

Joginder Gulati Vs. Io Dri

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Court : Delhi

Decided On : Jan-20-2010

Reported in : 166(2010)DLT789

Judge : V.K. Jain, J.

Acts : Customs Act - Sections 108, 112, 124, 135, 135(1), 167, 236 and 237, ;Foreign Exchange Regulation Act, 1963 - Sections 23, 50, 51, 56, 58 and 61, ;Income Tax Act - Sections 276(C), ;Code of Criminal Procedure (CrPC) - Sections 403, 319, 340 and 482; [Constitution of India](#) - Article 20 and 20(2)

Appeal No. : Crl. M.C. No. 2658/2009

Appellant : Joginder Gulati

Respondent : io Dri

Advocate for Def. : Mukesh Anand, ; R.C.S. Bhadoria and ; Sumit Batra, Advs

Advocate for Pet/Ap. : Naveen Malhotra, Adv

Judgement :

V.K. Jain, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure for quashing the complaint filed against the petitioner under Section 135(1)(a) of

Customs Act. The case of the complainant is that on receiving intelligence about smuggling of contraband goods into India through speed post parcels, officers of DRI went to speed post centre at Bhai Vir Singh Marg, New Delhi on 12.10.2002 and identified eight packages. Four parcels out of them belong to accused No. 1 Beam Technologies Pvt. Ltd. and were consigned by VIST International Pte. Ltd. from Singapore. Description of the goods had not been given on the consignment note affixed on them and the goods found inside the packages were not in terms of the description given in the invoices found inside the packages. A letter was also received from Sh. Pradeep Jain, counsel for accused No. 1 Beam Technologies Pvt. Ltd., enclosing certain invoices therewith and claiming that there was no variance in the description given in those invoices and the actual goods found in the packages. It was, however, found, on a scrutiny, that the invoices enclosed with the letter did not tally with the invoices found inside the packages since there was discrepancy in the quantity and value. The invoice No. 6070 forwarded with the letter showed the quantity as 100 and total price as US\$3,500, whereas the invoice recovered from the package showed the quantity as 50 and the price as US\$1,750. The quantity actually recovered from the package was 100 and not 50.

2. During the course of investigation, statement of accused No. 2 Sandeep Sehgal was recorded, in which he stated that petitioner Joginder Gulati was also a Director in Beam Technologies Pvt. Ltd. He further stated that Joginder Gulati used to reside at Singapore and owned two companies including VIST International Pvt. Ltd. and that he along with Joginder Gulati, had decided to import computer parts to India from the company of Gulati in Singapore. He also stated that during the period from August 2002 to December 2002, they had got cleared about 70-80 parcels, out of which only 50% contained computer parts and the rest contained printing material and that he had not paid any duty for the consignments imported during that period. He further stated that he used to send money to Singapore through persons, whose names and details were conveyed to him by Joginder Gulati. He also stated that the parcels seized by DRI on 12.10.2002 contained 128 SD RAM and Intel Processor valued at US\$69,800, which included the value of 50 Processors, which were not shown in the invoices recovered from the parcels. In respect of one parcel, there was a declaration

regarding contents and/or value, whereas the value declared on the remaining three parcels was far less as compared to the actual value. He specifically stated that this double set of declaration was done as per arrangement with Gulati for the purposes of evading duty. During investigation, it was found that the petitioner being the owner of VIST International, Singapore, would consign the goods through speed post route to accused No. 1 Beam Technologies Pvt. Ltd. and the Consignment Note on the parcel would not carry true declaration regarding description of the goods being imported. It was also stated by accused No. 2 in his statement under Section 108 of Customs Act, that the documents seized from the godown of Beam Technologies Pvt. Ltd. included a blank invoice of VIST International, Singapore in the name of Beam Technologies and it was maintained in their computer and these formats were used in their regular import for preparing invoice for custom purpose.

3. A show cause notice dated 7th April 2003 was issued to the petitioner under Section 124 of Customs Act in connection with seizure of the above referred computer parts at Speed Post Centre, Bhai Vir Singh Marg, New Delhi on 12th October 2002. A penalty of Rs. 1,00,000/- under Section 112 of Customs Act was imposed upon the petitioner on 9th June 2005. However, in an appeal filed by him, CEGAT set aside the penalty imposed on him. Thus petition for quashing the complaint has been filed primarily on the ground that the petitioner having been exonerated by CEGAT, his prosecution under Section 135 of Customs Act cannot continue.

