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

% **W.P.(C) 3127/2014**

+ **Judgment Dated: 10th August, 2016.**

A.K. SAXENA

..... Petitioner

Through: **Mr. Ankur Chhibber and Mr. Manu Padalia, Advocates.**

versus

UNION OF INDIA & ORS.

..... Respondents

Through: **Mr. R.V.Sinha, Mr. R.N.Singh and Mr. A.S.Singh, Advocates.**

CORAM:

**HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE I.S.MEHTA**

G.S.SISTANI, J (ORAL)

1. Rule D.B.
2. Pleadings in this matter are complete. With the consent of the parties, the writ petition is set down for hearing and disposal.
3. Challenge in the present writ petition is to the order dated 01.10.2013 passed by the Central Administrative Tribunal (*hereinafter referred to as the 'Tribunal'*) whereby the OA filed by the petitioner has been dismissed.
4. Two questions arise for our consideration in the present matter. First, as to whether statements made under Sections 107 and 108 of the

Customs Act, 1962 can be relied upon in domestic inquiry without producing the makers of the statement as witnesses. Second, whether seized documents could be relied upon without their contents being proved by producing witnesses in view of Section 36-A of the Central Excise Act and their admission by the petitioner in his statement under Section 108 of the Central Customs Act.

5. The necessary facts which are required to be noticed for disposal of this writ petition are that on 26.02.1988 the Petitioner joined as an Inspector in the Central Excise Department. In the year 2002-2003 he was posted as Inspector, Central Excise in Range-X of Division-2, Faridabad. During the year 2002-2003, M/s Anu Exports and M/s Amico International requested the Superintendent, Central Excise, Division-II, Faridabad for issuance of feasibility report for permission of factory stuffing. The petitioner, on the instruction of the Superintendent, was directed to submit the feasibility report regarding the above mentioned firms. From December 2002 to January 2003, the petitioner in discharge of his duty submitted feasibility reports in respect of the movement of containers and stuffing and sealing thereof. The said reports were communicated to the Superintendent and permission was granted for factory stuffing.

6. An investigation was held by the Directorate of Revenue Intelligence (‘DRI’) on the basis of a compliant received after few years. In the said inquiry, the DRI after investigation booked a case against five firms, namely M/s Dig-Dig Creations, M/s Anu Exports, M/s Amico International, M/s Zebra Inc, and M/s Prayas Enterprises, for exporting

over-invoiced and sub-standard readymade garments through fictitious firms with the sole purpose of fraudulently availing drawbacks. A total of 24 consignments were exported under 24 different shipping bills declaring that total F.O.B. value of Rs. 9,65,42,371/- against which a total drawback of Rs. 1,04,62,396/- was availed. The declared value of the garments ranged from Rs. 343/- to 472/- per piece; while the market value was only between Rs. 8/- to Rs. 40/- per piece. The drawback availed on the same was between Rs. 40/- to Rs. 50/- per piece and further, no foreign remittance was realized. It was further discovered that the petitioner herein had colluded with the firms leading to a loss to the government exchequer of Rs. 1.04 Crores.

7. Accordingly, a Memorandum dated 04.10.2007 was issued to conduct an inquiry under Rule 14 of CCS (CCA) Rules 1965, with the allegation that the petitioner had failed to maintain absolute integrity in discharge of his duties. Seven Articles of Charge were framed against the petitioner, the crux of which is as under:

Article I: petitioner had submitted a false report confirming that there was garment manufacturing facility and stuffing feasibility at the premises of M/s Dig-Dig Creations;

Article II: petitioner had submitted a false report confirming that there was garment manufacturing facility and stuffing feasibility at the premises of M/s Anu Exports and M/s Amico International;

Article III: petitioner also supervised the factory stuffing of the export consignments of M/s Zebra Inc. and M/s Prayas Enterprises for which no factory stuffing permission was given by the Customs

Authority;

Article IV: petitioner instead of drawing representative sample from the export consignments of the foregoing exporters, took on record prime quality garments purchased from the local market by the exporter and sent the same as samples to the concerned customs office in order to facilitate and cover up the fraud;

Article V: petitioner also attempted to destroy evidence by removing leftover cartons similar to the export consignments from the alleged factory premises of M/s Anu Exports and M/s Amico International;

Article VI: petitioner alongwith his Superintendent was being paid Rs. 1,30,000/- per container by the exporters as per their statement;

Article VII: petitioner failed to act as per his best judgment resulting in undue benefit to the exporter and consequent loss to government revenue.

