(2010) 11 DEL CK 0251

In the Delhi High Court

Case No : Writ Petition (C) 5013 of 2010

Union of India (UOI) and Others APPELLANT

Vs

Harsh Vardhan Chauhan RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 14
Central Civil Services (Conduct) Rules, 1964 — Rule 3(1)
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 111, 112, 113, 114, 129A
Penal Code, 1860 (IPC) — Section 325

Citation : (2011) 176 DLT 284 : (2011) 183 ECR 25 : (2011) 270 ELT 364

Hon'ble Judges : Siddharth Mridul, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.V. Sinha, A.S. Singh and R.N. Singh, for the Appellant; Kailash Vasdev Priyadarshi Manish and Anjali Manish, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—In the financial year 2004-2005, two companies namely Rajesh Exports Limited (hereinafter referred to as "REL") and Adani Exports Limited (hereinafter referred to as "AEL") obtained Advance Licenses from the office of The Directorate General of Foreign Trade (hereinafter referred to as "DGFT") under the provisions of Chapter 4 of Foreign Trade Policy 2004-2009 and paragraph 4.56.1(b) of Handbook of Procedures authorizing them to effect duty free import of gold bars having 99.5% purity, with an obligation to manufacture and export gold jewellery studded with synthetic, semi-precious and imitation stones having 7% value addition. On the basis of advance licenses granted to them, REL and AEL imported duty free gold, manufactured the final product and exported the same; as claimed by them and in respect whereof they filed the necessary documents with the concerned department.

2. On 11.02.2005, DGFT issued policy circular No. 18/2004-9, which reads as under:

Sub: Minimum Value addition norms and calculation of value addition for the studded jewellery items.

Letters have been received from the licensing and customs authorities about the appropriate minimum value addition required for the export of studded gold/ silver/platinum jewellery and how the value addition for such export is to be calculated.

Handbook of Procedures Volume (2004-09) contains clear provisions regarding the above. These are reiterated for clarity.

Minimum Value Addition

The studded jewellery items falls under Para 4.56 I(a) of Handbook of Procedures Volume I (2004-09), and accordingly the minimum value addition required for studded gold/silver/platinum jewellery of all types is 15%.

How to calculate Value Addition

Para 4.68 of the Handbook of Procedures Volume I (2004-09) is clear about how the value addition is to be calculated. It is reproduced here for ready reference.

Value Addition - Under the scheme for export of jewellery, the value addition shall be calculated with reference to the CIF value of gold/silver/platinum which shall be equivalent to the total outflow of foreign exchange on account of gold/ silver/platinum content in the export product plus the admissible wastage. Wherever gold on loan basis has been given, the CIF value shall also include interest paid in free foreign exchange to the foreign supplier.

The above Para does not talk about CIF value of the imported gold only, rather it talks about total outgo of foreign exchange with reference to the gold content in export product plus the admissible wastage.

On the basis of above Para it is reiterated that the CIF value of gold will be equivalent to the total outflow of foreign exchange on account of gold content in the export product plus the admissible wastage and this will include imported gold and gold procured from other sources used in the export product.

3. Being aggrieved by the aforesaid circular issued by DGFT, REL filed a petition bearing No. 7256/2005 (GM-RES) under Articles 226 and 227 of Constitution of India before High Court of Karnataka, seeking quashing of the said policy circular and sought issuance of a direction to DGFT to redeem the licenses in respect of which REL had completed exports in accordance with Foreign Trade Policy 2004-2009 by achieving the required value addition. In the said petition, it was contended on behalf of REL that studded gold jewellery items fall within paragraph 4.56.1(a) of Handbook of Procedures Volume I (2004-09) and therefore minimum value addition required for studded gold jewellery items is 7%; that they had utilized gold which was purchased locally from the open market in manufacturing studded gold jewellery items and that the value of local gold should also be taken into consideration in determining the value addition in

terms of the policy circular dated 11.02.2005.

4. Vide judgment and order dated 15.06.2005, a learned Single Judge of the High Court of Karnataka allowed the writ petition filed by REL and directed DGFT to redeem the licenses in respect of which REL had completed exports in accordance with the Foreign Trade Policy 2004-2009 by achieving required value addition of 7% under paragraph 4.56.1(b).

5. Aggrieved by the judgment and order dated 15.06.2005 passed by the learned Single Judge of the High Court of Karnataka, DGFT filed an appeal bearing No. 1252/2005 u/s 4 of Karnataka High Court Act together with an application seeking stay of the operation of the impugned judgment dated 15.06.2005. Needless to state the appeal was before a Division Bench of the High Court of Karnataka.

