IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.5703 OF 2020

Ganesh Benzoplast Limited … Petitioner
Vs.
Union of India and others … Respondents

Mr. Vikram Nankani, Senior Advocate with Mr. Prithviraj Choudhary and Mr. Prabhakar Shetty for Petitioner.
Mr. Pradeep S. Jetly, Senior Advocate with Mr. J. B. Mishra for Respondents.

CORAM : UJJAL BHUYAN &
SMT. ANUJA PRABHUDESSAI, JJ.
Reserved on : AUGUST 10, 2020
Pronounced on : SEPTEMBER 02, 2020

P.C. : (*Per Ujjal Bhuyan, J.*)

By filing this petition under Article 226 of the Constitution of India, petitioner seeks a direction to respondent No.3 to comply with the appellate order dated 20.12.2019 and further seeks a direction to respondent No.3 to release the seized goods which were imported *vide* the bill of entry dated 01.11.2018.

2. We have heard Mr. Nankani, learned senior counsel along with Mr. Prithviraj Choudhary, learned counsel for the petitioner and Mr. Jetly, learned senior counsel along with Mr. J. B. Mishra for the respondents.

3. Petitioner is a public limited company registered under the Companies Act, 1956 having its registered office at Maharshi Karve Marg, Marine Lines, Mumbai. Petitioner is a leading liquid infrastructure storage company and is also a manufacturer, exporter and importer of chemicals. It also acts as agent on behalf of suppliers. It has been in the business of manufacturing and export of different chemicals since the year 1988.

4. Central Government through the Ministry of Chemicals and Fertilizers, Department of Chemicals and Petrochemicals on 03.04.2018 issued an order called the Bureau of Indian Standard (Caustic Soda) Order, 2018. The aforesaid order was issued in exercise of the powers conferred by sub-sections (1) and (2) of section 16 of the Bureau of Indian Standards Act, 2016 and after consulting the Bureau of Indian Standards. As per the said order, it was made mandatory that caustic soda should conform to Indian Standard IS 252:2013. In other words, the good specified i.e., caustic soda should conform to the Indian standard mark IS 252:2013 under a licence from the Bureau of Indian Standards (BIS) whether it is manufactured in India or imported. It was clarified that the aforesaid order would come into force on the date of its publication in the official gazette. Be it stated that the said order was published in the Gazette of India, Extraordinary on 03.04.2018 itself.

5. According to the petitioner, the manufacturer in Iran who intended to supply caustic soda to India, *viz.*, M/s. Aravand Petrochemical Company, Tehran, applied to the BIS on 09.10.2018 for a licence indicating that the product manufactured by them and which would be imported into India conform to IS 252:2013 standard specification.

6. A consignment of 9679.68 MTs i.e., 19515.489 LMTs of caustic soda was imported by the petitioner from M/s. Mena Energy, Dubai, United Arab Emirates *vide* bill of entry No.8697133 dated 01.11.2018. M/s. Mena Energy (referred to hereinafter as 'the supplier') had procured the aforesaid quantity of caustic soda from the manufacturer in Iran i.e., M/s. Aravand Petrochemical Company (referred to hereinafter as the 'foreign manufacturer') *vide* IGM No.2208452 dated 26.10.2018. The declared value of the goods is Rs.30,70,90,590.00.

6.1. Petitioner has stated that the application made by the foreign manufacturer with BIS was not processed in time. In the meanwhile the

consignment was shipped by the supplier. Therefore when the goods arrived in India it was not accompanied by the required BIS certificate in terms of the order dated 03.04.2018. As the goods reached the destination port i.e., Nhava Sheva, Raigad, petitioner filed bill of entry for warehousing under section 46(1) of the Customs Act, 1962 (briefly the 'Customs Act' hereinafter) till such time the required licence was granted to the foreign manufacturer. Being liquid cargo, discharge permission was procured and the cargo was discharged in petitioner's tank terminal in tank Nos.139 and 140 on 08.11.2018.

6.2. According to the petitioner, during that period consignments of similar nature without BIS certificate were cleared at various ports, including at Nhava Sheva, by conducting a test at approved laboratories. Accordingly, when the goods arrived at the port of destination petitioner made an application dated 19.11.2018 to the Deputy Commissioner of Customs, Group-II, Nhava Sheva for drawing a sample to examine the quality of the goods as per the Indian quality standards.

6.3. Initially sample was drawn and tested by DYCC Laboratory, Mumbai and as per the test report dated 05.12.2018 it was mentioned that the sample conformed to the standard of IS 252:1991. When it was realised that the testing ought to have been conducted on the present standard IS 252:2013, petitioner made a further application dated 02.05.2019 before the customs authority for testing the goods as per the applicable BIS standard i.e., IS 252:2013. However, no action was taken on the said application.

6.4. As the petitioner was incurring heavy loss for not being able to put the imported goods into commercial use, it entered into an agreement with M/s. SKS Glocem Limited on 29.01.2019 for sale of 600 MTs of the goods on bond to bond basis. In this connection necessary application was made to the Assistant Commissioner of Customs. M/s. SKS Glocem (P) Ltd. in turn transferred the title of the goods to M/s.