4. The respondent has opposed the petition and has alleged that in his statement under Section 108 of Customs Act, accused Sandeep Sehgal has stated that petitioner was also a Director of Beam Technologies Pvt. Ltd. besides being owner of M/s VIST International, Singapore. It has been further alleged that both, Sandeep Sehgal and the petitioner Joginder Gulati had hatched the conspiracy for import of computer parts in the Country without payment of customs duty and double set of invoices were created intentionally for the purposes of evading duty, which was clearly indicative that they were fully aware of the modus operandi and had conspired with the management of Beam Technologies to evade duty, as the Consignment Note on the parcels did not carry the true declaration regarding the

description of the items or quantity being imported. It has been further claimed that the investigations have revealed that the petitioner was also a Director of Beam Technologies Pvt. Ltd.

5. The issue which comes up for consideration in this case is as to whether the criminal proceedings initiated against the petitioner are liable to be quashed merely on account of the order passed by CEGAT on 4th June 2009. The issue as to whether the decision in adjudication proceedings has any impact on the criminal prosecution or not, came up for consideration before a three Judges. Bench of Hon'ble Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement* : 2006 (197) ELT 18 (SC). In that case the petitioners, on receipt of notice requiring them to show cause why adjudication proceedings for imposition of penalty under Section 50 and 51 of FERA be not initiated against them, challenged constitutional validity of Sections 56, 58 and 61 of Foreign Exchange Regulation Act, 1963. During the course of arguments, it was contended on behalf of the appellants that under the scheme of the Act, it was incumbent upon Directorate of Enforcement to first adjudicate in terms of Section 58 of FERA and only if satisfied, to proceed with the prosecution under Section 56 of the Act. The argument was that only after completion of adjudication proceedings Directorate of Enforcement can, in that light of the findings in that adjudication for penalty, decide to initiate a prosecution and seek to impose or not to impose further punishment under Section 56 of the Act. It was submitted before the Hon'ble Supreme Court that adjudication proceedings would give the Directorate an idea as to the gravity of the violation and also an opportunity to decide whether the contravention deserved also a punishment by way of prosecution. The contention of the appellants was inter alia noted by the Hon'ble Supreme Court as under:

If in the adjudication proceedings it is found that the alleged offender has not infringed any of the provisions of the Act, there will be no occasion for the Directorate of Enforcement to prosecute a person for violating FERA, when in the adjudication proceedings against him it had been found that the person had not violated any of the provisions of FERA.

6. The learned Addl. Solicitor General on the other hand contended that the FEFA adjudication and prosecution were two separate and distinct procedures with distinct purposes. He inter alia submitted as under:

There was no bar either in FERA or in any other law, to an adjudication and prosecution being launched in respect of an alleged contravention of FERA. Counsel submitted that the law has permitted it by providing two separate modes for dealing with the person who contravenes the law in relation to foreign exchange. While the primary purpose of imposing of the penalty is the interests of revenue and the preservation of foreign exchange, the primary purpose of prosecution is to serve as a strong deterrent to persons or companies contravening the provisions of the Act and to send a message to the society at large. Counsel pointed out that Section 56 of FERA which deals with offences and prosecutions, commences with the words without prejudice to any award of penalty by the adjudicating officer under this Act. A person contravening any of the provisions shall upon conviction by a court will be punished, even if a penalty has been imposed on him.

7. Upholding the contention made by the learned Addl. Solicitor General and repelling the contention made on behalf of the petitioner, the Hon'ble Supreme Court inter alia held as under:

The Act was enacted, as indicated by its preamble, for the conservation of foreign resources of the country and the proper utilization thereof in the economic development of the country. When interpreting such a law, in the absence of any provision in that regard in the Act itself, we see no reason to restrict the scope of any of the provisions of the Act, especially in the context of the presence of the without prejudice clause in Section 56 of the Act dealing with offences and prosecutions. We find substance in the contention of the learned Additional Solicitor General that the Act subserves a twin purpose. One, to ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after an adjudication under Section 51 of the Act and two, to ensure that the tendency to violate is curbed by imposing an appropriate punishment after a due prosecution in terms of Section 56 of the Act. The

contention that as a matter of construction since the provisions could not be attacked as violative of the rights under Part III of the Constitution we should interpret the provisions of the Act and hold that an adjudication has to precede a prosecution cannot be accepted as we see nothing in the provisions of the Act justifying such a construction. On the scheme of the Act, the two proceedings are seen to be independent and the launching of the one or the other or both is seen to be controlled by the respective provisions themselves....

