CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION No.455/2013

Date of Decision: 20.02.2020.

CORAM: R. VIJAYKUMAR, MEMBER (A)
R.N. SINGH, MEMBER (J)

J. N. Meena, Aged 56 years,
presently working as Assistant Commissioner of
Customs Central Excise and Service Tax, Anand Division
under The Chief Commissioner of Central Excise and Customs
Vadodara Zone, Gujrat and Residing at Flat No.502,
Bldg. No.198, Shere Punjab Society, Mahakali Caves Road,
Andheri (West), Mumbai 93. ... ***Applicant.***
(By Advocate Shri Ramesh Ramamurthy)

VERSUS

1. Union of India,
Through the Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi-110 011.

2. The Chief Commissioner of
Customs, Mumbai Zone-I,
New Customs House,
Ballard Estate,
Mumbai-400 001. ... ***Respondents.***

(By Advocate Shri A. M. Sethna)

O R D E R (O R A L)

Per: R. Vijaykumar, Member (A)

When the case is called out, Shri Ramesh Ramamurthy, learned counsel appeared for the Applicant and Shri A. M. Sethna, learned counsel for the Respondents.

2. This application has been filed on 25.06.2013 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

> *"8(a) That this Hon'ble Court be pleased to hold and declare that the disagreement memorandum dated 13.03.2012 issued by Respondent No.2 is barred by limitation and not issued bona fide and the same is required to be held to be bad in law and liable to be quashed and set aside as the impugned penalty imposed pursuance thereto;*
>
> *(b) That this Hon'ble Court be please to hold and declare that the action taken by the Respondent No.2 on the disagreement memorandum dated 13.03.2012 as well as the imposition of penalty dated 13.05.2013 is without jurisdiction and the entire action is liable to be struck down.*
>
> *(c) That this Hon'ble Court be pleased to quash and set aside the impugned penalty order dated 10.05.2013 passed by the Respondent No.2 (Anenxure A-1).*
>
> • *that this honourable Tribunal be pleased to direct the grant the Respondents to grant to the Applicant all service benefits due to him including promotion as Assistant Commissioner, Deputy Commissioner, Joint Commissioner and Additional Commissioner from the due dates with all the admissible service benefits including continuity of service, seniority, full back wages and all other admissible service benefits along with interest at the rate of 18% per annum on the arrears on emoluments from the due date till payment.*
>
> *(e) that the costs of this application be granted.*

(f) that such other and further order of orders be passed in the facts and circumstances of the case, may be required;"

3. About 33 months after filing this OA, the applicant filed MA No.289/2016 on 03.03.2016 seeking to correct the date of Disagreement Memorandum mentioned against prayers 8(a) and 8(b) of the OA to read as 13.03.2012 without any change in the averments and other pleadings. This MA was allowed on 10.03.2016 with no objection from the respondents and the respondents, who had been served with the copy of the proposed corrections, were permitted to file a reply which they did on 09.06.2016. In this reply, they have urged that the argument put forward by the applicant that the Disagreement Memorandum was issued under somebody's advice is nowhere reflected in the Disagreement Memorandum now impugned and which was issued on 13.03.2012 and that it was an independent judicial decision fully based on facts on record and there was no vindictive action nor act of victimization as alleged. While allowing the MA, the applicant was directed to carry out the changes in the sets

of OA with the Bench. However, it is noted that the changes were not carried out even till date by the applicant or learned counsel for the applicant which shows utter carelessness and irresponsibility on their part towards the adjudication that they seek from this Tribunal and we take serious note of this aspect while *suo motu* incorporating the necessary changes in the reliefs above. Costs of Rs.50,000/- are accordingly imposed on the applicant which shall be payable to Swachh Bharat Trust within two weeks of receipt of this orders and proof of payment submitted to Respondent No.2 by that date, failing which respondents are directed to pay the amount initially and recover the said amount along with interest from the applicant by any means known to law including from his pension.

4. The applicant was issued Charge Memorandum on 21.08.1998 (Annexure A-2) with following Article of Charges;

> ***"ARTICLE-I***
>
> *That the said Shri J. N. Meena, while functioning as an Appraiser at Dock Examination Section of Customs House, Kandla During the period from July 1972 to July 1993*

failed to examine properly the consignment of declared description as 'Lead Scrap' which concealed the 'Ball Bearings' covered under Bill of Entry No.3058 dt.09.06.93 of Ms. R. K. International, Ahmedabad and thereby wrongly confirmed the description of the goods on reverse of the said B/E.

ARTICLE-II

That during the aforesaid period and while functioning in the aforesaid capacity, the said Shri J. N. Meena has written a false examination report by examining only two drums out of a total 80 drums and that too in a wrong manner and without ensuring the packing list. Thus, Shri J. N. Meena, Appraiser has aided/abetted in smuggling of 'Ball Bearings' of foreign original into India.

By the aforesaid acts of omission and commission, Shri J. N. Meena, Appraiser committed gross misconduct by exhibiting lack of integrity and lack of devotion to duty and thereby acted in a manner unbecoming of a Govt. Servant and thus violated the provisions of Rule 3 (1) (i) (ii) (iii) of the Central Civil Services (Conduct) Rules, 1964."

5. The respondents appointed an Inquiry Officer who conducted the Inquiry and submitted his report on 30.10.1999 (Annexure A-3) with the following findings:

"Keeping in view the facts of the case as brought out above, documents put forth by the prosecution and defence sides, depositions heard and written briefs received from both the prosecution and the defence sides, I hold that none of the allegations made against Shri Meena is established. Article-wise findings are as given below:

ARTICLE-I: Not proved.
ARTICLE-II: Not proved."