Camlin Fine Science Limited. M/s. Camlin Fine Science Limited filed bill of entry No.2015161 dated 11.02.2019 for clearance of the said goods. Accordingly, the goods were assessed and out of charge was granted by the Customs Department.

6.5. Similar transfer of goods was made by the petitioner, though for a lesser quantity, with M/s. Aqua Pharma Limited on 28.02.2019.

6.6. On instructions of M/s. Camlin Fine Science Limited and M/s. Aqua Pharma Limited, M/s. Narendra Forwarders, a customs broker, filed ex-bond bill of entry for the transferred goods.

6.7. However on 15.03.2019, officials of Special Investigation and Intelligence Branch (Import) visited the site where the goods were kept and sealed the concerned tanks. Petitioner was directed to withhold clearing of goods until further orders. At that stage a total quantity of 19,119.353 LMTs of caustic soda was lying in the two tanks. *Vide panchnama* dated 15.03.2019, Special Investigation and Intelligence Branch (Import) seized the said quantity of caustic soda.

6.8. Ultimately, show cause notice dated 25.07.2019 was issued to the petitioner and M/s. Narendra Forwarders by Additional Commissioner of Customs, NS-V under section 124 of the Customs Act. It was alleged that the instant import was unauthorizedly done i.e., without having a due BIS certification for goods already arrived. Thus the importer had rendered the said goods liable for confiscation under section 111(d) of the Customs Act as well as liable for penal action under section 112(a) of the said Act. Hence the petitioner was asked to show cause. In so far M/s. Narendra Forwarders was concerned, it was asked to show cause as to why penalty should not be imposed on it under section 112(b) of the Customs Act. The show cause notice was accompanied by a list of relied upon documents.

6.9. Petitioner submitted its reply on 30.08.2019 followed by a detailed additional submission on 16.10.2019.

6.10. Petitioner has stated that in the meanwhile BIS issued licence dated 30.09.2019 to the foreign manufacturer after due verification of its premises and manufacturing process. As per the license, the foreign manufacturer was informed that certification marks licence has been granted to it to use the standard mark IS 252:2013 in respect of the product caustic soda lye (grade 1). Thereafter an indemnity bond was executed by the foreign manufacturer and an agreement was entered into between BIS and the foreign manufacturer on 13.11.2019.

7. However, Joint Commissioner of Customs NS-I, Nhava Sheva i.e., respondent No.3 passed the order-in-original on 22.11.2019.

7.1. After recording the facts, respondent No.3 formulated three issues for adjudication :-

1. Liability to confiscation of the seized goods under section 111(d) of the Customs Act;
2. Penalty on the importer M/s. Ganesh Benzoplast Limited under section 112(a) of the Customs Act; and
3. Penalty on M/s. Narendra Forwarders (customs broker) under section 112(b) of the Customs Act.

7.2. In so far the present *lis* is concerned, the third question is not relevant. Regarding confiscability of the seized goods, respondent No.3 held that the imported goods are without standard mark; the supplier manufacturer is without valid BIS registration / licence; and the goods do not conform to the relevant standard. As such, it was held that the importation miscin question is in contravention of BIS requirements. After considering the rival contentions, respondent No.3 held that arguments put forward by the noticee i.e., petitioner were devoid of merit and hence liable to be rejected. Accordingly, respondent No.3 held

that the seized goods were liable to confiscation under section 111(d) of the Customs Act.

7.3. Moving on to the next question i.e., imposition of penalty on the importer, respondent No.3 held that penal action under section 112(a) was invocable in the facts and circumstances of the case against the petitioner. However, respondent No.3 noted that it was on record that the importer had applied for BIS registration before shipment of the goods from the country of origin or port of shipment; it did not file bill of entry for home consumption but stored the goods in customs bonded tanks; it obtained BIS registration on 30.09.2019. Therefore, respondent No.3 took the view that petitioner had acted *bona fidely* without any *mala fide* intention and hence he would take a lenient view while imposing penalty.

7.4. Ultimately, respondent No.3 ordered absolute confiscation of the seized goods and imposed penalty of Rs.1 crore on the petitioner. The proceeding against the customs broker M/s. Narendra Forwarders was dropped as it was found that there was absolutely total absence of any involvement by the customs broker in the commission of the offence.

8. Aggrieved by the aforesaid order-in-original dated 22.11.2019, petitioner preferred appeal before Commissioner of Customs (Appeals), Mumbai-II under section 128(1) of the Customs Act. Appeal was filed within the period of limitation and by making the requisite pre-deposit.

