Zunjarrao Bhikaji Nagarkar vs U.O.I. And Others on 6 August, 1999

Equivalent citations: AIR 1999 SUPREME COURT 2881, 1999 (7) SCC 409, 1999 AIR SCW 2779, 2000 (1) SERVLJ 291 SC, (2000) 1 SERVLJ 291, 1999 (8) SRJ 210, 1999 (7) ADSC 387, 1999 (4) SCALE 480, 1999 (4) LRI 295, (1999) 5 JT 366 (SC), 1999 (5) JT 366, (2000) 6 SERVLR 276, (1999) 112 ELT 772, (1999) 84 ECR 29, (2000) 1 LABLJ 728, (1999) 4 LAB LN 82, (1999) 4 MAD LJ 71, (2000) 2 MAH LJ 685, (1999) 3 SCT 835, (1999) 3 SCJ 291, (1999) 6 SUPREME 523, (1999) 4 SCALE 480, (1999) 2 CURLR 642, (1999) 3 ESC 2169, 1999 SCC (L&S) 1299, (1999) 4 BOM CR 843

Author: D.P. Wadhwa

Bench: S.Saghir Ahmad, D.P.Wadhwa

PETITIONER:
ZUNJARRAO BHIKAJI NAGARKAR

Vs.

RESPONDENT:
U.O.I. AND OTHERS

DATE OF JUDGMENT: 06/08/1999

BENCH:
S.Saghir Ahmad, D.P.Wadhwa

JUDGMENT:

D.P. Wadhwa, J.

Leave granted.

Appellant Zunjarrao Bhikaji Nagarkar was posted as Collector of Central Excise, Nagpur in the year 1995. Collector is now called Commissioner after amendment of the Central Excise Act, 1944 (for short the 'Act') by the Finance Act of 1995. Presently the appellant is posted as Director, National Academy of Customs, Excise and Narcotics, Mumbai. He was served with a memorandum dated September 2, 1997 under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 informing him that the President proposes to hold an inquiry against him on the

allegation that he favoured M/s. Hari Vishnu Packaging Ltd., Nagpur (assessee) by not imposing penalty on it under Rule 173Q of the Central Excise Rules, 1944 ('Rules' for short) when he passed an order in Original No. 20/95 dated March 2, 1995 holding that the assessee had clandestinely manufactured and cleared the excisable goods wilfully and evaded the excise duty and had ordered confiscation of the goods.

The appellant approached the Central Administrative Tribunal, Mumbai (CAT) challenging the proposed inquiry by filing Original Application No. 250 of 1998 on March 18, 1998. While admitting the application CAT granted interim relief and stayed the disciplinary proceedings against the appellant. This application was, however, dismissed by CAT by order dated August 12, 1998 with the result the interim order stood vacated. Immediately thereafter the appellant filed a writ petition in the Bombay High Court, it being Writ Petition No. 4717 of 1998. It was dismissed in limine by a Bench of the High Court by order dated September 7, 1998. This led the appellant to come to this Court in appeal by filing Special Leave Petition. While issuing notice on the Petition this Court granted interim stay.

The appellant has challenged the initiation of disciplinary proceedings against him. Before we consider his pleas we may as well note sequence of events leading to the issuance of the memorandum dated September 2, 1997.

Section 33 of the Act gives powers to Central Excise authorities to adjudicate. Under this Section 'where by the rules made under the Act anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged without limit, by a Commissioner of Central Excise'.

In exercise of powers conferred by Section 33 of the Act the appellant held adjudication proceedings against the assessee and two others. A show-cause notice was issued to the assessee on the following grounds:-

> "(a) It had clandestinely cleared 2,55,000 Nos. of HDPE woven sacks totally valued at Rs.13,77,000/- without payment of Central Excise duty amounting to Rs.4,81,950/-

(including the 95000 Nos. of HDPE sacks seized in transit) without cover of GP1's and without recording the productions, clearance in Central Excise records in contravention of Central Excise Rules 9, 49, 52A, 53, 173G and 226 of Central Excise Rules, 1944. Hence duty of Rs.4,81,950/- appeared recoverable from them under Rule 9(2) of Central Excise Rules, 1944 read with proviso (i) to Section 11-A of CESA, 1944.

