

+* THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 27.05.2009

+ WP(C) No. 8749 of 2009

**SAINT-GOBAIN GLASS INDIA LTD
& ANR.**

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondent

WP(C) No. 8761 of 2009

THE ALL INDIA GLASS MANUFACTURERS FEDERATION

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Raju M. Ramachandran, Sr. Advocate
with Mr Jitender Singh, Mr Saurabh S. Sinha, Mr
Shankar N. & Mr Mrigank Prabhakar, Advocates
in WP(C) No. 8749/2009.
Mr Pramod Kumar Rai with Mr Abdhesh
Chaudhary, Ms Manisha Suri & Mr Neelendu,
Advocates in WP(C) No. 8761/2009

For the Respondent : Mr. Sandeep Sethi, Sr. Advocate with Mr
Rajesh Sharma, Advocate in WP(C) No.
8749/2009
Mr Mukesh Anand, Advocate in WP(C) No.
8761/2009

CORAM :-

HON'BLE MR JUSTICE VIKRAMAJIT SEN
HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. The captioned writ petitions lay challenge to notice of initiation of safeguard investigation dated 16.01.2009 issued under Rule 6 of the Customs Tariff (Transitional Product Specific Safeguard Duty) Rules,

2002 (hereinafter referred to as 'Rules'), the notification of preliminary findings dated 30.01.2009 issued by the Director General (Safeguards)(hereinafter referred to as 'the Director General'), and the consequent notification bearing No.37/2009-Customs dated 20.04.2009 issued by the Government of India, Ministry of Finance, Department of Revenue imposing a provisional safeguard duty at the rate of 20 per cent ad valorem in respect to soda ash falling under sub-heading 283620 of the first schedule to the Act on its import into India from People's Republic of China (in short 'China').

2. Petitioner No.1 in Writ Petition No. 8749/2009 is a company incorporated under the Companies Act, 1956 (hereinafter referred to as 'Saint-Gobain'). The said petitioner is in the business of manufacturing and marketing Architectural and Automotive Glass. Petitioner No.2 in the said writ petition is an association of float glass manufacturers. The Petitioner in Writ Petition No.8761/2009 is the Federation of glass manufacturers which is incorporated as a non-profit company under the Companies Act, 1956 (hereinafter referred to as 'the Federation'). The Federation claims to represent all segments of the industry which includes large, medium and small scale manufacturers located in different parts of the country.

3. The genesis of the present litigation is in the initiation of safeguard investigation by the Director General under the provision of Rule 6 read with Section 8C of the Customs Tariff Tax, 1975 (hereinafter referred to as 'the Act'). It transpires that on 01.01.2009; the Alkali Manufacturers Association of India, i.e., Respondent No.3, which comprises of domestic producers such as Gujarat heavy Chemical Limited, Tata Chemicals Limited, Saurashtra Chemicals Limited, DCW Ltd and Nirma Ltd, (hereinafter collectively referred to

‘domestic producers’) filed an application with the Director General for the purposes of seeking initiation of investigation to determine existence of serious injury or threat of serious injury to the domestic producers of soda ash on account of import of increased quantities of soda ash from China which had the potentiality of market disruption or threatened to cause a market disruption both in absolute and relative terms when compared to the domestic production of soda ash. By the said application, the domestic producers sought protection by seeking an imposition of both safeguard duty as well as quantitative restrictions with regard to import of soda ash originating from China for a period of four years. In the application, a prayer was also made that, in the interregnum, a provisional duty be imposed in view of the presence of ‘critical circumstances’ which, according to them, would result in irreparable damage. The said application was followed by an updated application which was filed with the Director General on 14.01.2009.

4. On receipt of the aforesaid written application of the domestic producers, the Director General issued the impugned notice of initiation of safeguards investigation dated 16.01.2009; a copy of which, as mandated under Rule 5, was sent to all interested parties calling upon them to respond by 16.02.2009. By the said initiation notice, it was also made clear that any other party to the investigation who wishes to be considered as an interested party was free to submit its request to the Director General within 21 days of the said notice.

4.1 It is not disputed that Saint-Gobain received a copy of the initiation notice, even though the date of receipt is not indicated in the writ petition. What is, however, not in dispute is that, by a communication dated 29.01.2009, Saint-Gobain requested the Director

General to supply to it, a copy of the initiation notification, correspondence exchanged with the interested parties and the domestic industry, copy of the application and updated information, if any, as also a copy of the index to the public file and inspection of the public file. In the very same communication, a request was also made that in the interregnum, in consonance with the principles of natural justice, no steps prejudicial to the interest of the user industry be taken till effective opportunity is given to them to respond to the notice of initiation of safeguard investigation.

5. It transpires that based on the views of the domestic producers, the information supplied by them and the information available with the Director General, came to the conclusion that preliminary findings had revealed that the import of soda ash in increased quantities from China had caused or threatened to cause a market disruption vis-a-vis the domestic industry. He further recommended that in view of the critical circumstances obtaining on account of import of soda ash from China in increased quantities, which, if not stemmed by imposition of provisional safeguard duty for a period of 200 days, pending final determination, would by virtue of market disruption and/or threat of market disruption, result in irreparable damage to the domestic industry. In the opinion of the Director General, keeping in view factors such as the average cost of production of soda ash by the domestic producers, a reasonable return of capital employed, the present level of import duty and current price of soda ash, a safeguard duty at the rate of 31% *ad valorem* be imposed to protect the interest of domestic industry in respect of imports from China with regard to soda ash falling under sub-heading 2836210, 28362020 and 28362090 of the first Schedule of the Act.