8.1. Commissioner of Customs (Appeals), Mumbai-II by the order-in-appeal dated 20.12.2019 disposed off the appeal. The appellate authority noted that in compliance to section 129-E of the Customs Act, petitioner had made the pre-deposit of Rs.7,50,000.00 which was exactly 7.5% of the penalty imposed in the order-in-original. When the appeal was heard, petitioner was represented by its counsel, who also filed a written submission. However, none appeared on behalf of the Department in the

hearing. No cross-objection or argument was filed before the appellate authority on behalf of the Department. After recording various grounds and reasons and relying on Circular No.30 of 2017 of the Central Board of Excise and Customs as well as applying the decision of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Allahabad in the case of *M/s. Aban Exim Private Limited Vs. CCE*, **2017 SCC OnLine CESTAT 3872**, appellate authority directed the original authority to draw fresh samples of the imported goods and to get those tested through a BIS accredited laboratory to ascertain whether the goods conform to IS 252:2013 specifications or not. It was further directed that on testing if the goods were found to conform to IS 252:2013 specification then clearance of the imported goods should be permitted as per law. For this, the case was remanded back to the original authority for passing a fresh order after carrying out the necessary testing. It was clarified that principles of natural justice should be followed before passing a fresh order. Consequently, the appellate authority set aside the order-in-original dated 22.11.2019 and remanded the matter back to the original authority for compliance as per directions issued. It was directed that since the matter pertained to a live consignment, the original authority should complete the entire process on remand and pass a fresh order within a period of six weeks from the date of receipt of the said order.

9. On receipt of the appellate order, petitioner requested respondent No.3 *vide* letters dated 24.12.2019 and 03.01.2020 to comply with the order-in-appeal. Respondent No.3 was requested to draw samples from the goods and get those tested at the earliest. It appears that the samples were drawn in the first week of January, 2020 but there was inordinate delay in forwarding the same for testing to an accredited laboratory. This compelled the petitioner to write further letters dated 17.02.2020 and 19.02.2020 to respondent No.3. Petitioner continued to make correspondence with respondent No.3 requesting the said authority to furnish a copy of the test report and to comply with the appellate order

dated 20.12.2019.

10. Though from various sources, petitioner could gather that results of testing of the samples were available with the office of respondent No.3 in the last week of March 2020, the same was not being made available to the petitioner; besides no fresh order was passed by the original authority. In such circumstances, petitioner filed an application dated 14.05.2020 under the Right to Information Act, 2005 seeking the aforesaid information. The said application was disposed off by an order dated 08.06.2020 whereby petitioner was informed that Committee of Commissioners had decided to review the order-in-appeal dated 20.12.2019 and that filing of appeal before CESTAT is under process. It was also stated that copy of the test report was forwarded to representative of the petitioner.

11. From a perusal of the test report dated 23.03.2020, it became evident that the goods in question conform to IS 252:2013 standard specification.

12. Aggrieved by the inaction of the respondents in giving effect to the order-in-appeal, petitioner has approached this Court by filing the present writ petition seeking the reliefs as indicated above.

13. It is contended that the action of the respondents in sitting over the order-in-appeal is totally unacceptable and is violative of judicial discipline.

13.1. There was delay in drawing up samples following the order-in-appeal, further delay in sending those samples for testing to accredited laboratory and thereafter total inaction *vis-a-vis* giving effect to the order-in-appeal. Only when the petitioner filed application under the Right to Information Act, 2005, it was informed that Committee of Commissioners had decided to review the order passed in appeal

whereafter filing of appeal before CESTAT was under process. When the Committee of Commissioners met and when the appeal would be filed before CESTAT were not informed. Not giving effect to the order-in-appeal on the specious ground that Committee of Commissioners wanted review of the said order for which reason it was decided to file appeal before CESTAT is totally unjustified besides being oppressive and violative of the fundamental right to carry on business and trade within the meaning of Article 19(1)(g) of the Constitution of India.

14. Respondents have filed affidavit in reply. It is stated that the importer had committed offence under order dated 03.04.2018 and rendered the subject goods liable for confiscation under section 111(d) of the Customs Act. Having reasonable belief that the said goods were liable for confiscation, the same were seize13-14d under section 110 of the Customs Act *vide* seizure *panchanama* dated 15.03.2019. Reference has been made to the show cause notice dated 25.07.2019 and thereafter to the order-in-original dated 22.11.2019. In so far appeal filed by the petitioner is concerned, it is stated that the same was disposed off by the Commissioner of Customs (Appeals), Zone-II *vide* order dated 20.12.2019 remanding the matter back to the original authority for drawing up fresh samples of the seized goods and getting those tested in an accredited laboratory. While setting aside the order-in-original dated 22.11.2019, appellate authority granted the original authority a period of six weeks for passing fresh order.

14.1. It is stated that the order-in-appeal dated 20.12.2019 was submitted before the Committee of Commissioners for review. Committee reviewed the same *vide* order dated 20.03.2020 and directed to file appeal before CESTAT. It is further stated that appeal has been filed before CESTAT on 24.06.2020 with a prayer to set aside the order-in-appeal and to confirm the order-in-original. Stay application has been filed for stay of the order-in-appeal during pendency of the appeal before CESTAT. Contentions have been made on merit as well justifying

seizure and confiscation of the goods.

14.2. Finally it is stated that the appeal along with the stay application is pending before the CESTAT and therefore, the writ petition filed by the petitioner may not be entertained giving opportunity to the respondents to effectively pursue their remedy before the CESTAT.

14.3. Further contentions have been made on the merit of the order-in-appeal. Contending that the goods were imported in contravention with BIS law which matter is pending for adjudication at the final appellate stage, respondents seek dismissal of the writ petition. It is also contended that any order in favour of the petitioner in the form of release of the goods will make the appeal of the respondents before CESTAT infructuous. Hence, respondents seek dismissal of the writ petition.