(b) It appeared to have willfully with the intention to evade Central Excise duty, cleared clandestinely 95000 Nos. of HDPE sacks valued at 4,18,000/- without recording in Central Excise records, without issue of Central Excise gate pass and without payment of Central Excise duty. These goods seized in transit along with Truck No. 4145 on 16.1.94 appeared liable for confiscation under Rule 173Q of CESA, 1944.

(c) It also appeared to have willfully not recorded the production of 25,500 Nos. of 'L' shaped HDPE sacks valued at Rs.1,27,500/- in their RG-1 register with the intention to clear the same clandestinely without payment of duty as this quantity was found in excess than the recorded balance and therefore appeared liable to confiscation under Rule 173-Q of the Central Excise Rules, 1944.

(d) It also appeared liable for penal action under Rule 173-Q of the Central Excise Rules, 1944."

The assessee was asked to show-cause as to why central excise duty of Rs.4,81,950/- be not recovered from him under Rule 9(2) read with proviso to Section 11-A of the Act and why not 95,000 numbers and 25,500 numbers of HDPE bags seized in transit and from its factory premises be confiscated and why penalty be not imposed on it under Rule 173-Q of the Rules.

After examining the evidence on record and hearing the assessee the appellant by his order in Original No. 20 of 1995 held as under:-

> "In view of the foregoing, I hereby pass the following order:-
>
> I confirm the excise duty of Rs.3,57,000/- on 25,500 Nos. of HDPE Woven sacks removed by Noticee-1 clandestinely under Rule 9(2) of the Central Excise Rules, 1944 read with proviso to Section 11-A of the CESA, 1944.
>
> 95,000 bags cleared clandestinely by Noticee-1 and seized on 16.1.1994 are liable for confiscation under Rule 173-Q of C.Ex. Rules, 1944. However, I find that the goods had been released provisionally on execution of bond for the full value of the goods and cash security of Rs.1 lakh. As the goods are not available for confiscation, I appropriate the amount of Rs.10,000/- in lieu of confiscation.
>
> I order confiscation of 'L' shaped 25,500 Nos. of HDPE woven sacks valued at Rs.1,27,500/- under Rule 173Q of C. Ex. Rules, 1944. I however, allow the goods to be redeemed on payment of Rs.10,000/- (Rs. Ten Thousand only)."

Appellant directed release of the vehicle from where the goods were seized by appropriating the cash security or Rs.10,000/- in lieu of confiscation. He said the owner of the vehicle was a transporter. He did not impose any penalty on the transporter but cautioned him not to repeat such act as the same would be viewed seriously in future. As regards the third noticee he was also cautioned.

Under Section 35B of the Act an appeal lies to the Customs, Excise and Gold (Control) Appellate Tribunal (Appellate Tribunal) against a decision or order passed by the Commissioner of Central Excise as an adjudicating authority. Powers have been conferred on the Central Board of Excise and Customs (Board) under Section 35E of the Act to pass certain orders. This Section, in relevant part, is as under:-

"35E. Powers of Board or Commissioner of Central Excise to pass certain orders. - (1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) .....

(3) No order shall be made under sub-section (1) or sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.

(4) Where in pursuance of an order under sub-section (1) or sub-section (2) the adjudicating authority or the authorised officer makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of three months from the date of communication of the order under sub- section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of Section 35B shall, so far as may be, apply to such application.

(5) ....."

By order dated February 26, 1996 made under Section 35E of the Act Board directed the appellant to file appeal to the Appellate Tribunal to determine whether his order in Original No. 20/95 dated March 20, 1995 against the assessee was correct, legal and proper and whether the appellant ought to have imposed penalty. Accordingly appeal was filed before the Appellate Tribunal which, it is stated, is still pending.

Mr. Raju Ramachandran, learned senior advocate, appearing for the appellant, raised the following points in support of the appeal:-

1. Adjudication order by the appellant is quasi judicial in nature whereby he confirmed the confiscation of the goods and the duty demanded. He did not choose to impose any penalty in the facts and circumstances of the case. Merely on that ground he could not be subjected to the disciplinary proceedings.

2. The undisputed facts which appear from the record are as follows:-

a) Admittedly by the said order, the goods in question stood confiscated and the duty demand amounting to Rs.3,57,000/- stood confirmed. b) The memo of charge read with the imputation of misconduct only alleged that the appellant was in error by not

having imposed a penalty but there is no allegation of any corrupt motive or any familiarity with the party. c) The aforesaid is further buttressed by the fact that the Department does not want to produce any witness and the list of documents only pertain to the record of this case.

