

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2017

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.17926 & 17927 of 2017 & 17937 of 2017  
and W.M.P.Nos.19454 to 19457 of 2017 & 19466 to 19468 of 2017

The Southern India Mills Association,  
rep. by its Secretary General, Dr.K.Selvaraju,  
"Shanmukha Manram", 41, Race Course Road,  
Coimbatore-641 018, Tamil Nadu, India. ... Petitioner in  
WP Nos.17926 & 17927/2017

Lambodhara Textiles Limited, rep. by its  
Managing Director, Mr.R.Santhoossh,  
3A, 3<sup>rd</sup> Floor, B Block, Pioneer Apartments,  
1075 B, Avinashi Road, Coimbatore-641 018. ... Petitioner in  
WP No.17937/2017

Vs.

- 1.The Additional Secretary & Designated  
Authority, Directorate General of  
Anti-dumping & Allied Duties (DGAD)  
Department of Commerce,  
New Delhi-110 001.
- 2.M/s.Alok Industries Ltd.,  
Peninsula Business Park, Tower B,  
II & III Floor, Ganpatrao Kadam Marg,  
Lower Parel, Mumbai-400 013.
- 3.The Bombay Dyeing & Manufacturing Co. Ltd.,  
C-1, Wadia International Centre,  
Pandurang Budhkar Marg.,  
Worli, Mumbai, Maharashtra-400 025.
- 4.Indo Rama Synthetics (India) Ltd.,  
20<sup>th</sup> Floor, DLF Square, DLF Phase-2,  
NH-8, Gurgaon, Haryana-122 002.
- 5.M/s.Reliance Industries Ltd.,  
Maker Chambers-IV, Nariman Point,  
Mumbai-400 021, India.

... Respondents  
in all W.Ps.

Prayer in W.P.No.17926 of 2017 : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records on the files of the first respondent herein in case No.OI/04/2017 in File No.14/49/2016-DGAD, dated 2<sup>nd</sup> February, 2017, and quash the said proceedings in Case No.OI/04/2017 in File No.14/49/2016-DGAD, dated 2<sup>nd</sup> February, 2017 of the first respondent as illegal, arbitrary and without jurisdiction.

Prayer in W.P.No.17927 of 2017 : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus, to direct the first respondent therein, to proceed to determine its jurisdiction to initiate proceedings under Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on dumped articles and for determination of injury) Rules 1995 as prayed for in the applications of the petitioners in their letters, dated 21.04.2017, dated 22.04.2017, dated 25.04.2017, before the first respondent against the communication in Case No.OI/04/2017 in File No.14/49/2016-DGAD, dated 2<sup>nd</sup> February, 2017, pending disposal of the writ petition.

Prayer in W.P.No.17937 of 2017 : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records of the impugned order of the first respondent dated 02.02.2017 in Case No.IO/04/2016 and quash the same as being arbitrary, illegal and without authority of law.

For Petitioner: Mr.C.Natarajan, Senior Counsel  
for Mr.Mohammed shaffiq  
(in W.P.Nos.17926 & 17927/2017)

For Petitioner: Mr.Rahul Balaj  
for Mr.Mohammed Shaffiq  
(in W.P.No.17936 of 2017)

For Respondents: Mr.Mr.G.Rajagopalan, ASG for R1  
(in all W.Ps.) for Mr.B.Rabu Manohar, SCGSC

:Mr.Giridharan, for R2

:Mr.Sankaranarayanan,  
Senior Counsel, for R3  
for Mr.Jitendra Singh

:Mr.P.S.Raman  
Senior Counsel, for R4  
for Mr.Jitendra Singh

: Mr.Muthu Venkataraman, for R5

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## C O M M O N O R D E R

Since the issue involved in all these writ petitions are identical, they were heard together and disposed of by this common order.

