
(2011) 06 BOM CK 0111
In the Bombay High Court
Case No : Writ Petition No. 61 of 2011

ISMT Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-06-2011

Acts Referred:

Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 — Rule 10, 11, 12, 14, 17

Customs Tariff Act, 1975 — Section 9A, 9A(1), 9A(6)

Citation : (2012) 1 BomCR 393 : (2011) 113 BOMLR 2284 : (2011) 270 ELT 19

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Vikram Nankani and Sushanth Murthy, instructed, Madhur R. Baya, for the Appellant; Pradeep S. Jetly, V. Shreedharan, Prakash Shah and Jas Sanghavi, instructed by y., PDS Legal for Intervenors, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—The challenge in these proceedings is to an order passed by the Designated Authority by which an investigation under the provisions of the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995, has been terminated.

2. The Petitioner engages in the manufacture and sale of Seamless Tubes and Pipes. The Petitioner filed an antidumping application before the Designated Authority alleging dumping of seamless tubes, pipes and hollow profiles of iron, alloy or no alloy steel (other than cast iron), "whether hot finished or cold drawn or cold rolled, of an external diameter not exceeding of 273 mm or 10"," originating in or exported from the Peoples Republic of China. The Petitioner sought an initiation of investigation and a levy of antidumping duty on the import of the goods in question. The application of the Petitioner was supported by two other companies Maharashtra Seamless Limited (MSL) and Jindal Saw Limited

(JSL). The Petitioner accounted for about 27.09% of the Indian production of goods in 20082009.

The production of the two supporting companies represented 70% of the total Indian production.

3. An investigation was initiated by the Designated Authority by a notification dated 12 January 2010. The notification recorded that the Petitioner, with or without the exclusion of JSL constituted a "domestic industry" within the meaning of Rule 2 and satisfied the criterion of standing under Rule 5 of the Rules. Under the provisions of Rule 17, the Designated Authority was required to issue a determination within one year from the date of initiation of investigation, this period being liable to be extended by the Central Government in its discretion in special circumstances by a further period of six months. MSL who had supported the application of the Petitioner and being a major producer of the goods in question in the country was called upon by a letter dated 26 April 2010 to submit information pertaining to its costing and as regards the injury alleged to emanate to it. Letters of reminder were addressed to MSL on 3 May 2010, 13 July 2010 and 17 August 2010. JSL, which had also supported the Application, was similarly called upon by letters dated 3 May 2010, 13 July 2010 and 17 August 2010 to submit information and data.

4. On 17 August 2010, the Designated Authority addressed a communication to the Petitioner's Advocates calling upon the Petitioner to furnish certain information. The letter recorded that both MSL and JSL, who had supported the application, had not provided information in regard to costing and injury despite reminders. By the letter the Petitioner was called upon to ensure that the two companies who had supported the application provided the requisite information by 24 August 2010, failing which it was stated that the application would be treated as withdrawn. This was followed by a letter dated 27 August 2010 granting an extension of time as sought by the Petitioner until 30 August 2010. The Petitioner was once again reminded that the supporting industry would have to submit data by that date. The Petitioner thereafter, addressed a communication on 30 August 2010 by which a disclosure of information was made by the Petitioner. The Petitioner followed this with a further communication of 16 September 2010. A personal hearing was granted to the Petitioner by the Designated Authority on 26 October 2010. In the affidavit in reply, (to which there is no traverse to the contrary), it has been stated that the Petitioner assured that the requisite information and data from MSL would be submitted within a period of two weeks. No data was submitted by the supporting manufacturers.

5. Eventually, by an order dated 18 November 2010, the Designated Authority terminated the investigation, holding that while the Petitioner had a 27% share of domestic production, the balance was held in a majority by the supporting companies. The supporting companies had despite opportunity, failed to supply complete costing and injury information though they were major producers of

the goods in the country. The Designated Authority held that in the absence of data pertaining to the major producers of the goods in India, it was not possible to conclude that there was any injury from the alleged dumped import of the goods in question. The Authority concluded that a "combined analysis of determination of injury" for the period of investigation in respect of the industry could not be carried out in the absence of compliance. The investigation was accordingly terminated.

6. The order which has been passed by the Designated Authority has been challenged on the ground that there has been a violation of the principles of natural justice and a failure to consider relevant information which was disclosed by the Petitioner. Counsel submitted that (i) the proceeding before the Designated Authority is a quasi judicial proceeding, which must be conducted in accordance with the principles of natural justice; (ii) no notice to show cause was furnished to the Petitioner before the investigation was terminated; (iii) the Authority failed to consider the material which was adduced by the Petitioner; and (iv) the order of the Designated Authority terminating investigation suffers from the vice of being a no speaking order.

