

**(2005) 11 DEL CK 0032**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 21603 of 2005 and CMs 14207-08 of 2005

Jindal Stainless Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 18-11-2005

**Acts Referred:**

Central Excise Rules, 1944 — Rule 17  
Constitution of India, 1950 — Article 136, 141, 226  
Customs Act, 1962 — Section 129  
Customs Tariff Act, 1975 — Section 18(1), 18(4), 9C

**Citation :** (2005) 125 DLT 326 : (2005) 85 DRJ 368 : (2005) 129 ECR 9 :  
(2006) 1 RCR(Civil) 301

**Hon'ble Judges :** Vikramajit Sen, J

**Bench :** Single Bench

**Advocate :** Raju Ramachandran, Sarad Bansali, Meenakshi Arora, Priya Rao and Jitendra Singh, for the Appellant; P.P. Malhotra, ASG, Ashish Rana and Arvind Sharma, for the Respondent

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## **Judgement**

Vikramajit Sen, J.—This Writ Petition assails the Notification/Final Finding dated 13.9.2005 on the subject of Mid-term Review of Anti-dumping Duty imposed against imports of Cold Rolled Flat Products of Stainless Steel from European Union, USA, Japan and Canada. The Order in terms records that none of the exporters from EU, USA and Canada has given any information on the Questionnaire and that the exporters from Japan were non-cooperative. The impugned Order itself mentions that an Appeal against it shall lie before Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in accordance with the Customs Tariff Act. It is in this connection that an objection concerning the maintainability of the Writ Petition has been raised on behalf of the Respondents.

2. I had the opportunity of considering similar issues in WP(C) No.10615/2005 entitled Kalyani Steels v. Union of India in which an Order dated 20.5.2005 was assailed. This Order was the Final Finding on the subject of Midterm Anti Dumping Review investigations in the matter relating to imports of certain types/

grades of alloy and non alloy steel billets, bars and rounds having 70 mm to 250 mm diameter from Russia and China. In the course of those hearings the Notification had been Gazetted. I had recorded that there was no scope for contending that a prima facie case had not been made out for the continuance of anti-dumping duties. Nevertheless, the Petitioner had been granted fifteen days time within which to file an Appeal before CESTAT. The Notification was stayed till the date on which the Tribunal fixed the matter for public hearing. A similar order is pressed for in these proceedings.

3. Learned Senior Counsel for the Petitioner has conceded that the remedy of an Appeal is wider and more comprehensive than a Writ Petition, and Therefore, cannot but be a more efficacious remedy. He, however, contends that CESTAT has expressed the opinion in 2000 (72) ECC 416 that an Appeal against a Final-Finding of the Designated Authority is not maintainable in view of the pronouncement of the Apex Court in Saurashtra Chemicals Ltd. Vs. Union of India (UOI), The view of the Tribunal is based entirely on the above pronouncement. Dismissal of an SLP in liming does not constitute a precedent as envisaged in Article 141 of the Constitution. That Order has been reproduced by the Tribunal and reads as follows:

We see no reason whatsoever to entertain these Special Leave petitions. It is perfectly clear now that we have seen the provisions of the Act that the order of the Designated Authority is purely recommendatory. The appeal that lies is against the determination and that determination has to be made by the Central Government. For this reason, we decline to exercise jurisdiction under Article 136 of the Constitution of India and dismiss the Special Leave petitions.

4. I am unable to agree with the view taken by the Tribunal. The law declared by the Supreme Court is binding on all Courts within the territory of India as has been stated in Article 141 of the Constitution. However, the facts of the case have not been recorded by the Hon"ble Supreme Court. It is a matter of conjecture whether the Appeal was against levy or withdrawal of anti-dumping duty. It is likely to be the former, since the statute permits the exercise of discretion in that eventuality, and not where the opinion in the Review is in the negative. It does not appear to pertain to an Order of Review. It is palpably clear, Therefore, that the Order in Saurashtra's case was not intended to partake of the character of a precedent under Article 141 of the Constitution. It must be restricted to the circumstances of that case.