6. The then Disciplinary Authority accepted these findings by recording his views in the connected file but his successor differed from him and issued a Disagreement Note along with show-cause notice. The applicant alleged that this decision was taken under pressure of Vigilance and was not an independent decision and thereupon challenged the notice on this basis in OA No.49/2002 in which, the Tribunal quashed the show-cause notice and this was upheld by the Hon'ble High Court and achieved finality by which the Hon'ble Court held that the acceptance of the Inquiry Officer's report by the Disciplinary Authority rendered reference thereafter to the Vigilance unnecessary. In accordance with these directions, the Disciplinary Authority accepted the findings of the Inquiry Officer referred to hereinabove in orders dated 18.08.2011 (Annexure A-9) and communicated his orders on 18.08.2011 (Annexure A-9). The applicant was subsequently promoted on ad-hoc basis to the post of Assistant Commissioner of Customs and Central Excise vide order no.264/2010 dated

19.11.2010 for six months without conferring any right to continue or obtain regular promotion or to count the period towards seniority.

7. Subsequently, by a *suo motu* decision of the Appellate Authority and Chief Commissioner of Customs and Central Excise, Mumbai Zone, the Appellate Authority communicated his intention by way of letter dated 15.02.2012 (Annexure A-10) which referred to the orders passed by the Disciplinary Authority on 18.08.2011, to revise the said order under Rule 29 of the CCS (CCA) Rule, 1965 and also informing that the Appellate Authority, in exercise of powers conferred under Rule 38 of CCS (CCA) Rules, 1965 had extended the time limit to revise the said order in original up to 16.05.2012. The applicant was also informed that he would get the opportunity to present his case before the Appellate Authority in due course of time. The Applicant served the respondents with an Advocate's notice on 05.03.2012 (Annex. A-13) challenging the exercise of powers under Rule 29 and Rule 31 of the CCS (CCA) Rules, 1965 for

extending the time limit for the Appellate Authority to consider and revise the orders of the Disciplinary Authority. He simultaneously filed an OA No.205/2012 which was considered and disposed on 09.07.2012. This Bench declined to deal with the various contentions raised by the applicant on the interpretation of the two Rules 29 & 31 and on the basis that the applicant submitted that he would be satisfied if appropriate directions were given, this Bench directed the respondents to consider all these and other objections of the applicant in consequential departmental proceedings and to pass orders as expeditiously as possible within six months from the receipt of a reply from the applicant. Meanwhile, during the pendency of the OA, the respondents issued a Disagreement Memorandum dated 13.03.2012 conveying the reasons for disagreement and tentative views of the respondents to which they invited the applicant to furnish his specific replies.

8. The applicant then approached this Tribunal by way of Review Petition No.77/2012 in the aforesaid OA No.205/2012 seeking review

of the order dated 09.07.2012. In this RP, filed on the grounds that the orders were not workable, the applicant has taken the specific ground that by passage of time the applicant has been promoted to the post of Assistant Commissioner of Customs and Central Excise and thus, in this case, the President had become the Disciplinary Authority. However, this Tribunal dismissed the Review Application vide order dated 04.10.2012 (Annexure A-16) and with regard to such ground of the applicant, the Tribunal held in para-6 of its order dated 04.10.2012 as under:

> *"6.However, it is not in dispute that as on the date when Annexure A-1 notice was issued by the Respondent, he was well within his powers to do so. Therefore, the competence or jurisdiction of the Respondent has to be tested as on the date of issue of the show cause notice. In that view of the matter the subsequent promotion of the Petitioner as a Group 'A' officer will have no bearing on Annexure A-1 notice. It must also be remembered that Disciplinary Proceeding was initiated against the Petitioner in relation to an alleged misconduct of the year 1998."*

9. Thereafter, the applicant challenged the order dated 09.07.2012 as well as the order dated 04.10.2012 passed in RP No.77/2012 before the Hon'ble High Court in WP No.11681/2012.

However, the same was dismissed as withdrawn vide order dated 18.12.2012 (Annexure A-7) wherein the Lordships of the Hon'ble High Court have disposed the petition by keeping the issues open.

10. Following these orders and in view of the liberty granted by the Tribunal, the applicant preferred his objections to the aforesaid show-cause notice dated 11.1.2013 (Annexure A-18).

11. After considering the reply to Show-Cause Notice/Disagreement dated 11.1.2013 filed by the applicant, the Appellate Authority invoked its jurisdiction under Rule 29 and passed the impugned orders dated 10.05.2013 (Annexure A-1) imposing a major penalty by way of the following orders:

> *"I order a penalty of reduction in salary under Rule 11 of the CCS (CCA) Rules, 1965, be imposed on Shri J. N. Meena, Appraiser and his pay be reduced by three (3) stages from Rs.24110 + Rs.5400 (Grade Pay) to Rs.21600 + Rs.5400 (Grade Pay) in the time scale of Rs.15600 - 39100 + 5400 (Grade Pay) for a period of two (2) year with effect from 01.06.2013. It is further directed that Shri J. N. Meena, Appraiser, will not earn increments of pay during the period of reduction and that, on expiry of this period, the reduction will not have the effect of postponing his further increments of pay."*

12. The learned counsel for the applicant was heard at length. He has challenged the impugned orders on the following grounds:

(i) that under Rule 31 of CCS (CCA) Rules the Appellate Authority does not have the jurisdiction to extend the period of six months as provided under Rule 29 and in that situation, once the order passed by the Disciplinary Authority has been revisited by the Appellate Authority *suo motu* beyond the period of six months, it becomes *ab-initio*.

(ii) Show cause notice issued by the Appellate Authority by invoking the jurisdiction of Rule 29 of CCS (CCA) Rules is not an independent application of mind but under coercion and undue influence of the department and therefore, the same is bad in the eyes of law.

