IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WP-ASDB-LD-VC-237 OF 2020

WRIT PETITION (ST) NO. OF 2020

M/s. Mangalnath Developers and another … Petitioners
Vs.
Union of India and others … Respondents

Mr. Prasad Paranjape a/w. Mr. Jas Sanghavi and Mr. D. P. Poojari i/b. PDS Legal for Petitioners.
Mr. Jitendra B. Mishra for Respondents-UOI.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.
Reserved on : AUGUST 24, 2020
Pronounced on : SEPTEMBER 15, 2020

JUDGMENT and ORDER : (*Per Ujjal Bhuyan, J.*)

Heard Mr. Prasad Paranjape, learned counsel for the petitioners and Mr. Mishra, learned counsel for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioners seek a direction to the respondents to give effect to the order-in-appeal dated 29.11.2019 and to allow clearance of the imported watch covered by bill of entry No.9494939 dated 02.01.2019 on payment of duty on the declared value.

3. As averred in the writ petition, petitioner No.1 is a partnership firm having its office at Vashi, Navi Mumbai. Petitioner No.2 is a partner of petitioner No.1. Petitioners imported an automatic Patek Philippe wrist watch (referred to hereinafter as ‘the imported watch’) from New Mashoom LLC, Dubai, United Arab Emirates (referred to hereinafter as ‘the seller’) for 2,15,000.00 AED equivalent to Rs.42,67,470.00 in Indian currency. It is stated that the said price was paid by petitioner No.2 through his AMEX card on 14.06.2018. It is

further stated that the said watch has been imported for the personal use of petitioner No.2.

4. According to the petitioners, in the invoice dated 16.12.2018 the seller mentioned the CIF value but due to inadvertence, instead of CIF, C and F was printed.

5. Petitioner No.1 filed bill of entry bearing No.9494939 dated 02.01.2019 for the purpose of assessment of the imported watch under the Customs Act, 1962 (briefly 'the Customs Act' hereinafter). Petitioner declared the value of the imported watch at Rs.42,32,845.00.

6. After hearing the matter, Deputy Commissioner of Customs, Group VB, Air Cargo Complex, Sahar, Andheri (E), Mumbai i.e., respondent No.3 passed order-in-assessment dated 25.03.2019 rejecting the declared value of the imported watch and re-determined the same at Rs.1,00,49,150.00 under Rule 9 of the Customs Valuation Rules, 2007.

7. Aggrieved by the said order-in-assessment, petitioners preferred an appeal under section 128 before the Commissioner of Customs (Appeals), Mumbai-III which was registered as Appeal No.452 of 2019. By his appellate order dated 29.11.2019 passed under section 128A of the Customs Act, Commissioner of Customs set aside the order-in-assessment and held that the bill of entry is to be assessed at the invoice price. The appeal was accordingly allowed.

8. Though Commissioner of Customs (Appeals) set aside the order-in-assessment, respondents did not allow or permit clearance of the imported watch in terms of the appellate order. Faced with such a situation, petitioner wrote to the respondents on 20.12.2019 to atleast grant provisional release of the imported watch. Assistant Commissioner of Customs, Group-VB *vide* his letter dated 04.02.2020 informed petitioner No.1 that Commissioner of Customs (Import) has allowed

provisional release of the consignment subject to fulfillment of the conditions mentioned therein, viz,-

1. Submission of bond in the prescribed format for the differential amount;
2. Bank guarantee for an amount of Rs.22,25,347.00;
3. Payment of merit duty and dues as applicable.

9. The aforesaid conditions are unreasonable and unwarranted post the order-in-appeal, according to the petitioners and therefore *vide* letter dated 25.05.2020, they requested respondent Nos.2 and 3 to forthwith release the imported watch by implementing the order-in-appeal and without insisting on any condition. Inspite of such demand being made, the imported watch has not been released in terms of the appellate order and without insisting on the conditions in terms of the letter dated 04.02.2020.