3. In view of the above, the allegations made in the charge-sheet do not show any culpability on the part of the petitioner nor do they amount to misconduct. That being so, the present charge-sheet is liable to be quashed because on the face of it, no misconduct is disclosed which is a sine qua non to the maintainability of any charge-sheet. In this context, the appellant relies upon the analogy underlying Order 7 Rule 11, CPC and Section 482 of Cr.P.C. for quashing of FIRs.

4. Even otherwise, as per the decision of this Court in Union of India and others vs. K.K. Dhawan (1993 (2) SCC

56), a charge sheet can only be issued if there is prima facie material. In the present case, there is no material let alone prima facie material, rendering the charge-sheet void ab initio.

5. A perusal of the statement of imputations annexed along with the charge-sheet demonstrates that the case of the respondents is that by having committed an error of law which was favourable to the party, the appellant has shown favour. On the face of it, such conduct cannot constitute favour as required to sustain a charge of a misconduct. In other words, in the submission of the appellant committing an error of law does not amount to showing of favour which is the sine qua non for the maintainability of the charge-sheet.

6. An error of law, assuming it was committed can only be corrected by recourse to the Appellate Forum.

7. Provisions of Rule 173Q are not mandatory and the discretion vests with the adjudicating authority whether to impose any penalty or not in the circumstances of the case. Section 11AC was introduced in the Act by Finance (No. 2) Act, 1996, w.e.f. September 28, 1996, under which levy of penalty is now mandatory.

In answer to these pleas raised by the appellant Mr. Harish Chandra, learned senior advocate for the Union of India submitted that there was sufficient material to proceed against the appellant and that the CAT and the High Court were right in not interfering in the disciplinary proceedings at the very threshold. He said the appellant would have the opportunity to defend himself in the proceedings which have been initiated against him. He said provisions of Rule 173Q are mandatory and that Section 11AC also mandates levy of penalty.

In the course of the arguments in support of the rival contentions we were referred to various judgments of this Court. Before we examine these judgments we may set out the provisions of Rule 173Q and Section 11AC:-

"173Q. Confiscation and penalty. - (1) If any manufacturer, producer, registered person of a warehouse or a registered dealer -

(a) removes any excisable goods in contravention of any of the provisions of these rules; or

(b) does not account for any excisable goods manufactured, produced or stored by him; or (bb) .....

(bbb) .....

(c) .....

(d) contravenes any of the provisions of these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater."

"11AC. Penalty for short-levy or non- levy of duty in certain cases. - Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section11A, shall also be liable to pay a penalty equal to the duty so determined:

Provided that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account."

Section 37 of the Act empowers the Central Government to make rules carrying into effect the purposes of the Act. Sub-section (5) of Section 37 is relevant, which is as under:-

"(5) Notwithstanding anything contained in sub-section (3), the Central Government may make rules to provide for the imposition upon any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or the rules made thereunder, a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

Reference may now be made to a few decisions cited at the Bar.

In Union of India vs. K.K. Dhawan [(1993) 2 SCC 56) respondent was working as Income Tax Officer. A charge Memorandum was served on him that it was proposed to held an inquiry against him under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. In the statement of article of charge framed against him, it was alleged that he completed assessment of nine firms in "an irregular manner, in undue haste and apparently with a view to conferring undue favour upon the assesses concerned". An application filed by the respondent against the proposed action was allowed by the Central Administrative Tribunal and it was held that orders passed by the respondent as Income Tax Officer were quasi judicial and could not have formed the basis of disciplinary action. Charge Memorandum was, thus, set aside. The question before this Court was whether an authority enjoyed immunity from disciplinary proceedings with respect to matters decided by him in exercise of quasi judicial functions. After examining the early decisions of this Court in V.D. Trivedi vs. Union of India [(1993) 2 SCC 55]; Union of India vs. R.K. Desai [(1993) 2 SCC 49]; Union of India vs. A.N. Saxena [(1992) 3 SCC 124]and also in S. Govinda menon vs. Union of India [AIR 1967 SC 1274] this Court held as under :

> "Certainly, therefore, the officer who exercises judicial or quasi judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act but we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases :
>
> (i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;
>
> (ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;
>
> (iii)if he has acted in a manner which is unbecoming of a Government servant;
>
> (iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
>
> (v) if he had acted in order to unduly favour a party;
>
> (vi) if he had been actuated by corrupt motive, however, small the bribe may be because Lord Coke said long ago "though the bribe may be small yet the fault is great".