8. The memorandum was also accompanied with a list of documents and list of witnesses by which the articles were proposed to be sustained. The list of witnesses did not name any witness; while the list of documents included the statements under Sections 107 and 108 of the Customs Act, 1962 of the following persons:

“7) *Statements dated 26.02.03 and 27.02.03 of Sh. Deepak Bansal, partner of M/s Jawala Steel Corporation, Plot No.124 Sector-24 Faridabad (Haryana).*

8) *Statement dated 26.02.03 of Sh. A.N.Ahuja, Director of M/s AGI Switches, Plot No.129, Sector-24 Faridabad (Haryana).*

9) *Statement dated 21.02.03 of Sh. Gurcharan Singh stating that they (S/Sh. Gurcharan Singh and Hitesh Dutta) were*

paying Rs.1,30,000/- per container to the officers of Central Excise

10) Statement dated 05-03-2003 of Shri A.K. Saxena, Inspector.”

9. Thereafter, the Enquiry Officer conducted the inquiry and submitted its report dated 08.06.2009 holding that the charges contained in articles I, II and VII had been proved beyond reasonable doubt; article III was not proved; while articles IV, V and VI were not proved beyond reasonable doubt but preponderance of probability indicated towards their truth. In coming to the said conclusion, the Enquiry Officer had heavily relied upon the statements mentioned in the previous paragraph. During the course of the inquiry, the petitioner had raised an objection relating to the admissibility of the documents and the statements recorded under Sections 107 and 108 of the Customs Act. The objection was shrugged aside by the inquiry officer observing that “[t]his is not a statement recorded under preliminary inquiry necessitating the production of the author of the statement.”

10. The disciplinary authority, considering the report of the enquiry officer, forwarded the same to the petitioner for filing his representation. Accordingly, on 31.10.2010, the petitioner submitted a reply denying the charges whilst giving justifications. The disciplinary authority, without considering the reply filed by the petitioner, imposed a punishment of reduction in the pay scale of petitioner to the lowest grade of his post, i.e. Inspector, with having pay of Rs.15,810/- plus grade pay of Rs.4,600/- from Rs.19,110/- plus grade pay of Rs.4,800/- with cumulative effect for a period of five years w.e.f. 01.01.2011.

11. The petitioner filed an appeal before the Chief Commissioner, Central Excise contending that the enquiry was conducted without complying with the provision prescribed under Rule 14 of CCS (CCA) Rules, as no witness was called upon to prove the documents on the basis of which the alleged charges have been levelled against the petitioner thus, those documents could not have been relied upon. On 24.10.2011, the appeal filed by the petitioner was rejected by the Chief Commissioner.

12. Aggrieved by the orders of the disciplinary authority and the appellate authority, the petitioner filed an OA bearing No. 952/2012 before the Tribunal wherein it was also specifically pointed out that the said OA was squarely covered by the order of the Tribunal in ***Sh. J.P. Singh v. Union of India & Ors.***, OA No. 1690/2007 dated 19.11.2008. The Tribunal dismissed the said OA vide its order dated 01.10.2013, which has led to the filing of the present writ petition.

13. Learned counsel for the petitioner submits that the order passed by the Tribunal is bad in law and the same requires to be set aside. Counsel submits that the Tribunal has failed to take into account that neither a single witness was produced before the Inquiry Officer nor the documents relied upon have been exhibited by the prosecution. Reliance was placed upon statements made under Section 107 and 108 of the Customs Act before the DRI without producing the witnesses. Learned counsel for the petitioner submits that this issue is no longer *res integra* that a statement made under Section 108 of the Customs Act without producing the witnesses cannot be relied upon. To this end, he relies upon the decision rendered by a coordinate bench of the Tribunal in ***J. P. Singh (Supra)***. It

was brought to the notice of the court that the said judgment was assailed before this Court in ***UOI & Ors. v. J.P. Singh*, ILR (2014) 1 Del 589 (DB)**, which has upheld the order of the Tribunal; however the same was dismissed by merely observing the delay in the departmental proceedings and without any observation as to the admissibility of statements made under Section 108. While relying upon the decision of the Supreme Court in ***Union of India v. Colonel G. S. Grewal*, (2014) 7 SCC 303**, counsel for the petitioner submits that the Supreme Court of India has frowned upon the practice of not adhering to the judgments of a coordinate bench. Accordingly, learned counsel submits that the Tribunal was bound by the judgment of the coordinate bench and erred by not following judicial precedent.