(iii) Once the applicant has been promoted to the post of Assistant Commissioner and in his such capacity, the President has become the Disciplinary Authority, the Chief Commissioner of Customs and Central Excise who was earlier the Appellate Authority for the applicant

cannot exercise the power of Appellate Authority against the applicant.

(iv) As argued in the OA, he argues that the impugned order was based on consideration of extraneous and new matters which, therefore, vitiates its validity in view of the violation of principles of natural justice. The learned counsel for the applicant in rebuttal also referred to a list of documents of imports made by two firms M/s. R.K. International and M/s. Ram Metal Industries and certain comparisons for which he argues that these are new facts and were not part of the charge memo or the inquiry.

(v) After the Adjudicating Authority under the Customs Act had held against the department on grounds of mis-declaration and concealment of ball bearings (illegal import) by M/s. R.K. International and which had been upheld by CESTAT on 25.06.2003, these orders cannot be ignored by the Authority concerned while passing the impugned orders of punishment dated 10.05.2013 and that too, when such finding of the CESTAT was dismissed by the Hon'ble Apex

Court after detailed consideration on the lack of conclusive proof on actual identification of ball bearings said to have been imported and when the CESTAT, the last forum for determination of questions of fact, had held that the Revenue had failed to prove the presence of ball bearings.

13. On these issues, the learned counsel for the applicant argues that Rule 29 of CCS (CCA) Rules, 1965 provides for *suo motu* revision by the Appellate Authority to be exercised within six months and this period had expired by 17.02.2012 by which time, no revision orders had been issued. The Disagreement Memorandum was also issued on 13.03.2012 which was beyond the six months time limit allowed for the Appellate Authority under Rule 29(1)(v). However, the Appellate Authority had invoked powers under Rule 31 of the Rules and in orders passed on 15.02.2012 extended the time limit to revise the orders for a further three months up to 16.05.2012. The exercise of such powers under Rule 31 was not available to the Appellate Authority, according to the learned

counsel for the Applicant, since Rule 29 itself had no provision for extending the time limit of six months for *suo motu* of exercise of powers. Learned counsel for the applicant argues that Rule 31 commences with the words 'Save as otherwise expressly provided in these rules' and this means that where time limits have already been specified in the rule, Rule 31 cannot be applied. According to him, Rule 31 was a provision to relax time limit for condonation of delay for an employee in filing appeal or revision and not for the purpose exercised in the present proceedings. The applicant had also objected to such exercise of powers in a letter dated 05.03.2012 in response to the orders passed by the Appellate Authority under Rule 31.

14. On the second aspect, learned counsel for applicant argues that the Appellate Authority replicated the Disagreement Memorandum earlier exercised by the successor of the first Disciplinary Authority, who had concurred with the Inquiry Officer and had not exercised his mind independently and had again come under the

pressure of the Vigilance department. This was despite the fact that the earlier notice-cum-Disagreement Memorandum issued at the first stage by the successor Disciplinary Authority had been quashed by this Tribunal, upheld by the Hon'ble High Court and the respondents failed even before the Hon'ble Apex Court.

15. On the third aspect of competence, the learned counsel for applicant argues that the competent authority was now only the President in his case in view of his promotion on 12.07.2012 (Annexure A-15) and not the Appellate Authority, the Chief Commissioner. This Tribunal had rejected these contentions as raised in RP 77/2012 in OA 205/2012 as totally misconceived on the grounds that the competence of jurisdiction of the respondents had to be tested as on the date of issue of the show cause notice on 15.02.2012 and not with reference to his subsequent promotion as a Group 'A' officer (12.07.2012). The applicant's challenge before the Hon'ble High Court of Bombay in WP No. 11681/2012 was disposed on 18.12.2012 as withdrawn by keeping the issues

open. He had, therefore, also raised this issue in his additional reply which was filed subsequently on 11.01.2013 on the Disagreement Memorandum dated 13.03.2012 and this was in addition to his oral submissions during the personal hearing granted to him by the Appellate Authority on the same date. This additional submission includes both his preliminary objections on the manner in which the powers were exercised by the Appellate Authority under Rule 31 and 29 of CCS (CCA) Rules and his interpretation of the consequence of his having become a Group 'A' officer in the interregnum.

16. On the other aspects, learned counsel for applicant argues that the reasoning contained in the Disagreement Memorandum of 13.03.2012 is a duplication of the earlier Disagreement Memorandum dated 13.08.2001 issued by the Disciplinary Authority and does not refer to any deposition of the witnesses during the inquiry or reasoning of the Inquiry Officer or the Disciplinary Authority. He also argues that the nature of inconsistencies between witnesses

had been brought out elaborately in the Inquiry Officer's report and this has not been properly considered and some statements had been relied on without giving an overall consideration which had been done by the Inquiry Officer. Therefore, he claimed, that the Disagreement Memorandum had not been issued after due deliberation or examination in depth. He also argues that the respondents have relied on a so-called confessional statement given by him and had made an interpretation which is not correct and have also taken account of certain submissions that were never part of the inquiry. He argues that his statement under Section 108 can only be used for corroboration or contradiction and has not been done during the inquiry nor were the documents proved although the said document was a relied-upon document. The Applicant has also argued that the authority had exercised powers of revision and not of appeal and during such revision, which was of a discretionary and restricted nature, the authority could not misuse its jurisdiction to re-argue the matter or to re-

appreciate the evidence or else to give a totally new justification to impose punishment.

17. During arguments, the learned counsel for the applicant has relied on few judgments which are as follows:

(i) State of Mysore Vs. S. S. Makapur, reported in AIR 1963 SC 375.

(ii) Kuldeep Singh Vs. Commissioner of Police, reported in (1992) 2 SCC 10.

(iii) M. K. Sarangi Vs. Dy Commissioner of Customs, reported in (2007) 219 ELT 114 Bom HC.