6. Vide order dated 20.09.2005, the Division Bench admitted the aforesaid appeal for hearing but declined to grant any stay as sought for. It is thus apparent that the mandamus issued by the learned Single Judge was capable of being given effect to notwithstanding the appeal pending before the Division Bench.

7. On 18.11.2005, Commissioner of Customs, Bangalore issued a show cause notice to REL and AEL, inter-alia, alleging that they have evaded custom duty in sum of Rs. 54,64,31,672/- by wrongly declaring exported items as studded gold jewellery/CE bangles instead of gold scrap and not achieving required value addition of 15% in the exported items as per para 4.61 of Handbook of Procedures of Foreign Trade Policy.

8. On 21.12.2006, the Chief Commissioner Customs issued an Office Order, relevant portion whereof reads as under:

At the Chief Commissioners Conference held on 15th and 16th December, 2006, the Member (Customs) desired that a Work Plan should be chalked out for disposal of pendencies in key areas. Accordingly, I have devised a Work Plan, which is enclosed herewith. The disposals are time-bound and the Member has stated that performance in these areas will be taken into account for assessing the Zonal/Commissionerate performance for the year.

I would therefore request you to make all out efforts to see that the time schedule for disposals is adhered to and disposals in all key areas are maximized.

Work Plan for Disposal of Pendency in Key Result Areas

1. Adjudication

....

WORK PLAN: The priority for disposal will be for cases pending over one year, cases involving revenue over Rs. one crore and cases pending over six months. The plan for disposal is as under:

All cases over one year to be disposed of by 31-12-2006.

All cases involving revenue over Rs. 1 crore by 31-3-2007 with a minimum disposal of six cases per month.

50% of the cases pending over six months to be disposed of by 31-3-2007.

....

9. Disposing of the show cause notice, vide order dated 31.01.2007, the Respondent who was then posted as Commissioner Customs, Bangalore determined that the department has not been able to prove the charges leveled by it against REL and AEL in the show cause notice dated 18.11.2005 and thus consequently the demand of customs duty raised in the said show cause notice was dropped. The operative portion of the order dated 31.01.2007 reads as under:

79. In view, of the above it is held and Ordered as below:

I(i) The imported gold as per description and condition of the Advance Licence and has been utilized for manufacture and export of gold jewellery. The said exported jewellery has also not been misdeclared at the time of export. Hence, no case is made out for confiscation of imported gold i.e. 21428.643 kgs of gold u/s 111(o) of the Customs Act, 1962, read with Notification No. 93/04 Cus. Dt. 10.09.2004.

2) As there has been no misdeclaration of gold jewellery exported, no case is made out for confiscation of 23053.90 kgs of gold jewellery exported u/s 113(i) of the Customs Act, 1962.

3) Further and consequently, as the allegations of misdeclaration of the gold product at the time of export or misdeclaration of the imported gold at the time of import has not been made out, there is no ground or basis for raising any demand of Customs duty under notification No. 93/04 Cus and/or proviso to Section 28 of the Customs Act, 1962 in respect of any quantity of gold imported. As such the demand of duty indicated in para 36 of SCN is not sustained and require to be dropped.

4) Since there is no case for demand of duty, the question of demand and levy of interest does not arise.

5) The exports made from India was studded gold jewellery, bangles, articles as per declaration in the shipping bill and other documents filed with the Customs at the time of export. Accordingly, all assessment of shipping bill, including provisional assessed shipping bills of Rajesh Export Ltd and Adani Export Ltd at Air Cargo Complex, Bangalore are to be finalized.

6) Further, as contravention of Section 111(o) and 113(i) of the Customs Act, 1962 has not been held, the question of imposition of penalty u/s 112(a) and Section 114(a) of the Customs Act, 1962 does not arise.

II. In terms of Value Addition, the Judgment of the Karnataka High Court dated 15.6.05 as prevailing is binding. The above High Court Judgment also applies to the issue regarding jewellery exported. Although, an appeal has been filed, no stay has been obtained. However, these matters, as to whether the Value Addition of 7% or 15% is to be taken into account, as well as the foreign exchange component in respect of local gold are matters to be examined and finalized by the Licensing Authority/by the office of DGFT Bangalore/Ahemdabad and these Authorities may take appropriate action in light of Judgment of Division Bench of Karnataka High Court as and when the same is pronounced.

III. However, in the interest of revenue and pending orders of the Division Branch Judgment, I propose to hold back the surety Bonds executed by the two Exporter i.e. M/s. Rajesh Export Ltd., Bangalore and M/s. Adani Export Ltd., Ahemdabad, in case of any adverse Judgment delivered by the Division Bench of Hon?ble Karnataka High Court, in respect of the points/issues raised in the writ petition No. 7256 of 2005 (GM-RES), (against which a Writ Appeal against the present Judgment of the Karnataka High Court has been filed) and the same would be released only after the Judgment is received and/or on receipt of directions from the Joint DGFT Bangalore/Ahemdabad.