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

In Union of India & Ors. vs. Upendra Singh [(1994) 3 SCC 357] question was again raised if the Central Administrative Tribunal was right in staying the disciplinary proceedings against the respondent who was served with a charge-sheet. It was alleged against him that while working as Deputy Commissioner of Income- Tax, he gave illegal and improper directions to the assessing officer to complete the assessments of three firms under Section 143(1) of the Income Tax Act even though at the relevant time proceedings under Section 144A of the Income Tax Act were pending before him and these cases did not come within the purview of summary assessment scheme of Amnesty Scheme of the Central Board of Direct Taxes and, therefore, respondent had violated Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS (Conduct) Rules, 1964. Aggrieved by the interim order of the Tribunal, Union of India come to this Court. Again this Court examined its earlier decisions and said that the Tribunal or Court can interfere only if on the charged framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law and that at that stage the Tribunal had no jurisdiction to go into the correctness or truth of the charges. Order of the Tribunal was set aside.

In Dy. Inspector General of Police vs. K.S. Swaminathan [(1996) 11 SCC 498] a charge memo imputing misconduct on the part of the respondent, an Inspector of police, was issued to him. Tamil Nadu Administrative Tribunal on an application filed by the respondent set aside the charge memo on the ground that the charges were vague. On appeal to this Court, it was held that at the stage of framing of the charge, the statement of facts and the charge sheet supplied are required to be looked into by the Court or the tribunal as to the nature of the charges, i.e., whether the statement of facts and material in support thereof supplied to the delinquent officer would disclose the alleged misconduct. This Court observed that the tribunal, therefore, was totally unjustified in going into the charges at that stage.

In M.S. Bindra vs. Union of India & Ors. [(1998) 7 SCC 310] the appellant was served with an order of compulsory retirement. His challenge to this order did not find favour with the Central Administrative Tribunal. On appeal to this Court it was observed that judicial scrutiny of any order imposing premature compulsory retirement is permissible if the order is rather arbitrary or mala fide or if it is based on no evidence. Then this Court observed as under :

> "While viewing this case from the next angle for judicial scrutiny, i.e., want of evidence or material to reach such a conclusion, we may add that want of any material is almost equivalent to the next situation that from the available materials, no reasonable man would reach such a conclusion. While evaluating the materials, the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim "nemo firut repente turpissimus" (no one becomes dishonest all of a sudden) is not unexceptional but still it is a salutary guideline to judge human conduct, particularly in the field of administrative law. The authorities

> should not keep their eyes totally closed towards the overall estimation in which the delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle of "doubtful integrity", it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the lable "doubtful integrity".

In M/s. Hindustan Steel Ltd. vs. The State Orisa [AIR 1970 SC 253] the authorities under the Orissa Sales Tax Act, 1947 had imposed penalty on the appellant. One of the question before this Court was whether the Tribunal is right in holding that penalties under Section 12(5) of the Act had been rightly levied and whether in view of the serious dispute of the law it cannot be said that there was sufficient cause for not applying for registration. This Court then said as under:

> "Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

In the case of Madan Mohan Choudhary vs. State of Bihar and others (1999 (3) SCC 396), this Court set aside the order of compulsory retirement of the appellant, a member of the Bihar Superior Judicial Service, on the ground that there was no material on record to reasonably form an opinion that compulsory retirement of the officer was in public interest.

We may note some more judgments.

In State of Madhya Pradesh vs. Bharat Heavy Electricals [(1998) 99 ELT 33 (SC)] this Court examined the validity of Section 7(5) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, which provides for levy of penalty. Earlier the Madhya Pradesh High

Court in a writ petition had held the provisions of the Act were ultra vires and also violative of Articles 14 and 19 of the Constitution. Sub-section (5) of Section 7 of the Act relevant for our purpose is as under :

> "7. Registered dealers to issue bill etc. stating that goods sold are local goods. -
>
> (5) Where a registered dealer referred to in sub-section (1) or sub- section (2) has, in the course of his business, sold local goods to other registered dealers and has failed to make the statement referred to in sub-

section (1) [...], it shall be presumed that he has facilitated the evasion of entry tax on the local goods so sold and accordingly he shall be liable to pay penalty equal to ten times the amount of entry tax payable on such goods as if they were not goods of local origin."

