IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 71 OF 2020

Satyendra Singh Gurjar …Applicant

Versus

1. CBI, ACB, Mumbai
2. The State of Maharashtra ...Respondents

….

Mr.Subhash Jha with Mr.Sajal Yadav, Mr. Shalabh Saxena, Mr. Harsh Ghangurde, Mr. Raj Raut, Mr. Siddharth Jha, Mr. Dwivendra Dubey, Ms.Alka Pandey i/by Mr.Mitul Shah, Advocate for Applicant.

Mr.Harsh Dedhia i/by Mr.H.S.Venegavkar, Special Public Prosecutor for Respondent No.1- CBI.

Mr.Arfan Sait, APP, for Respondent No.2- State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 25th JULY, 2022.

PER COURT:

1. The applicant is facing prosecution vide Special CBI Case No.8 of 2009 pending before the Court of Special Judge for CBI at Mumbai for offences under Sections 120-B, 420, 468, 471 r/w Section 34 of Indian Penal Code (for short “IPC”), Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short “PC Act”).

2. The brief facts of prosecution case are as under :-

i) Reliable information was received to the effect that, one import container was cleared by filing a bill of entry dated 04.12.2006 at New Customs House, Mumbai by CHA M/s. Abba & Sons in the name of consignee M/s. Ratan Enterprise, Gandhinagar. The consignment was declared to contain Tooth brush, Baby Diapers, Plastic Bowls etc. for Rs.3,03,359/- on which the customs duly calculated was Rs.84,621/-. The container was kept in Frere Basin Container Yard.

ii) On 05.12.2006 on the basis of specific intelligence a trailer truck bearing No. MH-43 E-1345 outside the Dock premises at Mallet Road was intercepted by Directorate of Revenue Intelligence, Mumbai Zonal Unit which was found loaded with above container. At the time of interception, the bottle seal of shipping line was found intact in said container, it indicated that, it was out of charge by customs without opening the container and without examination of the goods.

iii) The said container was taken inside the Frere Basin container yard for examination by the DRI officials and during the course of examination, CHA representative Shri. Ramesh Pandey was present. The DRI recovered 4159 pieces of Titan and Fast track wrist watches which were found concealed in 10 boxes declared to contain tooth brushes. The goods were seized under Panchanama.

iv) During the course of investigation by DRI, Shri. Ramesh Pandey, representative of CHA stated that, Shri. Mohd. Ghouse and Imran Chasmawala were importers of the said consignment and the out of charge for the said container was obtained from an appraising officer S.S. Gurjar posted at Sewri Timber Point (STP) a specific location for container of MBPT.

v) It was revealed that, Shri. S.S. Gurjar, (applicant) appraising officer of the customs holding specific jurisdiction of STP on 04.12.2006 by abusing his official position as public servant cleared the above container which was actually located at Frere Basin another location of the container in the port out of his jurisdiction after obtaining illegal gratification of Rs. One Lakh from the representative of CHA.

vi) The public servant as a motive or reward and in connivance with others, by using his password on the customs Electronic Data Interchange (EDI) system and unauthorisedly generated "out of charge" document which denotes that, the consignment has been examined, duly has been paid and therefore the same released from the customs notified area and cleared for delivery. Thereby, caused loss of customs duty for the value corresponding to the goods recovered to the customs development and pecuniary advantage to the importers and himself.

3. The applicant preferred an application for discharge before the trial Court. The said application was rejected by order dated 17.08.2012. The applicant thereafter preferred Criminal Revision Application No.384 of 2012 before this Court. The said revision application was rejected by order dated 28.06.2013.

4. The applicant had preferred Special Leave Petition before the Hon'ble Supreme Court. The Petition was dismissed vide order dated 21.10.2013. However, the Supreme Court had observed that the Petitioner is free to raise all contentions on facts in law open to him before the trial Court at the stage of framing of charge. The trial Court shall while examining any such contention remain uninfluenced by the observations made by the High Court in the impugned order or those made by the trial Court in its order dated 17.08.2012 rejecting the application for discharge. It was also observed that the apex Court had not expressed any opinion on the merits of the case which aspects is left entirely for the trial Court to examine at the appropriate state and in accordance with law on the subject Special Leave Petition.

5. The applicant preferred another application for discharge before the trial Court on merits. The said application was rejected by order dated 18.01.2018.

6. The order dated 18.01.2018 was challenged by preferring Criminal Revision Application No.205 of 2018. The said revision application was withdrawn and disposed of vide order dated 04.09.2019. The Petitioner had also preferred Writ Petition No.4505.2019 before this Court which was withdrawn with liberty to file fresh one after decision in Writ Petition No.12403 of 2018. The Petition was disposed off as withdrawn with leave and liberty as prayed vide order dated 22.10.2019.