(Emphasis Supplied)

10. On the next day i.e. 01.02.2007, the Respondent got transferred to DRI, Bangalore.

11. Aggrieved by the order dated 31.01.2007 passed by the Respondent in his capacity as Commissioner Customs, Bangalore the department filed an appeal u/s 129A(1) of Customs Act, 1962 before Customs Excise, Sales Tax Appellate Tribunal (hereinafter referred to as "CESTAT"), South Zonal Branch, Bangalore.

12. On 24.08.2007 Deputy Director General of Foreign Trade issued a letter to Joint Director General of Foreign Trade regarding the value addition required in case of AEL, the relevant portion whereof reads as under:

Subject: Clarification on the applicable Value Addition against export of Studded Jewellery where per gram value of precious metal is less than per gram value of gold-regarding.

Sir,

Please refer to your letter dated 9-4-2007 referring to your earlier letters dated 19-1-2006 and 15-1-2007 on the above subject. The matter was deliberated upon in this Directorate in detail taking into account the following facts furnished by Regional Authorities concerned:

1. M/s Adani Exports have not availed any benefit under DFCB and Target Plus Scheme for the exports of studded jewellery for the period of these exports under consideration under advance authorization scheme.

2. Orders of Hon''ble High Court of Karnataka directing the RA to consider value

addition to be 7% against which no stay could be obtained till date.

....

Accordingly, it is informed that for the exports of studded jewellery effected prior to 11-2-05 (i.e. prior to issuance of the Policy Circular No. 18 dated 11-2-05) where per gram value of precious stones is less than per gram value of gold, the said minimum value addition will be 7% and not 15%. Pending Export Obligation discharge applications may be processed accordingly.

(Emphasis Supplied)

13. In the meantime, the Respondent got information that the department is contemplating initiation of disciplinary proceedings against him in respect of the adjudicating order dated 31.01.2007 passed by him. In such circumstances, the Respondent made as many as eight representations before the department inter-alia stating that the adjudicating order dated 31.01.2007 passed by him is legally sound and that he had not favored AEL & REL while passing said order and therefore no disciplinary proceedings be initiated against him.

14. While the appeal preferred by the Petitioner was pending adjudication before the CESTAT, the department issued a charge sheet dated 16.01.2009 to the Respondent initiating disciplinary proceedings against him under Rule 14 of Central Civil Services (Classification, Control and Appeal) Rules 1965. The relevant portion of the charge sheet reads as under:

Articles of charge framed against Shri H.V. Chauhan, the then Commissioner of customs, Bangalore

Article-I

That the said Shri H.V. Chauhan, while functioning as Commissioner of Customs, Bangalore during the period of 05.05.2006 to 31.01.2007 passed an adjudication order No. 1/2007 dated 31.1.07 in the case of M/s Rajesh Exports Ltd, Bangalore and M/s Adani Exports Ltd., Ahemdabad dropping the proceedings initiated against the aforesaid exports for recovery of Customs duty foregone on 21428.693 KGs Gold imported by them duty free under Advance License Scheme under Foreign Trade Policy. Bangalore Customs (C.I.U.) investigated this case relating to the irregularities in exports made by the above firms and on completion of this investigation, a Show Cause Notice C. No. VIII/10/56/2005 Cus. Adj. dated 18.11.2005 was issued to M/s Rajesh Exports Ltd., Bangalore and M/s Adani Exports Ltd., Ahemdabad demanding Customs duty of Rs. 54,64,31,672/-, besides proposals for imposition of fine and penalties under various provisions of the Customs Act, 1962. Shri H.V. Chauhan at the time of adjudication was fully aware of the fact that the Department?s appeal is pending in this matter before the Hon?ble High Court of Karnataka. Further Shri H.V. Chauhan went ahead and adjudicated the case instead of transferring it to Call Book as per CBEC Circular No. 162/73/95 CX dated 14.12.95 and 719/35/2003 CX dated 28.5.2003. The hasty action on the part of Shri H.V. Chauhan, in dropping the proceedings initiated by the aforementioned S.C.N. has resulted in loss of revenue to the Government to the tune of Rs. 54,64,31,672/-. Thus by above acts of commission and omission, Shri H.V. Chauhan, the then Commissioner of Customs, Bangalore failed to maintain devotion to duty and acted in a manner unbecoming of a Government servant and thereby violated the provisions of Rule 3(1)(ii) and (iii) of CCS. (Conduct) Rules, 1964.