There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned senior counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act.

8. In view of the above referred authoritative pronouncements, the Hon'ble Supreme Court directly on the issue involved in this petition, there seems to be no scope for taking a view that a finding in favour of the accused in adjudication proceedings would ipso facto entitle him to quashing of the criminal proceedings initiated against him. Section 56 of FERA opens with the words without prejudice to any award or penalty by the adjudicating officer under this Act, which to my mind would mean that the criminal prosecution under Section 56 of FERA would be an action independent of the penalty proceedings conducted by the adjudicating Officer and the decision in those proceedings will not influence the criminal prosecution, irrespective of whether the result is in favour of or against the accused. Section 135(1)(a) of Customs Act also opens with the words without prejudice to any action that may be taken under this Act. Therefore, the decision of the Hon'ble Supreme Court in the case of Standard Chartered Bank (supra) would squarely apply to prosecution under Section 135 of Customs Act and consequently the proceedings for imposition of penalty initiated under Section 124 of Customs Act would not affect the criminal prosecution for the offence punishable under Section 135 of Customs Act irrespective of the outcome of the penalty

proceedings.

9. In *Assistant Collector of Customs v. L.R. Malwani* 1999 (110) ELT 317 (SC) issues that came up for consideration before the Hon'ble Supreme Court included the following two:

(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Article 20(2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act?

(ii) Whether under any circumstance the finding of the Collector of Customs that the 1st and 2nd accused are not proved to be guilty operated as an issue estoppels in the criminal case against those accused?

10. The first issue was answered by the Hon'ble Supreme Court as under:

Hence the question is whether that prosecution is barred under Article 20(2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this Article the rule of *autrefois acquit* embodied in Section 403 Criminal Procedure Code. Assuming we can do that still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20(2), it is necessary for an accused person to establish that he had been tried by a court of competent jurisdiction for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is a bar. If that much is established, it can be contended that he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 or for which he might have been convicted under Section 237. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a prosecution nor the Collector of Customs a Court. In *Maqbool Hussain v. The State of Bombay* : 1983 (13) E.L.T. 1284 (S.C.) : (1953) SCR 730, this Court held that the wording of Article 20 of the

Constitution and the words used therein show that the proceedings therein contemplated are proceedings of the nature of criminal proceedings before a court of law or a judicial tribunal and prosecution in the context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. This Court further held that where a person against whom proceedings had been taken by the Sea Customs authorities under Section 167 of the Sea Customs Act and an order for confiscation of goods had been passed, was subsequently prosecuted before a criminal court for an offence under Section 23 of the Foreign Exchange Regulation Act in respect of the same act, the proceeding before the Sea Customs authorities was not a prosecution and the order for confiscation was not a punishment inflicted by a Court or judicial Tribunal within the meaning of Article 20(2) of the Constitution and hence his subsequent prosecution was not barred. The said rule was reiterated in *Thomas Dana v. State of Punjab* (1959) SCR 274 and in several other cases.

11. As regards the applicability of the Rule Estoppel, the Hon'ble Supreme Court *inter alia* held as under:

But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant cause for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2.

12. In *Sant Ram Paper Mills v. Collector of Central Excise* : 1997 (96) ELT 19 (SC), the appellant before the Hon'ble Supreme Court had challenged the order passed by the Tribunal. The Hon'ble Supreme Court did not find any material in the challenge. The learned Counsel for the appellant brought to the notice of the Hon'ble Supreme Court that the appellant was also being prosecuted in a Criminal Court. The Hon'ble Supreme Court observed that the criminal case shall be decided on its own merits and according to law, uninhibited by the finding of the

Tribunal. This judgment, therefore, supports the legal proposition that the proceedings in adjudication proceedings cannot influence the criminal prosecution.

13. In *P. Jayappan v. S.K. Perumal* : 1984 (Suppl.) SCC 437, Hon'ble Supreme Court, inter alia, held as under:

The criminal court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it. Otherwise there is a danger of a contention being advanced that whenever the assessee or any other person liable under the Act has failed to convince the authorities in the proceedings under the Act that he has not deliberately made any false statement or that he has not fabricated any material evidence, the conviction of such person should invariably follow in the criminal court.

Though the issue before the Hon'ble Supreme Court in the case *P. Jayappan*(supra) was as to whether criminal proceedings needs to be stayed pending reassessment proceedings under Income Tax Act, the observations made by the Hon'ble Court are pertinent and have a direct bearing on the issue involved in this petition.