14. Counsel contends that the learned Tribunal failed to appreciate that the whole object of holding a Departmental Enquiry is to afford an opportunity to the delinquent to defend himself and since no witnesses were produced, the petitioner was denied the opportunity to defend himself. It is further submitted on behalf of the petitioner that the Tribunal erred in appreciating the fact that the basic thread of Departmental Enquiry, principles of natural justice have been violated which vitiates the whole enquiry as such findings of Departmental Enquiry are not sustainable in law.

15. Counsel for the petitioner further submits that the Tribunal has failed to appreciate that in the present case not a single witness was produced by the prosecution to prove its case. Relying on the copy of the charge sheet, counsel submits that neither any witness was cited in the

charge sheet nor any witness was produced to prove the documents relied upon by the prosecution. In the light of the judgment of the Supreme Court judgment in the case of **Roop Singh Negi v. Punjab National Bank (2009) 2 SCC 570**, wherein it was held that documents cannot be said to have proved the case of the prosecution as it has been held by the Supreme Court that mere production of document is not enough. The document produced in the evidence has to be proved by examining witnesses. Thus, Mr. Chhibber contends that it is a case of no evidence and accordingly, the charge against the petitioner has not been proved by the respondents.

16. Counsel submits that reliance on Section 36A of the Central Excise Act and Section 108 of the Customs Act is erroneous in law. Counsel submits that the Tribunal has failed to appreciate that the I.O had himself mentioned that:

“At the outset it is mentioned that so far as the department is concerned, this enquiry is not based on the evidence in the form of testimony of any witness as no witness has been mentioned in Annexure IV of the Memorandum. In fact no witness was produced by the department to prove the charges. The charged officer also did not produce any witness in defence.”

17. Counsel for the petitioner further submits that the Tribunal has failed to appreciate that in the case of **State Bank of Bikaner and Jaipur v. Srinath Gupta & Anr., (1996) 6 SCC 486** (paras 10 and 13), wherein it has been held that the statement earlier recorded by the CBI under Section 161 of Code of Criminal Procedure, 1973 cannot be admissible as evidence in the departmental enquiry, unless the delinquent has been

granted full opportunity of cross-examining the said witnesses in the departmental enquiry.

18. It is further argued on behalf of the petitioner that the Tribunal has failed to appreciate that based on the same charges, criminal prosecution was initiated against the petitioner by the respondent. In the said criminal case the petitioner has been discharged by the trial court vide order dated 01.06.2010. Thereafter, the respondents herein had filed an appeal against the said order and the High Court has set-aside the said order. Aggrieved, the petitioner has filed an SLP before the Supreme Court and the judgment has been stayed; therefore the matter is *sub-judice*.

19. The learned counsel for the petitioner has also argued at length on the merits of the matter as to the conclusion drawn by the enquiry officer could not be sustained by the material on record before it.

20. In support of his submissions, counsel for the petitioner has additionally relied upon the judgments rendered in ***Union of India v. Yuvraj Gupta & Ors.*, 2015 SCC Online Delhi 13395; Ministry of Finance & Anr. v. S.B. Ramesh**, (1998) 3 SCC 227 (para 13); and ***State of Uttar Pradesh & Ors. v. Saroj Kumar Sinha***, (2010) 2 SCC 772 (paras 26 and 28).

21. Mr. R. V. Sinha, learned counsel for the respondents submits at the outset that strict rules of evidence are not applicable and required to be followed in a domestic inquiry. To substantiate his argument, he has placed reliance on para 12 of the judgment of the Supreme Court in ***State Bank of Bikaner and Jaipur*** (Supra).

22. While drawing the attention of the Court to the Articles of Charge, he further submits that the charges against the petitioner are grave and serious in nature. He further submits that the documents which were not denied by the petitioner herein in his statement made under Section 108 of the Customs Act are admissible and were rightly relied upon by the department. Therefore, based on the statements which were not required to be proved, the enquiry officer and the disciplinary authority have rightly recorded a finding of guilt and appropriate punishment has been awarded to the delinquent officer.