7. On the other hand, it is urged on behalf of the Union of India and the Second Respondent that; (i) The order terminating the investigation is in accordance with the provisions of Clause (b) of Rule 14 of the Rules; (ii) Under Rule 17, a time limit for the completion of investigation has been laid down in line with the obligation cast by Article 5.10 of the WTO Agreement; (iii) The Petitioner and the supporting Applicants were required by law to furnish complete factual information which they failed to do; (iv) The Authority had acted fairly and consistent with the principles of natural justice by furnishing several opportunities to the Petitioner and to the supporting Applicants to produce relevant material, despite which material was not forthcoming from the supporting manufacturers; (v) In view of the law laid down by the Supreme Court, it is now a settled principle that in exercising its jurisdiction under the Rules, the Designated Authority has to consider the position of the industry as a whole; (vi) The failure of the Petitioner and the supporting manufacturers to adduce relevant information in regard to costing and injury over the period under investigation was a circumstance which would have a significant bearing on the question as to whether there was an adverse impact on the industry as a whole; and (vii) The Authority was justified, in the circumstances, in terminating the investigation in spite of which, it would be still open to the Petitioner to submit a fresh application; if it is so advised, complete with requisite information.

8. During the course of the proceedings, we have also permitted the intervention of M/s. Kirtanlal International Dmcc, Dubai and the China Iron and Steel Association. The Court has been informed that both the interveners had produced information before the Designated Authority, in response to the notification initiating investigation.

9. u/s 9A of the Customs Tariff Act, 1975, where any article is exported from any

country or territory to India at less than its normal value, the Central Government is empowered by notification in the Official Gazette, to impose an antidumping duty not exceeding the margin of dumping in relation to such article. The expressions "margin of dumping"; "export price" and "normal value" have been defined in the explanation to Sub-Section 1 of Section 9A of the Act. The Rules to which a reference has been made earlier have been framed by the Central Government in exercise of powers conferred by Sub-Section 6 of Section 9A. Rule 2(b) defines the expression "domestic industry" and in so far as is material, it is to the following effect;

2.(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof [in such case the term "domestic industry" may be construed as referring to the rest of the producers only]:

10. Rule 5 provides for the initiation of an investigation by the Designated Authority to determine the existence, degree and effect of any alleged dumping upon a receipt of a written application by or on behalf of the domestic industry. The concept of "domestic industry" is defined with reference to the body of domestic producers as a whole engaged in the manufacture of a like article or those domestic producers whose collective output of the article constitutes a major proportion of the domestic production of the Article. Under Rule 5, an application for the initiation of investigation has to be supported by evidence of (i) dumping; (ii) injury; and (iii) a causal link between the dumped imports and the alleged injury. The Designated Authority is under a mandate under Sub-rule 3 of Rule 5 not to initiate an investigation unless it determines on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like product, that the application has been made by or on behalf of a domestic industry. The proviso to Sub-rule 3 of Rule 5 stipulates that no investigation shall be initiated if domestic producers expressly supporting the application account for less than 25% of the total production of the like article by the domestic industry. The explanation to Rule 5 brings in a deeming provision under which the application shall be deemed to have been made by or on behalf of a domestic industry, if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition, as the case may be, to the application.

11. Rule 6 lays down the principles governing the investigation. Rule 10 deals with the determination of the normal value, export price and margin of dumping. Rule 11 provides for the determination of injury to the domestic industry, threat of injury to domestic industry or material retardation in the establishment of

domestic industry, and a causal link between dumped imports and the injury. The principles which underlie such a determination have been enunciated in Annexure II to the Rules. Under Rule 12, the Designated Authority is empowered to enter a preliminary finding.

12. Rule 14 of the Rules, provides for the circumstances under which an investigation may be terminated. Rule 14 is to the following effect.

14. Termination of investigation. The designated authority shall, by issue of a public notice, terminate an investigation immediately if

(a) it receives a request in writing for doing so from or on behalf of the domestic industry affected, at whose instance the investigation was initiated;

(b) it is satisfied in the course of an investigation, that there is not sufficient evidence of dumping or, where applicable, injury to justify the continuation of the investigation;

(c) it determines that the margin of dumping is less than two per cent of the export price;

(d) it determines that the volume of the dumped imports, actual or potential, from a particular country accounts for less than three per cent of the imports of the like product, unless, the countries which individually account for less than three per cent of the imports of the like product, collectively account for more than seven per cent of the import of the like product; or

(e) it determines that the injury, where applicable, is negligible.

13. Rule 17 provides for the final findings of the Designated Authority. The Authority has to determine as to whether or not the article under investigation is being dumped in India and to submit to the Central Government its finding as to, (i) the export price, normal value and the margin of dumping of the article; (ii) whether the import of the article into India, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry of India; and (iii) a causal link, where applicable, between the dumped imports and the injury. Provisions have been thereafter, made under Rule 18 for the levy of duty by the Central Government.

14. The proceedings before the Designated Authority are of a quasi judicial character. In *Automotive Tyre Manufacturers Association Vs. The Designated Authority and Others*, , the Supreme Court held that "the Designated Authority exercises quasi judicial functions and is bound to act judicially". Hence, the Supreme Court held that "the duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules" (Paragraph 68 and 82).