Article-II

That during the aforesaid period and while functioning in the aforesaid office, the said Shri H.V. Chauhan passed an adjudication order No. 1/2007 dated 31.1.2007 in the case of M/s Rajesh Exports Ltd, Bangalore and M/s Adani Exports Ltd., Ahemdabad dropping the proceedings initiated against the aforesaid exports for recovery of Customs duty foregone on 21428.693 KGs Gold imported by them duty free under Advance License Scheme under Foreign Trade Policy. While passing the adjudication order, Shri H.V. Chauhan has ignored the evidence adduced by the Department in the SCN. Shri H.V. Chauhan acting as a quasi-judicial adjudicating authority has relied on the copies of the Bills of Entry produced by the aforesaid exporters and gave no credence to the copies of Bills of Entry relied upon in SCN issued by the Department. Shri H.V. Chauhan has accepted the copies of Bills of Entry produced by the exporters during Personal Hearing without causing further verification; as the discrepancies noticed in the description of the items are quite glaring in the documents relied upon in the SCN and those produced by the aforesaid exporters during the proceedings/ personal hearing and these discrepancies cast a grave doubt as to the bonafides of the exports. Thus, Shri H.V. Chauhan as a quasi-judicial authority has denied principles of natural justice to the Department by not causing the verification of the documents produced by the aforesaid exporters during personal hearing as there are variations in the evidences adduced by the Department and by the Noticees of the SCN. Therefore, it appears that Shri H.V. Chauhan, the then Commissioner of Customs, Bangalore has favoured M/s Rajesh Exports Ltd and M/s Adani Exports Ltd, the Noticees of SCN dated 18.11.2005 by dropping the proceedings initiated by aforesaid SCN. As a quasi-judicial adjudicating authority, Shri H.V. Chauhan has failed to safeguard Government revenue and his action of dropping the case led to loss of revenue of Rs. 54,64,31,672/- to the Government. By the aforesaid commissions and omissions, Shri H.V. Chauhan while working as Commissioner of Customs, Bangalore failed to maintain absolute integrity, devotion of duty and acted in a manner unbecoming of a Government servant and thereby violated the provisions of Rule 3(1)(i), (ii) and (iii) of CCS. (Conduct) Rules, 1964.

Statement of Imputation in support of articles of charges framed against Shri H.V. Chauhan, the then Commissioner of customs, Bangalore

Articles I & II

....

5. As the said matter is pending before the Division Bench of High Court, it was not legal and proper on the part of Shri H.V. Chauhan to take a final decision with regard to the value addition or other matters in the light of instructions issued by Central Board of Excise and Customs in their Circular No:162/73/95/CX dated 14.12.95 and 719/35/2003 CX dated 28.5.2003 warranting such categories of cases to be transferred to call book pending decision or proceedings before the Court. Shri H.V. Chauhan as Commissioner of Customs was bound to follow the aforesaid instructions of the Board directing that cases where the Department had gone in appeal to the appropriate authorities be transferred to Call Book and it was improper on his part to decide a matter which is sub-judice....

7. Shri H.V. Chauhan, as adjudicating authority should not have taken up this case for adjudication as the matter is pending in Hon?ble Karnataka High Court and in the light of the instructions contained in CBEC Circular No. 162/73/95 CX 3 dated 14.12.95, the case should have been kept in Call Book. In deed, a Call Book is maintained in Bangalore Customs (Hqrs.) and it is noticed that cases not ripe for disposal were regularly transferred to the call book. During the year 2006, six cases and during the year 2007, fifteen cases were transferred to the call book as per the Call book register maintained in Bangalore Customs Commissionerate.

....

11. Shri H.V. Chauhan assumed office as Commissioner of Customs, Bangalore on 5.5.06 and relinquished that office in Bangalore Customs on 31.1.07. At the time of his assuming charge, the number of adjudications pending at the level of Commissioner was 24. Similarly, at the time of his relinquishing charge, the number of adjudications pending at Commissioner?s level was 41. The total number of cases adjudicated by Shri H.V. Chauhan during his tenure as Commissioner of Customs in Bangalore was 10 only. Hence, it appears that the undue priority was given to the case relating to M/s Rajesh Exports, and M/s Adani Exports and that too this case was decided on the last working day of his tenure in Bangalore Customs i.e. on 31.1.07. Shri H.V. Chauhan has not taken similar steps to reduce pendency in respect of all other cases. In respect of two other cases relating to M/s GEBE Pvt. Ltd and M/s G.E. Medical System, Shri H.V. Chauhan has conducted Personal Hearing on 14.11.06. These Personal hearings were held prior to the Personal hearing of the case relating to M/s Rajesh Exports Ltd and M/s Adani Exports Ltd. Such an action on the part of Shri H.V. Chauhan has created doubts over the undue haste in the finalization of the case relating to M/s Rajesh Exports Ltd and M/s Adani Exports Ltd.