10. Aggrieved, present writ petition has been filed seeking the relief as indicated above.

11. Contention of the petitioner is that respondent Nos.2 and 3 are bound to comply with and implement the order-in-appeal dated 29.11.2019. No further appellate proceeding appears to have been instituted by the respondents against the order-in-appeal and in any event in the absence of any stay granted by the Customs, Excise and Service Tax Appellate Tribunal (briefly 'CESTAT' hereinafter), respondents are duty bound to implement the order of the appellate authority. In this connection reliance has been placed on a decision of the Supreme Court in *Union of India Vs. Kamlakshi Finance Corporation Limited*, **55 ELT 433**. Question of provisional release of the imported watch does not arise.

12. Respondents have filed an affidavit through Mr. Prashant Gawande, Deputy Commissioner of Customs (Import), Air Cargo

Complex, Sahar, Andheri (E), Mumbai. Stand of the respondents is that during assessment proceeding petitioner had declared value of the imported watch at Rs.42,32,485.00. On investigation by the Customs Department it was found that online e-commerce price of such brand of watches ranged from Rs.2,09,02,328.00 to Rs.2,69,82,814.00. The declared price was very low compared to the price of similar goods available in the market. Thus under Rule 9 of the Customs Valuation Rules, 2007 price of the imported watch was decided by taking the lowest selling price of Rs.2,09,02,328.00 and the assessable value was decided at Rs.1,00,49,150.00. Thereafter order-in-assessment was passed on 25.03.2019.

12.1. Against the order-in-assessment, petitioner preferred appeal which was allowed *vide* the order-in-appeal dated 29.11.2019. It is stated that the said order-in-appeal was received on 18.12.2019.

12.2. Referring to the letter dated 04.02.2020, it is stated that petitioner was informed to avail provisional release of the imported watch subject to submission of bond and bank guarantee in order to safeguard government revenue. This was followed by e-mail dated 05.06.2020.

12.3. The appellate order was examined by a Committee of Commissioners on 05.03.2020 wherein it was decided that against the appellate order, Customs Department should file appeal before CESTAT. Accordingly, appeal along with stay application has been filed before CESTAT, Mumbai Bench on 09.06.2020. The delay in filing the appeal has been explained on account of the present pandemic situation for which CESTAT was not accepting appeals with effect from March, 2020. As per Chapter V of the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020, the limitation period for filing of appeal stood extended upto 30.06.2020.

12.4. According to the respondents when the petitioners request for

provisional release of the imported watch has been accepted by the respondents, there is no cause for filing the writ petition. When the appeal along with the related stay application is pending before the CESTAT, question of releasing the imported watch in terms of the order-in-appeal does not arise. In such circumstances, respondents seek dismissal of the writ petition.

13. Mr. Paranjape, learned counsel for the petitioner submits that action of respondent No.3 in not complying with the order-in-appeal despite being a subordinate authority is totally illegal and unacceptable. Mere filing of appeal against the order-in-appeal before the CESTAT is no ground for not releasing the imported watch in terms of the order-in-appeal. On a query by the Court, he submits that it was on wrong legal advice that petitioner sought for provisional release of the good. Since there is no seizure in the instant case being a case of assessment that too set aside by the appellate authority, question of provisional release of the good with stringent conditions does not arise. He, therefore, seeks a direction to the respondents to release the imported watch in terms of the appellate order.

14. *Per contra* Mr. Mishra, learned counsel for the respondents submits that the writ petition is misconceived. Since the Customs Department has preferred appeal before the CESTAT, any direction for release of the imported watch will render the said appeal infructuous. He prays for eight weeks time to enable the Customs Department to obtain suitable order from the CESTAT. That apart, respondents have favourably considered the request of the petitioners for provisional release of the good in question *vide* letter dated 04.02.2020. If the petitioners are aggrieved by the conditions imposed for provisional release of the good in question, they can file appeal. He therefore seeks dismissal of the writ petition.

15. Submissions made by learned counsel for the parties have been

duly considered. Also perused the materials on record.