23. As an alternate argument, he submits that if this Court finds favour with the submissions of counsel for the petitioner, the matter should be remanded back to enable the department to conduct the inquiry afresh in accordance with law by complying with the provisions of natural justice and also Rule 14 of the CCS (CCA) Rules. To this end, he has relied upon the decision rendered in the case of ***State Bank of Patiala & Ors. v. S. K. Sharma***, (1996) 3 SCC 364 (para-33), which reads as under:

“33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

...

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — “no notice”, “no opportunity” and “no hearing”

categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

...”

(Emphasis Supplied)

24. We have heard the learned counsel for the parties and considered their rival submissions.

25. From the facts noticed in paragraphs foregoing, it is clear that the department relied upon the statements of three witnesses and the petitioner

herein recorded under Sections 107 and 108 of the Customs Act and further that the department did not produce a single witness to prove the charges against the petitioner.

26. The first question which arises for our consideration is as to whether statements recorded under Sections 107 and 108 of the Customs Act can be relied upon in a domestic enquiry without producing their makers as witnesses. This has been decided by a coordinate bench of the Tribunal in **J. P. Singh (Supra)**. The relevant paragraphs of the order read as under:

“18. It is also observed that the case against the Applicant is founded largely on statements of various persons whose statements in previous enquiries, recorded in the absence of the Applicant, have been listed as relied upon documents. The list of documents by which the Articles of Charge are proposed to be proved, as appended at page 45 of the paper book is reproduced below:

...

The enormity of the Respondents fallacy is clear from the above documents. Only the statements of seven material witnesses in the departmental enquiry are proposed to be produced as documents. These statements have been recorded in 1999 by the officers mentioned in the list of witnesses. These officers cited in the list of witnesses do not have any knowledge of the incident for which the Applicant is being proceeded against departmentally. They would only prove that they recorded the statements, which are cited as relied upon documents. The Applicant would have no opportunity to confront the persons who made the statements. In our considered opinion this procedure is illegal. The persons whose statements are cited in the list of documents have to be examined in the departmental enquiry in the presence of the Applicant. Although, they have not been called as witnesses in the departmental inquiry, yet we are unable to agree with the learned counsel for the

Respondents that the statements recorded under Section 108 of the Customs Act, 1962 can be taken into evidence in the departmental enquiry without giving the Applicant any opportunity to cross-examine them. It would militate against the ratio laid down by the Honourable Supreme Court in Kuldeep Singh Vs. Commissioner of Police & Ors., (1992) 2 SCC 10; Central Bank of India Ltd. Vs. Prakash Chand Jain, AIR 1969 SC 983; and Ministry of Finance and Anr. Vs. S.B. Ramesh, SLJ 1998 (2) SC 67.

...

The Department of Personnel and Training (DoP&T) has also prescribed in its OM No. 134/7/75-AVD.I dated 11.06.1976 (quoted in Swamys Compilation of CCS CCA Rules, Swamy Publishers (P) Ltd., Thirty First Edition, 2007, page 63) as follows:

"1. Statement of witness recorded at the preliminary inquiry/ investigation to be read out to him and got admitted as evidence. The present procedure followed in departmental inquiries held under the CCS (CCA) Rules, 1965, and other corresponding Disciplinary Rules is to disregard statements made by witnesses during the preliminary inquiry / investigation except for the purpose of contradicting the witnesses and to record the evidence of the witnesses de novo as examination-in-chief by the Inquiry Authority. The question whether statements made by the witnesses during the preliminary inquiry / investigation can be straightaway taken on record as evidence in examination-in-chief at oral inquiries has been examined in consultation with the Department of Legal Affairs, the Central Vigilance Commission and the Central Bureau of Investigation.

2. On considering the observations made by the Supreme Court in certain cases, it may be legally permissible and in accord with the principles of natural justice to take on record the statements made by witnesses during the preliminary inquiry/ investigation at oral inquiries, if the statement is admitted by the witness on its being read out to him. It is felt that by adopting this procedure, it should be

possible to reduce the time taken in conducting departmental inquiries. It has, therefore, been decided that in future, instead of recording the evidence of the prosecution witnesses de novo, wherever it is possible, the statement of a witness already recorded at the preliminary inquiry/ investigation may be read out to him at the oral inquiry and if it is admitted by him, the cross-examination of the witness may commence thereafter straightaway. A copy of the said statement should, however, be made available to the delinquent officer sufficiently in advance, i.e., at least three days before the date on which it is to come up at the inquiry.

