Case No. 2/S/2002/B reveals following case of the respondent:-

4. The petitioners Shri. A. Alornekar, Shri S.P. Bharne and Shri M.L. Sardessai, all Superintendents of Customs, Shri Manoj Kumar, Shri Raj Kumar and Shri Mukund Shinde, all Appraisers of Customs, Shri Atmaram Ghadi, Tax Assistant, M/s. Adani Exports Ltd., Ahmedabad, through Shri Rajesh Adani, M/s. Ganesh Benzoplast Ltd., Vasco Goa, through Shri Ramesh Pilani, M/s. J.A.F. Leitao & Son through Shri Mario Leitao, Shri T.S. Colaco, then Assistant Commissioner of Customs, Goa, Shri Virender Kumar and Shri R.S. Sawant both Deputy Commissioners of Customs conspired among themselves to cause wrongful gain to M/s. Adani Exports Ltd. and M/s. Ganesh Benzoplast Ltd. and wrongful loss to the Government Exchequer, during the period from June, 2005 to September, 2006. In pursuance of the said criminal conspiracy, the above said custom officials, by abusing their official position as public servants, by corrupt and illegal means, in violation of existing rules/norms, allowed the illegal storage and discharge of three consignments (2 of Naphtha and 1 of Furnace Oil) imported by M/s. Adani Exports Ltd. and stored in private Bonded warehouse of M/s.

Benzoplast Ltd. M/s. Adani Exports Ltd. was required to furnish double duty bonds prior to storage of the said consignments jointly with the licensee. As per the terms and conditions of the licence No. 2/2005, the bonded cargo was required to be insured. However, the above requirements were not complied with. M/s. Adani Exports Ltd. sold the total 7438.665 MT imported Naphtha to seven purchasers/ firms and 4626.999 MT Fuel oil to six different firms. The purchasers confirmed during investigation that M/s. Adani Exports Pvt. Ltd. executed Transfer of Ownership Agreements (TOOA). All agreements of sale were undated and the transfer price was mentioned as CIF + 2%. These agreements did not specify whether the sale was on transfer of ownership basis or on High-Sea Sale basis. Out of 86 Ex-Bond Bills of Entry, only 3 TOOA were found on record of Customs. Copies of remaining agreements were collected from the purchasers by the Customs Department during the course of their inquiry and recording of statements u/s 108 of Customs Act and taken on record during investigation.

5. Further charge is that the three consignments were got cleared by filing 88 Ex-Bond Bills of Entry and one Shipping Bill. Two Ex-Bond Bills of Entry were filed by M/s. Adani Exports/M/s. Adani Enterprises in its own name for the short quantity of Naphtha and excess quantity of Furnace Oil. The 86 Ex-Bond Bills of Entry were filed by CHA M/s. J.A.F. Leitao and Son on behalf of the purchaser firms without the permission of the proper officer of Customs. Each Ex-Bond Bill of Entry was filed bearing identical endorsements "Goods sold on High Seas Sale". The sale of goods was fraudulently shown on High Seas Sale basis though the goods have been sold under Customs Bond on Transfer of Ownership Basis. Further, there was no declaration of any name of the purchaser firm on the Into-Bond Bill of Entry, nor was any name of purchaser firm declared on the respective Double Duty Bonds.

6. It is further stated in the charge-sheet that in furtherance of the aforesaid conspiracy, the above said Customs officials knowingly and dishonestly and by gross violation of the standing instruction and rules regarding debiting of Ex-Bond Bills of Entry had debited the quantities on all the Ex-Bond Bills of Entry which were signed and submitted by Shri Mario Leitao, CHA without obtaining the required prior permission of the Assistant Commissioner/Deputy Commissioner as stipulated in the Check list IV in Mumbai Customs Preventive Service Manual and section 2(26) and 2(25) of the Customs Act, 1962. The said Customs officials also dishonestly debited and assessed the Ex-Bond Bills of Entry filed for Home Consumption which were otherwise not eligible for assessment u/s 15(1)(b) after the expiry of warehousing license period or in the absence of licence for warehousing of Fuel Oil. Non compliance in respect of such rules governing the aforesaid goods attract proceedings for confiscation and penalty as per section 72(1)(b) of the Customs Act and Shri Atmaram Ghadi also made dishonest endorsements for the free warehousing period on these Ex-Bond Bills of Entry, knowing that such goods were not entitled for any free warehousing period in the absence of any valid warehousing license u/s 58 of the