16. Short point for consideration is whether respondent No.3 is justified in not releasing the imported watch of the petitioner in terms of the order-in-appeal dated 29.11.2019 and insisting on provisional release of the same subject to the conditions mentioned in the letter dated 04.02.2020?

17. Before venturing to answer the above question, it would be apposite to deal with the order-in-assessment as well as the order-in-appeal and the related factual matrix.

18. On perusal of the order-in-assessment dated 25.03.2019 it is seen that respondent No.3 noted that as against the declared value of the imported watch at Rs.42,32,845.00 online price of such brand of watches ranged from Rs.2,09,02,328.00 to Rs.2,69,82,814.00. A view was taken that since the price of the watch available on websites is much higher than the declared price, the transaction in question involved an abnormal discount or abnormal reduction from the ordinary competitive pricing. Therefore, it was held that the declared value of the imported watch was liable to be rejected under Rule 12 of the Customs Valuation Rules, 2007 and the same was required to be determined by proceeding sequentially in accordance with Rules 4 to 9 of the said Rules. After considering those Rules it was found that Rules 4 to 8 were not applicable as the value of the imported watch could not be determined in accordance with the said Rules. Therefore Rule 9 was applied whereafter value of the imported watch was re-determined at Rs.1,00,49,150.00 after rejecting the declared value. Relevant portion of the order-in-assessment is quoted hereunder:-

> "13. If selling price is Rs.208.00096, CIF value would be Rs.100.00. when selling price of the goods is Rs.2,09,02,328/-, CIF value would be Rs.1,00,49,150/-.
>
> In view of above discussion, I hereby pass the following order:

ORDER

> 14. I hereby reject the declared value of the impugned goods imported vide Bill of Entry No.9494939 dated 02.01.2019 imported by M/s. Mangalnath Developers and re-determined the same as Rs.1,00,49,150/- under Rule 9 of Customs Valuation Rules, 2007."

19. When the petitioners preferred appeal before the Commissioner of Customs (Appeals), by the order-in-appeal dated 29.11.2019 the appellate authority set aside the order-in-assessment and directed that the bill of entry should be assessed at the invoice price. Thus the appeal was allowed. On going through the order-in-appeal we do not find presence of any departmental representative in the appeal hearing though appellants i.e., the petitioners were duly represented by learned counsel who had also filed written submission. It does not appear that any objection or written submission were filed on behalf of the respondents before the appellate authority. Be that as it may, relevant portion of the order-in-appeal is extracted hereunder:-

> "5. I have gone through the facts of the case and submissions made by the appellant. I find that the impugned watch was imported by the appellant from M/s. New Mashoom Jewellery LLC UAE and an invoice to this effect was enclosed with the bill of entry No.9494939 dated 02.01.2019 with full details of the watch. During the course of adjudication proceedings, a letter of M/s. New Mashoom Jewellery LLC UAE was submitted reiterating particulars of invoice and confirming that payment was made through Amex Card on 14.06.2018 (i.e. more than 6 months in advance) for an amount of AED 2,15,000/- equivalent to Rs.4232845/-.
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> 6. It is not the case of Revenue that the transaction entered into by the importer was not genuine or under-valued or the appellant had suppressed any information about brand / specification of the watch or had made any additional payment for the said watch other than the banking channel. There is no allegation of the supplier and importer being in collusion. Admittedly, there is no contemporaneous import data suggesting import of the watch at higher value as well.
>
> 7. I find that section 14 of the Customs Act, 1962 provides that the value of imported goods shall be the transaction value i.e., the price actually paid or payable when sold for export to India where the buyer and seller are not related and price is the sole consideration. It is further observed that sub Rule 3 of

Customs Valuation Rules, 2007 specifies that transaction value shall be accepted provided that-

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which-

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related.