2.W.P.Nos.17926 and 17927 of 2017, have been filed by an Association called the Southern India Mills Association, Coimbatore and W.P.No.17937 of 2017 has been filed by an individual Textile Mill. The prayer in W.P.Nos.17926 & 17937 of 2017, are identical by which the petitioners seek for issuance of writ of certiorari to quash the notification issued by the first respondent dated 02.02.2017, initiating Anti-dumping investigation concerning imports of "Non-dyed Polyester Staple Fiber (hereinafter referred as "PSF") from China PR, Indonesia, Malaysia and Thailand.

3.In W.P.No.17927 of 2017, the petitioner association seeks for issuance of writ of mandamus, to issue a direction upon the first respondent /the Designated Authority to proceed to determine its jurisdiction to initiate proceedings under Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on dumped articles and for determination of injury) Rules 1995, as sought for by them in their letters dated 21.04.2017, 22.04.2017, and 25.04.2017.

4.The learned Senior Counsel appearing for the petitioners, the learned Additional Solicitor General appearing for the first respondent as well as the learned counsels appearing for the private respondents submit that W.P.No.17926 of 2017, may be taken up for disposal first and if the same is disposed of, it may not be necessary to consider the prayer sought for in the other two writ petitions. This statement is taken on record and this Court proceeds to take up for consideration the writ petition in W.P.No.17926 of 2017.

5.The background facts, which are necessary for the disposal of the writ petition is as follows:

(i) The first respondent has initiated investigation for alleged dumping of PSF from China (Peoples Republic), Indonesia, Thailand and Malaysia into India to levy anti-dumping duties for the period from April 2012 to March 2015. The petitioner would state that they are interested parties in the investigation initiated by the first respondent, as they have approximately 400 members, 80 of whom are industrial consumers of PSF for manufacture of yarn, sewing threads, etc. and that any anti-dumping duty as initiated to be levied will have severe financial impact on the imports of the members of the petitioner/Association, who will suffer adverse civil consequences. Therefore, they claim that they have locus standi to represent the matter before the Designated Authority as well as to maintain the writ petitions.

(ii) It is further submitted that respondents 2, 3 and 4 have filed an application before the first respondent for imposition of anti-dumping duty on imports of certain types of PSF from those four countries. The fifth respondent is a domestic producer in India with its plants at various places in India. The admitted position is that the fifth respondent produces PSF, which is in excess of 50% of the gross domestic production of the goods. The data of gross import of PSF from the four Countries were presented in such application. It is further submitted that no application was taken raising a complaint by the fifth respondent, which is a major producer of PSF within the Country.

(iii) It is further submitted that the period of investigation as stated in the impugned order is between from April 2012 to March 2015. No data was furnished by the complainant for the period beyond March 2015 and no such injury is claimed for the period prior to April 2012 or after April 2015. It is stated that any duty provisionally or finally imposed will be governed by the past, when the PSF yarn was imported from the Countries by various members of the petitioner/association, who had imported the goods. On receipt of the proceedings, the petitioner/association sent a letter dated 15.02.2017, expressing their interest in the impugned proceedings and an application to the said effect was filed on 21.04.2017. It was submitted that there was no reason to initiate the proceedings and there was misconstruction of the norms of domestic industry. This was followed by another objection dated 22.04.2017, raising lack of jurisdiction to initiate investigation and requested that the issue of jurisdiction should be decided upfront before proceeding further. An application was submitted to the said effect on 25.04.2017 followed by a reminder dated 16.05.2017. It is



stated that on 04.06.2017, the petitioner/association along with their counsel met the first respondent at Delhi and submitted that the first respondent was wrong in initiating the proceeding and the issue of jurisdiction has to be decided before any other matter is proceeded with. Since there was no response as decided by the respondent, the petitioners have filed these writ petitions seeking for a direction to decide the question of jurisdiction and by way of abundant caution, questioned the impugned initiation notification.