Customs Act, 1962 and also in the absence of valid insurance policy on record in respect of storage of Furnace Oil. Further, there were no double duty bonds on record of the Customs as required u/s 59(3) executed by purchasers of Naphtha and Furnace Oil. The Customs officials also accepted the Ex-Bond Bills of Entry fully knowing that the same were not supported by invoices in the name of buyers in whose name the Ex-Bond Bills of Entry for Home Consumption were filed, which was also in gross contravention of Form III notified by Central Board of Excise & Customs (CBEC) vide Notification No. 396-Cus. dated 1st August, 1976. Further, the Customs officials did not take cognizance of the absence of GATT declaration required to be furnished duly signed by the buyers in whose name the Ex-Bond Bills of Entry for Home Consumption were filed. The said Customs officials dishonestly debited, assessed and released the goods in respect of 34 Ex-Bond Bills of Entry over a period of eight months knowing that warehousing license No. 02/05 of M/s. Ganesh Benzoplast Ltd. had already expired on 31/ 12/2005 which was also in contravention of CBEC''s Circular No. 31/97 dated 14.8.97 and Condition No. 08 of the warehousing license which stipulated that:- "The licensee shall apply for the renewal of license not later than two months before the expiry of the present license. In the event of failure to do so, no clearance shall be permissible between the period after the expiry of the license and its renewal."

6. The charge-sheet further states that the said Customs Officials in conspiracy with the private firms had dishonestly debited and assessed the Ex-Bond Bill of Entry No. 295/ 22-11-2006 filed in the name of M/s. Adani Enterprises, Ahmedabad for the short quantity of 117 MT of Naphtha after the commencement of investigation by SUB, Customs, Goa related to this import, whereas there were no goods in the bonded warehouse since December, 2005. The warehousing licence and double duty bond had also expired and there was no request from the bonder for any extension or renewal. The said Customs officials in conspiracy debited and assessed the Ex-Bond bills of entry deliberately and dishonestly in the name of buyers, in the absence of mandatory documents as required in terms of Standing Order No. 7157 dated 8/12/1995 issued by Commissioner of Customs, Bombay i.e. Declaration of Commission being charged by the importer/seller in the contract on Rs. 100/- stamp paper required at the time of filing Ex-Bond Bill of entry.

8. It is further stated in the charge-sheet that pursuant to the aforesaid criminal conspiracy and in furtherance of the acts of Shri Atmaram Chadi, Bond Clerk, the three Appraisers of Customs, Goa namely Shri Manoj Kumar, Shri Rajkumar and Shri Mukund Shinde, by abuse of official position, knowingly assessed and accepted the dishonestly declared undervaluation of the Customs duty leviable on these Ex-Bond Bills of Entry. They knowingly accepted the declared notional commission @ 2% and landing charges @ 1% and thereby facilitated the importer/buyer in avoiding the Customs duty whereas the same was to be assessed on actual sale price (invoice and debit note value) paid by the buyers to M/s. Adani Export Ltd.. In none of these Ex-Bond Bills of Entry, the above said

accused Customs officials had affixed their names and designation stamp in contravention of instruction of Ministry Finance, Department of Revenue, CBEC vide para 2(I) of the letter F.No. C-11016/8/2000-Ad. V dated 12/1/2002. None of these Appraisers had made any endorsement on the reverse of duplicate Ex-Bond bill of entry assessed by them which shows the submission of required enclosures i.e. Invoices, Debit Note, TOOA, GATT declaration etc., with the Ex-Bond Bills of Entry.