5.1 By the very same notification on preliminary findings, the Director General also indicated that a public hearing would be held in due course, on the date to be indicated, before proceeding to a final determination.

6. In response to the aforesaid notification of preliminary findings dated 30.01.2009, Saint-Gobain addressed a communication dated 11.02.2009 to the Secretary to the Government of India, Department of Revenue. It would be pertinent to note, that two days prior to the said notice, the Federation, that is, the petitioner in Writ Petition No. 8761/2009 had also issued a notice dated 09.02.2009 on almost identical lines to the Secretary, to the Government of India, Department of Commerce, which was thereafter followed by a second communication dated 13.02.2009.

7. It has been averred by the petitioner in CWP 8761/2009 i.e., the Federation that earlier, Writ Petition bearing No. 7782/2009 filed by Saint-Gobain, wherein the very same initiation notification dated 16.01.2009 and the notification of preliminary findings dated 30.01.2009 were impugned, was filed in this court, on 06.03.2009. The said writ petition, i.e., WP(C) No. 7782/2009 came up for hearing in Court on 26.03.2009 when, it was disposed of by a Division Bench, briefly, on the ground that the institution of the writ petition was premature as no order of levy of provisional safeguard duty had been passed by the Central Government at that point in time.

7.1 It would be important to note at this stage that, in the interregnum, i.e., 23.03.2009, a public hearing had been held by the Director General as indicated in the Notification of preliminary hearing dated 30.01.2009. This fact requires to be mentioned at this juncture

as great stress has been laid on this aspect of the matter by the petitioners before us which will be dealt with at a later stage in this judgment.

7.2. Continuing with the narration, the petitioners' stand is that after the conclusion of the public hearing, an opportunity was given to file written submissions. Accordingly, written submissions were filed by the petitioners on 30.03.2009 followed by a rejoinder by the domestic producers on 30.04.2009.

7.3. It seems that Government of India, without awaiting the return of findings by the Director General has decided to accept his recommendation for imposition of provisional duty on import of soda ash into India from China vide Notification no. 37/2009-Customs dated 20.04.2009. By this Notification, the Central Government, in exercise of its powers under Section 8C (2) of the Act, read with Rules 10 and 14, upon consideration of the findings of the Director General, decided to impose a provisional duty at the rate of 20% *ad valorem* in respect of soda ash falling under sub-heading 283620 of the First Schedule of the Act. The notification dated 20.04.2009 further provides that the said provisional duty shall be effective upto 05.11.2009 unless revoked, superseded or amended at an earlier date.

8. The petitioners, being aggrieved by the aforementioned actions of the respondents 1 and 2, have instituted the instant writ petitions. On behalf of the petitioners, in Writ Petition No. 8749/2009, submissions were made by Sh. Raju Ramachandran, Sr. Advocate and in Writ Petition No. 8761/2009, submissions were made by Sh. Pramod Kumar Rai, Advocate. There are several grounds taken in the writ

petition. However, the petitioners before us confined their submissions to the following:-

8.1 The initiation notification dated 16.01.2009 issued by the Director General clearly indicated that the interested parties may respond to the application filed by domestic producers on or before 16.02.2009. It was submitted that even without waiting for the time stipulated in the said notification, within a period of 14 days, the Director General proceeded to issue a notification of preliminary findings dated 30.01.2009, thus depriving them of an effective opportunity to protect their interest and challenge the contentions raised by the domestic producers, in their application before the Director General. According to the learned counsels appearing for the petitioners, right to be heard is ingrained in Rule 6(4) which requires the Director General to accord at least 30 days time to respond to the initiation of safeguards investigation notice issued by the Director General. It was contended that the failure to do so had resulted in the infraction of a right conferred under Rule 6(4) and hence all such steps taken by the Director General and the Government of India thereafter which included the issuance of notification of preliminary findings dated 30.01.2009 and the Government of India notification dated 20.04.2009 imposing provisional duty had to be quashed and set aside.

8.2 In order to buttress their submission, the learned counsel for the petitioners drew our attention to the application filed by the domestic producers to demonstrate the inherent contradiction in the assertions made in their application. Towards this end, it was pointed out that even though the domestic producers' application specifically states that the soda ash imported from China is high density soda ash, the relief sought is with respect to all types of soda ash which includes

light as well as high density soda ash. Our attention was also drawn to the statistical table contained in Section II, paragraph 8 of the application to demonstrate that the allegation of import of increased quantities of soda ash from China, which purportedly caused or threatened to cause market disruption, could not sustain on a plain reading of the data incorporated therein. To appreciate this submission, it would be perhaps relevant to note that comparative data which has been filed by the domestic producers to show import of increased quantities of soda ash from China is for the period April-September, 2008 with respect to quantities and price of soda ash imported from China and countries other than China. The relevant table incorporated in paragraph 8 of the application is extracted hereinbelow:-

“Export price: Details of export price of the imported product exporter/country-wise and the basis thereof (provide the f.o.b./ c.i.f. price at which the goods enter into India).