7. The charge was framed against the Petitioner and other accused by the trial Court vide order dated 11.11.2019.

8. Learned Advocate Mr. Jha appearing for the Applicant submitted as under :-

i) Disciplinary Proceedings were initiated against the applicant vide Charge Memorandum dated 18.02.2011. Three charges were framed against the applicant. The inquiry proceedings exonerated the applicant of Article I and Article III and held charge-II as partially proved to the extent of its factual content only without attributing any ill motive or malafide on part of the Applicant. The Disciplinary Authority however imposed penalty on the applicant on the charge at Article II while holding that passing OCC without examining was deliberate and willful.

(ii) Penalty Order dated 11.03.2014 was challenged before the Appellate Authority. The Appeal was dismissed vide order dated 24.09.2014. The applicant challenged the order dated 11.03.2014 passed by Disciplinary Authority and order dated 24.09.2014 passed by Appellate Authority before the Central Administrative Tribunal by Original Application No.14 of 2015. The Central Administrative Tribunal rejected the application vide order dated 12.12.2017. The order passed by the Central Administrative Tribunal was challenged before this Court by preferring Writ Petition No.12403 of 2018. The Division Bench of this Court quashed the order dated 03.11.2017, 11.03.2014 and 24.09.2014 and exonerated the applicant from all the charges initiated against him.

(iii) The prosecution case is based on the charge-sheet filed by Respondent No.1. The charge-sheet is based on material collected by D.R.I. The D.R.I. did not have sufficient material to proceed against the applicant and even to subject him to adjudication proceedings to penalize him. The applicant is exonerated from all the charges in disciplinary proceedings. The burden of proof in Criminal trial is much higher.

(iv) In view of the findings in quasi-judicial proceedings and further validation by the Division Bench of this Court that the applicant did not enter into a conspiracy, did not accept or extend undue favour to importer, or any misconduct, did not act with deliberate and/or malafide intention, did not act dishonestly for illegal monetary consideration to cause loss of revenue to the Government Exchequer, did not cause any wrongful gain to the importers and did not allow the passing of undeclared exported goods deliberately. In these circumstances the applicant cannot be prosecuted in criminal proceedings.

(v) The applicant is exonerated on all counts in disciplinary inquiry germinating out of identical facts. The prosecution did not invoke Section 7 of the PC Act qua the applicant. It is not the case of the prosecution that the applicant has accepted, obtained or agreed to accept or attempted to obtain any consideration for alleged act/omission.

vi) The primary requisite for offence under Section 13(1)(d) of the PC Act is proof of demand from request of valuable thing or pecuniary advantage from the public servant. In the absence of proof of demand or request for a valuable thing or pecuniary advantage from public servant, the offence under Section 13(1)(d) cannot be established. This Court had exonerated the applicant from charges framed by disciplinary authority.

vii) The criminal proceedings arises on the basis of material collected and statements recorded by DRI. If the DRI did not find sufficient material to proceed against the applicant or even to subject him to adjudication proceedings, the present proceedings would be abuse of process of law.

viii) The applicant is exonerated from all the charges in disciplinary proceedings under CCS(CCA) Conduct Rules 1965 where the test is preponderance of probability. The foundational facts for consideration by DRI, departmental proceedings and investigation under IPC and PC Act are same. The transaction is same. The documents are same. The departmental proceedings and DRI proceedings assumes significance. The burden of proof is higher in criminal prosecution.

9. Learned Advocate Mr. Jha, has relied upon followings decisions :-

i) *Aashoo Surendranath Tewari V/s. Deputy Superintendent of Police*, EOW, CBI (2020) 9 SCC 636.

ii) *Radheshyam Kejriwal V/s. State of West Bengal and Another* (2011) 2 SCC 581.

iii) *Manoj Kumar Sarangi V/s. Dy. Commissioner of Customs (P) R & I.* 2007 (219) E.L.T. 114 (Bom.)

iv) Order dated 4th April, 2014 passed by Karnataka High Court in Criminal Revision Petition No.583 of 2012 in the case of *C. Krishnappa S/o Chinnappa V/s. State by CBI.*

v) Order dated 23rd August, 2011 passed by Delhi High Court in Criminal M.C. No.3970 of 2010 in the case of *R.K. Srivastava V/s. CBI.*

vi) *J. Seker alias Sekar Reddy V/s. Directorate of Enforcement* 2022 SCC OnLine SC 561.

vii) *Johnson Jacob V/s. State* 2022 SCC OnLine Del 1864.

viii) *Keshav V/s. State of Maharashtra* 2022 SCC OnLine Bom 1314.