14. It has to be appreciated that the Adjudicating Officer as also the Tribunal perform quasi-judicial functions and the department can only place its case before them. It is then left to the Adjudicating Authority or the Tribunal, as the case may be, to take such view, as it may deem appropriate, on the facts presented before it. The Adjudicating Authority or the Tribunal, therefore, cannot be identified with the department and it cannot be said that the view taken by the Adjudicating Authority or the Tribunal, as the case may be, represents the view of the department. In fact, in the present case, the petitioner was not exonerated by the Adjudicating Officer and it was only the Tribunal which has decided in his favour. The view taken by the Tribunal cannot be said to be the view of the department and, therefore, does not bind it.

15. I feel that considering the authoritative pronouncement of the Hon'ble Supreme Court in the case of Standard Chartered Bank (supra), it is difficult to make the fate of the criminal proceedings dependent upon the outcome of the proceedings initiated for adjudication and recovery of penalty. The Hon'ble Supreme Court having specifically held that the two proceedings are independent and launching of the one or the other or the both is controlled by the respective provisions themselves and having further held that the findings in adjudication were not binding on the court in a proceedings under Section 56 of FERA and also having held that the findings in one proceedings is not conclusive in the other, it is difficult for this Court to take a contrary view and to say that if it is held in adjudication proceedings that there was no contravention of the provisions of Customs Act attracting levy of penalty, that finding would be binding upon the criminal court and the accused would be entitled to quashing of proceedings on this ground alone, without giving an opportunity to the complainant to the guilt attributed to the accused, in a criminal trial.

16. It has to be kept in mind that neither the Adjudicating Officer nor the Tribunal is a Court' and, therefore, neither bar of Article 20(2) of the Constitution applies to the prosecution despite the view taken in adjudication proceedings, nor does rule of estoppel applies in such a case. No provision of law is, therefore, violated on account of continuance of the criminal proceedings despite the department having failed to succeed in the proceedings initiated for imposition of penalty. If there is no violation of any statutory provision on account of continuance of the criminal proceedings, it is difficult for the court to quash the proceedings merely on account of the view taken in adjudication proceedings.

17. The learned Counsel for the petitioner has referred to the decision of this Court in Sunil Gulati v. Jogender Pal Singh 2007 (1) JCC 220 as well as to the subsequent decisions of this Court in D.K. Modi v. K.C. Ibahim 2007 (3) JCC 2069, D.K. Rastogi v. Union of India 2007 (2) JCC 1523, Anil Mahajan v. Union of India CRL. Rev. No. 160/2007 decided on 5th February, 2008, Vinod Kumar Jain v. Union of India CRL.M.C. No. 272/2004 decided on 7th February, 2008 and Arjun Amla v. Enforcement Directorate 158 (2009) DLT 751. In the case of Sunil Gulati (supra), which has been followed in the later cases, this Court after considering

various decisions on the subject, including decision of the Hon'ble Supreme Court in the case of Standard Chartered Bank (supra), L.R. Motwani (supra) and Sant Ram Paper Mills (supra), inter alia, held as under:

The principles which can be culled out from the aforesaid judgments, when all these judgments are read out harmoniously, would be the following:

1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.
2. The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of prosecution.
3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.
4. In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be

allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

18. Even going by the propositions laid down by this Court, in the case of Sunil Gulati(supra), I am of the view that the decision of the Tribunal cannot be taken as exoneration of the petitioner on merits.

19. A perusal of the judgment of the Tribunal would show that the submission on behalf of the petitioner was recorded as under:

As regards, Shri Joginder Gulati it was pleaded that since he is a NRI, no penalty can be imposed on him and in this regard reliance was placed on Tribunal's Judgment in the case of Ankit Gopal Agarwal v. CC Cochin reported in 2008 (89) RLT 756 (CESTAT Bang.). In any case, he was only a supplier and he had no role to play in alleged supplied by his company from Singapore.

20. The submission of the department against the petitioner was recorded as under:

There was a conspiracy between Shri Joginder Gulati and Shri Sandeep Sehgal on one hand and Shri Koshori Lal and Vishnu Kumar postal employees and Rajesh Kumar, the Customs Inspector on the other hand for illicit clearance of the dutiable goods imported through post parcels, without payment of duty and in this regard, the statements of these persons recorded under Section 108 of the Customs Act are clear evidence.