5. The Hon"ble Supreme Court has itself clarified in a catena of cases including State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, ; State of Manipur Vs. Thingujam Brojen Meetei, , Ajit Kumar Rath Vs. State of Orissa and Others, and U.P. State Road Transport Corporation through its Chairman Vs. Omaditya Verma and Others, that Orders of this nature would not tantamount to a declaration of law which binds all Courts. In Synthetics and Chemicals Ltd. the Court observed thus:

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. The bench held that, "precedents sub-silentio and without arguments are of no moment". The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Shama Rao v. Union Territory of Pondicherry* it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

6. In *Ajit Kumar Rath* the following observations were made:

32. Learned counsel for the respondents has referred to the judgment of the Orissa High Court passed in an identical situation and relating to the same service on 12-3-1985, by which the seniority was denied to certain promoted officers over those appointed by direct recruitment, on the ground that ad hoc promotion was contrary to rules. It is contended that a SLP against that judgment was dismissed by this Court on 28-3-1998. A copy of the order by which the special petition was dismissed has been placed on record which indicates that no reasons were given for dismissing the petition. This order, Therefore, would not constitute a binding precedent. Moreover, the judgment of the Orissa High Court was delivered on 12-3-1985, that is to say, many years earlier than the decision rendered by the Constitution Bench in the 1990 case of *Direct Recruit Class II Engg. Officers' Assn.* On the basis of the Constitution Bench decision as also the other decisions of this Court, the efficacy of the judgment passed by the Orissa High Court has altogether vanished and there was no occasion for the Tribunal to have relied upon that judgment in preference to the Constitution Bench decision while writing the review judgment.

7. In Thingujam Brojen Meetei case the Court opined as follows:

10. It is no doubt true that SLP (Civil) No.285 of 1993 filed by the State of Manipur against the decision of the High Court in N. Arun Kumar Singh v. State of Manipur was dismissed by this Court by order dated 15-2-1993. The said SLP was, however, dismissed in limine without expressing any opinion on the merits of the impugned judgment. The dismissal of a SLP by a non-speaking order which does not contain the reasons for dismissal does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-speaking order of dismissal without anything more only means that this court has decided only that it is not a fit case where the SLP should be granted. Such an order does not constitute law laid down by this Court for the purpose of Article 141 of the Constitution. (See : Rup Diamonds v. Union of India; Nawab Sir Mir Osman Ali Khan v. CWT and Supreme Court Employees' Welfare Assn. v. Union of India. The High Court was, Therefore, in error in holding that by dismissing the SLP against the judgment in N. Arun Kumar Singh v. State of Manipur this Court has affirmed the said decision of the High Court and the said view of this Court is binding under Article 141 of the Constitution.

8. It is also worthy of note and as mentioned above, that whereas a recommendation made by the Designated Authority for the levy of anti-dumping duty leaves its imposition to the discretion of the Central Government, be imposed u/s 18(1), but if the Final Finding is in the negative, the Central Government has no option but to withdraw provisional duty within 45 days as per sub-clause (4) thereof. Section 18(1) and (4) are reproduced for facility of reference:

18. Levy of duty. - (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.

(4) If the final finding of the designated authority is negative that is contrary to the evidence on whose basis the investigation was initiated, the Central Government shall, within forty-five days of the publication of final findings by the designated authority under rule 17, withdraw the provisional duty imposed, if any.

It is a foregone conclusion that the impugned Final Finding shall be acted upon and the duty shall be withdrawn. It is true that this must be implemented by the Gazetting of a Notification, which action has not been taken till date.

9. Mr. P.P. Malhotra, learned Additional Solicitor General, affirmatively and unequivocally supports the statement contained in the Final Finding to the effect that it is appealable before CESTAT. A perusal of Section 9C of the Customs Tariff Act, 1975 leaves no scope for doubt that an Appeal against the Order of Determination or Review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to CESTAT. I

am of the opinion that the impugned Order is appealable before CESTAT u/s 9C of the Customs Tariff Act, 1975.