10. Learned counsel for respondents Mr. Venegaonkar submitted that, the departmental proceedings/adjudication proceedings and the criminal prosecution stands on different footings. On the ground of exoneration in the departmental proceedings, the applicant cannot be absolved of charges in the criminal prosecution. The prosecution is relying upon several documents, and statements of witnesses. The prosecution must be given an

opportunity to examine the witnesses and to prove charges. The scope of criminal prosecution and departmental proceedings is different. The degree of proof in departmental inquiry is based on preponderance of probability. The offences are of serious nature. The findings of the departmental inquiry are not binding on the criminal Court.

11. Mr. Venegaonkar relied upon the decision of the Hon'ble Supreme Court in the case *Union of India and Others V/s. Dalbir Singh* 2021(11) SCC 321.

12. Show cause notice dated 01.06.2007 was issued under Section 124 of the Customs Act, 1962 by the Directorate of Revenue Intelligence to show cause to the adjudicating authority i.e. Commissioner of Customs (Import) Mumbai as to why the wrist watches seized from consignment covered by bill of Entry No. 727840 dated 04.12.2006 filed in the name of M/s. Ratan Enterprises should not be confiscated under the provisions of Section 111(d) of the Customs Act and under the provisions of Foreign Trade (Regulation) Rules 1993 and why penalty under Section 112(a) and 112(b) of the Customs Act,1962 should not be imposed against the persons to whom the said notice was issued. The chow cause notice was issued to Mohammed Imran Arif

Chasmawala, Mohammed Gouse Kareem and Ramesh Pandey.

13. FIR was registered on 28.12.2007 by CBI bearing No.RC BAI/ 2007/A0040 for offences under Section 420, 120(B) of IPC and Section 13(2) r/w Section 13(1)(d) of PC Act against applicant, Mr. Mohammed Ghouse, Mr. Imran Chasmawala and Mr. Ramesh Pandey. Charge-sheet was filed on 20.01.2009. The Court took cognizance of charge-sheet and issued process vide Order dated 03.02.2009.

14. Departmental proceedings were initiated against the applicant vide Memorandum dated 18.02.2011 by Commissioner of Customs Mumbai. Three charges were framed against the applicant. The Article of Charge – I was that the applicant, while functioning as Appraiser at Sewree Timber Pond in the month of December – 2006 applicant had entered into a conspiracy with Shri. Mohammed Ghouse Karim, Imran Chasmawala, importers and Shri. Ramesh Pandey employee of CHA M/s. Abba & Sons and had extended undue favour to them in discharge of his official duty by granting clearance to an import consignment container in respect of Bill Entry No.727840 dated 04.12.2006 and issued Out of Charge Order No. 12911 dated 05.12.2006 for the removal of the said container from the customs notified area which was not

under his jurisdiction and that he was not permitted to do so. The Article of Charge – II was that the applicant had not examined the import consignment loaded in container under Bill Entry No.4553921 dated 04.12.2006. The applicant had cleared the said consignment lying at Frere Basin – 1 not within his jurisdiction, using his user ID Number on the EDI System by calculatingly feeding an examination report of having opened and examined 40 packages in the presence of CHA and generated fallacious documents to make an impression that the consignment had been examined and had given out of charge. The Article of Charge - III was that the applicant with deliberate and malafide intention to help Mohammed Ghause Karim, Imran Chasmawala, importers and Shri.Ramesh Pandey, the employee of CHA M/s. Abba & Sons and to avoid payment of proper customs duty acted dishonestly for illegal monetary consideration and to cause loss of revenue to the Government Exchequer and wrongful gain to the importers. He deliberately did not detect the undeclared imported goods which were concealed in the container to cause loss of revenue in exchange of his own monetary consideration. While granting clearance to the import cargo in respect of Bill of Entry No.727840 dated 04.12.2006 not under his jurisdiction without any proper authority and without examining the consignment, for illegal monetary consideration besides generating the data to the effect of having examined the goods, had not only abused his official position, but had also failed to maintain absolute integrity and shown gross negligence in discharge of his duties and acted in a manner unbecoming of a Government Servant. Had the consignment not been intercepted by the officials of DRI, if would have resulted in Revenue loss to the Government. By aforesaid acts of commission and omission, the applicant committed gross misconduct, failed to maintain absolute integrity showed lack of devotion to duty and acted in a manner unbecoming of government servant and thereby contravened the provisions of Rule 3(1)(i)(ii) & (iii) of CCS (Conduct) Rules, 1964. It was gross misconduct by the applicant.