9. The charge-sheet further states that in furtherance of the fraudulent assessment and deliberate undervaluation by the three Appraisers, the Ex-Bond Bills of entry were also examined by Shri R.S. Sawant, Shri Virender Kumar, both Deputy Commissioner and Shri T.C. Colaco, Assistant Commissioner of Customs, Goa, who by abuse of their official position, dishonestly and knowingly countersigned such Ex-Bond Bills of Entry and thereby facilitated the pecuniary loss to the Government Exchequer. They deliberately accepted dishonest acts of omissions and commissions on the part of Shri Atmaram Ghadi, Bond Clerk and aforesaid three Appraisers of Customs. Further, the three countersigning Commissioners of Customs (DC/AC) deliberately did not send the Ex-Bond Bills of Entry for post audit which is in gross contravention of the instruction of Ministry of Finance, Department of Revenue, vide File No. 473/291/88-Cus-vii dated 3/10/1988.

10. It is further stated in the charge-sheet that In furtherance of the criminal conspiracy, the three Superintendents of Customs namely Shri Atchut M. Alornekar, Shri M.K. Sardessai and Shri S.P. Bharne, having jurisdiction over Bonded Warehouse of M/s. Ganesh Benzoplast Ltd. during the relevant period, also by abuse of their official position dishonestly and fraudulently allowed the storage of Furnace Oil and delivery of the aforesaid consignments of Naphtha and Furnace Oil in violation of conditions No. 5 and 8 of the Warehousing License No. 02/ 05 dated 13/7/2005 issued u/s 58 of the Customs Act, 1962. It is revealed that the time endorsed on the Merchant Overtime Applications (MOT) attended by these Superintendents does not correspond with the time shown on the weighing slips. Shri S.P. Bharne, Superintendent of Customs had shown his presence at 2 to 4 different locations at the same time on 23 occasions. He had also/allowed for two days the discharge of cargo in the absence of any MOT applications from M/s. Adani Exports Ltd. or any other purchaser parties. Mr. A. Alornekar, Superintendent of Customs had shown his presence at 2 to 4 different locations at the same time on 47 occasions. He had also allowed for 12 days the discharge of cargo in the absence of any MOT applications from M/s. Adani Exports Ltd., or any other purchaser parties. Shri M.L. Sardessai, Superintendent of Customs had shown his presence at 2 to 4 different locations at the same time on 19 occasions and had allowed for 12 days the discharge of cargo in the absence of any MOT applications from M/s. Adani Exports Ltd. or any other purchaser parties. None of the Superintendents had endorsed the actual timings of the supervision for release of cargo on any of the MOT Applications attended by them during the period from 7/7/2005 to 11/9/2006. Further, to screen the

three Superintendents of Customs namely Shri S.P. Bharne, Shri A. Alornekar and Shri M.L. Sardessai, an amount of Rs. 1,01,275/- was recovered from M/s. Ganesh Benzoplast Limited towards arrears of the bonding supervision from 7/7/2005 to 7/ 8/2006 vide challan No. 210/25.9.2007 by Customs Department after the commencement of investigation by SIIB, Custom House, Marmagoa.

11. Case of the petitioners is as follows:

They are employees of the commissionerate of Customs, central Excise & Service Tax, in the state of Goa. The accusations made in the F.I.R. were exclusively based on a report prepared by one S.K. Katiyar along with one Sanjay Choudhari, both of whom were working at the relevant time as Superintendents of Customs, Central Excise and Service tax, Goa. The report prepared by the said S.K. Katiyar was examined by the Deputy Commissioner of Customs (SUB) namely Shri S.S.R. Lobo, the Officer higher in rank to Shri S.K. Katiyar and upon said examination, the Deputy Commissioner of Customs (SIIB), for reasons recorded in his report dated 20/ 6/2008, taking note of the law laid down by the Apex Court, and the observations at N/s. CCCXXII and with reference to the provisions of Customs Act 1962, concluded that mere procedural lapses had been deliberately misrepresented by Shri S.K. Katiyar and Shri Sanjay Choudhary, in order to mislead and thus make a non-existent undervaluation case and that there was no revenue loss to the Government. Though the report submitted by S.K. Katiyar has been made a part of the charge-sheet filed by the respondent, in the Court of the Judicial Magistrate First Class at Vasco-da-Gama, however, the report submitted by Shri S.S.R. Lobo, has been deliberately suppressed, which suppression is mischievous and motivated.