21. It would, thus, be seen that the Tribunal did not at all scrutinise the allegations against the petitioner on their merits. Despite the department claiming that there was a conspiracy between the petitioner and his co-accused Sandeep Sehgal, on one hand, Shri Kishori Lal and Vishnu Kumar postal employees and Rajesh Kumar Customs Inspector, on the other hand, for illicit clearance of the dutiable goods imported through post parcels without, payment of duty, the Tribunal has not given a finding that there was no such conspiracy or that the petitioner was not a party to the conspiracy pursuant to which dutiable goods were imported without payment of requisite customs duty. The case of the respondent/complainant is that double sets of invoices were created intentionally as per arrangement with the petitioner for the purpose of evading duty as was clearly indicative from the fact that the consignment note on the parcel did carry two declaration regarding the description of the item or the quantity being imported. It is not in dispute that the petitioner owned VIST International PTE Limited, which had exported these goods from Singapore to India. The Tribunal has not given any finding that the double sets of invoices were not created, as the case of the complainant/prosecution is. The Tribunal has not given a finding that the petitioner was not aware of the modus operandi adopted for importing these goods without payment of customs duty.

22. This is also not the finding of the Tribunal that the consignment seized by the respondent were not sent by the petitioner or that they contained true declaration as regards the description of the items as well as regarding quantity contained therein. As per the complainant, in his statement under Section 108 of the Customs Act, accused No. 2, Sandeep Sehgal had stated that he used to send money to Singapore through persons known to Joginder Gulati and the names and details of those persons used to be conveyed to him by Joginder Gulati on telephone. The Tribunal has not given a finding that no such statement was made by accused No. 2 Sandeep Sehgal or that his statement was not adequate to show complicity of the petitioner in import of computer parts without payment of requisite customs duty. He further stated that the parcels which were seized on 12th October, 2002 contained 128 SD RAM and INTEL processor valued at US\$ 69,800, which included the value of 50 processors that were not shown in the invoices recovered from inside of the parcels, and that in respect of one parcel, there was a declaration regarding content and/or value whereas the value

declared on the remaining three parcels was far less when compared to the actual value not given in the invoices placed inside the packages. He also stated that this double set of declaration was intentional as per arrangement with the petitioner Joginder Gulati for the purpose of evading duty. This is not the finding of the Tribunal that the declaration made on the parcels was correct. There is no finding by the Tribunal that there were no double sets of invoices or that the invoices which were found inside the parcels contained accurate description and value of the goods. Since these parcels were sent by the petitioner from Singapore, he was responsible for the description given in the invoices found in the parcels. The Tribunal has not at all gone into the allegations made and the evidence collected against the petitioner and has simply chosen to, altogether, ignore the allegations made and evidence collected against him.

23. In the case of Sunil Gulati (*supra*), the petitioner before this Court was let off by CEGAT on the ground that imposition of penalty on him was based on his solitary statement which had later been retracted by him. The trial court, which rejected the application of the petitioner for discharge, relying upon the various judicial pronouncements held that the statement under Section 108 of Customs Act could not be disbelieved merely because of retraction. In these circumstances, it was held by this Court that exoneration of the petitioner was not on merits and it would still be open to the criminal court to decide as to whether the statement made by the petitioner before it under Section 108 of Customs Act should be believed, or not. Thus, the exoneration was not held to be on merit as the Tribunal had based its decision on a wrong view of law regarding admissibility of a retracted statement. In the present case, the Tribunal has not even adverted to the statement made by accused No. 2 under Section 108 of Customs Act, nor has it touched upon the circumstances appearing in evidence against the petitioner and the evidence collected against him during investigation. In these circumstances, it cannot be said that the Tribunal has exonerated the petitioner on merits. Therefore, going by the decision of this Court in the case of Sunil Gulati which has been followed in a number of other cases, the petitioner is not entitled to quashing of the criminal proceedings initiated against him.