15. Mr. Nankani, learned senior counsel for the petitioner submits that conduct of the respondents is highly deplorable. Customs Act provides for a hierarchy of authorities including authorities deciding appeals. Subordinate authorities are bound to comply with orders of the higher authorities as well as the appellate authority. It is not open to the subordinate authority to sit over an order passed by the appellate authority by taking the unjustified plea of filing of appeal before the CESTAT. The list of dates will clearly indicate that respondents have taken their own sweet time in filing appeal against the order-in-appeal and not pursuing the same. On the ground of pendency of appeal before the CESTAT, respondents have deliberately not complied with the order-in-appeal. The original authority has not even bothered to pass fresh order-in-original as directed by the appellate authority. Therefore, there is no justification for withholding the imported goods of the petitioner.

15.1. On merit, he submits that before the goods were imported, the foreign manufacturer had already applied for BIS registration for caustic soda having the standard mark of IS 252:2013. It is another matter that the imported consignment reached the port of destination before such

registration was done. However, the BIS registration was made available to the foreign manufacturer before the order-in-original was passed. Subsequently, as per test reports of accredited laboratory, the imported goods were found to conform to BIS standard mark IS 252:2013. Therefore, there can be no justification for withholding of such goods. He submits that BIS registration of the foreign importer would be counted from the date of making of application and not from the date of issue of registration. In this connection, he has placed reliance on a decision of the Supreme Court in *State of UP Vs. Haji Ismail Noor Mohammad,* **(1988) 3 SCC 398** and a decision of CESTAT, West Zone, Mumbai Bench in *Balmer Lawrie Van Leer Limited Vs. Chief Commissioner*, **150 ELT 1298**.

16. *Per contra*, Mr. Jetly, learned senior counsel for the respondents submits that the imported consignment of caustic soda was in violation of order dated 03.04.2018 as the manufacturer did not have the required BIS standard mark. The goods were rightly seized and thereafter confiscated. He submits that Commissioner of Appeals does not have the power of remand and therefore, the order-in-appeal passed by the Commissioner of Appeals remanding the matter to the original authority for a fresh order is *non est* and bad in law.

16.1. Regarding the request of the petitioner dated 02.05.2019 for drawing representative sample of the goods and to get the same tested by any BIS authorized laboratory, it is stated that the said request was not accepted as the importer had committed an offence in terms of order dated 03.04.2018. He submits that in terms of the order-in-appeal dated 20.12.2019, samples were drawn on 08.01.2010 and submitted before the accredited laboratory on 05.03.2020. Regarding this delay it is stated that liquid samples were not accepted by the postal department and therefore, an officer was deputed to send the samples to M/s. Shriram Institute for Industrial Research, Bangalore. Test certificate dated 23.03.2020 was received by email on 14.04.2020.

16.2. He further submits that it was in January 2020 that the matter was placed before the Committee of Commissioners and after due deliberation, the Committee decided to seek review of the order-in-appeal and accordingly directed filing of appeal before CESTAT.

16.3. In such circumstances, Mr. Jetly submits that the writ petition is not only not maintainable but is also premature. If the writ petition is entertained at this stage and orders are passed thereon, it will render the appeal filed by the respondents before the CESTAT infructuous. He, therefore, seeks dismissal of the writ petition.

17. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record, including the written submissions of the respondents.

18. Before proceeding further it would be apposite to summarize what is the case all about. Government of India in the Ministry of Chemicals and Fertilizers had issued order dated 03.04.2018 which was notified in the Gazette of India of even date mandating BIS standard marking of IS 252:2013 on the good caustic soda, both domestic and imported. The foreign manufacturer manufacturing caustic soda to be imported to India through the petitioner had applied for such licence before the BIS on 09.10.2018 but before such licence was granted, the goods in question i.e., 19515.489 LMTs equivalent to 9679:683 BMTs of caustic soda was imported by the petitioner *vide* bill of entry dated 01.11.2018. Certain quantity of the imported goods were sold by the petitioner; the balance quantity remained discharged into petitioner's tank terminal under the overall custody of the Customs Department. The goods so imported did not have the BIS standard marking of IS 252:2013. Taking the view that non-compliance with the Central Government order dated 03.04.2018 making BIS standard marking IS 252:2013 mandatory placed the imported goods under the category of prohibited goods, the

same was seized by the departmental authority on 15.03.2019. Following show cause notice and hearing, order-in-original was passed on 22.11.2019 ordering confiscation of the seized goods and imposition of penalty.

18.1. It may not be out of place to mention herein about two significant developments. Firstly, the foreign manufacturer was granted BIS registration of IS 252:2013 standard marking for the good caustic soda *vide* licence dated 30.09.2019. Secondly, the test report of fresh testing of the sample of the goods carried out by a BIS accredited laboratory post the order-in-appeal disclosed that the said goods in fact conformed to the BIS standard marking of IS 252:2013.