After considering the stand of the State Government that presumption raised in sub-section (5) of Section 7 was rebuttable and that the said provision did not provide for a fixed rate of penalty and that the assessing authority has discretion to impose reasonable amount of penalty, this Court held:

> "From the aforesaid it follows that Section 7(5) has to be construed to mean that the presumption contained therein is rebuttable and secondly the penalty of ten times the amount of entry tax stipulated therein is only the maximum amount which could be levied and the assessing authority has the discretion to levy lesser amount, depending upon the facts and circumstances of each case. Construing Section 7(5) in this manner the decision of the High Court that Section 7(5) is ultra vires cannot be sustained."

It will be thus seen that once there was a case of imposition of penalty only the amount of penalty to be levied was left to the discretion of the assessing authority on the facts of the case.

In Government of Tamil Nadu vs. K.N. Ramamurthy (1997 (7) SCC 101) it has been held that failure to exercise quasi judicial power properly amounts to misconduct. In this case, the respondent working as Deputy Commercial Tax Officer was served with the following charges:

> "(i) That he failed to analyse the facts involved in each and every case referred to above;
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> (ii) that he failed to check the accounts deeply and thoroughly while making final assessment;
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> (iii) that he failed to subject the above turnover to tax originally; and
>
> (iv) that he failed to safeguard government revenue to a huge extent of Rs.44,850."

These charges were held proved against him and he was imposed with a punishment of stoppage of increment for three years with cumulative effect. Against the order of punishment, the respondent approached the Tamil Nadu Administrative Tribunal which set aside the disciplinary proceedings against the respondent. The Tribunal was of the view that the order of assessment passed by the respondent was in his quasi judicial capacity and there were hierarchy of authorities under the General Sales Tax Act to correct his order if it was erroneous. Tribunal held the disciplinary proceedings initiated against the respondent are warranted and set aside the punishment imposed on him. In appeal by the Government of Tamil Nadu against the judgment of the Tribunal this Court referred to certain decisions in the cases of Union of India vs. Upendra Singh (1994 (3) SCC 357); Union of India vs. A.N. Saxena (1992 (3) SCC 124); and Union of India vs. K.K. Dhawan (1993) (2) SCC 56). In the case of Upendra Singh, this Court had ruled that the Tribunal had no jurisdiction to go into the correctness of truth of the charges and the Tribunal cannot take over the functions of the disciplinary authority. This Court had also observed that the function of the court/Tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court. A Tribunal or court can interfere only if the charge (read with imputation or particulars of the charge, if any) no misconduct or other irregularity alleged can be said to have been made out or the charge framed is contrary to any law. This Court said that the finding accepted by the disciplinary authority was to the effect that by the act of negligence in making the assessment the delinquent caused loss to the government exchequer to the extent of Rs.44,850/- and that that finding of the disciplinary authority was not open to challenge on the facts of the case.

In State of Punjab and ors. vs. Ram Singh Ex- Constable (1992 (4) SCC 54) this Court referred to the definition of 'misconduct' as given in Black's Law Dictionary and Aiyar's Law Lexicon and said as under:-

> "Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve."

Keeping in view the provisions of law and guidelines led by various judgments of this Court, we may now refer to the Article of Charge given to the appellant. It reads as under :

> "Shri Z.B. Nagarkar while working as Collector, Central Excise, Nagpur (now redesignated as Commissioner of Central Excise) has passed an Order-in-Original No.20/95 dated 20.03.95 in which he had favoured M/s. Hari Vishnu Packaging Ltd., Nagpur by not imposing any penalty on the said party even though he had held that M/s. Hari Vishnu Packaging Ltd. had clandestinely manufactured and cleared the

> excisable goods and evaded the excise duty wilfully. Shri Nagarkar has thus failed to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a Govt. Servant and contravened Rule 3(1)(i) and (ii) and
>
> (iii) of the CCS (Conduct) Rules, 1964."