20. It is clear, therefore, that the witnesses have to be examined in the presence of the Applicant, who would be given an opportunity for cross examining them. We cannot accept the argument of the learned counsel for the Respondents that a statement recorded under Section 108 of Customs Act, 1962 could be produced in the enquiry without examining the witnesses.”

(Emphasis Supplied)

27. The present case raises the same facts and circumstances thus the Tribunal ought to have followed the said judgment and allowed the OA and if it did not agree with the earlier order, the said matter ought to have been referred to a larger bench for re-consideration. This is clearly necessitated in order to create certainty in law. If courts/tribunals fail to take cognizance of their own previous judgments, it will inevitably create havoc and seriously undermine public confidence in the judicial system.

28. However without following the said procedure and without differing with the earlier judgment, the Tribunal could not have dismissed the OA. Thus the impugned order is liable to be set aside on this ground alone.

29. Even otherwise, the proposition of law laid down in ***J. P. Singh (Supra)*** is good law. A somewhat similar issue had come up for consideration before the Supreme Court of India in the case of ***State Bank of Bikaner & Jaipur (Supra)*** wherein the statements recorded under Section 161 of Cr.P.C. were sought to be relied upon in the disciplinary inquiry and the maker of the statement was produced and allowed to be examined. The Supreme Court held as under:-

“13. The statements under Section 161 Cr.P.C. may not be admissible in the criminal trial, but the said statements can be produced in a disciplinary inquiry like the present. The person who made the statement has been examined before the Inquiry Officer. It was open to the witness to have stated orally the entire contents of what was recorded in his statement under Section 161 Cr.P.C. Instead of following this time-consuming procedure, the said statement recorded under Section 161 Cr.P.C. was read over to the witness who admitted the contents thereof. In this way the earlier statement under Section 161 Cr.P.C. became a part of the examination-in-chief of the witness before the Inquiry Officer. It is not in dispute that the said statements had been given to the respondent in advance and full opportunity was granted to the respondent to cross-examine the said witnesses. This being the case, it is difficult to appreciate as to how the High Court could have come to the conclusion that the inquiry proceedings stood vitiated.”

(Emphasis Supplied)

30. A reading of paragraph 13, extracted above, would show that the Supreme Court has held that there is no bar in relying on a statement of the witness recorded under Section 161 Cr.P.C. provided that the maker of the said statement is produced and an opportunity to cross-examine the said witness is granted to the delinquent officer. Based on the same analogy, we are of the considered view that in case the department was

desirous of relying upon the statement of witnesses recorded under Section 108 of the Customs Act, the said witnesses should have been produced before the Inquiry Officer to enable the delinquent officer to cross-examine those witnesses, failing which the testimonies of these witnesses cannot be relied upon.

31. We are also fortified by the judgment in ***S.B.Ramesh (Supra)*** where the statement of one, Smt. K.R. Aruna, was relied upon by the disciplinary authority without examining her. This was held to be impermissible in law by the Tribunal and upheld by the Supreme Court. It would also be useful to reproduce the observations of the Supreme Court in ***Kuldeep Singh v. Comm. of Police, (1999) 2 SCC 10*** wherein it has been held that reliance on a previous statement of a witness without producing him as a witness and extending an opportunity of cross-examination deprives the charged officer of the protection under Article 311 of a reasonable opportunity to defend himself. The relevant paragraph reads as follows:

“32. Apart from the above, Rule 16(3) has to be considered in the light of the provisions contained in Article 311(2) of the Constitution to find out whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311(2) means “hearing” in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the

delinquent who should thereafter be given an opportunity to cross-examine that witness.

33. In *State of Mysore v. Shivabasappa Shivappa Makapur* [AIR 1963 SC 375 : (1963) 2 SCR 943] the witness was not examined in the presence of the delinquent so far as his examination-in-chief was concerned and it was his previous statement recorded at an earlier stage which was brought on record. That statement was put to the witness who acknowledged having made that statement. The witness was thereafter offered for cross-examination and it was held that although the statement (examination-in-chief) was not recorded in the presence of the delinquent, since the witness had been offered for cross-examination after he acknowledged having made the previous statement, the rules of natural justice were sufficiently complied with.