18.2. While as per the order-in-original the goods in question were confiscated and penalty imposed, the said order was set aside in appeal by the Commissioner of Customs (Appeals) *vide* the order-in-appeal dated 20.12.2019. After setting aside the order-in-original, appellate authority remanded the matter back to the original authority directing the latter to draw fresh samples of the goods in question and get the same tested through a BIS accredited laboratory to ascertain whether the goods conformed to IS 252:2013 specification or not, with the further direction that if the goods conformed to the above specification then the goods should be cleared. Since the consignment was a live one, original authority was directed to complete the exercise within six weeks from the date of receipt of the appellate order.

18.3. Following the order-in-appeal, fresh samples of the goods were drawn and tested in a BIS accredited laboratory. Test report indicates that the goods conform to IS 252:2013 standard specification. Notwithstanding the same, original authority has not passed the fresh order-in-original as directed by the appellate authority. The goods have also not been released to the petitioner. Non-release of goods has been justified and defended by the respondents on the ground that the

Department has filed appeal against the order-in-appeal before the CESTAT.

18.4. This then in a nutshell is the controversy or *lis* before us.

19. At this stage we may mention the relevant dates which have been culled out from the pleadings and written submissions, which according to us have a material bearing on the adjudication. For the sake of convenience, we may mention the dates chronologically:-

1.	Central Government order making BIS standard marking of IS 252:2013 mandatory on the specified good “caustic soda”.	03.04.2018
2.	Application by the foreign manufacture to the BIS for a licence in terms of the above order.	09.10.2018
3.	Goods i.e., caustic soda imported vide the concerned bill of entry.	01.11.2018
4.	Goods discharged into petitioner's tank terminal.	08.11.2018
5.	Special Investigation & Intelligence Branch (Import) seized the imported goods.	15.03.2019
6.	Special Investigation & Intelligence Branch (Import) issued show cause notice for confiscation of the seized goods and for imposition of penalty.	25.07.2019
7.	BIS issued licence to foreign manufacture.	30.09.2019
8.	Order-in-original passed.	22.11.2019
9.	Order-in-appeal passed.	20.12.2019
10.	Appellate order received by the Department.	08.01.2020
11.	Appellate order sent to Committee of Commissioners for examination.	January, 2020
12.	Decision of Committee of Commissioners to file appeal before CESTAT.	20.03.2020
13.	Department filed appeal along with stay application before CESTAT.	24.06.2020

20. Now, reverting to the order-in-original, we find that the original authority took the view that importation of caustic soda by the petitioner was without compliance to BIS standard IS 252:2013 made mandatory *vide* Government of India order dated 03.04.2018. Therefore, the said importation being in contravention of BIS requirements, was liable to confiscation under section 111(d) of the Customs Act. While further holding that penal action under section 112(a) of the Customs Act was invocable in the case of the petitioner, it was however observed that petitioner had acted *bona fidely* without any *mala fide* intention. This portion of the order-in-original reads as under:-

> "32.1. However, it is on record that the importer has applied for BIS registration before shipment of the goods from the country of origin or port of shipment; that they did not file B/E for Home Consumption but as per their interpretation of Policy Para 2.36, they stored the goods in Custom bonded tanks vide Warehouse Bill of Entry; that they have obtained BIS registration on 30.09.2019. Therefore, it is evident that they acted bonafidely without any malafide intention, hence I am inclined to take lenient view while imposing penalty."

21. Coming to the appeal preferred by the petitioner, appellate authority *vide* the order-in-appeal dated 20.12.2019 noted that the appellant i.e., the petitioner had made the requisite pre-deposit of Rs.7,50,000.00 on 27.11.2019 which is 7.5% of the penalty imposed in the order-in-original. Therefore, the appellate authority declared that appellant had made the mandatory pre-deposit and thus this requirement was satisfied.

21.1. Appellate authority further noted that the appeal was heard on 09.12.2019. While counsel for the appellant attended the hearing and made submissions on behalf of the appellant, there was no representation on behalf of the Department. Department neither filed any cross-objection on the appeal memo nor submitted any written argument.

21.2. From the above, it is quite evident that the Department did not

contest the appeal filed by the petitioner under section 128 of the Customs Act. Significantly, neither in the affidavit-in-reply nor in the written submissions filed by the respondents there is any explanation for such default by the Department. This conduct of the Department is inexplicable and quite baffling to say the least.

21.3. Appellate authority noted that appellant had produced a BIS certification marks licence dated 30.09.2019 which certifies the overseas manufacturer as licensed under BIS having IS 252:2013 standard marking for the product caustic soda. The licence records that the marking fee was payable with effect from 14.08.2018 for the period of validity of the licence. It was noted by the appellate authority that the fees were charged and paid from 14.08.2018 much prior to importation of the goods on 01.11.2018. Therefore, appellate authority opined that the registration compliance cannot be held to have not been fulfilled. In fact the same was held to be sufficient compliance so far registration / licence is concerned. In this connection appellate authority referred to and relied upon a decision of the CESTAT in **M/s. Balmer Lawrie Van Leer Limited** (*supra*) as well as Government of India notification dated 15.12.2017.