24. The Learned Counsel for the petitioner has also submitted a copy of the decision of this Court in *Surkhi Lal v. Union of India* 2005 (3) JCC 1788. I need not discuss this judgment in view of the later decision of this Court starting from the case of *Sunil Gulati (supra)*. This is more so when the petitioner has not been exonerated on merits of the case. The learned Counsel for the petitioner has further submitted copies of the judgments in *Crl.M.C. No. 38 of 2005, Behariji . and Ors. v. Commissioner of Central Excise Anti Evasion, Delhi-1, K.C. Builders v. Assistant Commissioner of Income Tax : JT 2004 (2) SC 100*, and *Commissioner of Income Tax (Mumbai) v. Bhupen Champak Lal Dala*, 2001 SCC (Crl.) 544. In the case of *Behariji Manufacturing Company*, the Tribunal had given a finding that no materials were produced nor was there anything brought on record to show that the goods were actually cleared by the petitioner. The allegation against him was clandestine removal of manufactured goods which, taken together, attracted payment of excise duty. In the present case, since the Tribunal has not even adverted to the case of the department against the petitioner, this judgment is of no help to him. In the case of *K.C. Builders (supra)*, the Hon'ble Supreme Court held that the levy of penalty and prosecution under Section 276(C) of Income Tax Act being simultaneous one, the penalties were cancelled on the ground that there was no concealment, the quashing of prosecution under Section 276 was automatic. This judgment came up for consideration before the Hon'ble Supreme Court in *Standard Chartered Bank (supra)* and was dealt with as under:

The decision in *K.C. Builders and Anr. v. Assistant Commissioner of Income Tax : 2004 (2) SCC 731* is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it was settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and

separate, Hence, the ratio of the above decision is not applicable. That apart, there is merit in the submission of the learned Additional Solicitor General that the correctness of the view taken in K.C. Builders (supra) may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in Assistant Collector of Customs, Bombay v. L.R. Melwani and Anr. (supra) and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here.

25. Therefore, the judgment of the Hon'ble Supreme Court in the case of K.C. Builders (supra) does not apply to the present case. In the case of Bhupen Champak Lal (supra), the High Court had stayed the prosecution under Income Tax Act on the ground that the proceedings before the appellate authorities would have a bearing on the cases lodged against the respondents. The Hon'ble Supreme Court felt that the interim order passed by the High Court did not call for any interference by it. This judgment being in respect of prosecution under Income Tax Act has no application to a prosecution under Section 135 of Customs Act, in view of the decision of the Hon'ble Supreme Court in the Standard Chartered Bank taking therein the view that the decision of the Hon'ble Court in the case of K.C. Builders would not apply to prosecution under FERA, 1973 and the relevant provisions of FERA being identical to the relevant provisions of Customs Act as far as the issue involved in this petition is concerned. The learned Counsel has also submitted a copy of the judgment of Hon'ble Supreme Court in P.S. Raja v. State of Bihar 1996 SCC (Cri.) 897. In the case before the Hon'ble Supreme Court, the main basis of the charge sheet filed by CBI was the valuation given at Rs. 7,69,300/- by the very same engineer who had earlier given value at Rs. 4.67 lakhs in respect of the same house and, there was no indication as to why there was a difference in the value of the property. In the Departmental Inquiry conducted by the Central Vigilance Commission, the Commission exonerated the appellant. The Union Public Service Commission concurred with the recommendation of the Central Vigilance Commission and accepting the report of the Union Public Service Commission, the President passed final order in favour of the appellant, who then filed a petition for quashing of the cognizance of the charge. It was also noticed by the Hon'ble Supreme Court that there were

allegations of overwriting and alteration in the subsequent report submitted by the CBI for which complaint had been filed by the appellant under Section 340 of the Cr. P.C. In these circumstances, prosecution was quashed relying upon the guidelines laid down in *State of Haryana v. Bhajan Lal* 1992 SCC (CrL.) 426. This judgment is of no help to the petitioner in the facts and circumstances of the present case.

26. The learned Counsel for the petitioner has lastly submitted a copy of the decision of this Court in *Arjun Amla*(Supra). In that case, the department itself had taken a view that no case was made out against the petitioner and had decided not to initiate criminal prosecution against him. The petitioner was, however, summoned by the learned ACMM under Section 319 of Cr.P.C. During the course of arguments before this Court, it was conceded by the respondent that the show-cause notice issued to the petitioner had been recalled and a decision was taken not to levy any penalty against him. Even before the Adjudicating Authority, the department took the view that no case was made out against the petitioner. In these circumstances, it was held by this Court that when the department itself had decided not to take any criminal proceedings against the petitioner and was not even seriously opposing the petition filed by him, the order passed by the learned ACMM could not be sustained. This judgment is of no help to the petitioner since not only penalty was imposed upon him by the Adjudicating Officer and it was only the CEGAT which reversed the order imposing penalty, the respondent is vehemently opposing this petition for quashing the complaint filed by it and this is not the case of the respondent that the petitioner had not contravened any provisions of Customs Act.

27. For the reasons given in the preceding paragraphs, I hold that there is no valid ground warranting quashing of the criminal complaint filed by the respondent against the petitioner. The petition, being devoid of any merit, is dismissed.