8. There is no finding in the impugned order that the subject import fell within any of the situations enumerated in Rule 3 of CVR, 2007. Moreover, the price taken for comparison from e-commerce sites cannot be treated as instances indicating contemporaneous value of goods to reject the actual transaction value. It is observed that time and again the Hon'ble Apex Court has held that in absence of any of the special circumstances indicated in Section 14(1) of the Act and particularized in Rule 3 of CVR, 2007 the price actually paid to the supplier shall be the basis for determination of assessable value. The department has to prove under valuation by evidence of contemporaneous imports at higher price. In absence of any such data, the transaction value cannot be discarded.

(i) Century Metal Recycling Pvt. Ltd. Vs. Union of India 2019 (367) ELT 3 (SC);

(ii) CCE & ST Noida Vs. Sanjivani Non Ferrous Trading Pvt. Ltd. 2019 (365) E.L.T. 3 (S.C.);

(iii) CC, Vishakhapatnam Vs. Aggarwal Industries Ltd. 2011 (272) ELT 641 (SC);

(iv) CC, New Delhi Vs. Prabhu Dayal Prem Chand 2010 (253) E.L.T. 353 (S.C.);

(v) CC, Calcutta Vs. South India Television (P) Ltd. 2007 (214) E.L.T. 3 (S.C.);

(vi) Eicher Tractors Ltd. Vs. CC, Mumbai 2000 (122) ELT 321 (SC).

9. In view of peculiar facts of the case and settled legal position as discussed above, the impugned order deserves to be set aside. The bill of entry is to be assessed at the invoice price.

10. The appeal is accordingly allowed."

20. From the affidavit of the respondents it is seen that the order-in-appeal dated 29.11.2019 was received by the respondents on 18.12.2019. Committee of Commissioners took the decision on 05.03.2020 that the Customs Department should file appeal against the order-in-appeal before CESTAT whereafter the appeal alongwith stay application were filed on 09.06.2020 before CESTAT, Mumbai Bench. Be that as it may, since the Customs Department has preferred appeal before the CESTAT, we would refrain from expressing any opinion on merit. That leaves us with the question which we have formulated on the basis of objections raised by the respondents.

21. Section 129 of the Customs Act deals with Appellate Tribunal i.e., CESTAT whereas section 129-A deals with appeals to Appellate Tribunal. As per sub-section 1(b) of section 129-A, an order passed by the Commissioner (Appeals) under section 128-A is appealable to the CESTAT.

21.1. Sub-section (1B) provides for constitution of Committee of Commissioners of Customs by order of Central Board of Excise and Customs. As per sub-section (2) the said Committee shall examine an order-in-appeal passed under section 128 or 128-A and if it is of the opinion that the said order is not legal or proper, then to direct the proper officer to file appeal against such order before the CESTAT.

21.2. According to sub-section (3), every appeal under section 129-A shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Principal Commissioner of Customs or Commissioner of Customs or as the case may be, the other party preferring the appeal. Since sub-section (3) is relevant, the same is extracted hereunder:

> "(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be

> appealed against is communicated to the Principal Commissioner of Customs or Commissioner of Customs or as the case may be, the other party preferring the appeal."

21.3. Of course, the said limitation period is extendable under sub-section (5) if CESTAT is satisfied that there was sufficient cause for not presenting the appeal within time.

22. However, the moot point to be noted is that the period of limitation of three months commences from the date on which the order sought to be appealed against is communicated and not from the date of decision of the Committee of Commissioners. This aspect was examined by this Court in the recent decision of *Ganesh Benzoplast Limited Vs. Union of India*, decided on 02.09.2020, wherein it was held as under:-

> "27.5. What is crucial from the above is that an appeal to CESTAT has to be filed within three months from the date of communication of the order sought to be appealed against with the period of limitation extendable on sufficient cause being shown. Therefore what is of relevance is that the limitation of three months commences from the date on which the order sought to be appealed against is communicated and not from the date of decision or opinion rendered by the Committee of Commissioners under sub-section (2)."

23. Reverting back to the facts of the present case, according to the respondents themselves the order-in-appeal dated 29.11.2019 was received by the respondents on 18.12.2019. The limitation period of three months therefore commences from this date.