15. Various prosecution as well as defence witnesses were examined during the enquiry proceedings. Witnesses from the prosecution side included DRI officials, who were associated with investigation, Panch witnesses, Gate Preventive Officer, importer and CHA were produced as defence witnesses and examined in the proceedings. DRI officials namely Shri. Swaminathan Raman, Shri. R. Hanumantha, Shri. C. Jagiasi and Mr. Devendra Verma were examined and cross examined in their capacity of prosecution

witnesses. Shri. Maduranian Singh (DW-1), the then appraiser at Docks, Shri. H.C. Verma (DW-2), Shri. Rishekesh Shashi (DW-3) and CO (applicant) were examined as defence witnesses. The inquiry report was submitted on 25.10.2012. The Findings in the Report mentions that, the witnesses do not even remotely suggest any motive or conspiracy and accordingly the inadvertent error on the part of the CO cannot be attributed to any ill motive. In respect of charge No.1, it is held that, it is not proved that CO entered into conspiracy either with importer or with CHA employee. It is also not proved that CO had any motive to extend any undue favour to CHA or importer or to both despite the fact that he had given out of charge with regards to Charge – II it was held that, article Charge – II emanates from article of Charge-I in the sense that, because of conspiracy and intentions to extend undue favour, CO may have been alleged to feed wrong examination report without examination so as to create fallacious document. Ingredients of conspiracy and ill motives could not be established. No evidences were brought on record to substantiate conspiracy or ill motive on the part of CO, so now would allegation of creation of fallacious document survive. The two departmental officers were examined as defence witnesses in these proceedings. They have clearly brought on record the circumstances under which the inadvertent out of charge could have taken place. Their deposition has made it clear that, such type f mistake do happen at docks. None of the prosecution witness examined has otherwise brought anything on record to show that, it was not an inadvertent error once it is established that there was no conscious and deliberate act on the part of the CO in issuing the out of charge of B/E No.727840 dated 04.12.2006, what remains is merely a statement of facts and therefore article of Charge-II is proved partially to the extent of its factual content only without attributing any ill motive and malafide on part of CO. In respect to charge – III it was held that, the said charge may be deconstructed into four parts. a) CO had deliberate and malafide intention. b) CO acted dishonestly for illegal monetary consideration c) CO helped CHA and importer to avoid payment of proper customs duty and causing illegal gain to the importer and loss to the government exchequer and CO did not deliberately detect the concealed watches. It was observed that, brushing aside testimony of two senior government officials of the same department, who appeared as defense witnesses, without showing reasons to even doubt their bonafides is highly objectionable and dis-approvable in the present departmental proceedings. The ethical practices are to be kept in mind, so as not to reduce inquiry proceedings to an empty formality. The two witnesses were posted at Mumbai Docks as shed Appraisers and both of them have taken pain to explain that such inadvertent errors kept happening in Docks. There were evidences produced from past showing similar wrongdoers of out of charge in the EDI. This was not a rare and solitary case so far as a wrong out of charge out of jurisdiction or without examination was concerned. Still difference of concealment is there in this case. Witnesses including DRI Officers have established that the CO was not aware of any such concealment in the container. None of the witnesses examined during the course of inquiry have spelt out anything to the effect that there was any deliberate and malafide intention on the part of CO in generating the said out of charge. The prosecution has not brought on record any evidence during the course of inquiry to prove that, the CO acted dishonestly for illegal monetary consideration. There is no tangible evidence on record to indicate that any malafide intention was involved on part of the CO or the CO connived with the importer/CHA. The examination of PW-13 PW-15, PW-11 and DW-3 has completely disapproved the prosecution theory. The deposition of PW-15 (importer) that, they had not informed even PW-13 about concealment in the container and that, there was no understanding or planning of clandestine removal of the container with PW-13 involving the CO is further confirmed by DRI officer PW-11. After such a categorical deposition by the importer (PW-15) which has been further corroborated by the CHA employee (PW-13) and DRI Officer (PW-11), there is no room left for any speculation. PW-12, Shri. D.R.Verma, DRI, Officer also confirmed that, PW-13 (CHA employee) had not mentioned any specific monetary consideration on part of CO. The charge of not detecting watches deliberately could hold good, had the CO opened and examined the container. When the container not opened at all then question of deliberately not detecting watches to enforce other charges should not arise. In such circumstances any presumption to suggest motive need to be proved by examining relevant witnesses, particularly when defense has demonstrated that such wrong/erroneous out of charge have happened in the past. Even senior officers have testified that, such mistakes have happened in Docks. To suggest any probability of existence of ill motive, it has to be demonstrated and established during the course of inquiry. No worthwhile evidences to this effect could be brought on record during enquiry proceedings. On the contrary, examinations of prosecution witnesses have yielded results contrary to prosecution theory. Concealment of watches was not in the knowledge of Ramesh Pandey or CO and importer. Under the circumstances, the allegations of extending any favour or help to the CHA or importer cannot survive and therefore article of Charge-III is not proved.