Enclosed as Annexure-2 with this petition. these are CIF import prices (as reported to Indian Customs). Summarized position with regard to volume and price is given below:

Year	Volume MT			Price Rs./MT		
	China	Other countries	Total	China	Other countries	Total
1999-2000	3067	29872	32939	5342	5176	5191
2000-01	-	43428	43428	-	5547	5547
2001-02	14840	148778	163617	7655	6987	7048
2002-03	1597	103679	105276	7382	6192	6210
2003-04	151	128214	128365	42268	5801	5844
2004-05	2120	182427	184547	11804	6257	6321
2005-06	9016	692026	701042	8778	1601	1694
2006-07	44892	215494	260386	8568	8143	8216
2007-08	45771	309003	354774	8906	9187	9151
Apr. -	22907	105997	128904	13181	11365	11688

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Petitioner obtained information with regard to exports from China to various countries in the world as per information published by China Customs, which shows import volumes as follows:

	Import Volume (MT)	Average Monthly Imports (MT)	Average FOB Price (US\$MT)
2005-06	10063	839	157.15
2006-07	47252	3938	145.43
2007-08	45771	3814	218.55
April - Oct. 2007	22334	3191	167.39
Apr. - Oct. 2008	28284	4041	218.87
Nov., 2008	10000	10000	Import price declined upto CIF US\$ 200
Dec. 2008	15000	15000	
Apr. - Dec. 2008	48284	5365	

8.3 Based on the aforesaid, it was argued that during the relevant period i.e., April-September, 2008, the volume of imports of soda ash from China was only 22,907 metric tonnes (MT) whereas in comparison, the import from other countries was much more, i.e., 1,05,997 MT. Similarly, the price of soda ash imported from China was Rs 13,181/- per MT, which was higher than that which was obtained with respect to soda ash imported from other countries which disclosed as Rs 11,365/- per MT. Pivoted on these discrepancies, a contention was made that the domestic producers had failed to make out even a prima facie case, despite which, the Director General, without making a suitable inquiry into the matter, had, with undue haste, proceeded to issue a notice of preliminary findings, setting out his recommendation for imposition of provisional duty, by accepting the material and data supplied by domestic producers as gospel truth.

9. In rebuttal, on behalf of the Union of India and the Director General Mr. Mukesh Anand, Advocate and Mr. Sandeep Sethi, Sr.

Advocate representing the domestic producers, vigorously opposed the admission of the Writ Petition contending that if the submission of petitioners was accepted the entire purpose with which the various provisions and the mechanism for imposition of provisional duty stands incorporated in the Act and Rules would become nugatory.

9.1 The learned counsel for respondents submitted that the procedure for imposition of provisional duty was contained in Rule 9, which provided that if the Director General was of the view that there was evidence to show that increased quantities would cause or threaten to cause market disruption of domestic industry, he would conduct an investigation and proceed to record his preliminary findings, recommending thereby to the Government of India, a suitable course of action to prevent and/or stem market disruption. In view of the imminence of irreparable damage to the domestic industry by virtue of increased quantities of imports, the procedure prescribed under Rule 6(4) was not applicable to the inquiry conducted under Rule 9, and thus no fault could be found with the actions of the Director General, in not awaiting the expiry of the period notified under the Initiation Notification dated 16.01.2009.

9.2 As regards the discrepancies pointed out by the petitioners with respect to fact that the imports from China were far less than those from other countries and at a higher price than imports from other countries, it was submitted that a bare perusal of the contents of the said table would show that within a span of four months, that is, April-September, 2008, imports from China were equivalent to almost 50% of the imports made from China in 2006-07 and 2007-08. Furthermore, as regards the price, it was submitted that no mileage could be drawn by comparing the price of import of soda ash with that

of other countries, in view of the fact that the findings of the Director General clearly indicated that the FOB price of export of soda ash from China dropped from US \$ 280.14 per MT in April, 2008 to US \$ 194.07 per MT in December, 2008. This by itself, according to the learned counsel, showed a sharp decline in the price and thus the necessity for immediate action.

10. In rejoinder, the learned counsel for the Petitioner submitted that assuming without admitting that Rule 6(4) did not apply in respect of proceedings initiated under Rule 9, even then the principles of natural justice had to be read into the said procedure since the imposition of provisional duty for a period of nearly 200 days at the rate of 20% *ad valorem* by the Government of India, entailed serious civil consequences. It was submitted that there were no critical circumstances which were present in the instant case, as the imposition of the provisional duty was brought about after expiry of nearly two and a half months from the date of issuance of Notification of preliminary findings by the Director General. It was further contended that at the point in time when the petitioners had approached this Court by way of writ petition in March, 2009, it was contended by the respondent Nos. 1 & 2 before this Court, that it may not be necessary to issue an order for imposition of provisional duty as hearing with respect to final determination had been completed in the matter. It was submitted that contrary to the stand taken before this Court on 26.03.2009, in the earlier round, the Respondent Nos. 1 & 2 had proceeded to impose provisional duty without giving any opportunity to the petitioners to protect their interests.

11. We have heard the learned counsels for the parties. In order to adjudicate upon this writ petition, it would be important to take note of

certain provisions of the Act and the Rules as well as the basic purpose and object in empowering the Director General and the Government of India to take recourse to the measures provided therein.