23.1. The word 'month' is not defined in the Customs Act. We therefore take recourse to the definition of the said word as provided in the General Clauses Act, 1897. Section 3 of the said act provides for various definitions and says that after commencement of the General Clauses Act, 1897, the meaning given to the expressions contained in various sub-sections of section 3 would be applicable to all central acts and regulations unless there is anything repugnant in the subject or context. As per sub-section (35) of section 3, the word 'month' has been defined

to mean a month reckoned according to the British calendar.

23.2. In the case of *In re: V. S. Metha*, **AIR 1970 AP 234**, Andhra Pradesh High Court was considering the provisions of section 106 of the Factories Act, 1948 as per which no court shall take cognizance of any offence punishable under the said act unless complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of the inspector. In that context, Andhra Pradesh High Court examined the meaning of the word 'month' : whether it would mean 30 days in which case the complaint should be filed within 90 days from the date of knowledge. After referring to section 3(35) of the General Clauses Act, 1897, it was held that the word 'month' would mean a calendar month and by extension the term 'three months' as appearing in section 106 of the Factories Act, 1948 would only mean a period of three calendar months.

23.3. Again, in *Bibi Salma Khatoon Vs. State of Bihar*, **AIR 2001 SC 3596**, Supreme Court dealt with provisions of section 16(3) of the Bihar Land Reforms Act, 1961 which provided that benefits under the said act could be availed of if an application is made within three months of the date of registration of the documents of transfer. Posing the question as to what was meant by the word 'month', Supreme Court held that British calendar would mean Gregorian calendar. It was held that when the period prescribed is a calendar month running from any arbitrary date, the period of one month would expire upon the day in the succeeding month corresponding to the date upon which the period starts.

23.4. Supreme Court in *State of H. P. Vs. M/s. Himachal Techno Engineers*, **2010 AIR SCW 5088** considered the period of limitation prescribed under sub-section (3) of section 34 of the Arbitration and Conciliation Act, 1996. While section 34 relates to application for setting aside arbitral award, sub-section (3) thereof prescribes the period of limitation for such application which is three months. In that context,

Supreme Court examined the meaning of the word ‘month’ and held that a month does not refer to a period of 30 days but refers to the actual period of a calendar month. It was clarified that if the month is April, June, September or November, the period comprising the month will be 30 days; if the month is January, March, May, July, August, October or December, the month will comprise of 31 days; but if the month is February, the period will be 29 days or 28 days depending upon whether it is a leap year or not. After referring to section 3(35) of the General Clauses Act, 1897, it was held that the general rule is that the period ends on the corresponding date in the appropriate subsequent month irrespective of some months being longer than the rest. Therefore, it was held that when the period prescribed is three months (as contrasted from 90 days) from a specific date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending on the months, it may mean 90 days or 91 days or 92 days or 89 days.

23.5. Therefore, following the above discussion, it is evident that in the present case the limitation period of three months which commenced on 18.12.2019 had expired on 18.03.2020.

24. Respondents in their affidavit have placed reliance on Chapter V of the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (briefly “the 2020 Ordinance” hereinafter) to contend that they would get the benefit of the said Ordinance by extension of the period of limitation. We have already held that the limitation period for filing appeal before the CESTAT had expired on 18.03.2020 though under sub-section (5) of section 129-A of the Customs Act, the limitation period is extendable if sufficient cause is shown.