....

(Emphasis Supplied)

15. Vide order dated 10.02.2009, CESTAT dismissed the appeal filed by the Petitioner against the adjudication order dated 31.01.2007 passed by the Respondent. The relevant portion of the appellate order reads as under:

....

4. Learned Special Counsel Shri P.R.V. Ramanan appearing for the revenue would submit that the impugned order is not correct for more than one reason. It is his submission that the Adjudicating Authority should have waited for the outcome of the appeal filed by the revenue before Division Bench of Hon?ble High Court of Karnataka. It is his submission that the Adjudicating Authority has overlooked para 28 of the Show Cause Notice, wherein it is indicated that the revenue reserves right to add/alter/amend/modify the Show Cause Notice....

4.3 It was submitted that the Commissioner accepted the evidentiary value of the copies of Bills of Entry purported to have been filed by the importers at Dubai, which were submitted at the time of the personal hearing, without causing any enquiries as to their veracity. In fact prima facie comparison of the said copies with the copies of Bills of Entry forwarded by the Indian Consulate revealed many discrepancies such as:

....

7 Learned Counsel for revenue in rejoinder would submit that the Adjudicating Authority has not appreciated the entire evidence on record and rejected the evidence adduced by the department in the form of report received from the Consulate of India, Dubai....

8.2 We would first deal with the issue of the revenue as to whether the Adjudicating Authority was in error to decide the show cause notice when an appeal is pending before the Division Bench of Hon?ble High Court of Karnataka....

It was submitted by the Special Counsel for revenue that revenue has challenged the above order in a Writ Appeal and the same is admitted in the Hon?ble High Court of Karnataka. On a specific query from the bench, it was submitted that the Division Bench of Hon?ble High Court of Karnataka has not stayed the order of the Hon?ble Single Judge. It is settled law, that unless there is a stay of the order by higher judicial forum, the order is binding. We note that in the absence of any stay of the order in W.P. No. 7256 of 2005, the learned Adjudicating Authority as not in error in taking up the matter for adjudication, as the show cause notice is dated 18.11.2005. We note that the action of the Adjudicating Authority to take up the matter for disposal vide Order-In-Original dated 31.1.2007 cannot be faulted for the reason that Writ Appeal is pending before Division Bench.

8.3 The next issue for disposal is whether the impugned order needs to be set aside and the matter should be remanded back to the Adjudicating Authority only on the ground that the Commissioner should have awaited the outcome of the Writ Appeal filed by revenue. In our considered opinion, this proposition does not contain any merit. On perusal of the impugned order, we find that being a speaking order, does not require any remand.

....

9.1 We take up the challenge of the impugned order, by the revenue on merits. We find that the grounds on which revenue has filed appeals are as under:

....

It can be seen from the above reproduced grounds of appeal that the revenue?s challenge is only on the ground that the Adjudicating Authority has not considered the evidence produced by the revenue in form of report received from Consul (Economics), Consulate General of India, Dubai, UAE. The importers at Dubai have cleared the consignment of ?gold scrap?. Mis-declaration charges were dropped based on the documents submitted by the Respondents without causing any verification, and the importers were related to Respondents. We gave anxious considerations to the oral and written submissions made by the learned Special Counsel for revenue. We find that the Adjudicating Authority, on the facts that exports were of gold jewellery manufactured/made of imported gold, has held as under:

....

9.2 The next contention of the revenue is that the Adjudicating Authority has not properly considered the evidence adduced by the revenue in form of report received from the Indian Consulate, Dubai, UAE....

9.3 We find that the present case before us, revenue has not given the copy of the report received from Indian Consulate to establish that the declarations before the Customs Authorities at Dubai were from authentic source and further, the said documents were copies of the copies obtained from some sources. We are of the considered view that unauthenticated documents cannot be relied upon for pressing home charges of mis-declaration on an Assessee. On the contrary, we find that the Respondents have produced certified copies of the Bills of Entry filed by the importer before Customs authorities at Dubai. We are of the view that the finding of the Adjudicating Authority on this point is very relevant, which are as under:

....

It is to be noted that the relevant documents produced by the Respondents to support their case were attested by an officer from Indian Consulate, Dubai, UAE while the very same documents produced by the revenue through Indian Consulate were not attested. Suffice to say, that the documents produced by Respondent has more evidentiary value, we hold that the reliance placed by Adjudicating Authority on such documents (as produced by the Respondents) cannot be faulted with.