12. Under the Act, i.e., Customs Tariff Act, 1975, the Government of India in order to protect the domestic industry has power to impose broadly; Anti-Dumping Duty, Countervailing Duty or the Safeguard Duty. Broadly, Anti-Dumping duty is imposed by the Government of India where goods are imported into the country at a dumped price. Dumped price is a price less than the normal value which is judged with reference to the comparable price of an article imported to the country in the ordinary course of trade when exported from the exporting country. As against this, Countervailing Duty is imposed generally if goods are subsidized in the country of export. Similarly, resort is taken to imposition of safeguard duty if increased quantities of goods enter the country. The determining factor as to which of the three measures ought to be adopted when the goods are imported into country, at a dumped price or are subjected to subsidy in the country of export or in increased quantities, is dependent upon whether these actions result in causing or threaten to cause material injury or material retardation in the establishment of domestic industry or result in causing or threaten to cause serious injury to domestic producers of like or competitive products. In the case of the former, recourse may be had to Anti-Dumping duty or Countervailing Duty, while in case of the latter situation, resort may be had to safeguard duty.

12.1 Under Section 8B of the Act, the Central Government has been given power to impose safeguard duty if after conducting an enquiry it is satisfied that the article imported into the country in such increased quantities and under such conditions, will cause or threaten to cause

serious injury to domestic industries. This is a general power available to the Government of India. A specific provision i.e., Section 8C was introduced in the Act by Finance Act, 2003 w.e.f. 11.05.2002 in respect of specific safeguards duty with regard to imports from China. Under Sub-Section (6) of Section 8C, the Central Government has been empowered to make rules for the purposes of giving effect to the provisions of Section 8C. By a notification no. 34/2002-Customs dated 11.06.2002 the Central Government has framed the necessary Rules.

13. It would be relevant to note that the provisions for safeguard duty under Section 8B and 8C of the Act and the relevant rules framed thereunder have been enacted pursuant to '**Article XIX of GATT - Emergency Action on Imports of Particular Products**' (in short 'GATT') read with '**WTO Agreement on Safeguards**' (in short 'WTO Agreement'). A reading of the provisions of clause 1(a), 1(b), 2, 3(a) and 3(b) of Article XIX GATT read with the provisions of WTO agreement on Safeguards would show that the measures provided for imposition of safeguard duty as also provisional duty in the event of presence of critical circumstances is taken recourse to ensure play for 'structural adjustment' by the domestic industry with a view to 'enhance rather than limit competition' in international markets. The provisions for imposition of safeguard duty are thus temporary in nature. We do not wish to burden the judgment with extensive extracts from either the GATT or the WTO agreement. It would perhaps be sufficient to indicate that the provisions both under 8B and 8C of the Act as well as the rules framed thereunder are largely based on the provisions of Article XIX of the GATT and the WTO agreement on safeguards. For the purposes of the present writ petition, it may

perhaps be convenient to refer to clause 1(a) and 2 of Article XIX. The same read as follows:-

“1.(a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

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*2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the **Contracting Parties** as far in advance as may be practicable parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party, which has requested the action. In critical circumstances, where delay would cause damage, which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.* (emphasis supplied)

14. A reading of the aforementioned provisions of clause 1(a) and 2 of Article XIX shows that if on account of increased quantities of import of an article into the territory of a contracting party causes or threatens to cause serious injury to the domestic producers in that territory of like or directly competitive products then the contracting party so effected, is free to suspend the obligation in whole or in part or to withdraw or modify the concession in respect of such an article to the extent it is considered necessary to prevent or remedy such injury. Similarly, under clause 2, before taking any action, the contracting party is required to give notice in writing to the other contracting

party as far as may be practicable. However, in critical circumstances where delay would cause damage, which would be difficult to repair, action under Paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation will be effected immediately after taking such action.

15. When this provision is compared with the Rules provided under Section 8C (2) of the Act the scheme of said Rules attains greater clarity. A brief overview of the Rules in so far it is relevant is as follows.

15.1 Rule 1 gives the short title and the date on which the Rules come into force. Rule 2 sets out the definition amongst others, all that which would constitute 'Critical circumstances' and 'Increased quantity'. Rule 3 makes provision for appointment of the Director General (Safeguard). Rule 4 sets out the duties of the Director General, in particular, to investigate existence of market disruption or threat of market disruption to the domestic industry as a consequence of increased import of an article into India as also to identify the article liable for safeguard duty under Section 8C of the Act. On conclusion of his findings provisional or otherwise the Director General is required to submit the same to the Central Government with a recommendation as to the quantum of duty to be levied and the duration for which the levy should enure in order to remove market disruption or threat of market disruption to the domestic industry. It is also the duty of the Director General under Sub-Rule (5) of Rule 4 to review from time to time the need for continuance of such safeguard duty.

15.2 Under Rule 5, the Director General on receipt of a written application by or on behalf of the domestic producer of like article or

directly competitive article, is required to investigate the existence of market disruption or threat to market disruption. Under Sub-Rule (2) of Rule 5, the applicant is required to give evidence of

- (i) increased imports;
- (ii) the market disruption or threat to market disruption caused to the domestic industry in absolute or relative terms to domestic production;
- (iii) and lastly, the causal link between the imports and the alleged market disruption or threat to market disruption.

15.3 Under Rule 5(3), the Director General is required to examine the accuracy and adequacy of evidence in respect of the aforesaid ingredients. The Director General may initiate a suo motu action under sub-Rule (4) of Rule 5.