16. In view of the aforesaid finding of the Inquiry Officer, the disciplinary authority sought second stage advice from the Directorate General of Vigilance, Customs and Central Excise. After receipt of advice vide Memorandum dated 03.01.2014, disciplinary authority disagreed with the findings of the Inquiry Officer that the Article of Charge – II was partially proved and recorded tentative view that the Article of Charge – II against the applicant was fully proved. The applicant was called upon to submit a representation on the tentative views recorded by disciplinary authority. After considering the representation of the applicant, the disciplinary authority vide order dated 11th March, 2014 held that, the disciplinary authority found no reason to disagree with the findings of Inquiry Officer in respect of Article of Charge -I and charge - III. As regards Article of Charge - II, the disciplinary authority disagreed with the Inquiry Officer and held that Article of Charge – II was proved conclusively and the action of passing an out of charge order by the applicant without actually examining the contents of consignment was deliberate and willful in character and thus, there was gross dereliction of duty on the part of the

applicant which amounts to misconduct. The disciplinary authority proceeded to impose a penalty of reduction of pay by three stages.

17. The order dated 11.03.2014 was challenged by the applicant before Chief Commissioner of Customs by preferring appeal. The appellate authority vide order dated 24.09.2014, dismissed the appeal and confirmed the penalty imposed by the Disciplinary Authority.

18. The applicant challenged the aforesaid orders of disciplinary authority and appellate authority by preferring Original Application No.14 of 2015 before the Central Administrative Tribunal. The Tribunal did not find any reason to interfere with the impugned orders. Vide order dated 03.11.2017, the application was dismissed.

19. The applicant preferred Writ Petition No.12403 of 2018 before this Court challenging the aforesaid orders. The division bench of this Court vide judgment and order dated 20.12.2019 set aside the order of Central Administration Tribunal dated 03.11.2017 and order dated 11.03.2014 passed by the Commissioner of Customs and the order in appeal passed by the Chief Commissioner of Customs dated 24.09.2014. The findings of misconduct recorded by the disciplinary authority and the penalty

imposed by the disciplinary authority of reduction in pay by three stages were quashed and set aside.

20. The question which arises for consideration in the present proceedings is that, whether the applicant can be prosecuted for criminal prosecution in spite of his exoneration in the departmental proceedings. Undisputedly, the applicant was working as an Appraiser (Customs Officer). It is alleged that he had extended favours to importers and CHA by not examining containers which contained concealed/undeclared goods and issued fabricated and forged Out of Charge for authorizing removal of subject container from customs notified area which was not under his jurisdiction. Departmental proceedings were conducted against him and he was exonerated from two charges and one charge was proved partially to the extent of its factual content without attributing any ill motive and malafide. The division bench of this Court vide its judgment and order dated 20.12.2019 completely exonerated the applicant from departmental proceedings. The division bench of this Court considered the question, whether the applicant can be said to have committed misconduct. In paragraph – 21 of the said decision it was observed that, the cleavage in the opinion of the inquiry officer and the disciplinary authority was on the point of the applicant

having 'calculatingly' fed and generated fallacious (false) document. The word 'calculatingly' covers in its fold a mental element. It is impregnated with an idea of deliberateness. It implies that, the action was taken after taking into account, the foreseeable consequences thereof. The element of intentional and deliberate act, therefore was part of charge-II attributed to the applicant. In the Paragraph 22 of the said decision it was observed that the disciplinary authority was of the view that the act was done 'calculatingly' was borne out by the fact that the applicant did not realize that he was attending to the unauthorized documents at three stages i.e. at the time of feeding examination report, at the time of giving out of charge order in the system and at the time of signing of Out of Charge Order. No.12911 for the said bill of entry.

21. It would be relevant to quote observations of this Court in this aforesaid decision in Paragraph 23 to 28 which reads as follows:

> *"23. The defence of the petitioner was that he issued the out of charge order on account of an inadvertent mistake as Rishikesh Shahi (DW-3), the employee of CHA, had tendered the bill in question along with five bills of entries of STP, which were within his jurisdiction. The out of charge order was issued as the EDI system had no location specific user ID and an appraiser had no way to know where exactly the container was lying. This defence was sought to be bolstered up by examining DW-3 Rishikesh Shahi, who deposed to the fact that he had given the bill of entry in question along with five bills of entries of STP to the petitioner and later realised*

that the bill of entry in question was also passed by the petitioner. The limitations in the EDI system were sought to be brought on record by the petitioner by examining Mr. Madhuranjan Singh (DW-1) and Mr. H. C. Verma (DW-2), who testified to the fact that on account of all the Appraiser being in a position to issue out of charge order, irrespective of the fact as to whether the consignment was within their jurisdiction, and the Appraisers being expected to make entries in 'Yes' or 'No' ('Y' or 'N') and the system generated out of charge order automatically, there was possibility of issuance of inadvertent out of charge orders. It was also brought on record that such mistakes did occur in the past as well.