18. The first few citations concern the need for prior statements of witnesses to be made known to the Charged Officer, produced during domestic examination and opportunity for cross-examination provided to the Charged Officer. He, therefore argues that the statements given during the preliminary inquiry will need to be proved at the time of inquiry by being brought on record after they are exhibited at the time of inquiry and he argues that the applicant's statement during the preliminary inquiry was not handled in this manner and therefore, cannot be relied on for this purpose. He also

relies on ***M. K. Sarangi Vs. Deputy Commissioner of Customs (supra)*** where it has been held that when the CESTAT had considered the issue on appeal from the orders of the Adjudicating Authority under the Customs Act on the aspects of evasion of duty and clearance of goods without payment of duty, and had arrived at a judgment that nothing could be held against the applicant, there could not be a different view taken in the Disciplinary Proceedings. The judgment he now relies on in support of this, states at para 26 reads as below:

> *"...26. In the light of the said provisions noted above, in my view considering the fact that the petitioner has been exonerated in adjudication proceedings where the rigour is not what is required in the criminal proceedings, then, this is a fit case where regular criminal case should be quashed. The standard of proof required in the criminal case is much stronger and rigorous. In adjudication proceedings itself, the respondents could not bring home the charge. It is not now possible for the prosecution to prove the case against the petitioner, more so, in the light of its report in the C.B.I. Special case. In such circumstances and when the participation and role of the petitioner in the entire transaction is in grave doubt, then, interest of justice would be sub served by holding that continuation of the subject criminal criminal proceedings is an abuse of the process of the Court. The prosecution having not been able to succeed in adjudication proceedings and the facts of the present case being peculiar inasmuch as the C.B.I. Special Case is also dropped, then, forcing the petitioner to go through*

a trial would not be in the interest of justice but would be a clear abuse of the process of the Court."

19. In reply, the learned counsel for the respondents refers to the provisions of Rule 31 of the CCS (CCA) Rules. He argues that these provisions hold that the Competent Authority under these rules may pass orders for good and sufficient reasons to extend the time and it has not been disputed that the Authority who exercised such powers was the Competent Authority in this regard.

20. With regard to the provisions of Rule 29 which required the Appellate Authority to act within six months of the date of the order proposed to be revised and pass such orders, he refers to the instructions of Government of India under this Rule at Decision No.4 on how to reckon the period of revision of six months wherein in accordance with the judgment of a Hon'ble High Court, it was clarified as follows in DG, P. & T., Letter No.6/1/72-Disc., I, dated the 27th July, 1972:

"...29 Decision(4) How to reckon the period of revision of six months.

Accordingly to Rule 29(1)(v), an Appellate Authority may within a period of six months of the date of the order proposed to be revised call for the records of any enquiry at any time either on his own motion or otherwise and revise any order made under these rules. In D.G., P & T., Letter No.15/10/67-Disc., dated the 22nd May, 1968 (not printed), it was stated that the Appellate Authority, calling for the relevant records of the case with a view to revising an order already passed within six months of the date of the order to be revised would be acting well within this time-limit. It has now become necessary, however, to revise this order in view of a recent judgment of a High Court. Accordingly, it is hereby clarified that it will be incumbent upon the Appellate Authority to make a specific mention of the fact that it proposes to revise the order already passed, when calling for the papers. In other words, the Appellate Authority should clearly indicate in the order calling for the records of the case that it proposes to revise the order and it is in this connection the papers are being called for. At the same time, the Government servant should also be informed that the Appellate Authority proposes to revise the order. It is necessary to ensure that the intention of the Appellate Authority to revise the orders in this way is conveyed to all concerned within the stipulated period of six months from the date of the order proposed to be revised."

Therefore, it was necessary for the Appellate Authority to convey his intention to revise the order within the stipulated period of six months by virtue of Rule 31 of CCS (CCA) Rules. Therefore, he argues that the adoption of Rule 31 and 29 in the present case were quite in order.

21. On the argument that the Appellate Authority was not the Competent Authority to pass orders, on the consideration that the official had, in the intervening period, had been promoted as Group 'A' Officer, learned counsel for respondents argues that the issue had already been dealt by this Bench in its previous decision in RP No.77/2012 in OA No.205/2012 decided on 04.10.2012 in which it was pointed out that the show cause notice impugned in those proceedings by the applicant had been issued before the applicant become a Group 'A' officer and therefore, there was nothing inherently wrong in the assertion of powers by the Appellate Authority who was, therefore, competent in this regard. The Applicant challenged these orders in the Hon'ble High Court of Bombay in WP No.11681/2012 but withdrew his writ which was accordingly disposed of keeping issues open in orders dated 18.12.2012.

22. On the three remaining contentions of the learned counsel for applicant, the learned counsel for the respondents denied that the

Appellate Authority who had issued the Disagreement Memorandum, had not independently appreciated the material on record and for this proposition, he referred to the first Disagreement Memorandum dated 30.08.2001 (Annex.A-4) where the statements of various witnesses have been considered including the manner in which the Inquiry Officer has evaluated the various statements of witnesses and relative weightage assigned to contradictions that were noted between statements of various witnesses who were heard during the inquiry. The two disagreement notes were in no way identical. He emphasized that the Appellate Authority had differed from the Inquiry Officer's report on a number of aspects including on the method and details of examination of the consignments by the Charged Officer as also the shortcomings in examination with reference to the standard instructions given to him for these purposes. The Disagreement Note had conveyed its tentative conclusion on how the evidence pointed to commission of gross misconduct by the charged

employee who was a Government servant. The Disagreement Note was also not couched as a final view and accordingly, invited the views of the charged employee which the employee also submitted subsequent to disposal of his case before the Tribunal and the Hon'ble High Court and availed the opportunity of personal hearing. Learned counsel for the respondents referred to the Charge Memorandum in which the so-called confessional statements of 05.03.1994 and 29.03.1994 which are interpreted and described by the Appellate Authority in this later Disagreement Note as in the nature of true statement deposed under Section 108 of the Customs Act in which he differed from the subordinate officers in considering them to be confessional statements. He held that these were statements of fact in a judicial proceeding and had been provided under Section 108 of the Customs Act and had to be considered as true and voluntary statements which could then be used as valid evidence to substantiate the charges framed in the disciplinary inquiry and not only for rebuttal.