21.4. Though the appellate authority referred to the test report of accredited laboratory dated 18.12.2018 which mentioned that the imported goods were in conformity with the specification of IS 252:1991, it was however stated that post 03.04.2018 import of caustic soda is subject to conformity with IS 252:2013 specification. Test report dated 18.12.2018 did not specify that the sample of imported caustic soda did not conform to IS 252:2013 specification. On this aspect the test report was inconclusive. Appellate authority also mentioned about petitioner's letter dated 02.05.2019 requesting drawal of fresh sample and further testing of the same in any BIS accredited laboratory to ascertain as to whether the goods conformed to IS 252:2013 standard specification. Referring to the Board's Circular No.30/2017 appellate

authority noted that the said circular permitted re-testing of the goods where the goods are still in control of the Department. Observing that in the present case the test to find out as to whether the goods conformed to IS specification 252:2013 was not done at all, it was held that the original authority did not record any finding on the request of the appellant dated 02.05.2019 for fresh testing of sample through BIS accredited laboratory. The said test having not been done, it was held that the order-in-original could not be sustained in law, being pre-mature. Therefore, it was held that the said test was required to be done in the present case. Relevant portion of the order-in-appeal is as under:-

> "9.2 ……...
> The said test, however, has not been done by the Department. Therefore, impugned OIO is pre-mature and such OIO cannot be sustained in the law. The said test to ascertain as to whether or not the impugned goods are in conformity to the IS 252:2013 is required to be done in this case."

21.5. In such circumstances appellate authority directed the original authority to draw fresh samples of the goods and get those tested through a BIS accredited laboratory to ascertain as to whether the goods conform to IS 252:2013 specification or not. It was further directed that if the goods were found to conform to the above specification then it should be cleared. For this purpose the case was required to be remanded back to the original authority for passing of fresh order in accordance with law. It was held thus:-

> "9.3. Therefore, taking into account that the impugned goods are customs bonded in a warehouse and are still under the control of Customs, I direct the OA to draw the fresh samples of the impugned goods and get tested through BIS accredited Lab to ascertain whether the goods conform to the IS 252:2013 specifications or not. On testing, if goods are found to conform to the IS 252:2013 specifications, then clearance of the imported goods shall be permitted as per law. For this, the case is required to be remanded back to the OA for a fresh order after following the above directions for testing. Principles of natural justice shall also be followed, before passing a fresh order."

21.6. Finally, Commissioner of Customs (Appeals) disposed off the

appeal of the petitioner in the following terms:-

> "11. In view of the above, I set aside the order-in-original No.603/2019-20/JC/NS-1/CAC/JNCH dated 22.11.2019 passed by Joint Commissioner of Customs, NS I, JNCH, Nhava Sheva and remand the matter back to the original authority for compliance as per directions recorded hereinabove. Since the case is pertaining to a live consignment, the OA shall complete the entire process as directed hereinabove and pass a fresh order within a period of 6 weeks from the date of receipt of this order."

21.7. Thus the appellate authority set aside the order-in-original and remanded the matter back to the original authority for compliance of the directions issued making it clear that the entire exercise should be completed within a period of six weeks from the date of receipt of the appellate order.

22. From the above it is evident that the foreign manufacturer obtained licence on 30.09.2019 from BIS for the standard specification IS 252:2013 for its manufactured goods i.e., caustic soda which was imported into India by the petitioner on 01.11.2018. Post the order-in-appeal, test report of the sample of the goods of BIS accredited laboratory showed that the goods conform to BIS standard IS 252:2013 specification. Objection of the respondents is that at the time of arrival on import on 01.11.2018 the goods did not have the BIS standard specification IS 252:2013 marking. Therefore, seizure and subsequent confiscation is justified.

22.1. According to us, this objection of the respondents is more of form than of substance.

22.2. In so far substance is concerned, appellate authority has held the view taken by the respondents to be pre-mature as well as erroneous. According to the appellate authority, though the licence was granted subsequently to the foreign manufacturer, the same covered the goods in question as the marking fee for use of the standard mark was paid from

14.08.2018. This was held to be sufficient compliance to the registration requirement. While setting aside the order-in-original, appellate authority directed the original authority to draw fresh samples of the goods and get those tested in BIS accredited laboratory, with the further direction that if the result proved that the goods conform to BIS standard IS 252:2013, the goods should be released. Original authority was directed to complete the above exercise and pass fresh order-in-original within a period of six weeks from the date of receipt of a copy of the order-in-appeal.

22.3. Mr. Jetly's contention in addition to assailing the order-in-appeal on merit is that Commissioner of Customs (Appeals) as the appellate authority under section 128A has no power to direct remand after the amendment made in the year 2001. His further contention is that when the Department has preferred appeal against the order-in-appeal before the CESTAT, any direction to release the goods will render the appeal infructuous.

23. Since Department has preferred appeal against the order-in-appeal before the CESTAT, we would refrain from expressing any opinion on the merit of the appellate decision. Instead we will deal with the two objections raised by the respondents because these constitute the objection on form.