12. The petitioners further say that the Commissioner of Customs and Central Excise then referred the matter to the Chief Commissioner of Customs and Central Excise, Pune, who in his turn forwarded the same to the CBEC, New Delhi. On 3/6/2010 the CBEC issued a circular No. 11, stating that the: valuation adopted by the petitioners for the purpose of levying Customs and other duties, in the instant case, was the correct one. u/s 19 of the P.C. Act, 1988, prior Sanction has to be obtained for the purpose of prosecution of public servants, from the Appropriate Authority. In the present case, prior Sanction had to be obtained from the Central Vigilance Commission (C.V.C.), New Delhi. Accordingly, the matter relating to prosecution of the petitioners, on the basis of the F.I.R. registered on 25/4/2008 and the subsequent investigation, was forwarded firstly to the CBEC, New Delhi for its decision, in the matter of grant of Sanction for prosecution and then to C.V.C., which after joint meeting both of the C.B.I., and the administrative authorities of the Commissionerate of Customs and Central Excise, was of the considered opinion that the matter was not fit for launching of prosecution. The C.V.C. advised initiation of major penalty proceedings, against some of the accused named in the F.I.R. registered on 25/4/2008 as also against Shri Sanjay Choudhary and Shri S.K. Katiyar. The CBEC and the C.B.I. submitted a proposal to the C.V.C. to reconsider its decision, of refusing sanction for the

prosecution, and the C.V.C., having examined the re-consideration proposal, maintained its earlier decision, that the lapses on the part of Custom Officers, were procedural in nature and hence the Commission would stick to its earlier decision, of initiation of major penalty proceedings against the Petitioners. Thereafter, C.V.O., C.N.E.C. and C.B.I., submitted a proposal to the C.V.C. to reconsider its decision. However, the C.V.C. again, upon reconsideration and upon having gone through the proposal, observed that the lapses on the part of the Customs Officials, were procedural in nature and the Commission maintains its earlier advise of initiation of major penalty proceedings against the officials mentioned in the Office Memorandum dated 9/6/2010. This decision of the C.V.C. was conveyed to the CBEC.

13. According to the petitioners, departmental proceedings have already been initiated against the petitioners and others, which are in progress. However, contrary to the advice of the C.V.C., the C.B.I., have mischievously filed a charge-sheet in the Court of Judicial Magistrate, First Class at Vasco-da-Gama (Goa), against the petitioners and others who are implicated in the F.I.R. in respect of offences punishable under sections 120B r/w. 420 of I.P.C., only. No prior Sanction has been obtained by the C.B.I., before filing the said charge-sheet, which has been registered as Criminal Case No. 2/S/2012/ B. The accusation that the petitioners had committed offence punishable under sections 120B r/w. 420 of I.P.C. was squarely interlinked with the offences punishable u/s 13(2) read with 13(1)(d) of the P.C. Act, 1988 and in view of the opinion of the C.V.C., the case was not fit for lodging prosecution and therefore the prosecution of the petitioners, even for the alleged offences u/s 120B r/w. 420 of I.P.C., was not permissible. Even otherwise, the accusations made in the F.I.R. do not spell out any case u/s 420 of I.P.C. Since from the contents of the F.I.R., the offences alleged, arise out of discharge of the duties of the petitioners, as officers of Commissionerate of Customs and Central Excise, u/s 197 of Cr.P.C., prior Sanction of the authorities was mandatory, before lodging prosecution, even in respect of offence punishable u/s 120B r/w section 420 of I.P.C. The Judicial Magistrate, First Class at Vasco-da-Gama (Goa) has proceeded to issue Summons to the petitioners and others, for appearance in the matter, which action is unsustainable. In the circumstances, charge-sheet filed by C.B.I. as also the F.I.R. registered by the C.B.I., on 25/ 4/2008, is liable to be set aside.