23. Learned counsel also reiterated that this statement formed part of the relied-upon documents and although the Presenting Officer or the Inquiry Officer had not proved these documents by putting questions to the applicant, the applicant also did not ever dispute the truth of the statements on its relation of facts. He fairly admitted the fact that the documents were not brought formally in the inquiry, but argued that it may at most be considered only a minor irregularity that could not vitiate the proceedings or deny relevance and reliance on this document especially since the documents find place in the body of the charge memo under Article II in the Statement of Imputations and in Annex. A-3 of documents relied on by the department and are also mentioned in the report of the Presenting Officer. The Inquiry Officer has also incorporated the statement of charged employee at para 3.1.7 and 3.1.8 of his report although not completely. Learned counsel also referred to para 3.1.16 of the Inquiry Officer's report which records that the charged employee had

examined the consignment without reference to the packing list, a fact that has been noticed by the Appellate Authority while expressing disagreement. These aspects contained in the disagreement note have been further elaborated in the orders passed by the Appellate Authority and this has been done in accordance with the powers of revision that are conferred on the Appellate Authority under Section 29(1)(v) of the CCA (CCA) Rules, 1965. He asserted that the actions of the applicant had led to improper import which amounted to smuggling and duty evasion and it was on this basis that disciplinary action was taken against the applicant for acts of gross misconduct unbecoming of a public servant. In this regard, he argued that the disciplinary proceedings cover different ground from the proceedings under the Customs Act before the CESTAT and the contentions raised by the applicant that CESTAT had held that there was no conclusive proof on illegal consignments received by M/s. R.K. International had also been fully taken into consideration by the Appellate Authority while

passing orders including by passing remarks on the conduct of various Customs officers which include the applicant. In this regard, he referred to the annexure enclosed in additional affidavit of the applicant which enclosed the orders of the Hon'ble Apex Court but made no mention of the applicant since the issue before the CESTAT and the Hon'ble Apex Court concerned the violations of the importing firm. Therefore, the disciplinary proceedings which proceed on these aspects of violations of CCS (Conduct) Rules, 1964 cannot cease only because of certain orders of the Adjudicating Authority and higher Tribunals/Courts under the Customs Act.

24. The learned counsel for the respondents relied on ***Ram Saran Vs. I.G. Of Police, CRPF & Ors., AIR 2006 SC 3530*** on the aspect of leniency and the scope of judicial review being limited to the deficiency in decision-making process and not the decision. He also cited the case of ***Commissioner and Secretary to the Govt. & Ors. Vs. C. Shanmugam, 1998(4) SCT 288 (SC)*** that the Tribunal cannot enter into the re-appreciation of the

evidence and conduct an independent inqury into evidence. In ***Union of India & Ors. Vs. B.K. Srivastava, AIR 1998 SC 300*** it was held that the Tribunal could not sit in appeal against the orders of disciplinary and appellate authorities while exercising its powers of judicial review. On the availability of reasons for an act or omission to amount to grave misconduct, the learned counsel referred to ***Government of Tamil Nadu & Ors. Vs. Vel Raj, AIR 1997 SC 1990*** wherein it was considered adequate that there were good and sufficient reason for initiating a disciplinary proceeding and the Tribunal could not have taken a contrary view. He further relied on ***State of Tamil Nadu & Ors. Vs. S. Subramaniam, AIR 1996 SC 1232*** on the adequacy of evidence and where it was held that the only consideration that the Tribunal could make in judicial review is to consider whether a conclusion is based on evidence on record and supports the findings.

25. We have heard the learned counsel for the Applicant and the learned counsel for the Respondents at considerable length and have

perused the pleadings and Annexures that the applicant has chosen to file in support of his arguments and have evaluated the respective positions of the parties with reference to facts on record, law, Rules and precedents.

26. On the first aspect of challenge to the interpretation and application of the respondents to Rules 29 & 31, we may refer to Parts VIII & IX of the CCS (CCA) Rules, 1965. Part VIII refers to Revision and Review and includes Rule 29 on Revision and Rule 29-A on Review. Part IX titled Miscellaneous includes Rule 30 on nature of service of orders and notices and Rule 31 on the power to relax time limit and to condone delay. Essentially, as we comprehend the thrust of the CCS (CCA) Rules and in particular, the importance of these two parts, the objective of the disciplinary rules is to ensure that no Government officer who is responsible for the management and disposal of a variety of functions affecting the public weal and expenditure thereof is permitted to escape the consequences merely because of or in consequence, in some cases, of collusion of

their associates or superior departmental authorities. Rule 29 ensures that the Head of the Department serving directly under the Central Government and the President and other authorities in different departments have no limits on the time for them to exercise powers of revision and by which they could confirm, modify or set aside the orders or alter the penalties by increasing or reducing them including for remitting the case to the concerned authority and allows for complete discretion to pass such other order as it may deem fit. However, a restriction is placed in that such powers cannot be exercised arbitrarily and that the charged employee should be given opportunity, in the interest of natural justice, of making a representation against the penalties proposed and where an appropriate inquiry for the nature of punishment has not been already held, relevant inquiry should be conducted prior to imposing such a punishment. Rule 29 also provides for an Appellate Authority to exercise powers within six months of the order proposed to be revised