15.4 After receipt of an application from domestic producers under Rule 5 or in the event the Director General decides to take suo motu action, he is obliged to issue a public notice under Rule 6 if he intends to initiate investigation. In the public notice, the Director General is required to give information with regard to the article involved, the date of initiation of investigation, a summary on the basis of which allegation of market disruption or threat to market disruption is based, reasons for initiation of investigation, the time limits and the address to which responses of interested parties should be directed. Under sub-Rule (2) of Rule 6, certain entities are specifically mentioned to whom copies of public notice are to be provided. Sub-Rule (3) of Rule 6 states that the Director General is required to give a copy of the application to known exporters, or the concerned trade association, the Chinese Government and the Central Government and the

Government of India, Ministry of Commerce. Sub-Rule (4) of Rule 6 provides that the Director General may also issue notice calling for any information in such form as may be specified by him from the exporters, foreign producers and the Chinese Government. This information is to reach the Director General within a period of 30 days from the date of receipt of the notice or within such extended period as the Director General may allow on sufficient cause been shown. Under Sub-Rule (5) of Rule 6, the Director General is also required to provide an opportunity to industrial users of the article under investigation and representatives of consumer organisations to furnish information relevant to the investigation. Interested parties or its representatives may make oral representations which are to be taken into account only if they are followed by a written submission. Under Sub-Rule (7) of Rule 6, the Director General is required to make evidence available presented by one interested party to all other interested parties participating in the investigation. If a party refuses access to or fails to provide information within reasonable period or impedes the investigation, the Director General under Sub-Rule (8) of Rule 6 would record that fact and make such recommendations to the Central Government as he deems fit under the circumstances.

15.5 The confidentiality of information supplied is protected under Rule 7 unless the Director General comes to a conclusion that the same is unwarranted. In such eventuality, the Director General may call upon the party to give a summary of the non-confidential information.

15.6 The basis for determining market disruption or threat to market disruption is provided in Rule 8 read with Annexure to the Rules, which delineates that determination shall be based on evaluation of all

relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the article concerned in absolute and relative terms, the share of the domestic market taken up by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profit and loss and employment. Keeping in mind the factors indicated above, it would have to be demonstrated that there is a causal link between increased imports of the article concerned and market disruption or threat to market disruption. If for some reason the Director General is of the view that the market disruption or threat to market disruption is not on account of increased import, then, he is well within his power to refer the complaint to the concerned authority for anti-dumping or countervailing duty investigation as may be deemed appropriate.

15.7 In the event the Director General is of the view that critical circumstances obtain, then, he is empowered to proceed expeditiously under Rule 9 with the conduct of investigation regarding market disruption or threat to market disruption. The finding arrived at by Director General are communicated through public notice with a copy to the Central Government, Ministry of Commerce and Finance.

15.8 In the event the Central Government accepts the recommendation of the Director General, it would proceed to impose provisional duty as recommended or in such modified form as it may deem fit. The proviso to Rule 10, however, makes it clear that provisional duty, if imposed, shall not remain in force for a period exceeding 200 days from the date of its imposition.

15.9 Under Rule 11, the Director General is required to give final findings within eight months from the date of initiation of investigation or such extended time as the Central Government may accord. The final findings are nothing but a final determination that the increased imports of an article under investigation has caused or threatens to cause a market disruption to the domestic industry keeping in mind the umbilical chord of a causal link between the two. In the final determination, the Director General is required to recommend that quantum of duty which, if levied, would be adequate in preventing or in remedying the injury, that is, market disruption caused to the domestic producers. This recommendation would also indicate the duration for which the duty ought to be levied. In recording final findings, the Director General is obliged to deal with all matters of fact and law and give a reasoned conclusions. The said final findings are required to be publically notified with a copy to the Central Government, Ministry of Commerce and Finance.

15.10 Under Rule 12, the Central Government on receipt of the final findings of the Director General may impose a safeguard duty not exceeding the amount indicated by the Director General. In the event the Director General's final findings are contrary to the prima facie evidence on which investigation under Section 8C of the Act was initiated, in the first instance, then the Central Government within 30 days of publication of the final findings is obliged to withdraw the provisional duty, if any, imposed under the Act.

15.11 Rule 13 provides for the obligation to impose a safeguard duty on a Non-discriminatory basis, that is, on all imports of such article from China.

15.12 Rule 14 provides that safeguard duty shall take effect whether provisional duty under Rule 10 or duty imposed under Rule 12, from the date of publication of the notification in the Official Gazette imposing such duty.

15.13 Rule 15 provides for refund of safeguard duty in case after the conclusions of the investigations under Section 8C of the Act, the safeguard duty imposed is lower than the provisional duty which has been imposed and collected. The differential amount is to be refunded to the importer.

15.14 Under Rule 16, it has been made clear that the duty shall be imposed only if the period necessary to prevent or remedy market disruption and, in no event shall it operate beyond four years from the date of its imposition. The Central Government, however, in case of imports from China, is empowered to extend the period of imposition with an outer limit of 10 years from the date on which such duty was first imposed.

15.15 Under Rule 17, the Director General is required to review from time to time, the need for continued imposition of safeguard duty and in the event, there is no justification for continued imposition, he is required to recommend to the Central Government for withdrawal of the same. In the event, the imposition of safeguard duty extends beyond three years, the Director General is required to review its continued imposition which, in any case, will not be later than mid term of such imposition.