Statement of imputations of misconduct or misbehaviour in support of the article of charge briefly refers to the show cause notice issued to HVPL - the assessee - by the appellant and his Orders-in-Original as adjudicating authority under the Act. Reference has also been made to the explanation submitted by the appellant when he was asked to explain as to why he did not think it necessary to impose a penalty on HVPL - the assessee. In rejecting the explanation of the appellant, the statement of imputations of misconduct concludes :

> "The judgments quoted by Shri Nagarkar do not appear to be relevant to the case of M/s. HVPL as these judgments refer to those cases where there are technical lapses/violations of the law; whereas in the instant case, Shri Nagarkar himself had reached the conclusion that M/s. HVPL had clandestinely cleared the goods with an intention to evade payment of duty. He had also held that M/s. Delite plastics Industries had actively supported M/s. HVPL to evade the duty. it was based on the findings that he had ordered confiscation of the goods and confirmed the duty. Therefore, when the goods were confiscated and duty was confirmed, appropriate penalty should have been imposed by Shri Nagarkar on M/s. HVPL. The above action of Shri Nagarkar amounts to unjustified favour shown by him to M/s. HVPL."

Two principal issues arise for our consideration: (1) if levy of penalty under Rule 173Q was obligatory and (2) was there enough background material for the Central Government to form a prima facie opinion to proceed against the officer on the charge of misconduct on his failure to levy penalty under Rule 173Q. Appellant has contended that it is only now after insertion of Section 11AC in the Act that levy of penalty has become mandatory and that it was not so under Rule 173Q. This contention does not appear to be correct. In both Rule 173Q and Section 11AC the language is somewhat similar. Under Rule 173Q "such goods shall be liable to confiscation" and the person concerned "shall be liable to penalty" not exceeding three times the value of excisable goods or five thousand rupees whichever is greater. Under Section 11AC the person, who is liable to pay duty on the excisable goods as determined "shall also be liable to pay penalty equal to the duty so determined". What is the significance of the word "liable" used both in Rule 173Q and Section 11AC? Under Rule 173Q apart from confiscation of the goods the person concerned is liable to penalty. Under Section 11AC the word "also" has been used but that does not appear to be quite material in interpreting the word "liable" and if liability to pay penalty has to be fixed by the adjudicating authority. The word "liable" in the Concise Oxford Dictionary means, "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (sixth edition), the word "liable' means, "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution.... Obligated; accountable for or chargeable with. Condition of being bound to respond because a wrong has occurred. Condition out of which a legal liability might arise.... Justly or legally responsible or answerable".

When we examine Rule 173Q it does appear to us that apart from the offending goods which are liable to confiscation the person concerned with that shall be liable to penalty upto the amount specified in the Rule. It is difficult to accept the argument of the appellant that levy of penalty is discretionary. It is only the amount of penalty which is discretionary. Both things are necessary:

> (1) goods are liable to confiscation and (2) person concerned is liable to penalty. We may contrast the provisions of Rule 173Q and Section 11AC with Section 271 of the Income-tax Atc, 1961. This Section, prior to amendment in 1988, stood as under :
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> "Failure to furnish returns, comply with notices, concealment of income, etc. 271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act is satisfied that any person -
>
> (a) has failed to furnish the return of total income which he was required to furnish under sub-section (1) of Section 139 or by notice given under sub-section (2) of section 139 or section 148 or has failed to furnish it within the time allowed and in the manner required by sub-

section (1) of section 139 or by such notice as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub- section (1) of section 142 or sub- section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,--

(i) in the cases referred to in clause (a),-

(a) in the case of a person referred to in sub-section (4A) of section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax, a sum not exceeding one per cent of the total income computed under this Act without giving effect to the provisions of sections 11 and 12 for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued.

Explanation.- In this clause "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C;

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any,

which would have been avoided if the income returned by such person had been accepted as the correct income;

(iii)in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income : ..."

It would, thus, be seen that under provisions of Section 271 of the Income Tax Act in the first instance there is a discretion with the assessing authority whether to impose any penalty or not and if the assessing authority finds that it is a case for imposition of penalty then it has no discretion in the matter and the certain amount of penalty depending on the facts and circumstances of each case has to be imposed subject to the maximum limit mentioned in the section.