14. The Superintendent of Police, C.B.I., A.C.B., Panaji has filed affidavit-in-reply on behalf of the respondent. According to the respondent, Shri Atmaram Ghadi, Tax Assistant, Shri S.P. Bharne, Shri A. Alornekar, Shri M.L. Sardessai, all Superintendents of Customs, Shri Manoj Kumar, Shri Raj Kumar and Shri Mukund Shinde, all Appraisers of Customs and Shri R. Sawant and Shri Virender Kumar, both Deputy Commissioner of Customs and Shri T.S. Colaco, then Assistant Commissioner of Customs, Goa, M/ s. Adani Exports Ltd, M/s. JAF Leitao and Son and M/s. Ganesh Benzoplast Ltd. have deliberately, dishonestly and in abuse of official position as public servants, fraudulently facilitated under valuation of the three consignments aggregating to Rs. 2,97,54,951/- and thereby caused

corresponding wrongful loss of Rs. 84,83,445/- towards Customs Duty and also ineligible free warehousing charges to the tune of Rs. 23,01,954/-. Thus, the Government Exchequer has been cheated by causing wrongful loss of Rs. 1,07,85,399/ to it and corresponding wrongful gain to the accused persons. According to the respondent the above acts and omissions on the part of the petitioners and others constitute offence punishable u/s 120B r/w. 420 of I.P.C.

15. The respondent submitted that the C.V.C. is an advisory body and its opinions are not binding either on the petitioners or on the respondent. Therefore, even if Sanction u/s 19 of P.C. Act, 1988 has not been accorded by the Competent Authority, there is no bar to prosecute the accused persons under I.P.C. offences. Sanction u/s 197 of Cr.P.C. Is required only in case of acts done in official discharge of duty and not otherwise. Hence, no Sanction u/s 197 of Or. P.C was required to prosecute the Customs officials. The petition therefore deserves to be rejected.

16. The petitioner No. 1 has filed affidavit-in-rejoinder thereby denying the averments made by the respondent in the affidavit-in-reply, which are contrary to the case of the petitioners.

17. Mr. S.D. Lotlikar, learned Senior Counsel appearing for the petitioners, argued that u/s 8(1)(a) of the Central Vigilance Commission Act 2003 (C.V.C. Act, 2003), the C.V.C. exercises superintendence over the functioning of the respondent Insofar as it relates to the investigation of the offence alleged to have been committed under the P. C. Act as well as under I.P.C. He pointed out that in the present case, the matter relating to the prosecution of the petitioners was referred to the C.V.C. and the C.V.C. had opined that the matter was not fit for launching of prosecution and that the C.V.C. advised initiation of major penalty proceedings. He further pointed out that the C.B.E.C. and the C.B.I had submitted proposal to the C.V.C. to reconsider its decision of refusing sanction for prosecution, but the C.V.C. having examined the reconsideration proposal maintained its earlier decision. Learned Senior Counsel appearing for the petitioners further pointed out that again the proposal was forwarded to C.V.C. to reconsider its decision but the C.V.C., upon reconsideration again observed that the lapses on the part of customs officials was procedural in nature. The learned Senior Counsel submitted that the departmental proceedings have already been initiated against the petitioners and others and contrary to the decision of C.V.C., the respondent has filed charge-sheet against the petitioners and others. He, therefore, submitted that there was no prima facie case against the petitioners and others for filing the charge-sheet. He further contended that there is no revenue loss at all and, therefore, question of cheating the Government does not arise. He further argued that sanction u/s 197 of Cr.P.C. was required prior to the filing of the charge-sheet and admittedly such sanction has not been obtained. Mr. Lotlikar, learned Senior Counsel for the petitioners relied upon: (i) State of Madhya Pradesh Vs. Sheetla Sahai and Others, and (ii) Costao Fernandes Vs. State at the instance of D.S.P..C.B.I. Bombay, . He, therefore, prayed that the

F.I.R. registered on 25/4/ 2008 by the respondent as well as the proceedings in Criminal Case No. 2/S/2012/B pending before the Court of J.M.F.C., Vasco be quashed.