10. In totality, on the facts and circumstances of the case, we find that impugned order passed by the Adjudicating Authority is correct, legal and cannot be faulted with.

11. In view of the above reasonings, we are of the considered view that the impugned order needs to be upheld and we do so and reject the appeals filed by the revenue.

16. Thereafter, on 24.02.2009 the Respondent made a representation to the department inter-alia stating that in view of the fact that CESTAT has repelled the challenge preferred by the department against the adjudicating order dated 31.01.2007, the charge sheet issued against him deserves to be withdrawn for the reason his order which form the basis of initiating disciplinary action was upheld by a superior appellate authority.

17. Since the department did not pay any heed to the afore-noted representation dated 24.02.2009 made by the Respondent and did not pass any order thereon, the Respondent filed an application u/s 19, Principal Bench, Central Administrative Tribunal, New Delhi seeking quashing of the afore-noted charge sheet issued by the department against him.

18. During the pendency of the afore-mentioned application filed by the Respondent before the Tribunal, the Respondent retired from the service on 30.11.2009.

19. The Respondent urged before the Tribunal that he had passed the order in question in exercise of his quasi-judicial functions and the order passed by him was upheld by the superior appellate Tribunal and thus the same could not form the subject matter of a disciplinary proceedings. In respect of the charge of having violated the departmental instructions he referred to departmental instructions dated 21.12.2006 contents whereof have been noted by us in para 8 above to urge that he was justified in disposing of the pending matter i.e. the show cause notice. He also highlighted that the decision of the learned Single Judge of the Karnataka High Court not being stayed by the Division Bench he was fully justified in proceeding ahead with the matter. He highlighted before the Tribunal that his representations to the competent authority to decide whether the charge sheet should be withdrawn in light of the submissions made by him have not even been responded to, much less considered. The Petitioner opposed the Original Application filed by the Respondent by urging that the charge sheet could not be interdicted till the disciplinary proceedings concluded for the reason merits of the controversy would be decided only after the inquiry was completed. It was thus urged that the Original Application merited dismissal.

20. After holding that the Tribunal has ample powers to test the correctness of the act of the disciplinary authority of issuing the charge sheet to an employee in respect of an order passed by him in his capacity as quasi-judicial authority and holding that there was no occasion for the department to issue a charge sheet to the Respondent in respect of an adjudication order passed by him when CESTAT had repelled the challenge of the department against the said adjudication order, vide impugned judgment and order dated 21.01.2009 the Tribunal allowed the Original Application filed by the Respondent.

21. Aggrieved by the impugned judgment and order dated 21.01.2010 passed by the Tribunal, the Petitioner has filed the present petition under Articles 226 and 227 of Constitution of India.

22. During the hearing before us, learned Counsel for the Petitioner submitted that the Tribunal committed an illegality in quashing the charge sheet issued against the Respondent at the very threshold, for it is settled legal position that in the case of charges framed in a disciplinary inquiry, the Tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law, which was not the position in the instant case. In support of said submission, reliance was placed upon the decision of Supreme Court reported as Union of India (UOI) and Others Vs. Upendra Singh,

23. Per contra, learned senior counsel for the Respondent submitted that a reading of the charge sheet issued against the Respondent, together with statement of imputation of charges, shows that the department is challenging the correctness of the adjudicating order dated 31.01.2007 passed by the Respondent in the disciplinary proceedings, which is not permissible as the said order could be corrected only by way of filing an appeal against the said order and not by way of initiating disciplinary proceedings against the Respondent. Counsel submitted that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such disciplinary proceedings is likely to shake the confidence of the public in the officer concerned and also is lightly taken likely to undermine his independence. Hence there is need for taking extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. It was highlighted that the department/disciplinary authority was refusing to decide the representations made by the Respondent praying that in view of his order being upheld by CESTAT the charge sheet should be withdrawn.

24. The first and foremost question which has arisen for consideration in the present case is when can an action be taken against an officer with respect to his performing quasi-judicial functions.

25. The leading decision on the point is the decision of Supreme Court reported as Union of India and Others Vs. K.K. Dhawan, . In the said case, the Respondent was working as an income tax Officer. A charge sheet was issued to him proposing to hold disciplinary inquiry against him under Rule 14 of Central Civil Services (Classification, Control and Appeal) Rules 1965. In the statement of charges framed against the Respondent it was alleged that the Respondent completed assessment of nine firms in ?an irregular manner, in undue haste and apparently with a view to conferring undue favor upon the assesses concerned?.