Now when show-cause notice was issued to the assessee he was also asked to show cause as to why penalty be not imposed upon him. The stand of the Union of India before us, as stated in the counter affidavit, is : "It was observed that the petitioner in his capacity as adjudicating authority came to the conclusion that the party M/s. HVPL had clandestinely cleared the goods with an intention to evade the payment of duty. he also ordered for the confiscation of the goods and confirmed the duty. In these circumstances, he would have imposed appropriate penalty on the party. It was under these circumstances, that the impugned charge memo was issued." And further it appeared "that the discretion in this regard did not appear to have been exercised clearly and reasonably". It is not that non-levy of penalty by the appellant in his adjudication order was mere omission. Order is silent as to why he did not think it fit to impose any penalty on the assessee. In the case of the transporter who was also proceeded against the appellant did not impose any penalty as he said he (transporter) being the owner of a public vehicle. The transporter was merely cautioned "not to repeat such an act, as the same would be viewed seriously in future". The third noticee was also cautioned. Rather non-levy of penalty by the appellant on the assessee was intentional as he himself in his explanation dated November 18, 1996 said : (1) On going through the records of the case he was aware that there was no conclusive evidence against the assessee and the material evidence on record was not sufficient to sustain the charges levelled against the party. (2) He took a pro-revenue stance in this case although there was perhaps a case, at least an arguable one, in their favour and his conclusion regarding mens rea on the part of the assessee was also based purely on circumstantial evidence; and that it was a weak case for the department which he could uphold only on placing a little extra reliance on evidence on record. (3) It would have been unfair to impose penalty on the assessee since the penal provisions should be invoked only in cases where the adjudicator is fully convinced with the material and there is direct evidence substantiating the guilt of the notice and this view was fully supported by the judgments of the High Court, some High Courts and the Tribunal. (4) He had a nagging feeling that had he imposed any penalty on the assessee, they would have gone on appeal before the Appellant Tribunal and the department would have not only lost the case in terms of penal action but probably the confirmation of the duty demanded could have been jeopardized.

The question is : If such a stance by the appellant was to "favour" the assessee or the officer was rightly of the view that it was not a case of levy of penalty. It is a quasi judicial order. Merely because

penalty imposable has not been imposed, which was obligatory for the officer to impose, could it be said that if it is a case of misconduct and he is liable to be proceeded against? The officer did impose the excise duty and also ordered confiscation of the goods. What is the evidence before the authority to come to prima facie view of levying charge of misconduct on the officer? He was served with the memorandum dated September 2, 1997. It was accompanied with annexure 1 (Article of charge), annexure II (Statement of Imputations of misconduct or misbehaviour in support of the Article of Charge), annexure III (List of documents) and annexure IV (List of witnesses). Article of charge we have reproduced above. Statement of Imputations of misconduct or misbehaviour referred to the Order in Original passed by the officer and his explanation as to why he did not think it fit to impose penalty. List of documents mentions only three documents, namely, Order-in- original, (2) order of the Board under Section 129 of the Act for filing appeal and (3) explanation dated November 18, 1996 of the officer. There is no witness mentioned in the list of witnesses. So the Order in Original, the explanation of the officer and the direction of the Board for filing appeal are the basis for the charge of misconduct or misbehaviour.

Penalty to be imposed has to be in commensurate with the gravity of the offence and the extent of the evasion. In the present case, penalty could have been justified. Appellant was, however, of the view that imposition of penalty was not mandatory. He could have formed such a view. Under Section 325 Indian Penal Code, a person found guilty "shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine". Section 63 IPC provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive. A single Judge of the Patna High Court in Tetar Gope vs. Ganauri Gope [AIR 1968 Patna 287] took the view that expression "shall also liable to fine" in Section 325 IPC does not mean that a sentence of fine must be imposed in every case of conviction in that section. He said :

> "Such an expression has been used in the penal Code only in connection with those offences where the legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences, the legislature has left a discretion in the Court to impose also a sentence of fine in appropriate cases in addition to the imposition of a sentence of imprisonment which alone is obligatory."

We do not think that the view expressed by the Patna High Court is correct as it would appear from the language of the section that sentences of both imprisonment and fine are imperative. It is the extent of fine which has been left to the discretion of the court. In Rajasthan Pharmaceuticals Laboratory, Bangalore & Ors. vs. State of Karnataka [(1981) 1 SCC 645] this Court has taken the view that imprisonment and fine both are imperative when the expression "shall also be liable to fine" was used under Section 34 of the Drug and Cosmetics Act, 1940. In that case, this Court was considering Section 27 of the Drugs and Cosmetics Act, 1940, which enumerates the penalties for illegal manufacture, sale, etc., of drugs and is as under -

> "Whoever himself or by any other person on his behalf manufacture for sale, sells, stocks or exhibits for sale or distributes -

(a) any drug -

(i) .....