16. As is evident from the scheme of the Rules framed under Section 8C of the Act, that if critical circumstances obtain, the Director General is obliged to conduct an expeditious investigation and record

the result of his investigation by way of a preliminary finding. The trigger for invoking the Rule 9 is the presence of critical circumstances, that is, circumstances backed by clear evidence that increased quantities of import have caused or threaten to cause market disruption of the domestic industry to the extent that it could inflict irreparable damage on the domestic industry.

17. If such a situation arises, the scheme of the rules according to us, excludes implicitly the applicability of Rule 6(4) or a procedure akin to it. The reasons for the same are not far to see. Firstly, the criticality of the circumstances demand immediate action in order to remedy and/or prevent the damage to domestic industry of irreparable nature. Secondly, the period of imposition of provisional duty is brief, in any event, cannot exceed 200 days. Thirdly, the recommendation of the Director General for imposition of provisional duty if accepted by the Central Government is subject to the outcome of the final findings of the Director General. If the final finding of the Director General is in the negative, the Central Government is required to withdraw the provisional duty imposed within 30 days, and if the duty recommended in the final finding it is less than that imposed as provisional duty, the importer is entitled to a refund. And lastly, the final finding has to be returned by the Director General within eight months from the date of initiation of investigation.

18. We are fortified, in our view, if regard is had to the provisions of clause (2) of Article XIX of the GATT which states, in no uncertain terms, that prior consultation is excluded in the event critical circumstances exist which require immediate imposition of provisional duty. However, the affected party should be heard immediately thereafter. In the scheme of the Rules referred to above, by necessary

implication, hearing of Petitioner and persons similarly placed is excluded. Mr Ramachandran's submission that even if Rule 6(4) is excluded, since civil consequences follow imposition of provisional duty, the principles of natural justice had to be adhered to even at the stage of imposition of provisional duty is untenable for the reason if the rationale provided in the first instance for exclusion of opportunity is expedition, it cannot be implied in Rule 9 to negate this very purpose. Therefore, in our view the requirement of a hearing followed by consideration of written submission before final findings are returned by the Director General are the sine qua non of the scheme evolved in the Rules, a mechanism which adequately protects the interest of the petitioners

19. In our opinion rules of natural justice stand circumscribed if recourse is had to Rule 9, as is suggestive on an appreciation of the scheme of the Act and Rules framed thereunder. In this context, the observations of Tucker, L.J. in ***Russell vs Duke of Norfolk and Ors.*** **1949 (1) All.E.R. 109** at page 118 being relevant, are extracted hereinbelow:-

"....There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."

20. Our Supreme Court, in its judgment, in the case of ***Ajit Kumar Nag v. G.M., Indian Oil Corporation Ltd.*** **AIR 2005 SC 4217** at page 4227, paragraph 28, encapsulated the law as to when pre-decisional hearing can be excluded. In that case, the services of an employee of the corporation were terminated on the grounds of acts of

hooliganism. The order of termination was passed by the General Manager of the employer corporation. In doing so, the General Manager dispensed with an enquiry by taking recourse to the relevant standing orders. The employee challenged the validity of the said standing order as well as the termination order on the ground that it violated the principle of natural justice. The Supreme Court, in that context, made the following observations based on the Constitution Bench judgment of the Supreme Court in the case of ***UOI & Anr. vs Tulsi Ram Patel (1985) 3 SCC 398***, in the context of the proviso to Article 311(2) of the Constitution of India:-

*“The Court also stated that Article 311(2) required that before a civil servant is dismissed, removed or reduced in rank, an enquiry must be held and reasonable opportunity of being heard must be afforded to him in respect of the charges leveled against him. The Court, however, observed that in certain circumstances, application of the principles of natural justice could be modified and even excluded. **Both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct in taking of prompt action, such a right could be excluded. It could also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. The maxim audi alteram partem could not be invoked if import of such maxim would have the effect of paralyzing the administrative process or where the need for promptitude or the urgency so demands.** The Court stated that if legislation and the necessities of a situation can exclude the principles of natural justice including the audi alteram partem rule, a fortiori so can a provision of the Constitution, for a constitutional provision has a far greater and all pervading sanctity than a statutory provision. It also stated that the principles of natural justice having been expressly excluded by a constitutional provision, namely, the second proviso to Article 311(2), it could not be reintroduced by a side door by providing for the enquiry. The Court, however, hastened to add that where the second proviso to Article 311(2) is applied on an extraneous ground or a ground having no relation to the situation envisaged in that clause, the action would be mala fide and void. In such a case, invalidating factor may be referable to Article 14. The second proviso to Article 311(2) was based on public policy, in public interest and*

for public good and it must be given effect to. Regarding opportunities to such Government servants who have been dealt with in exercise of power under the second proviso to Article 311(2), the Court stated :

"In this connection, it must be remembered that a government servant is not wholly without any opportunity. Rules made under the proviso to Article 309 or under Acts referable to that article generally provide for a right of appeal except in those cases where the order of dismissal, removal or reduction in rank is passed by the President or the Governor of a State because they being the highest constitutional functionaries, there can be no higher authority to which an appeal can lie from an order passed by one of them. Thus, where the second proviso applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him, he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements of natural justice. In Maneka Gandhi case and in Liberty Oil Mills v. Union of India, the right to make a representation after an action was taken was held to be a sufficient remedy, and an appeal is a much wider and more effective remedy than a right of making a representation....."