6. Heard Mr.C.Natarajan, learned Senior Counsel, appearing on behalf of Southern India Mills Association, Mr.Rahul Balaj, learned counsel appearing for Lambodhara Textiles Limited, Mr.G.Rajagopalan, learned Additional Solicitor General for the first respondent, Mr.Giridharan, learned counsel for the second respondent, Mr.Sankaranarayanan, learned Senior Counsel for the third respondent, Mr.P.S.Raman, learned Senior Counsel for the fourth respondent and Mr.S.Muthuvenkataraman, learned Counsel for the fifth respondent.

7. The short issue, which falls for consideration is as to whether the direction as sought for by the petitioner/Association to direct the first respondent to proceed to determine his jurisdiction to initiate proceedings under Rule 5 of the Anti-Dumping Rules as sought for in their representation/application should be issued. To determine as to what relief the petitioners are entitled to, it may be necessary to refer certain legal provisions.

8. Section 9A of the Customs Tariff Act, 1975, deals with Anti-dumping duty on dumped articles. Sub-section 1 of Section 9A of the Customs Tariff Act, states where any article is exported by an exporter or producer from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

9. Section 9B of the Customs Tariff Act, deals with cases whether no levy under Section 9 or Section 9A could be made. Sub-section 2 of Section 9B of the Customs Tariff Act, empowers the Government to make rules for the purpose of this said Section, by notification in Official Gazette. It is in pursuant to such powers the Anti-Dumping Rules, 1955 were notified. The following Rules would be relevant.

2. Definitions.- In these rules, unless the context otherwise requires-

(a) "Act" means the Customs Tariff Act, 1975 (51 of 1975),

(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 the rest of the producers.

Provided that in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if -

(i) the producers within such a market sell all or almost all of their production of the article in question in that market; and

(ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;

2 Explanation. - For the purposes of this clause,-

(i) producers shall be deemed to be related to exporters or importers only if,-

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person subject to the condition that are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-

related producers.

(ii) a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter.

(c) "interested party" includes -

(i) an exporter or a foreign producer or the importer of an article subject to investigation for being dumped in India, or a trader or business association a majority of the members of which are producers, exporters or importers of such an article;

(ii) the government of the exporting country; and

(iii) a producer of the like article in India or a trade and business association a majority of the members of which produce the like article in India;

.....

5. Initiation of investigation. - (1) Except as provided in sub-rule (4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry.

(2) An application under sub-rule (1) shall be in the form as maybe specified by the designated authority and the application shall be supported by evidence of -

(a) dumping

(b) injury, where applicable, and

(c) where applicable, a causal link between such dumped imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless -

(a) 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 the domestic industry : Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty

five per cent of the total production of the like article by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -

(i) dumping,

(ii) injury, where applicable; and

(iii) where applicable, a casual link between such dumped imports and the alleged injury, to justify the initiation of an investigation.

Explanation. - For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent 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.

(4) Notwithstanding anything contained in sub-rule (1) the designated authority may initiate an investigation suo moto if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation.

6. Principles governing investigations.- (1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate information on the following:-

(i) the name of the exporting country or countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged



in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed; and

(vi) the time-limits allowed to interested parties for making their views known.

.....

(6) The designated authority may allow an interested party or its representative to present the information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.....

12. Preliminary findings. - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries, it shall also record a further finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. It will also contain:-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the article which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

2. The designated authority shall issue a public notice recording its preliminary findings.

10.The contention or rather the apprehension of the petitioner is with regard to the alleged relationship between the fifth respondent and the Malaysian company that there is no finding that the alleged relationship caused the fifth respondent to behave differently as to add, or to cause dumping of the goods into India as part of manipulative exercise or otherwise. Assuming that the relationship between the Malaysian producer and the fifth respondent had causative effect on the behaviour of the fifth respondent, nothing has been stated or found as to why the said relationship had any causative effect on other business of other exporters from other countries such as China, Korea or Thailand as proceeded against. Thus, it is submitted that the restrictions containing in Rule 5 of the Anti-Dumping Rules is intended to preempt and ward off possibility of the law being abused by indigenous manufacturer, in order to hike their price to create scarcity and adversely affecting competitiveness of prices of raw materials to industrial user.