24. Firstly we will deal with the contention of the respondents that after the amendment carried out in the year 2001 the power of remand which was earlier available to the Commissioner of Customs (Appeals) has been withdrawn and therefore Commissioner of Customs (Appeals) has no power to remand. To appreciate this contention, let us advert to the relevant provisions dealing with appeals to Commissioner (Appeals). As per section 128(1) of the Customs Act, any person aggrieved by a decision or order passed under the said Act by an officer of customs lower in rank than a Principal Commissioner of Customs or

Commissioner of Customs may appeal to the Commissioner (Appeals) within 60 days from the date of communication of such decision or order which period is extendable on sufficient cause being shown. Sub-section (1A) provides that the appellate authority may grant adjournment of the hearing to either parties, subject to a maximum of three adjournments per party.

24.1. Section 128-A lays down the procedure in appeal. While sub-sections (1) and (2) may not be relevant for the purpose of the present deliberation, sub-section (3) is relevant. Prior to the amendment carried out by the Finance Act, 2001, sub-section (3) of section 128-A read as under:-

> "(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just, —
>
> (a) confirming, modifying or annulling the decision or order appealed against; or
>
> (b) referring the matter back to the adjudicating authority with directions for fresh adjudication or decision, as the case may be, in the following cases, namely:—
>
> (i) where an order or decision has been passed without following the principles of natural justice; or
>
> (ii) where no order or decision has been passed after re-assessment under section 17; or
>
> (iii) where an order of refund under section 27 has been issued by crediting the amount to Fund without recording any finding on the evidence produced by the applicant.
>
> Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:
>
> Provided further that where the Commissioner (Appeals) is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order."

After the amendment the said sub-section now reads as under:-

> "(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against:
>
> Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:
>
> Provided further that where the Commissioner (Appeals) is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order."

24.2. From the above it can be seen that prior to the amendment it was specifically mentioned in clause (b) that Commissioner (Appeals) could refer the matter back to the adjudicating authority for fresh adjudication or decision only in three situations, viz., (i) where an order or decision was passed without following the principles of natural justice; or (ii) where no order or decision was passed after re-assessment under section 17; or (iii) where an order of refund under section 27 was passed without recording any finding on the evidence produced by the applicant. By the 2001 amendment, clause (b) conferring the power of remand has been omitted, thus limiting the power of Commissioner (Appeals) to confirming, modifying or annulling the decision or order appealed against. Does it mean, as Mr. Jetly would like to contend, that after the 2001 amendment Commissioner (Appeals) has been divested of the power of remand?

24.3. Sub-section (3) of section 128-A as it stands today says that Commissioner (Appeals) after hearing the appeal shall pass such order as he thinks just and proper confirming, modifying or annulling the decision or order appealed against. While it may not be difficult to

comprehend the meaning of the expressions ‘confirming’, ‘modifying’ and ‘annulling’, suffice it to say that the expressions ‘modifying’ and ‘annulling’ would have to be given the widest possible meaning to make the appellate jurisdiction meaningful and would include within the broad fold setting aside of the order-in-original and in an appropriate case remanding the matter back to the original authority for fresh decision complying with the directives of the appellate authority. For example, if an order-in-original is passed in violation of the principles of natural justice or there is procedural impropriety or relevant materials have not been considered then the appropriate order in such a case would be to set aside the order-in-original and direct the original authority to pass a fresh order after hearing the parties or by removing the procedural defects or by considering the relevant materials. Therefore, when we say ‘modifying’ or ‘annulling’ the decision or order appealed against, it would indicate setting aside of the impugned order and in an appropriate case remanding of the matter back to the original authority for fresh decision by removing the lacuna and by following the due procedure. In our opinion, this power of remand is inherent in an appellate authority exercising *quasi-judicial* powers. Viewed in that context the power of remand which was available prior to the amendment was very limited; exercise of which was restricted to only three situations; by omitting this provision the limitation or restriction on remand has now been removed.

25. Gujarat High Court in *CCE Vs. Medico Labs*, **2004 (173) ELT 117** was confronted with the question as to whether Commissioner (Appeals) continues to have the power of remand even after the amendment of section 35-A(3) of the Central Excise Act, 1944 by Finance Act, 2001. It has held that even after amendment of section 35-A of the Central Excise Act, 1944 which is *pari materia* to the provisions contained in section 128-A(3) of the Customs Act, Commissioner (Appeals) continues to have the power of remand post 2001. It has been opined that order of remand necessarily annuls the decision under appeal before the appellate authority. As a matter of fact,

CESTAT in the case of *Commissioner of Customs Vs. Swapan Dey*, **2005 (192) ELT 463**, has followed the above decision and has held that Commissioner (Appeals) has the power to remand a matter to the lower authority even after the amendment in section 128A(3) of the Customs Act.

26. We are in agreement with the views expressed in **Medico Labs** (*supra*) and in **Swapan Dey** (*supra*). Such a view is logical and reasonable considering the exercise of appellate jurisdiction by Commissioner (Appeals). Any other view would be restrictive to the exercise of appellate jurisdiction and would be unsound. We therefore find this contention of the respondents to be unsustainable and accordingly reject the same.

27. This brings us to the other contention of the respondents i.e., pendency of appeal before CESTAT for which reason the relief sought for by the petitioner i.e., release of goods, should not be granted. To appreciate this contention it would be apposite to examine the relevant provisions dealing with appeals to CESTAT.