18. On the contrary, Mr. Ejaz Khan, learned Special Public Prosecutor appearing for the respondent, pointed out that there are only three Gazetted Officers removable by the Central Government who are the petitioners No. 15,16 and one Theodore Colaco whereas, others are all removable by the department He further contended that the acts done by the accused persons are not in discharge of public duties and, therefore, sanction u/s 197 of Cr.P.C. is not required. According to the learned Public Prosecutor, the function of C.V.C. is only to review the progress and supervise the investigation. He argued that during the investigation of the case several illegalities were noticed which have been mentioned in the charge and that the said facts constitutes offence punishable u/s 120B read with 420 of I.P.C. Relying upon State of Orissa Vs. Debendra Nath Padhi, , learned Special Public Prosecutor argued that the documents which have been referred to by the petitioners have not been relied upon by the prosecution and, therefore, they cannot be looked into at the stage of framing of charge. He relied upon State of Maharashtra and Others Vs. Arun Gulab Gawali and Others, and argued that this is not a fit case to exercise the power of quashing the criminal proceedings. According to learned Public Prosecutor, the contention of the petitioners that there is no loss of revenue is not correct. He submitted that the evidence collected by the respondent reveals that there is revenue loss of more than one crore. He therefore urged that there is no scope for exercise of inherent powers u/s 482 of Cr.P.C. to quash the F.J.R. and the Criminal Proceedings.

19. We have carefully perused the records namely the petition, reply, rejoinder and documents.

20. There can be no dispute that at the time of framing charge or taking cognizance, the accused has no right to produce any material and only such material as indicated in section 227 of Cr.P.C. can be taken into consideration by the Magistrate at that stage, in view of "Debendra Nath Padh" (supra). However, the present is a petition u/s 482 of Cr.P.C. and Article 226 of the Constitution. In the case of Rochiram and Sons Vs. Union of India (UOI) and Others, , relied upon by the learned Senior Counsel appearing on behalf of the petitioners, the Apex Court has held it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. It has been further held that in a proceeding taken u/s 482 of Cr.P.C., from order of the Magistrate u/s 227 of Cr.P.C., the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether charge as framed could be maintained. In view of the above, documents namely the report dated 20/6/2008 of the Deputy Commissioner of Customs, Circular No. 11 dated

3/6/2010, of the C.B.E.C. Office Memorandums dated 9/6/2010; 10/3/ 2011 of the C.V.C. the genuineness of which cannot be doubted, can be considered to arrive at a decision whether the charge could be maintained. Be that as it may, the respondent, in the charge has mentioned that in the mean time, CBEC had issued Circular No. 11/2010 dated 3/6/2010 and had clarified the position of valuation of imported goods and had nullified the charges against all the public servants. It is also stated in the charge that the C.V.C. by its letter dated 9/6/2010 opined that this is not a fit case for prosecution under P.C. Act and recommended RDA for major penalty. It is further stated in the charge that again a reconsideration proposal dated 12/7/2010 was sent to C.V.C. for prosecution but C.V.C. opined only for RDA major penalty vide its letter dated 10/3/2011. Thus, the material which the petitioners are relying upon, is already within the knowledge of the respondent.

21. The valuation of the goods is done in terms of section 14(1) of the Customs Act, 1962. Inter alia, it reads as under:

For the purposes of the Customs Tariff Act 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to Indie for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf.

22. Section 8(1)(a) of the C.V.C. Act, 2003 provides as follows:-

8. Functions and powers of Central Vigilance Commission. _ (1) The functions and powers of the Commission shall be

(a) exercise superintendence over the functioning of the Delhi Special Police Establishment insofar as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 (2 of 1988), or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure 1973 (2 of 1974), be charged at the same trial.

From the above provision of section 8(1)(a) of the C. V.C. Act, 2003, it is clear that it applies to the offences under P.C. Act as well as I.P.C. and that C.V.C. exercises superintendence over the functioning of the respondent insofar as it relates to such offences. The opinion given by C.V.C., in the exercise of its powers of superintendence, cannot be simply discarded by the respondent by saying that the same is not binding.