25. In exercise of the powers conferred by clause (1) of Article 123 of the Constitution, President of India has promulgated the 2020 Ordinance, which was published in the Gazette of India, Extraordinary

on 31.03.2020 to provide relaxation in the provisions of certain acts and for matters connected therewith or incidental thereto. It was stated therein that in view of the spread of pandemic COVID-19 causing immense loss to the lives of people, it had become imperative to relax certain provisions including extension of time-limit in taxation and other laws. Chapter V of the 2020 Ordinance deals with relaxation of time-limit under certain indirect tax laws, such as the Customs Act. Section 6 which is in Chapter V says that the time-limit specified in the said Acts which fell during the period from 20.03.2020 to 29.06.2020 or such other date after 29.06.2020 as the central government may by notification specify for completion or compliance of such action such as filing of appeal etc. shall, notwithstanding that completion or compliance of such action has not been made within such time, shall stand extended to 30.06.2020 or such other date after 30.06.2020 as the central government may by notification specify in this behalf. Therefore, what is deducible from the above is that if the expiry of the period of limitation fell during the period from 20.03.2020 to 29.06.2020, the limitation period would stand extended to 30.06.2020 or such other date thereafter as may be notified by the central government. To avail such relaxation in terms of the 2020 Ordinance, the limitation period must expire within the period from 20.03.2020 to 29.06.2020. In so far the instant case is concerned, we have already noted that the period of limitation had expired on 18.03.2020. Therefore, reliance placed by the respondents on the 2020 Ordinance is misplaced and the said ordinance can be of no assistance to the respondents.

26. This is not to say that the Customs Department is remedy-less. As already discussed above, sub-section (5) of Section 129-A provides for extension of the limitation period if sufficient cause is shown. Customs Department would also be entitled to the benefit of the order dated 23.03.2020 passed by the Supreme Court in *Suo Motu* Writ Petition (Civil) No.3 of 2020. Above analysis has been made only to highlight the lackadaisical approach of the respondents. Respondents have not shown any urgency at all in the matter. The order-in-appeal dated 29.11.2019 was

received on 18.12.2019 but the Committee of Commissioners took the decision to file appeal before CESTAT only on 05.03.2020 i.e., after a period of more than two and a half months. This coupled with the fact that respondents did not contest the appeal of the petitioners before the Commissioner (Appeals) has rendered the objection raised by the respondents as to release of the imported watch highly questionable. That apart, though the appeal along with the stay application was filed before the CESTAT on 09.06.2020, neither the appeal has been admitted nor has any stay been granted to the order-in-appeal. Not even a notice has been issued though urgent matters including stay applications are being heard by CESTAT through video-conferencing. Nothing has been placed on record to show that respondents had moved or attempted to move CESTAT for even a notice, not to speak of stay.

27. In so far the decision in **Kamlakshi Finance Corporation Limited** (*supra*) relied upon by the petitioners is concerned, Supreme Court held in clear terms that the mere fact that the order of the appellate authority is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. In that case arising out of the Central Excise Tariff Act, 1985 the adjudicating authority did not comply with the order passed by the appellate authority. When this was questioned before the High Court, severe strictures were passed by the High Court against two Assistant Collectors who had dealt with the matter. Upholding the strictures passed by the High Court, Supreme Court held that utmost regard should be paid by the adjudicating authorities as well as the appellate authorities to the requirements of judicial discipline and the need for giving effect to orders of the higher appellate authorities which are binding on them. Principles of judicial discipline require that orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. If this healthy rule is not followed, the result will be undue harassment to the assessees and chaos in administration of tax laws.

27.1. This view has been reiterated by this Court in *Viacom 18 Media*

Pvt. Ltd. Vs. State of Maharashtra, **2018 SCC OnLine Bom.18633** and in *M. D. Overseas Pvt. Ltd. Vs. State of Maharashtra*, decided on 12.08.2020.

28. Though the order-in-appeal was received by the respondents on 18.12.2019 more than eight months have elapsed since then without respondent No.3 complying with the order of the appellate authority. In view of the decision of the Supreme Court in **Kamlakshi Finance Corporation Limited** (*supra*), this is simply not permissible. Besides, such non-implementation or non-compliance of appellate order strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appeal remedy provided to a litigant under the statute. Had the respondents shown some urgency in the matter, the Court under Article 226 of the Constitution of India may have considered the request of the respondents for further time but in the present factual context, such request is unacceptable.