(ii) without a valid licence as required under clause

(c) of Section 18, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine :

Provided that the court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year:...."

This Court said that the High Court imposed a fine of two thousand rupees on each of the three appellants for the offence under Section 18(c) of the Act when Section 27(a)(ii) makes a sentence of imprisonment of not less than one year compulsory for such offence in addition to fine unless for special reasons a sentence of imprisonment for lesser period was warranted. It would, thus appear that this Court was of the opinion that in such a case the imprisonment and fine both are imperative.

When we talk of negligence in a quasi judicial adjudication, it is not negligence perceived as carelessness inadvertance or omission but as culpable negligence. This is how this court in State of Punjab & Ors. & Ors. vs. Ram Singh Ex-Constable [(1992) 4 SCC 54] interpreted 'misconduct' not coming within the purview of mere error in judgment, carelessness or negligence in performance of the duty. In the case of K.K. Dhawan (1993 (2) SCC 56), the allegation was of conferring undue favour upon the assessees. It was not a case of negligence as such. In Upendra Singh's case (1994 (3) SCC 357), the charge was that he gave illegal and improper directions to the assessing officer in order to unduly favour the assessee. Case of K.S. Swaminathan (1996 (11) SCC 498), was not where the respondent was acting in any quasi judicial capacity. This Court said that at the stage of framing of the charge the statement of facts and the charge-sheet supplied are required to be looked into by the Court to see whether they support the charge of the alleged misconduct. In M.S. Bindra's case (1998 (7) SCC 310) where the appellant was compulsorily retired this Court said that judicial scrutiny of an order imposing premature compulsory retirement is permissible if the order is arbitrary or mala fide or based on no evidence. Again in the case of Madan Mohan Choudhary (1999 (3) SCC 396), which was also a case of compulsory retirement this Court said that there should exist material on record to reasonably form an opinion that compulsory retirement of the officer was in public interest. In K.N. Ramamurthy's case (1997 (7) SCC 101), it was certainly a case of culpable negligence. One of the charges was that th e officer had failed to safeguard Government revenue. In Hindustan Steel Ltd.'s case (AIR 1970 SC 253), it was said that where proceedings are quasi judicial penalty will not ordinarily be imposed unless the party charged had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation.

This Court has said that the penalty will not also be imposed merely because it is lawful so to do. In the present case, it is not that the appellant did not impose penalty because of any negligence on his part but he said it was not a case of imposition of penalty. We are, however, of the view that in a case like this which was being adjudicated upon by the appellant imposition of penalty was imperative. But then, there is nothing wrong or improper on the part of the appellant to form an opinion that imposition of penalty was not mandatory. We have noticed that Patna High Court while interpreting Section 325 IPC held that imposition of penalty was not mandatory which again we have said is not a correct view to take. A wrong interpretation of law cannot be a ground for misconduct. Of course it is a different matter altogether if it is deliberate and actuated by mala fides.

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

Initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

If, every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge- sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if

officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

Considering whole aspects of the matter, we are of the view that it was not a case for initiation of any disciplinary proceedings against the appellant. Charge of misconduct against him was not proper. It has to be quashed.

Before concluding, there are two aspects of the matter which we wish to point out. These are :

1. In the counter affidavit filed by the Union of India, it has been said that the special leave petition filed by the appellant "is totally misconceived, premature and highly irresponsible". In the whole body of counter affidavit strong language has been used. Union of India is not a private litigant. Such language in the pleading should be avoided. One can be firm without being impolite.

2. There is a charge of misconduct against the Collector (now Commissioner) of Central Excise. While disciplinary proceedings are pending against him, he is transferred to the National Academy of Custom Excise and Narcotics to guide the probationers. it is certainly a paradoxical situation that a man who is not fit to hold the post of Collector is fit enough to impart training to the probationers entering the service. Best talent should be sent to the academy to teach the probationers. Posting to the academy should be considered as an honour and not punishment. Our comment is no reflection on the appellant herein as we have set aside the initiation of disciplinary proceedings against him.

With these observations, the appeal is allowed with costs. The Order of the Central Administrative Tribunal dated August 12, 1998 and the impugned judgment dated September 7, 1998] of the High Court are set aside. Article of Charge issued against the appellant is quashed.