24. The aforesaid material is required to be appreciated in the backdrop of the fact that the Inquiry Officer has found that there was no material to indicate that the petitioner had either conspired with the importer and CHA or had any nexus with the import of the goods by evading the customs duty. The petitioner was unaware of the factum of the import of the goods by evading the customs duty. There was no intent to either assist the importer or CHA in the evasion of duty nor there was any animus to cause wrongful loss to the revenue. The disciplinary authority, on the other hand, construed that there was an element of calculated action for failure on the part of the petitioner to notice the inadvertent mistake and immediately

report the same to the superior officers.

25. In our view, the said factor is not germane to attribute the element of deliberateness, consciousness and willful action of preparing out of charge order, which the term "calculatingly" implies. The Inquiry Officer was justified in drawing an inference that the mental element in Charge-II drew its support and sustenance from the indictment against the petitioner in Charge-I, of which the petitioner was exonerated. We are persuaded to take this view for reasons more than one.

26. Firstly, the failure of the department to bring home the Charge-I to the petitioner dismantles the substratum of the charge as regards the ill motive on the part of the petitioner. Secondly, the failure to establish the charge of conspiracy against the petitioner snaps the link between the petitioner and other persons, who imported the goods by evading the customs duty. Thirdly, the fact that Charge-III could not be *established leads to an inference that the act of the petitioner was not coupled with a deliberate mala fide intent to assist the importers and the exoneration of the petitioner from the said Charge-III leads to further inference that the petitioner did not give out of charge order for unlawful monetary or other extraneous consideration. Fourthly, if all these elements reflecting upon the state of mind of the petitioner are completely and thoroughly ruled out, then it would not be permissible to introduce the same element of deliberateness and willfulness by holding that the act was calculated one. Lastly, it is imperative to note that even the appellate authority recorded an express finding that the material on record negated the allegations in concluding part of Charge-II about the mala fide intent on the part of the petitioner to create false documents.*

27. If the element of state of mind is thus completely effaced the matter gets restricted to the consideration of the aspect of the gross negligence or carelessness. There are circumstances which suggest that though there was lapse on the part of the petitioner in issuing out of charge order, undoubtedly without inspecting the consignment in question; yet it cannot be said to be such a gross negligence as would constitute misconduct. Mr. Ramesh Pandey (DW-3) testified to the fact of bill of entry being submitted alongwith five bills pertaining to the consignment within the jurisdiction of the petitioner and out of charge order being obtained inadvertently. To add to this, two of the department's officers, namely, Mr. Madhuranjan Singh (DW-1) and Mr. H. C. Verma (DW-2) have deposed that the then prevalent system did not give the Appraisers the chance to examine whether the consignment in question was within the jurisdiction entrusted to them. Thirdly, the petitioner made an endorsement of having examined 40 packages only. The consignment in question was reported to contain 1407 cartons. If the act of the petitioner was deliberate and with intent to create a false record, the petitioner would have made an endorsement of having examined at least 70 packages, to conform to the norm of inspection of 5% of the consignment.

28. In our view, these circumstance, if considered in conjunction with total absence of ill motive, mala fide intent or animus to cause wrongful gain to the importers and the petitioner, lead to a legitimate inference that the act on the part of the petitioner was the result of negligence and carelessness. It falls short of "misconduct".

22. To reiterate what is observed herein above, as per inquiry report. Charge – I and Charge – III were not proved. Charge – II is proved partially to the extent of its factual content without attributing any ill motive, malafide on part of applicant. The department had examined several witnesses. Defense had examined Defense witnesses which includes officers of department. The witnesses were cross examined. Charge – I covers allegation of conspiracy with importer and employee of CHA. Charge – III attributes deliberateness and malafide intention to the act of issuance of out of charge order with the help of persons named therein in evading customs duty. Dishonestly was attributed to the applicant for the act of issuing out of charge order, in order to have monetary consideration and wrongful gain to importers. The exoneration of applicant from charge I and III is concurred by disciplinary authority. The FIR was registered against the applicant and others for offences under Sections 420, 120-B of IPC and Section 13(2) r/w Section 13(1)(d) of PC Act. Charge-sheet is filed for offences under Sections 420, 468, 471 r/w Section 34 of IPC and Section 13(2) r/w Section 13(1)(d) of PC Act. Charge is framed by trial Court vide order dated 11.11.2019 for offences under Section 120-B, 420, 468, 471 of IPC and Section 13(2) r/w Section 13(1)(d) of PC Act. In view of findings in enquiry and