34. In *Kesoram Cotton Mills Ltd. v. Gangadhar* [AIR 1964 SC 708 : (1964) 2 SCR 809] and *State of U.P. v. Om Prakash Gupta* [(1969) 3 SCC 775] the above principles were reiterated and it was laid down that if a previous statement of the witness was intended to be brought on record, it could be done provided the witness was offered for cross-examination by the delinquent.

35. Having regard to the law as set out above and also having regard to the fact that the factors set out in Rule 16(3) of the *Delhi Police (P&A) Rules, 1980* did not exist with the result that Rule 16(3) itself could not be invoked, we are of the opinion that the enquiry officer was not right in bringing on record the so-called previous statement of witnesses, Radhey Shyam and Rajpal Singh.”

(Emphasis Supplied)

32. It may be that the Tribunal had rejected the contention for the reason that statements recorded under the Customs Act and the Excise Act, 1944 stand on a different footing and are not required to be proved. It is settled law that the statements recorded under Section 108 of the Customs Act is not equivalent to a statement recorded under Section 161

of the Code of Criminal Procedure and is a material piece of evidence. Though there is a catena of judgments on the subject, we deem it appropriate to reproduce the following paragraph of the judgment of the Supreme Court in *Naresh J. Sukhawani v. Union of India*, 1995 Supp (4) SCC 663:

“4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.”

(Emphasis Supplied)

33. Although there is no quarrel to the proposition so laid, but the same is limited to admissibility of the statements made by the delinquent officer himself. In the present case, it has to be limited to the statement of the petitioner himself as listed in the list of documents at item no. 10 in the list extracted by us in paragraph 8. The same cannot be extended to place reliance upon the statements made by Sh. Deepak Bansal, Sh. A.N. Ahuja and Sh. Gurcharan Singh recorded under Sections 107 and 108 of the Customs Act, without producing them for cross-examination. Relying

upon statements of persons recorded behind the back of the charged officer cannot be allowed to be used to sustain his guilt, unless the makers are produced for cross-examination, as the same undermines the protection enshrined under Article 311 of the Constitution.

34. We now proceed to analyse the second issue in the present matter. The memorandum dated 04.10.2007 contained no witnesses to prove the contents of the documents. To this end, it would also be useful to refer to the observations of the Supreme Court in the case of **Roop Singh Negi (Supra)**:

“14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges levelled against the delinquent officer must be found to have been proved. The Enquiry Officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceedings. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof...

...

23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A

decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof.”

(Emphasis Supplied)

35. We may also take note of the following paragraph of the judgment of the Supreme Court in **Saroj Kr. Sinha (Supra)**:

“28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.”

(Emphasis Supplied)

36. The Supreme Court has consistently held that a departmental inquiry is akin to a quasi judicial proceeding. It has also been held that mere production of documents is not enough, the contents of the documents have also to be proved by examining the witnesses. This has been held while taking into consideration the fact that though the

provisions of the Evidence Act may not be applicable in departmental proceedings, but the principles of natural justice would certainly be applicable.

37. Resultantly, we are of the view that the Tribunal was bound by the decision rendered by the coordinate bench of the Tribunal. The Supreme Court in the case of **G. S. Grewal (supra)** have expressed its deep displeasure when such judicial propriety is not maintained. We reiterate, that in case for any strong reasons the Tribunal was of the view that the decision rendered by the coordinate bench was not in accordance with law, the only option available was to refer the matter to a larger bench which was not done in this case. Even otherwise, we are of the view that the decision rendered by the Tribunal in the case of **J.P.Singh (supra)** is good law.

38. Accordingly, the impugned orders passed by the Tribunal, the disciplinary authority and the appellate authority are hereby set aside/ quashed. However, based on the decision rendered by the Supreme Court, as relied upon by the counsel for the respondents, in the case of **State Bank of Patiala (supra)**, we remand the matter back to the disciplinary authority, which will conduct a *de novo* inquiry against the petitioner herein in accordance with law, after giving the petitioner an fair opportunity of hearing. Liberty is granted to the parties to add a list of witnesses and list of documents sought to be relied upon/ examined by them in the said inquiry.

39. The writ petition is disposed of in the above terms.

G.S.SISTANI
(JUDGE)

I.S.MEHTA
(JUDGE)

AUGUST 10, 2016
//‘dc’