An application was filed by the Respondent before the Tribunal against the proposed inquiry, which application was allowed on the ground that since the assessment orders passed by the Respondent as income tax Officer were quasi-judicial the same could not have formed the basis of disciplinary action against the Respondent. In appeal, the question formulated by Supreme Court for adjudication was whether an authority enjoys immunity from disciplinary proceedings with respect to matters decided by him in exercise of quasi-judicial functions. After examining early decisions of Supreme Court namely V.D. Trivedi v. Union of India, (1993) 2 SCC 55 Union of India v. R.K. Desai, (1993) 2 SCC 49 Union of India and others Vs. A.N. Saxena, and Govinda Menon Vs. Union of India (UOI), a three-Judge Bench allowed the appeal. The relevant observations made by the Court are being noted herein under as under:

28. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the Respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the Respondent but the conduct of the Respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases:

(i) Where the officer had acted in a manner as would reflect on his reputation or integrity or good faith or devotion to duty;

(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii) if he has acted in a manner which is unbecoming of a government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago ?though the bribe may be small? yet the fault is great.

29. The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above-enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated.

(Emphasis Supplied)

26. In the decision reported as Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others, the Appellant who was posted as Collector of Central Excise, Nagpur challenged the charge sheet issued against him in respect of an adjudication order passed by him, which charge sheet was quashed by Supreme Court. After examining its earlier decision in K.K. Dhawan?s case (supra) and the other decisions on the point, the Court observed as under:

When we talk of negligence in a quasi-judicial adjudication, it is not negligence perceived as carelessness, inadvertence or omission but as culpable negligence. This is how this Court in State 13 of Punjab v. Ex-Constable Ram Singh interpreted "misconduct" not coming within the purview of mere error in judgment, carelessness or negligence in 1 performance of duty. In the case of K.K. Dhawan the allegation was of conferring undue favour upon the Assessees. It was not a case of negligence as such.... In the present case, it is not that the Appellant did not impose penalty because of any negligence on his part but he said it was not a case of imposition of penalty. We are, however, of the view that in a case like this which was being adjudicated upon by the Appellant imposition of penalty was imperative. But then, there is nothing wrong or improper on the part of the Appellant to form an opinion that imposition of penalty was not mandatory. We have noticed that the Patna High Court while interpreting Section 325 IPC held that imposition of penalty was not mandatory which again we have said is not a correct view to take. A wrong interpretation of law cannot be a ground for misconduct. Of course it is a different matter altogether if it is deliberate and actuated by mala fides.

41. When penalty is not levied, the Assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the Assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the Appellant showed "favour" to the Assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.

42. Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter....

43. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers like the Appellant. Since in sum and substance misconduct is sought to be inferred by the Appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi-judicial authority something

more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

(Emphasis Supplied)

27. In the decision reported as Union of India v. Duli Chand (2006) 5 SCC 680 the question which has arisen for consideration before a three-Judge Bench of Supreme Court was whether disciplinary action can be taken against an employee on the ground that the employee had been found to be grossly negligent while discharging quasi-judicial functions. The Respondent challenged the initiation of disciplinary proceedings against him before the Tribunal on the ground that no disciplinary proceedings would lie against an officer discharging judicial/quasi-judicial unless there was an element of moral turpitude. After placing reliance upon the decision of Supreme Court in Nagarkar?s case (supra), the Tribunal allowed the application filed by the Respondent on the ground that disciplinary proceedings would not lie against an officer discharging quasi-judicial functions unless it was established that the officer concerned had obtained an undue advantage thereby or in connection therewith. The Appellant challenged the decision of the Tribunal before the High Court. The High Court came to the conclusion that since no ulterior motive was alleged against the Respondent, the Tribunal was correct in quashing the disciplinary proceedings initiated against the Respondent. In appeal, Supreme Court set aside the decisions passed by the Tribunal and the High Court. In coming to the said conclusion, Supreme Court overruled the ratio laid down in Nagarkar?s case (supra). The relevant observations made by the Court are being noted herein under:

8. In 1999 another Bench of two Judges in Zunjarrao Bhikaji Nagarkar 1 considered and referred to these earlier decisions. However, the Court appears to have reverted back to the earlier view of the matter where disciplinary action could be taken against an officer discharging judicial functions only where there was an element of culpability involved. Since in that particular case there was no evidence whatsoever that the employee had shown any favour to the Assessee to whom refund had been made, it was held that the proceedings against him would not lie. In fact the Court set aside the disciplinary proceedings at the stage of the issuance of charge-sheet to the charged officer.

9. In our opinion, Nagarkar case 1 was contrary to the view expressed in K.K. Dhawan case 2. The decision in K.K. Dhawan 2 being that of a larger Bench would prevail. The decision in Nagarkar case 1 therefore does not correctly represent the law. Inasmuch as the impugned orders of the Tribunal and the High

Court were passed on the law enunciated in Nagarkar case 1 this appeal must be allowed. The impugned decisions are accordingly set aside and the order of punishment upheld. There will be no order as to costs.