findings of this Court, the applicant need not be prosecuted for the said offences. The findings of authorities indicate that applicant did not enter into conspiracy, did not accept or extend undue favour from or to CHA/importer for any misconduct, did not act with deliberate and malafide intention, did not act dishonestly for illegal monetary consideration to cause loss of revenue to the government exchequer, did not cause any wrongful loss to importers and did not deliberately allowed the passing of undeclared imported goods. The standard of proof required in criminal proceedings is much higher than that of departmental proceedings. The applicant was not impleaded in adjudication proceedings. Section 13(1)(d) relates to offence of criminal misconduct by public servant. A public servant is said to commit the offence of criminal misconduct if he by corrupt or illegal means obtains for himself or illegal means obtains for himself or for any other person by any valuable thing or pecuniary advantage or by abusing his position as a public servant obtains for himself or while holding office as a public servant obtains for any person any valuable thing or pecuniary advantage without any public interest. There is no evidence to substantiate the aforesaid offence. Section 7 of PC Act has not been invoked in the present case. Not the case of payment of illegal gratification criminal proceedings are based on the statements recorded by DRI and material collected by them. The applicant was not subjected to adjudication proceedings. The applicant is exonerated from all charges in disciplinary proceedings, where the test is of preponderance of probabilities. The transaction is same. The documents are same. There is no material to support charge of forgery against applicant.

23. In the case of *Ashoo Surendranath Tewari* (supra), charge-sheet was filed against the appellant accused therein. He applied for discharge before trial Court. Application was rejected on the ground that, prima facie case is made out against the applicant. The High Court agreed with findings of trial Court. The central vigilance commission (CVC) had considered the facts of the case in great detail and held that, no sanction ought to be granted and no offence under the penal code was made out. The report was heavily relied upon before the High Court, however it was brushed aside stating that the CVC could not have come to aforesaid conclusion unless there was evidence to do so. The appellant would fall in category of other people with whom main accused had entered into conspiracy and he could be tried for offence under Section 420 of IPC. The apex Court considered the report of CVC and observed that, reading of report shows that at the highest the

appellant may be negligent without any criminal culpability. The finding of CVC that, appellant appears to be a victim of plot of other accused. It was also observed that, the standard of proof in a departmental proceedings, being based on preponderance of probability is somewhat lower than the standard of proof in a criminal proceedings where the case has to be proved beyond reasonable doubt. Reference was made to decisions in the case of P.S. Rajya V/s. State of Bihar (1996) 9 SCC 1 and Radheshyam Kejriwal V/s. State of W.B. (supra(and applying the said judgments to the facts of the case it was held that, in view of detailed CVC order, the chances of conviction in criminal trial involving the same facts appears to be bleak. The appellant was discharged from the offences under the Penal Code.

24. In the case of *Radheshyam Kejriwal Vs. State of W.B.*(supra) the factual matrix of the case would indicate that the appellant was arrested by Enforcement Directorate under Section 35 of Foreign Exchange Regulation Act, 1973. His statement was recorded under Section 40 of the Act. It was alleged that the appellant had contravened Section 9(1)(f)(i), and 8(2) of the Act r/w Section 64(2) of the Act and liable for penalty under Section 50 of the said Act. Show cause notice was issued by Directorate of Enforcement

to show cause as to why adjudication proceedings under Section 51 of the Act should not be held against him. The adjudication officer came to the conclusion that the allegations made against the appellant of contravention of Section 9(1)(f)(i) and Section 8(2) r/w Section 64(2) of the Act cannot be sustained. The enforcement Directorate on the same allegations which was the subject matter of adjudication proceedings filed a complaint against the appellant for prosecution under Section 56 of the Act before the Metropolitan Magistrate. Application for discharge was rejected by Metropolitan Magistrate. The revision application preferred before High Court was also rejected. The High Court had observed that Enforcement officer who has investigated into the case is a different agency from that of the adjudicating officer and it cannot be taken for granted that the Court will take the same view on the material on record which have prompted the departmental authority to find the allegations not substantiated. The procedure according to which the trial of such an accused by the Court it held has some special features and the two testing processes are so divergent that there is ample scope for the two parallel authorities to hold even diametrically opposite views so far as the question of proof of the charge against the accused is concerned. The apex Court in Paragraph – 26, 29 and 31 of this decision had observed as follows :