11.The above appears to be what has been lingering in the minds of the petitioner/association that they may be put to prejudice if the jurisdictional issue, which was raised by them, is not taken up for consideration.

12.The learned Additional Solicitor General on the other hand would submit that the petitioners themselves have given an application before the Designated Authority requesting that they may be heard in the matter and simultaneously they have moved this Court challenging the initiation notification and therefore, the petitioner has no locus standi to maintain these writ petitions. Further, it is submitted that all the issues, which have been raised by the petitioner can be canvassed before the authority and there is a further appeal remedy available under Section 9C of the Customs Tariff Act. Respondents 2 to 4 have taken an identical stand in the matter to state that the finding recorded by the first respondent in the impugned initiation notification dated 02.02.2017, in paragraph 6, is only a prima facie finding and not a conclusion and thus, writ of certiorari is not called for.

13.After elaborately considering the submissions made on either side, the apprehension in the minds of the petitioner/association should be warded off and for which purpose, no elaborate exercise is required as the answer lies in the Rules themselves.

14. Rule 2(b) of the Customs Tariff Rules, 1995, defines "domestic industry" to mean 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. There is an exception to this definition, which states that when such producers are related to the exporters or importers of the alleged dumped article or themselves importers thereof in such cases the term "domestic industry" may be construed as referring the rest of the producers.

15. Explanation under Rule 2(b) of the Customs Tariff Rules, explains as to when a producer shall be deemed to be related to exporters or importers and contingencies have been provided under Clauses a, b and c as quoted above. Rule 2(b) of the Customs Tariff Rules states that a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter.

16. Thus, the first respondent while deciding the issue as to whether the complaint is by the domestic industry of which any of them are related to the exporters or importers and test them under Clauses a to c in the explanation of Rules 2(b) of the Customs Tariff Rules. Rule 2(c) of the Customs Tariff Rules defines "interested party". It may not be necessary for this Court to make an enquiry into this aspect as the petitioners/association are interested parties.

17. Mr. C. Natarajan, learned Senior Counsel would submit that the language of the rule, especially Rule 5(3) of the Customs Tariff Rules is so worded that it is in the negative, that the Designated Authority shall not initiate an investigation pursuant to an application under sub-rule (1) of Rule 5(1) of the Customs Tariff Rules under the contingencies contemplated in Clauses a and b therein.

18. Rule 5 read with Rule 6(1) of the Customs Tariff Rules would show that the Designated Authority shall after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice should contain information provided under such rules. The first respondent having already decided such issue and the impugned notification has been issued under Rule 6(1) of the Custom



Tariff Rules, a direction should be issued to the first respondent to decide the issue of its jurisdiction as a preliminary issue.

19. In this regard, reference was made to the decisions in the case of K. Sagar, Managing Director, Kiran Chit Fund vs. A. Bal Reddy and another reported in (2008) 7 SCC 166 and in the case of Vodafone International Holdings BV v. Union of India and another reported in (2012) 6 SCC 757.

20. In my considered view, the apprehension of the petitioner/Association appears to be without any basis. This is so because of the manner in which Rule 12 of the Customs Tariff Rules is worded. In terms of Sub-rule (1) of Rule 12 of the Customs Tariff Rules, the Designated Authority shall proceed with the conduct of the investigation and in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping. To determine these three factors, essentially the first respondent has to go into the aspect as to who are the domestic industry and whether any of them are related to the exporters or importers. Likewise, the importers can be guided by the explanation under Rule 2(b) of the Customs Tariff Rules. On such examination being done, the first respondent would be in a position to determine the three factors mentioned viz. export price, normal value and margin of dumping. In other words, the first respondent has to first determine the denominator, the basis of value arrived at by taking into consideration the domestic industry, which has to be considered in accordance with the definition of the Rules. The consideration should be relevant to the injury determination in terms of Sub-Rule (1)(iv) of Rule 12 of the Customs Tariff Rules and after which alone, the Designated Authority shall record the preliminary finding. The petitioners were largely prejudiced by the manner in which the first respondent has worded paragraph 6 of the impugned notification. This has been interpreted to mean that already the first respondent has come to a conclusion that the fifth respondent is related to the Malaysian producer.