23. In the present case, a report called as "Penultimate Investigation Report" dated 1/ 3/2007 was prepared by the Investigating Officer, Shri S.K. Katiyar, the Superintendent of Customs(P)-SIIB. Mr. S.S. R. Lobo, the Deputy Commissioner of Customs & Central Excise, (SUB), an Officer superior in rank to Shri S.K.

Katiyar, vide his report dated 20/6/2008, upon consideration of the report prepared by Shri S.K. Katiyar; the observations at N/s. CCCXXII; provisions of the Customs Act, 1962 and the law laid down by the Supreme Court concluded that mere procedural lapses had been deliberately misrepresented by Shri S.K. Katiyar and Shri Sanjay Choudhari, in order to mislead and make out a non-existent case of undervaluation and that there was no revenue loss to the Government. It is pertinent to note that the report submitted by Shri S.K. Katiyar has been made part of the charge-sheet filed in the Court of the learned J.M.F.C. at Vasco-da-Gama but the report submitted by Shri S. S. R. Lobo has been suppressed. No explanation for such suppression has been given by the respondent.

24. The records reveal that the then Commissioner of Customs and (Central Excise, referred the matter to the Chief Commissioner of customs and central Excise, Pune, who in turn forwarded the same to CBEC, New Delhi. Upon examination and interpretation of section 14(1) of the Customs Act, 1962, the CBEC issued the Circular No. 11, dated 3/6/2010, which ultimately states that in case of sale of imported goods, after they are warehoused on Indian Territory, the value at which such transaction took place will not qualify as the transaction value, as per section 14 of the Customs Act, 1962.

25. In view of the above Circular, the petitioners cannot be said to have committed any offence. But before issuance of the said Circular, the respondent had already registered F.I.R. dated 25/4/2008. Since prior Sanction u/s 19 of the P. C. Act, was required, the matter was forwarded to CBEC, New Delhi for its decision, in the matter of grant of Sanction for prosecution. By Office Memorandum dated 9/6/2010, the C.V.C., after joint meeting with CBI and the Administrative authorities, advised that this is not a fit case for launching of prosecution and that the Commission advises initiation of major penalty proceedings against Shri Virendra Kumar, the then DC, Shri Manoj Kumar, Appraiser, Shri Rajkumar, Appraiser, Shri Mukund Shinde, Appraiser, Shri R.S. Sawant, Dy. Comm. (Retd.), Shri T.S. Colaco, Asst. Comm. (Retd.), Shri A. M. Alornekar, Supdt. (Retd.), Shri S.P. Bhame, Supdt., Shri Sanjay choudhari, Supdt., Shri S.K. Katiyar, Supdt. and Shri Atmaram Ghadi, Tax Asstt

26. The C.V.O., CBEC and C.B.I., submitted proposal to C.V.C. to reconsider its opinion dated 9/6/2010. By Office memorandum dated 10/3/2011, the C.V.C. after going through the proposal observed that the lapses on the part of customs officials were procedural in nature and hence the commission reiterates its earlier advice of initiation of major penalty proceedings against the said officers.

27. We are of the view that the interpretation of section 14(1) of the Customs Act, 1962 done by CBEC, by way of Circular No. 11 dated 3/6/2010, is correct. The petitioners and others cannot be held to have committed any offence by making deliberate under-

valuation of goods and consequent revenue loss to the Government.

28. The main lapses mentioned in the charge are as follows:

(a) Warehousing Licence No. 02/2005 of M/s Ganesh Benzoplast Ltd. had expired on 31/ 12/2005;

(b) Illegal storage of Furnace Oil in the tank licensed for storage of Naphtha;

(c) Double duty bond not furnished jointly by both the parties namely M/s Adani Exports Ltd. and M/s. Ganesh Benzoplast Ltd.;

(d) No insurance cover for the product stored.

(e) MOT for the services of the officers not charged properly;

(f) Fresh double duty bond u/s 59(3) of the Customs Act not furnished by third parties;

(g) For storage of Furnace Oil in tanks of Naphtha, the initial interest free period of 90 days could not have been allowed;.