> *"26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceeding. The Enforcement Directorate has not been able to prove its case in the adjudication proceeding and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceeding cannot be said to be irrelevant in the criminal case.*
>
> *29. We do not have the slightest hesitation in accepting the broad submission of Mr. Malhotra that finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceeding can not necessarily be held guilty in criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case entire burden to prove beyond all reasonable doubt lies on the prosecution.*
>
> *31. It is trite that standard of proof required in criminal proceedings is higher than that required before adjudicating authority and in case accused is exonerated before the adjudicating authority whether his prosecution on same set of facts can be allowed or not is the precise question which falls for determination in this case."*

After referring to various decisions, the Court analysed the ratio of those decisions in Paragraph 38, 39 and 47 as follows :

> *"38. The ratio which can be culled out from these decisions can broadly be stated as follows :-*
>
> *i) Adjudication proceeding and criminal prosecution can be launched simultaneously;*
>
> *(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;*
>
> *(iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;*
>
> *(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;*

> *(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;*
>
> *(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and*
>
> *(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.*
>
> *39. In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court.*
>
> *47. Bearing in mind the principles aforesaid we proceed to consider the case of the appellant. In the adjudication proceeding on merit the adjudicating authority has categorically held that "the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973 cannot be sustained". In the face of the aforesaid finding by the Enforcement Directorate in adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution."*

25. In the case of *J. Sekar alias Sekar Reddy* (supra) it was observed that, in a case of exoneration, however, on merits where allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

26. The Delhi High Court in the case of *Johnson Jacob V/s. State* (supra) has observed that, the Petitioner therein was exonerated in departmental proceedings and there is no substantial material on record to show the need to continue criminal proceedings against him, the criminal proceedings are required to be set aside.

27. In the case of *Keshav V/s. State of Maharashtra* (supra) this Court relied upon the decision of the apex Court in the case of *Ashoo Tewari* (supra) and *PS. Rajya V/s. State of Bihar,* 1996 (6) SCC 1 and set aside the FIR. It was observed that, the allegation in the criminal complaint are similar to the allegations in the departmental inquiry proceedings. The foundation of criminal complaint made against the applicant therein is a same set of allegations which constituted the charge levelled against him the departmental proceedings. The applicant was exonerated in the departmental proceedings.

28. In the case of *Union of India and Others V/s. Dalbir Singh* (supra) relied upon by learned counsel for respondents, the issue was different and the decisions as above relating to issue in question were not under consideration. The respondent therein was a constable in CRPF. He was tried for offences under Section 302 and 307 of IPC for firing from his service revolver on Head

Constable and Deputy Commandant resulting in death of one of them. The trial Court convicted him and sentenced to imprisonment for life. The High Court acquitted him by giving benefit of doubt. The respondent was served with charge-sheet for misconduct. He was dismissed from service on conviction and reinstated after acquittal. Departmental enquiry was conducted. The punishing authority returned a findings considering the evidence led by the Department that, the respondent had misused his service weapon and not entitled to be retained in force. The said order was affirmed by appellate and revisional authority. The High Court held that, it is not proved that weapon which was issued to respondent was misused by him the apex court held that, High Court has exceeded its jurisdiction while exercising the power of jurisdiction review. The decision was based on facts of that case. Learned counsel for respondent has adverted to observations in Paragraph 24 of the decision wherein reference is made to case of Ajit Kumar Nag V/s. Indian Oil Corporation Ltd. 2004 SCC OnLine Cal 59 in which it was observed that, degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused beyond reasonable doubt, he cannot be convicted by Court of law. In departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of 'preponderance of probability'. The acquittal by a criminal Court would not debar an employer from exercising power in accordance with Rules and Regulations in force. The decision is not applicable in the present case. It is pertinent to note that, the applicant in this case stands exonerated in departmental proceedings.

29. The entire charge in the criminal prosecution is based on the mental element. The division bench of this Court has held that, if the circumstances are considered in conjunction with absence of ill motive, malafide intent or animus to cause wrongful gain to the importers and the applicant lead to a legitimate inference that the act of his part was result of negligence and carelessness. It falls short of 'misconduct'. It is pertinent to note that the burden of proof is heavy in criminal prosecution than in departmental proceedings. In the facts and circumstance of this case it would be abuse of process of law to prosecute the applicant in criminal proceedings.

30. Hence, I pass the following order :-

<u>ORDER</u>

(i) Criminal Application is allowed and disposed off;

(ii) Impugned order dated 3rd February 2009 issuing process against applicant as well as order dated 11th November 2019 framing charge against applicant passed by Special Judge for CBI, Greater Mumbai in Special Case No. 8 of 2009 are quashed and set aside;

(iii) The proceedings in Special Case No.8 of 2009 arising out of FIR No.RC.BA1 2007/A0040, Dated 28th December 2007 registered by CBI, ACB, Mumbai as against applicant are quashed and set aside.

(PRAKASH D. NAIK, J.)