27.1. Section 129 of the Customs Act deals with Appellate Tribunal, already referred to as CESTAT. Section 129A provides for appeals to Appellate Tribunal. As per sub-section (1), any person aggrieved by any of the orders mentioned therein may appeal to the Appellate Tribunal against such order. Clause (b) mentions about an order passed by the Commissioner (Appeals) under section 128-A.

27.2. Sub-section (2) provides for a Committee of Commissioners of Customs to examine amongst others an order passed by the Commissioner (Appeals) under section 128-A as to whether it is not legal or proper in which event to direct the proper officer to file appeal before the CESTAT against such order.

27.3. Sub-section (3) is relevant and it says that 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.

27.4. As per sub-section (5), CESTAT may admit an appeal after expiry of the relevant period if it is satisfied that there was sufficient cause for not presenting it within the limitation period.

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).

28. Reverting to the facts, though respondents have not mentioned the date on which the order in appeal was communicated to the Chief Commissioner or Commissioner of Customs, it is however stated in paragraph 8 of the written submissions that in terms of the order-in-appeal dated 20.12.2019, samples were drawn on 08.01.2020. This goes to show that the order-in-appeal was communicated to the respondents prior to 08.01.2020. However as the respondents have not mentioned the date of communication of the order-in-appeal, we take 08.01.2020 as the date of communication. The three months limitation period would therefore be upto 07.04.2020. In paragraph 9 of the written submissions, it is stated that the order-in-appeal was submitted to the Committee of Commissioners in January, 2020 again without mentioning the exact date. As against this, in paragraph 10 of the affidavit-in-reply it is stated that Committee of Commissioners took decision on 20.03.2020 to file appeal before CESTAT. Ultimately, the appeal was filed along with stay application before CESTAT on 24.06.2020.

29. The above narration of facts clearly reveal complete lack of any unrgency or seriousness on the part of the respondents. While delayed filing of appeal can be explained to a certain extent due to the lockdown on account of coronavirus pandemic, it is inexplicable that Committee of Commissioners took more than two months from first week of January, 2020 to 20.03.2020 to decide whether appeal should be filed before CESTAT or not. This coupled with the fact that respondents did not contest the appeal of the petitioner before the Commissioner (Appeals) renders the objection raised by the respondents suspect. It may also be mentioned that though the appeal along with stay application was filed before the CESTAT on 24.06.2020, 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.

30. The factual position is that the order-in-original dated 22.11.2019 has been set aside by the order-in-appeal dated 20.12.2019 with further direction to the original authority to conduct test afresh of the goods in BIS accredited laboratory and if the goods conform to IS 252:2013 standard specification then to release the same. Whatever be the outcome of testing, fresh order-in-original was directed to be passed by the original authority within six weeks. While the test was conducted the result of which shows the goods as conforming to IS 252:2013 standard specification, the fresh order-in-original has not been passed by the original authority though the period of six weeks expired long back.

31. There are two legal implications which emerge from the above. First one is what is the legal effect of setting aside of the order-in-original by the appellate authority and the second is non-passing of fresh order-in-original by the original authority on remand by the appellate authority.

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."

31.2. Therefore it is evident that after the order-in-original has been set aside there is now no order of confiscation of the goods. While power of seizure is provided in section 110 of the Customs Act, section 111 thereof deals with confiscation of improperly imported goods. As per sub-section (1) of section 110, if the proper officer has reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods. Therefore, seizure is made if the proper officer has reason to believe that any goods is liable to confiscation. Thus seizure may be said to be the first step to confiscation. So when the order of confiscation is set aside, the order of seizure cannot survive. The legal implication of this is that without any order of seizure or confiscation, respondents are holding on to the goods of the petitioner. Such holding on is clearly without any authority of law and *per se* illegal. In fact such an action may amount to deprivation of the petitioner of his property

without any authority of law and thus violative of Article 300A of the Constitution of India.

32. Coming to the second issue, it is also evident that the original authority has not passed the fresh order-in-original on remand as directed by the Commissioner (Appeals), not to speak of within the stipulated period of six weeks but even till date though fresh testing of goods has been carried out which incidentally has turned out in favour of the petitioner. What is striking to note is that the original authority who is a subordinate authority in comparison to the appellate authority i.e., Commissioner (Appeals) has chosen not to comply with the direction of the higher appellate authority exercising *quasi-judicial* powers. This is disturbing to say the least as it strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appellate remedy provided to a litigant under the statute.

33. In *Union of India Vs. Kamlakshi Finance Corporation Limited*, **1992 (38) ECR 486**, 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.

34. Considering the above we are of the view that non-release of the goods of the petitioner by the respondents is without any justification and liable to be interfered with. Since we have refrained ourselves from adjudicating on the decision of the appellate authority on merit, it is not necessary to delve into the decisions cited by learned counsel for the petitioner.

35. Thus on thorough consideration of the matter we direct the respondents to release the goods i.e., caustic soda of the petitioner imported *vide* bill of entry dated 01.11.2018 forthwith without any delay.

36. Writ petition is accordingly allowed but without any order as to cost.

37. 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.

(SMT. ANUJA PRABHUDESSAI, J.) **(UJJAL BHUYAN, J.)**

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