29. There is another aspect. Appellate authority by the order-in-appeal dated 29.11.2019 has set aside the order-in-assessment dated 25.03.2019. The effect of setting aside of an order by a superior or appellate authority was dealt with in **Ganesh Benzoplast Limited** (*supra*) wherein it has been held that when an order is set aside by a superior authority or by an appellate authority, the consequence thereof is that such an order loses its effectiveness and becomes inoperative. It has been held thus:

> "31.1. In the present case there is no dispute that by the order-in-appeal dated 20.12.2019, the order-in-original dated 22.11.2019 was set aside. By the order-in-original the goods in question were confiscated. After the order-in-original is set aide, the order of confiscation no longer survives. When an order is set aside by a superior authority or appellate authority, the consequence thereof is that such an order loses its effectiveness and becomes inoperative. The expression 'set aside' was examined by a Division Bench of this Court in a recent decision dated 03.08.2020 passed in the case of *Dudhganga Sahakari Dudh Utpadak Sangh Maryadit Vs. Divisional Joint Registrar, Pune* where it was held as under:

> "32. When an order is set aside by a superior authority, the consequence thereof is that it becomes inoperative; it is rendered null and void; it is erased from the record book as if it was never passed. *Advanced Law Lexicon*, 3rd Edition, Reprint 2007 defines the expression 'set-aside' to mean to annul, quash, render void or nugatory. Similarly, in *Supreme Court on Words and Phrases*, Second Edition, it is stated that the ordinary meaning of the words 'set-aside' is to revoke or quash, the effect of which is to make the interim order inoperative or non-existent."

29.1. Therefore, when the order-in-assessment has been set aside by the appellate authority, the original order no longer survives until and unless the order-in-appeal is either stayed or in the ultimate analysis itself is set aside. Therefore, basing upon the order-in-assessment which no longer survives, it is not open to the departmental authorities to grant provisional release of the good in question that too subject to fulfillment of certain conditions which are clearly beyond the order-in-appeal.

30. This brings us to the other objection of the respondents i.e., when the petitioners themselves sought for provisional release of the imported watch and the same having been granted by the respondents subject to fulfillment of the conditions mentioned in the letter dated 04.02.2020, whether it is open to the petitioners to seek the relief as is being sought in the present proceeding?

31. The only provision in the Customs Act which deals with provisional release of goods etc. is section 110-A. This provision says that any goods, documents or things seized under section 110 may pending the order of the adjudicating authority be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require. From the above, it is seen that section 110-A will come into play only if two pre-conditions are fulfilled, namely, there must be seizure under section 110 and the goods, documents or things so seized may be subject to proceeding before the adjudicating authority. Seizure is dealt with in section 110. Sub-section (1) makes it very clear that if the proper officer has reason to believe that any goods are liable to confiscation under the Customs

Act, he may seize such goods. In the instant case, admittedly there was no seizure and secondly, assessment of the good in question was not pending consideration. Assessment was already made by way of the order-in-assessment dated 25.03.2019. It is another matter that even that order-in-assessment has been set aside by the order-in-appeal. Since there is neither any seizure nor pendency of proceeding before the adjudicating authority, question of application of section 110-A does not arise. In such circumstances, even if any prayer is made by the owner seeking provisional release of the good in question though such provisional release is not contemplated under the law, that cannot be a ground to fasten or compel the owner from accepting the provisional release of the good in question with conditions despite there being an appellate order in favour of the owner. In fact a view may be taken that in the light of what the Supreme Court had said in **Kamlakshi Finance Corporation Limited** (*supra*) insistence on such provisional release in the face of the appellate order may in fact amount to deliberate non-compliance of the order-in-appeal.

32. In the circumstances, we are of the view that both the objections raised by the respondents are legally and factually unsustainable and thus are hereby rejected.

33. Consequently, we direct respondent Nos.2 and 3 to release the imported watch of the petitioners forthwith in terms of the order-in-appeal dated 29.11.2019.

34. Petition is accordingly allowed. However, there shall be no order as to cost.

35. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(ABHAY AHUJA, J.) **(UJJAL BHUYAN, J.)**