in all the aspects provided for the President and Head of the Department but only subject to such an order being passed within six months of the date of order proposed to be revised. However, clause (d) of Rule 29(1) specifically allows and empowers the Appellate Authority to pass such other orders as it may deem fit as an alternative to the orders for confirming, modifying, setting aside, enhancing/reducing penalty or remitting the matter to the Disciplinary Authority. Learned counsel for the respondents has invited attention to Decision No.4 under these Rules for which the relevant portion has been reproduced supra (para 20) and is in conformity with the judgment of the Hon'ble High Court which was communicated by the D.G.P.&T. Considering its general application to the Conduct rules and not merely to the Posts & Telegraphs Department, the judgment of that Hon'ble High Court mentioned in the letter would squarely apply to all other cases where powers under Rule 29 have been exercised by an Appellate Authority. As required in those instructions, it was

necessary for the Appellate Authority to convey his intention to revise the orders within the stipulated period of six months from the date of the order proposed to be revised and this has been done in accordance with rules and binding precedent by the Appellate Authority in the present case. A question may arise as to whether the Appellate Authority has no time limits fixed for this purpose and whether he has absolute discretion on extending this time limit. For this purpose, reference is made to Rule 31 which confers a power to relax the time limit in accordance with Rule 29(1)(v) but in the absence of any requirement imposed on the Appellate Authority, it now makes this authority, who is otherwise competent under the Rules, to show good and sufficient reasons and where he can show sufficient cause, to extend the time limit.

27. In these circumstances, we are not persuaded by the arguments of the applicant that the action of the Appellate Authority of the respondents was in any manner in conflict or in violation of CCS (CCA) Rules, 1965. It is

noted further that the Appellate Authority who exercised the powers of revision under Rule 29, granted himself three months' time for this purpose on the grounds that he intended to revise the orders of the Disciplinary Authority. Thereafter, within a month, on 13.03.2012, the Appellate Authority issued a Disagreement Memorandum to the applicant and if the applicant had filed his reply within the period specified, there would have been no further delay in passing orders after examining the reply of the applicant and after giving personal hearing. However, the applicant chose to challenge the exercise of powers firstly and then on the plea of his adhoc promotion made in the interim on 12.03.2012, he attempted a Review Petition on the orders of this Tribunal which had earlier considered his pleas which had then only been made on the exercise of powers under Rule 29 and 31.

28. In pleadings, the applicant has also sought to make much of the confusion between the Revising Authority and the Appellate Authority in that the orders passed under Rule

29 and Rule 31 on 15.02.2012 refer to an Appellate Authority and the Disagreement Memorandum dated 13.03.2012 also refers to an Appellate Authority whereas the orders passed after hearing the applicant on 10.05.2013 (issued on 13.05.2013) refer to an order in revision. This is easily explained by reference to the title of Rule 29 which reads as 'Revision' and powers have been exercised in this case by an Appellate Authority. Therefore, when the Appellate Authority has exercised his powers through this Rule, this order would naturally read as a revision by the Appellate Authority and we are unable to comprehend the confusion arising in the learned counsel for the applicant for having raised such an issue.

29. The Applicant has urged by reference to the chronology of events that after the first Disciplinary Authority had accepted the report of the Inquiry Officer on the innocence of the charged employee, he had referred the matter to Vigilance and even before the order could be issued, the Vigilance differed and provided comments which were seen by a successor

Disciplinary Authority who issued a disagreement note on 30.08.2001. The applicant claims that the Appellate Authority had merely referred to these views of Vigilance and had duplicated the previous disagreement note which had already been agitated successfully by the applicant and had not applied his mind independently.

30. In this regard, the learned counsel for the respondents has argued at length on the factual aspects that have been raised by the Appellate Authority while differing from the Inquiry Officer's report and the manner in which the weightage of evidence and contradictory statements were not evaluated and considered properly by the Inquiry Officer. These are issues that differ markedly from the first disagreement memorandum. He has also referred to the duties of the charged employee as per standard instructions on the sampling of consignments and the reference to packing list. These are obviously relevant to determining the nature and conduct of the charged employee and when the charged employee failed to conduct

himself as per the instructions, there was no evidence that could be utilized against the importer who was then discharged by the Adjudicating Authority and Tribunal under the Customs Act for the charge of evading duty. He has emphasized that these aspects have been elaborated in the orders that have been passed subsequently by the Appellate Authority. It is also not at all necessary while conveying a disagreement note to reflect all aspects that will go into a detailed order. If this was done, it may convey the impression in judicial review that the Revising Authority (Appellate Authority) had already pre-determined his conclusion and this would have undermined the requirements of a disagreement note. Therefore, the main issues required to be included in the disagreement note need to be and have been, included and subsequently elaborated in the order by adding or dropping evidence as a consequence of considering the reply of the charged employee, his statements during personal hearing and after considering all the relevant evidence in the case.

31. While the applicant has not challenged the disagreement note on being a final view, we also find on examination of the Memorandum dated 13.03.2012 that the disagreement note has expressed a tentative view in that it suggests at para 17 that the rejection of certain statements by the Disciplinary Authority does not appear to be proper and also discussed the evidence flowing back from the Adjudicating Authority on the lack of evidence in the case which arose from the fact that illegal imports were concealed and were not detected by the applicant. He was, therefore, asked to show cause why his actions could not be considered as gross misconduct. Therefore, an opportunity had to be given in view of his differing inference and the circumstances of this inference were conveyed to the applicant for his views.