*.....We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten forbidden fruit. [See R. v. University of Cambridge, (1723) 1 Str 557]. **But we are also aware that principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straight-jacket. They must yield to and change with exigencies of situations.** They must be confined within their limits and cannot be allowed to run wild. It has been stated ; "To do a great right after all, it is permissible sometimes to do a little wrong". [Per Mukharji, C.J. in Charan Lal Sahu v. Union of India, (Bhopal Gas Disaster); (1990) 1 SCC 613. While interpreting legal provisions, a court of law cannot be unmindful of hard realities of life. In our opinion, the approach of the Court in dealing with **such cases should be pragmatic rather than pedantic,***

realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'.

21. This brings us to the submission of the petitioner that there were discrepancies in the data supplied and that the bare reading of the data supplied by domestic producers would show that the test of import of increased quantities of soda ash to an extent that it caused or threatened to cause market disruption of the domestic industry was not fulfilled. The learned counsel for the petitioners' comparison of quantity and price of figures of import of soda ash into India for the period April-September, 2008 between those from China and other countries, is misconceived for the following reasons. Firstly, import of 22907 MT of soda ash requires to be considered with imports of previous years. A perusal of figures of imports in paragraph 8 of the domestic producers application would show that, for the period 2003-04 to 2006-07, while imports increased from 151 MT to 45711 MT, in the four months period between April-September, 2008, the imports were 22907 MT, which is, almost 50% of the previous year's import. The total import from countries, other than China, in the same period between April-September, 2008, was 105997 MT. Thus, in percentage terms, out of the total import of 128904 in April-September, 2008, import from China was 17.7%, while in the earlier years, the percentage of import of soda ash from China, when compared with total imports of soda ash for a period of four months, works out to 5.75% for 2006-07, 0.43% for 2005-06, 0.38% for 2004-05 and 0.04% for 2003-04. The source of this data is Indian Customs as per table incorporated in the domestic producers' application. Similarly, even as regards price, there is a wide variation between price prevailing in 2003-04 which was Rs 42268 per MT to Rs 13191 per MT in April-

September, 2008. However, when compared with price of soda ash imported from other countries for the same period which is shown as Rs 11,365 per MT, is higher. The variation in price could be on account of various factors, one of which may be quality. But what is important, the annualized rate for 2007-08 of soda ash imported from China at Rs 8906 per MT, is lower than the rate of soda ash imported from other countries, which is shown at Rs 9187 per MT.

21.1 A significant point is that the Director General has collated and analyzed the data available with him and broadly arrived at following findings:

- (i) The soda ash, a product under investigation, which is produced by the domestic producers is like or directly competes with the soda ash imported from China.
- (ii) The applicants together manufacture more than 90% of the domestic production (nearly 99.98%) .
- (iii) That due to economic melt down, the demand for soda ash had declined. The Chinese producers have significant idling production capacities and therefore, they are resorting to sale of product in the Indian market. What has compounded the problem is the decline in demand for their product in the major export markets and the commencement of new commercial ventures of the same product. This has led to significant increase in imports from China at low prices.
- (iv) There is not only an increase in imports from China in absolute terms, but also, a significant increase in share of imports from China in relation to domestic production. The share of imports from China in relation to domestic

production has increased from 0.44%, in 2005-06 to 2.59% in April-September, 2008, which has sharply increased thereafter to 10.13%. Accordingly, there is market disruption in relation to domestic production. While domestic manufacturers commanded nearly 92.64% of the market share as against 0.44% by Chinese imports in 2005-06; this share of the Chinese imports has gone up to 10.13% during October-December, 2008 while the share of domestic producers has fallen to 83.20% during the same period.

- (v) The level of inventories of domestic production has increased significantly from 47721 MT in the first week of November, 2008 to 1,10,082 MT in the second week of January, 2009. The increase is 132% in just eight weeks. Result and effect on production is that average weekly production has declined from 42329 in November, 2008 to 37976 between 8th to 14th January, 2009.
- (vi) Similarly, capacity utilization has fallen from 93.41% in November, 2008 to 66.7% in January, 2009.
- (vii) The profit has fallen from Rs 2,114 per MT in the year 2005-06 to 2181 per MT in 2007-08 and further declined to Rs 1,976 per MT between April to September, 2008.
- (viii) The FOB price of export from China has dropped from US \$ 280 per MT in April, 2008 to US \$ 194.07 per MT in December, 2008 which continued to fall in January, 2009.
- (ix) The employment levels when compared to base year 2005-06 had also dipped. Instances of decline in employment

levels in Gujarat Heavy Chemicals and Tata Chemicals Ltd have been given.

21.2 The criticality of the situation has been expressed by noting that while there is a significant increase in export of soda ash from China in the recent times with the resultant increase in market share of such soda ash when compared to domestic producers, there is a shrinkage of domestic producers market. It is stated that this would critically impair the domestic industry whose inventories have increased from 130% between November, 2008 to January, 2009 with a significant decrease in capacity utilization, employment and profitability. There is, as per evidence available, a clear and imminent threat of market disruption warranting imposition of provisional duty as any delay would result in damage which would be difficult to repair.