15. The essence of the investigation by the Designated Authority on a complaint of dumping consists of three elements: (i) the existence of dumping; (ii) an injury to domestic industry; and (iii) a causal link between dumping and the

resulting injury. The Rules contemplate that this determination by the Authority has to be made with reference to the domestic industry as a whole. This principle indeed is no longer reintegrate. In *Reliance Industries Ltd. Vs. Designated Authority and Others*, , the Supreme Court noted that the entire investigation, analysis, recommendations and impositions are for the product under consideration for the whole domestic industry and not for an individual company. It is in this back ground, that the Rules contemplate a disclosure at every stage of relevant facts which would establish the existence of dumping, the injury which is sustained by domestic industry and a causal link between the two. Under the Anti Dumping Application Proforma, every applicant is required to furnish relevant information inter alia in regard to: (i) the imported product; (ii) the profile of Indian industry; (iii) evidence of dumping; (iv) evidence of injury; (v) evidence of causal link; and (vi) costing information. The disclosure in relation to the evidence of injury requires information inter alia in regard to the changes in market share held by Indian producers; the increase in import from the subject country; decline in the production of the Petitioner; decline in the utilization of the capacity of domestic industry; selling price; decline in the volume of sales and profitability for the Petitioner and the industry.

16. Now, it is in this background that the grievance of the Petitioner would have to be assessed. The Application of the Petitioner under the Rules was supported by MSL and JSL. The two supporting manufacturers together account for 70% of total Indian production. The share of the Petitioner is 27%. In the affidavit in reply that has been filed by the Second Respondent, it has been stated that several opportunities were furnished to both the supporting manufacturers to furnish information in relation to costing and injury. Letters were addressed to the supporting manufacturers on 3 May 2010, 13 July 2010 and 17 August 2010. The period of investigation in the present case was between 1 April 2008 and 30 June 2009. JSL did not respond to the request for disclosure of information. A letter was addressed to the Petitioner on 17 August 2010 specifically putting it on notice of the fact that both the supporting manufacturers had not supplied information despite reminders. A reminder was once again addressed to the Petitioner on 27 August 2010. While the Petitioner furnished information by letters dated 30 August 2010 and 16 September 2010, the Designated Authority noted that MSL furnished only partial information, including costing or injury data, and without covering the entire injury period. No data was received from JSL. A personal hearing took place before the Designated Authority on 26 October 2010. In paragraph 11 (9) of the reply, it has been stated that the Petitioner had assured the Authority that it would submit the required information/data from MSL within two weeks. No data was however, forthcoming. Now, it is in this background that the Designated Authority concluded that the supporting manufacturers had not submitted complete costing and injury information in the prescribed format for the entire injury period, including the period of investigation. The Authority concluded that any analysis would therefore, not reflect the actual injury to domestic industry and a causal link

between the alleged dumping of goods and the alleged injury to the domestic industry. The Designated Authority has, by its impugned order dated 18 November 2010, come to the conclusion that the analysis of the limited and partial data submitted by MSL, who is the major producer of the goods in India, does not show any injury from the alleged dumped imports of goods. This is a pure finding of fact which has been arrived at by the Authority. The Authority has noticed that in the absence of complete information for the injury period, from the major producer of the goods in the country, a combined analysis for the determination of injury over the injury period for the industry of the goods in India cannot be carried out. On these grounds, the investigation has been terminated.

17. Rule 14(b) of the Rules empowers the Designated Authority to terminate the investigation immediately if it is satisfied in the course of an investigation, that there is no sufficient evidence of dumping or, where applicable, of injury, to justify the continuation of the investigation. In the absence of data relating to the industry in question, the Authority was justified in coming to the conclusion. The facts on the record would indicate that sufficient opportunities were granted by the Designated Authority for the production of data relating to the industry as a whole. The Application of the Petitioner was supported by two manufacturers who between them, account for 70% of the total Indian production. Their failure, despite being supporting manufacturers to produce data in support of the application, could only result in a situation where the Authority would justifiably come to the conclusion that there was no sufficient evidence to justify the continuation of investigation. The proceeding before the Authority is time bound and cannot be kept pending indefinitely. In a case, such as the present, where despite sufficient opportunities, material is not produced before the Authority, the termination of the proceedings cannot be faulted. The Petitioner was made aware of the information required by the Authority for the purpose of investigation. The Petitioner was placed on notice of the fact that the supporting manufacturers had not responded. The Petitioner was given time to produce information from the supporting manufacturers. The Petitioner assured at the personal hearing that it would submit information from MSL but failed to do so. The Petitioner was aware of what information was needed, the failure of the supporting manufacturers and of the consequence that would ensue. The duty to act fairly and judiciously has been fulfilled. The Authority, as the reply would show, did as a matter of fact, grant a personal hearing and despite adequate opportunities, no material was produced in regard to the position of the industry as a whole. The order of the Designated Authority is therefore, neither lacking in jurisdiction nor is it in breach of the principles of natural justice. Moreover, the termination of the investigation would not preclude the Petitioner from applying afresh, in accordance with law. For these reasons, we do not find any merit in the Petition. The Petition is accordingly dismissed. There shall be no order as to costs.