32. The Applicant has argued that new evidence was considered while passing orders. We find on perusal of the Presenting Officer's report, the defence statement, the relied-upon documents and the detailed statement of imputations under

Articles of Charge that the so-called confessional statements of the applicant are extensively discussed therein. Since the applicant was not examined, there was a duty on the part of the Inquiry Officer to have put forth this evidence to the applicant in the form of queries at the conclusion of the inquiry before preparing his report. It is quite apparent that the Inquiry Officer simply ignored this statement made under Section 108 of the Customs Act which is considered a judicial proceeding and therefore, any statement of fact before that body can be considered in a disciplinary inquiry. On perusing the brief of the Presenting Officer, we find a discussion of the admissions made in statements dated 05.03.1994 and 29.03.1994 by the applicant before the Adjudicating Authority under Section 108 of the Customs Act on the number and manner in which he conducted the inspection of 70/80 drums found in the container that had been imported by the Importer. At that time, witness no.4, who was Assistant Commissioner, was his supervisor and

was present for some part of time. Both the CHAs, the officer of the DRI and the Assistant Commissioner were examined and the applicant had the opportunity of cross examining them during the course of inquiry proceedings and this is fully reflected in the details of inquiry proceedings. It must be kept in mind that this statement and related evidence was being used in the context of the allegation of evasion of duty and alleged import without payment of duty by the Importer for which the case had been considered by the Adjudicating Authority and the CESTAT. The Customs officers including the applicant did not make the import but their alleged delinquency is related to the allegations contained in the statements of the two private witnesses that they paid considerable amounts as bribe to the applicant and other officers. It is in relation to such allegations that this has confined itself to the essential charge of abetment of duty evasion by way of negligence or improper performance of the prescribed duty of checking the consignment and which could have led to an

appropriate punishment including punishment by the Adjudicating Authority. The charge of bribery has not, accordingly found place in the disciplinary inquiry. As we have already found in this case, the Adjudicating Authority found no conclusive proof and the same view was taken by the CESTAT and upheld by the Hon'ble Apex Court. When the offence itself is not proved, the question of abetment may not arise. However, the statements of facts, that are contained in that inquiry and which have not led to any result in terms of the heavy burden on the prosecution of proving the basic offence of duty evasion itself are, however, available for evidencing misconduct in terms of any available standard instructions as referred in the present disciplinary inquiry. Therefore, such statements are extremely relevant for the disciplinary inquiry. The learned counsel for the applicant has argued that having been acquitted by the Adjudicating Authority and CESTAT on the facts of the matter, no disciplinary case could be considered. However, reference to ***M.K. Sarangi (supra)*** cited by the

applicant shows that the Hon'ble High Court noted that in that case, the petitioner was first proceeded against for cheating and corruption and the CBI had filed a closure report before the Special Judge. It was only thereafter, that the respondents department proceeded against the petitioners therein under the Customs Act before the Adjudicating Authority and a case was lodged before the Tribunal. Thereafter, the respondents filed a criminal case quoting sections of the Customs Act and alleging criminal conspiracy. The Hon'ble Court held that when the applicant was acquitted even in adjudication proceedings where the degree of proof is lesser than that of criminal prosecution, it is unlikely that the prosecution would be able to bring home the charge in a criminal case. It has to be noted that the adjudication proceedings also consider all the evidence and are dependent on conclusive proof. Yet the Court had held that the degree of proof was less in such a proceeding. In the present case of a disciplinary proceeding, the Indian Evidence

Act has no bearing as referred by the learned counsel for the respondents and as the learned counsel for the respondents points out by reference to ***C. Shanmugam (supra)*** adopting the view of the Hon'ble Apex Court in ***State of Haryana Vs. Rattan Singh....*** Not only is the degree of proof and the rules of evidence different and lesser in the case of disciplinary proceeding, the analysis in such a proceeding is based on the preponderance of probability. Therefore, the argument of the applicant that the importer having been acquitted in adjudication proceeding and no liability consequently fixed on the applicant, would result in the lack of evidence for the purpose of disciplinary proceeding is entirely misconceived and opposite to the very citation that he claims as the law on the subject. We further observe in this matter that the applicant had made certain self-inculpatory statements before the Customs authority under Section 108 of the Customs Act and which is a judicial proceeding. Although that did not serve the purpose of the department to prove

abetment for the purpose of duty evasion by the importer, the issue before the disciplinary authority was whether these true and voluntary statements of actions done by the charged employee constituted an act of misconduct in terms of the standard instructions given to him for carrying out his duties. Although the statements of actions have been given in another context, they strictly amount to admissions and confessions in the present context of a disciplinary inquiry. It may have been then adequate to simply obtain the reply to the charge memo on the specific statements given by him and then to adjudge if these were sufficient to prove misconduct without the detailed process of inquiry that was initiated to prove his misconduct. While this aspect is now of an academic nature, the respondents have evidently erred on the side of caution and conducted the inquiry. In this inquiry, the applicant never examined himself and therefore the question of cross examining him did not arise. However, he could cross examine all the private and official witnesses who have made

serious imputations against him. Therefore, it cannot be said that these statements and connected inferences constitute new matters and new evidence and full opportunity under the principles of natural justice has clearly been accorded to the applicant. Even in his defence statement, the charged employee has not denied having given these statements. Moreover, in the present order that has been impugned, only the factual elements of his statement have been used and any aspect of admission of guilt or self-indictment has not been inferred since what has been adopted is that he inspected only two Drums and that too partially whereas the Inquiry Officer seems to have inferred otherwise. We quite agree that these two statements dated 05.03.1994 and 29.03.1994 cannot be termed as confessional statements. We also, therefore, do not agree with the views of the applicant that the respondents have erred in the manner in which they have first issued a detailed disagreement note and then proceeded by elaborating the reference to evidence through the impugned orders. The Hon'ble Apex