10. In *Shew Kumar Agarwal Vs. Union of India (UOI)*, the Calcutta High Court had concluded that the remedy against an Order of Determination and Review thereof are disjunctive of each other and lie before the CEGAT (now CESTAT). In *Debraj Dey Vs. Union of India (UOI)*, the Calcutta High Court has observed that the "Authority has jurisdiction to determine the duty finally at the preliminary stage or can review. On top of it there is also provision of appeal or review regarding the existing degree and effect of any dumping in relation to import of any article which shall lie with CEGAT u/s 129 of the Customs Act". The writ petition was dismissed but leave to file an appeal was granted. In *Surefaces Plus v. Union of India, 2004 (173) E.L.T. 127 (Guj.)* a Division Bench of the High Court of Gujarat had observed that a writ petition against the Preliminary Finding of the Designated Authority was premature. The stand taken in *Indian Spinners's* case appears to me not to be in consonance with law.

11. Certain observations of the Division Bench of the High Court of Judicature at Bombay in *Nicholas Piramal Ltd. v. Union of India* in WP(C) No.585/2005 have been read out to put forward the argument that an Appeal may not be an efficacious remedy. Shri A.B. Desai, learned Additional Solicitor General appears to have agreed with the submission that until all concerned parties have been served the Appellate Tribunal was not empowered to take up the Appeal for hearing and that the process would take two to three weeks time to complete. In that conspectus of facts and arguments the Division Bench had ordered that until the Appeal was set-down for final hearing the subject goods could be cleared on provisional basis on Bond. If the CESTAT has not been invested with the power to grant ex parte interim Orders a vacuum or lacuna in the law is palpably evident. It is for the Legislature to plug these shortcomings so that citizens are not compelled to knock at the doors of the High Courts and invoke their extraordinary powers under Article 226 of the Constitution to grant protection and succor to them.

12. While disposing of WP(C) No.10615/2005 titled *Kalyani Steels Ltd. v. UOI*, I had passed the following Order: This Petition was heard in detail on 4.7.2005, 5.7.2005, 6.7.2005, 11.7.2005, 19.7.2005 and 28.7.2005. Proceedings could not be concluded because on one occasion Mr.V.Lakshmi Kumaran, Advocate was not available. Thus, there is no scope for contending that a prima facie case had not been made out for the continuance of anti-dumping duties. During the pendency of these arguments the Notification has been Gazetted. Mr.Tiku states that this has been done by the Ministry of Finance which is not a party to these proceedings. That would imply that the Ministry of Finance does not function under the Union of India which is duly represented. On the last date of hearing, it had been noted that since an Appeal is now available the Notification may be held in abeyance for a short period so that status quo may be maintained till the matter is taken up before the Customs Excise and Service Tax Appellate Tribunal

(CESTAT). It is well-known principle of law that a person is entitled to protection from the moment he enters the portals of the Court. In the present case, keeping the detailed hearing that was being undertaken, an existence of a prima facie case was evident to all. Conditional on the Petitioner filing its Appeal before Customs Excise and Service Tax Appellate Tribunal (CESTAT) within a period of fifteen days from today, the Notification dated 19.7.2005 shall remain stayed till the date on which the Tribunal fixes the matter for public hearing. Mr.Tiku, learned counsel for the UOI, states that this Court may direct that the Appeal be listed before the Tribunal in the month of August since there is an apprehension that despite the Orders of this Court that may not happen as delays may be caused in the CESTAT Office. This is without prejudice to the rights of parties to assail this Order.

The Writ Petition stands disposed of in these terms. dusty.

13. Similar protection to the Petitioner commend itself in these proceedings also, but no further since henceforward it should be apparent that an Appeal to CESTAT is the proper remedy.

14. It has already been noted that there was no response from importers in USA, EU, Canada as well as Japan. So far as the complaint which emanated from Acerinox S.A., Spain is concerned, it was clearly not prosecuted since no evidence appears to have been led or furnished. It cannot possibly be contended that the Petition is bereft even of prima facie substance. Since the matter is to be adjudicated before CESTAT, I would say no more. It is CESTAT which must consider every facet of the case and pass orders which it considers appropriate.

15. This Writ Petition is disposed of by granting liberty to the Petitioner to file an Appeal before CESTAT within fifteen days from today. If a Notification is Gazetted predicated on the impugned Final Findings in Review between today and the date on which the interim/stay application of the Petitioner is listed for hearing before the CESTAT, its operation shall be held in abeyance in that interregnum.