21. However, this interpretation is incorrect, as the first respondent has only recorded a prima facie view and holds that the fifth respondent is not eligible to be considered as a part of eligible domestic industry in terms of Rule 2(b) of the Customs Tariff Rules and the Anti-Dumping Rules. Added to the above finding in paragraph 6 of the impugned notification, in paragraph 18 of the counter affidavit filed by the first respondent, it has been stated that the objection received from all the interested parties would be addressed while recording



preliminary findings under Rule 12 of the Customs Tariff Rules, as there is no other provision or power under which the first respondent is authorized to issue any order prior thereto. This is interpreted by the petitioner to mean that already the first respondent has come to a conclusion. This interpretation is not tenable. As pointed out earlier, there is a duty enjoined upon the first respondent to determine the export price, normal value and margin of dumping. Consideration should be relevant to the injury determination and to decide as to whether any of such producers are related to the exporters or the importers. Thus, the objections raised by the petitioners are required to be considered by the first respondent while deciding the matter in furtherance to Rule 6 of the Customs Tariff Rules.

22. In Vodafone International Holdings BV (supra), the issue was as to whether the jurisdictional issue may be determined by the authority concerned as a preliminary issue. Having regard to the facts and circumstances of the case, the Court pointed out that the petitioners are entitled to question the decision of the authority on preliminary issue before the High Court in the event, the same is against it.

23. In Kiran Chit Fund (supra), the jurisdiction of the said forum was called in question and in the factual background, the Hon'ble Supreme Court directed that the issue relating to jurisdiction has to be decided by the forum first. Thus, the Courts have taken such a view depending upon the facts and circumstances, more particularly, on the enactment on which the issue revolves. Thus, it may not be necessary that jurisdictional issues should be taken up as a preliminary issue and decided first, but, at best, can be tried as first among the several issues that may arise for consideration.

24. It is interesting to take note the decision in the case of Arun Kumar and others vs. Union of India and others reported in (2007) 1 SCC 732, wherein the Hon'ble Supreme Court explained the term "jurisdictional fact". Jurisdictional fact is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise

does not possess.

25.Thus, in the light of the above decision, if at the inception of an enquiry by a Tribunal or an authority, a challenge has been made to the jurisdiction, the Tribunal/authority has to take a decision as to whether or not to act and give a ruling on the preliminary or collateral issue, but such ruling is not a conclusion. Above all, the rules are clear, especially Rule 12 of the Customs Tariff Rules and there is no necessity for this Court to issue any direction to the first respondent to decide the matter in a particular manner nor it would be right in doing so, as he is cast with a statutory duty to determine the injury based on relevant consideration, which undoubtedly would mean as to whether the fifth respondent has to be excluded from the proceedings or not. It would be sufficient to direct the first respondent to hear all the interested parties including the petitioners/association and the individual writ petitioner as well as other petitioner and proceed in accordance with law.

26.With the above observations, W.P.No.17926 of 2017 is disposed of.

27.In the light of above, W.P.Nos.17927 and 17937 of 2017 are closed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

abr

To

The Additional Secretary & Designated  
Authority, Directorate General of  
Anti-dumping & Allied Duties (DGAD)  
Department of Commerce,  
New Delhi-110 001.

- +2 ccs to Mr.B.Rabu Manohar Advocate sr 82339,82340
- +3 ccs to Mr.A.Mohammed Shaffiq Advocate sr 82245,82389
- +3 ccs to Mr.B.MuthuVenkataraman Advocate sr 82299
- +1 cc to Mr.Karthik sundaram Advocate sr 82300
- +1 cc to Mr.P.Giridharan Advocate sr 82279
- +1 cc to Mr.R.Parthasarathy Advocate sr 82420

W.P.Nos.17926 & 17927 of 2017  
and 17937 of 2017

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