Court has also held in ***Central Bank of India Vs. Karunamoy Banerjee, AIR 1968 SC 266*** that if the workman admits his guilt, to insist upon the management to let in evidence about the allegations, will, in our opinion, only be an empty formality. Such an admission must of course be unconditional and unqualified and nothing more was to be necessary by way of inquiry as held in ***J.L. Toppo Vs. Tata Locomative & Engg. Co. Ltd., 1964 ICR 586 (IC).*** Further, the Hon'ble High Court of Andhra Pradesh in ***Instrumentation Ltd., Vs. P.O. Labour Court, 1988 II LLJ 492*** held that Section 58 of the Evidence Act lays down that facts admitted need not be proved, and therefore, where the facts are admitted and those are sufficient to make out a case of misconduct, any further departmental enquiry would be an empty formality. Again the Hon'ble High Court of Andhra Pradesh clarified in ***K. Venkateshwarlu Vs. Nagarjuna Gramin Bank, 1995 II LLJ 492*** that even if the employer holds a departmental enquiry inspite of such admission of guilt, and the Court finds some flaw or defect in such unnecessary enquiry

conducted by the employer, the Court cannot set aside the order made by the employer imposing punishment. It is so because even if a defective enquiry is conducted, no prejudice is caused to the delinquent because action could have been taken against him on the basis of admission. In the present case, despite the contradictions and that this was a self-inculpatory statement, there was a full inquiry examining witnesses and the employee was allowed the opportunity of cross examining the witnesses and adducing evidence as required by the Hon'ble Apex Court in ***Madikal Service Co-op. Bank Ltd Vs. Labour Court (1987)71 FJR322***.

33. The applicant has challenged the competence of the Appellate Authority on the grounds that he had been promoted on 12.03.2012 whereas the disagreement note was issued by the Appellate Authority under Rule 29 on 13.03.2012. This matter has already been addressed by this Bench while disposing of RP No.77/2012 on 04.10.2012 (Annex. A-16) and the relevant details of the order and proceedings have been bought out in paras 8, 9, 15, & 21

above including the fate of his recourse to the Hon'ble High Court. The orders passed by this Bench in those proceedings are as below:

> *"….5. But it is now contended, by the Petitioner that by order dated July 12, 2012 he has been promoted as Assistant Commissioner (Group 'A' Officer) and therefore, the Respondent herein, the Chief Commissioner, cannot have any authority, power or jurisdiction to review or interfere with the order passed by the Disciplinary Authority.*
>
> *6. However, it is not dispute that as on the date when Annexure A-1 notice was issued by the Respondent, he was well within the powers to do so. Therefore, the competence or jurisdiction of the Respondent has to be treated as on the date of issue of the show cause notice. In that view of the matter the subsequent promotion of the Petitioner as a Group 'A' Officer will have no bearing on Annexure A-1 notice. It must also be remembered that Disciplinary Proceeding was initiated against the Petitioner in relation to an alleged misconduct of the year 1998."*

We may do no better. However, we also note that the said promotions were temporary, ad hoc promotions and it cannot be visualized that these are to be considered as permanent

promotions to the post of Assistant Commissioner. If the ad hoc promotion had subsequently been terminated, the competent authority would obviously not fall back in the manner that the applicant argues. Therefore, we are in complete accord with the previous decision of this Bench in orders dated 04.10.2012 (supra). The applicant has argued that the Appellate Authority had ignored the finding of the CESTAT while passing the impugned orders. In the first place, the applicant has neither enclosed the orders of the Adjudicating Authority nor the orders of the CESTAT and has only enclosed the orders of the Hon'ble Apex Court on this matter. The Hon'ble Apex Court held that the CESTAT was the final forum for determination of facts and CESTAT has held that there was no conclusive proof of the existence of the illegal import, namely, Ball Bearings, in the consignment brought in by M/s. R.K. International under the relevant bill of entry. Therefore, the importer was let off by the Adjudicating Authority and by CESTAT but on the issue relevant to their

jurisdiction, which is of evasion of duty or clearance of goods without paying duty. However, the issue before the Disciplinary Authority was whether the prescribed instructions had been followed and due diligence was exercised by the applicant in the conduct of the inspection of the consignments and it is in this respect, that they found that he had failed to follow instructions and therefore, obviously, no evidence was then available for indicting the importer and as a result, the importer got away with the illegality under proceedings under the Customs Act. The CESTAT proceedings specifically commented on the lack of conclusive proof of such import and duty evasion as required in such proceedings and to be proven under the provisions of the Evidence Act. Neither aspect is relevant in the present case of disciplinary proceedings which is the settled law on the subject.

34. Moreover, on the aspect of availability of the evidence against the applicant, it is quite clear that there is substantial evidence on the

non-performance and lack of diligence on the part of the applicant and his failure to follow standard instructions. This Tribunal has limited powers in judicial review to re-appreciate the evidence in disciplinary proceedings and as held by the Hon'ble Apex Court in ***B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749*** and ***Rattan Singh (supra)*** the availability of some evidence is enough and, in the present case, we find that this requirement is more than satisfied.

35. Learned counsel for the respondents has also submitted that the punishment imposed on the applicant is not disproportionate although this issue has not been raised by the applicant. We observe that where the first Disciplinary Authority did not even give the delinquent a slap on the wrist for an act that led to loss of revenue as alleged by the respondents but which they could not prove before the appropriate forum, the punishment imposed by the Appellate Authority in the present matter can only be considered a light clap on the shoulder.

36. In the circumstances, we are of the view that this OA is entirely devoid of merits and it is, accordingly dismissed. Considering the circumstances of the matter, we observe that we have already directed the Applicant to pay costs as recorded in para 3 above. The Applicant shall also pay Respondents their legal costs estimated at Rs 25,000 within two weeks, failing which Respondents may recover the amount along with simple interest of 12%, by any means known to law.

(R.N. Singh)
Member (J)

(R. Vijaykumar)
Member (A)

dm.

JD
16/09/2015