28. In the backdrop of the afore-noted legal position, we proceed to determine the legality of the charge sheet issued against the Respondent.

29. The tenor of the allegations leveled against the Respondent are that while passing adjudication order dated 31.01.2007 he unduly favored AEL & REL Be it noted here that In K.K. Dhawan?s case (supra) wherein similar allegations were leveled against the officer therein it was held by Supreme Court that such allegations can form the basis of initiation of disciplinary proceedings against the officer discharging quasi-judicial functions.

30. Whether the Tribunal was justified in quashing the charge sheet issued against the Respondent at the very threshold?

31. As already noted herein above, the Respondent made a representation dated 24.02.2009 to the department challenging the validity of the charge sheet issued against him by bringing a subsequent development to the notice of the department, which development had a very material bearing on the validity of the said charge sheet. The development pointed out by the Respondent was that the CESTAT had dismissed the appeal preferred by the department against the adjudicating order dated 31.01.2007 passed by the Respondent, which order formed the basis of disciplinary action initiated against the Respondent. However, the department chose not to pay any heed to the said representation made by the Respondent. In such circumstances, the Tribunal was well-justified in testing the correctness of the charge sheet issued against the Respondent.

32. Whether the charge sheet issued by the department against the Respondent was valid?

33. A reading of Articles of Charges framed against the Respondent shows that following two irregularities are stated to have been committed by the Respondent:

(i) the Respondent acted in a haste manner by proceeding with the matter in question and not awaiting the outcome of the appeal preferred by the department against the order passed by the Single Judge of Karnataka High Court; and

(ii) the Respondent did not correctly appreciate the documentary evidence produced by the department and AEL and REL.

34. Insofar as first irregularity alleged to have been committed by the Respondent is concerned, following facts needs to be noted:- (i) a specific instruction was issued by Chief Commissioner to the Commissioners to dispose the matters pending over one year by 31.01.2006 and the matter in question fell in the said category. (See the contents of the Office Order dated 21.12.2006

issued by Chief Commissioner, noted in para 8 above); (ii) while admitting the appeal filed by the department for hearing no stay was granted by the Division Bench of Karnataka High Court on the operation of the judgment passed by the Single Judge; (iii) while passing adjudicating order dated 31.01.2007 the Respondent took due notice of the factum of pendency of the appeal filed by the department and safeguarded the interests of the department by directing that the surety bonds executed by AEL and REL shall be released to them only after dismissal of the appeal filed by the department; (iv) letter dated 24.08.2007 issued by Joint Director General of Foreign Trade impliedly provided implementation of the judgment passed by the Single Judge as no stay could be obtained by the department on the operation of the said judgment; and (v) the CESTAT found nothing irregular in the approach of the Tribunal in proceeding with the matter in question pending the disposal of the appeal filed by the department before the Division Bench of Karnataka High Court. (See the contents of paras 8.2 and 8.3 of the order passed by the CESTAT, noted in foregoing paras). In the teeth of said facts, by no stretch of imagination, it can be said that the Respondent acted in a haste manner in proceeding with the matter in question and not awaiting the outcome of the appeal filed by the department. Consequently, the department was wholly unjustified in issuing a charge sheet against the Respondent in respect of Article I.

35. As regard Article II framed against the Respondent is concerned, suffice would it be to state that grounds similar to irregularity (ii) were raised by the department before the CESTAT. (See the contents of paras 4.3, 7, 9.1 and 9.2 of the order of the CESTAT, noted in foregoing paras). After examining the adjudicating order passed by the Respondent in great detail, the CESTAT did not find any merit in the said grounds raised by the department and held that the Respondent had correctly appreciated the documentary evidence adduced by the department and REL & AEL. (See the contents of para 9.3 of the order of the CESTAT, noted in foregoing paras). In such circumstances, the department was wholly unjustified in issuing a charge sheet against the Respondent in respect of Article II.

36. It is apparent that an adjudication order passed by the Respondent while exercising quasi-judicial power was the foundation of the charge sheet and shorn of technicalities, at the heart of the charge was the allegation that the order was passed contrary to law to confer benefit upon the Assessees. Meaningfully read, the charge sheet seeks to inculpate the Respondent with reference to his acts performed in a quasi-judicial functioning and thus we hold that the Tribunal has returned a correct verdict.

37. In view of the above discussion, we uphold the impugned judgment dated 21.01.2010 passed by the Tribunal.

38. The petition is accordingly dismissed.

39. No costs.