(h) The sale of goods was fraudulently shown as on high sea sales basis though the goods were sold under Customs Bond on Transfer of Ownership basis and notional commission @ 2% and landing charges @ 1% were accepted. There was no declaration of any name of the purchaser firm on the Into-Bond Bill of Entry nor the name of purchaser firm was declared on the double duty bonds.

(I) Absence of GATT declaration;

(j) Undervaluation of Furnace Oil cleared vide Into Bond Bill Entry No. 480/25-10-05 to the tune of Rs. 1,01,02,485/- for which the officer sent DRI-2 and DRI-4 projecting the improprieties and undervaluation angle.

(k) Improprieties of earlier two imports of Naphtha covered by Into Bond Bill of entry Nos. 568/29-7-05 and 618/30-6-05.

29. All the above alleged lapses were duly considered by the Deputy Commissioner of Customs(SIIB) in his report dated 20/6/08 and he has observed that these are all procedural lapses. While summing up, the Deputy commissioner, in his report dated 20/ 6/08 has observed that there is no revenue loss but in fact this has resulted in collection of excess revenue on account of enhancement of value by 2%. He has observed that the lapses/mistakes in this case are of technical nature and not mala fide and there is no intention to evade payment of duty. Lastly, the Deputy Commissioner has observed that the mentioned procedural lapses have been misrepresented by Shri S.K. Katiyar and Shri Sanjay Choudhari in order to mislead in making a non-existent undervaluation case.

30. In our considered opinion, the various lapses/irregularities brought forth in the charge-sheet do not disclose offence punishable u/s 420 of I.P.C. They may give rise to grounds for initiating disciplinary proceedings. Admittedly, disciplinary proceedings have been initiated against some of the petitioners.

30. Admittedly, the F.I.R. was registered under sections 120B read with 420 of I.P.C. and sections 13(2) read with 13(1)(d) of the P.C. Act. All the petitioners are public servants. u/s 19 of the P. C. Act., prior sanction of the Appropriate Authority was required to prosecute the petitioners. In the present case, the prior sanction had to be obtained from the C.V.C., New Delhi. The allegations are the same for offences under I.P.C. and under P. C. Act. As already stated earlier, the C.V.C. had declined sanction stating that the matter was not fit for launching of prosecution. As has been argued by the learned Senior Counsel appearing for the petitioners, the offences punishable under sections 120B r/w. 420 of I.P.C. are interlinked with the offences punishable under sections 13(2) read with 13(1)(d) of the P. C. Act. The offences u/s 120B r/w. 420 of I.P.C., are not separate or independent accusations. Therefore once the sanction u/s 19 of the P. C. Act was refused by the Competent Authority and the said Competent Authority found that the matter was not fit for launching prosecution, the respondent could not have laid charge-sheet against the petitioners u/s 120B r/w. 420 of I.P.C., by conveniently dropping section 13(2) read with 13(1)(d) of P.C. Act, Again, the petitioners No. 15 and 16 are the public servants removable by the Central Government, though others are removable by the department. The allegation against them is that they abused their official position as public servants. The act or omission alleged to have been performed by the said petitioners is in the course of their service and as part of their duty and is official in nature. In the case of "Sheetla Sahai and ors." (supra), the Apex Court has held that for the purpose of attracting section 197 of Cr.P.C., it is not necessary that the public servants must act in their official capacity but even where the public servants purport to act in their official capacity, the same would attract the provisions of section 197. Therefore, prior sanction u/s 197 of Cr P.C. was required to be obtained insofar as the petitioners Nos. 15 and 16 are concerned.

31. In our considered opinion, this is a fit case where in order to meet the ends of justice and to prevent the miscarriage of justice, the F.I.R. and the proceedings in Criminal Case No. 2/S/2012/B pending in the Court of J.M.F.C. at Vasco-da-Gama as against the petitioners are liable to be quashed and set aside. No other view is possible. In the result, the petition is allowed. The F.I.R. registered on 25/4/2008 by the C.B.I.(A.C.B.) Goa and the proceedings in the Criminal Case No. 2/S/2012/B pending in the Court of the learned J.M.F.C. at Vasco-da-Gama, Goa, against the petitioners herein are quashed and set aside.