21.3 We would uphold the impugned notification dated 20.04.2009 levying provisional duty for the reasons:-

- (i) that the levy is in public interest, which is made to give effect to a provision in the statute that domestic industry is to be protected from onslaught of increased quantities of export which cause or threaten to cause market disruption;
- (ii) power is conferred on a senior functionary i.e., the Director General, who is required to exercise the same after due analysis of material and evidence collected by him after taking into account the presence of critical circumstances. In the instant case, the Director General has evaluated the material and criticality of circumstances and come to the conclusion that if the flow of increased imports from China are not stemmed it would cause or threaten to cause market disruption unleashing irreparable damage;

- (iii) the recommendation of the Director General was considered by the Central Government whereupon the rate of provisional duty imposed was 20% ad valorem as against the recommended rate of 31% ad valorem;
- (iv) the decision to levy provisional duty is transitory, which is required to be followed by a final finding by the Director General within a stated time frame after which the levy would dissolve.

21.4 Keeping the aforesaid data referred to in the preliminary findings in mind and, the analysis of the Director General which has been further considered by the Government, we have no doubt that the decision of the Central Government to impose provisional duty cannot be found fault with. In any event, this is not a case of no material or no evidence or a complete non-application of mind which would call for interference by a Writ Court. It is trite law that the Writ Court is, in fact, concerned with only the decision making process and not with the final decision. The Court cannot re-appreciate the primary or perceptive facts found by an authority acting under a statute. (See ***H.B. Gandhi, Excise and Taxation Officer cum Assessing Authority, Karnal & Ors vs M/s Gopi Nath & Sons & Ors 1992 Supp. (2) SCC 312*** and ***Indian Overseas Bank vs I.O.B Staff Canteen Workers' Union & Anr. (2000) 4 SCC 245*** The specialised agency which is the Director General has analyzed the material before it and has come to a conclusion that there is imminent danger of an irreparable kind to the domestic industry if imports from China are allowed into enter the country without the disincentive of a provisional duty. This recommendation of the Director General, after due consideration albeit, at a lower rate has been accepted by the

Central Government. We would be, in these circumstances, be wary of interdicting the same.

21.5 A perusal of the preliminary findings clearly establishes that the submissions of the petitioner that the Director General has merely adopted the opinion given by the domestic producers without any investigation, is belied by the fact that there is extensive collation of data and its analysis in the order of Director General in the notification dated 30.01.2009 containing the preliminary findings. The other contention of the learned counsel for the petitioner that there was no cause for imposing a provisional duty in view of the fact that nearly two and a half months have passed from the date of issuance of notification of preliminary findings by the Director General, is also untenable in our view for the reason, one has to bear in mind the extent of data which has to be collated and analyzed. The period of two and a half months by itself cannot be considered as one which would persuade us to hold that criticality of circumstances had disappeared. In this regard, the petitioners had tried to seek sustenance from the order dated 26.03.2009 passed in Writ Petition No. 7782/2009 when this Court had recorded the submissions of the counsel appearing for the Union of India and the Director General that the hearing for final determination is complete and therefore, it may not be any necessary to pass an order of provisional duty. According to us, a close reading of the order of this court dated 26.03.2009 would show that while the said observation of the counsel for Union of India and the Director General was recorded, the court went on to say that this is a matter which is to be considered by the Director General. It is obvious that these carefully worded observations were made keeping in mind the fact the assessment as to whether a provisional duty is to

be imposed till the final finding is arrived at by the Director General is entirely within the domain of the Director General. Upon reading of the notification containing the preliminary findings, we have not been able to persuade ourselves, as indicated hereinabove, that there was no material for the Director General to come to a conclusion that critical circumstances did not obtain in the matter calling for imposition of provisional duty. Whether the final findings support the preliminary findings is a matter which the Director General is empowered to consider and make suitable recommendation to the Central Government. Therefore, in our view, the said submission of the petitioners deserves to be rejected at the very threshold. The submission that the domestic producers in their application have categorically stated that the imported soda ash from China is High Density soda ash but the relief for imposing provisional duty has been sought for and granted even with respect to Low Density soda ash, is also without substance for more than one reason. First, this submission assumes that the Director General has based his investigation only on the basis of material supplied by the domestic producers. Second, there is material in the application of the domestic producers which indicates that High Density soda ash is made by mechanically compacting light soda ash. And lastly, these are technical matters which are completely within the ken of the Director General.

21.6 In our opinion, the scope for interference in matters which have huge economic impact is very narrow. As a matter of fact, actions instituted in courts such as the instant writ petitions have portents of derailing decisions- which could have a cascading impact and inflict resultant damage not only on the domestic industry in issue but even

on industries which are vertically integrated to the said domestic industry, as also on their employees and industrial labour, which perhaps at times Courts cannot monetarily quantify. Therefore, the Court in our view, should be slow in entertaining such petitions. However, we make it clear that we are not to be understood as saying that in no case can writ petitions be entertained. Writ Petitions in such cases ought to be entertained in our view, when there is either a complete lack of jurisdiction or a palpable error so grave which requires imminent interference by a writ court.

22. In view of our discussion above, we find no merit in the petitions. Both Writ Petition Nos. 8749/2009 and 8761/2009 are dismissed. There shall however be no order as to cost.

RAJIV SHAKDHER, J.

VIKRAMAJIT SEN, J.

**May 27, 2009
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