

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 15.09.2016

Pronounced on: 08.03.2017

+ **W.P.(C) 3544/2016, C.M. NOS. 15209/2016 & 25402/2016**

SUNCITY SHEETS PVT. LTD.

..... Petitioner

Through: Sh. Tarun Gulati, Sh. Kishore Kunal, Sh. Manish Rastogi, Sh. Pranav Bansal, Sh. Shashi Mathews and Sh. Anupam Mishra, Advocates, for Petitioner No.1.

Sh. Naresh Thakkar and Sh. Somnath Shukla, Advocates, for Petitioner No.2.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Sh. Sanjay Jain, ASG with Sh. Jasmeet Singh, CGSC, Ms. Natasha Thakur, GP, Sh. Srivats Kaushal, Ms. Aastha Jain and Sh. Sumit Mishra, Advocates, for UOI.

Sh. Sandeep Sethi, Sr. Advocate with Sh. Jitendra Singh, Sh. Nikhil Rohatagi and Ms. Kritka Sharma, Advocates, for Respondent No.4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioner challenges a Notification, dated 19.02.2016 which initiates investigation into the alleged circumvention of anti-dumping duty imposed upon the import of Cold Rolled Stainless Steel Sheets and Coils ("CRSS") of width 600 mm to 1250 mm from China, Korea, EU, South Africa, Taiwan, Thailand and USA, by Customs Notification No. 38/2009 dated 22.04.2009 and thereafter extended through Customs Notification No. 61/2015 dated 11.12.2015 after sunset review.

2. The Petitioner, a private limited company is engaged, *inter alia*, in the business of importing and trading CRSS of width above 1250 mm from China, Japan and Malaysia and further, in manufacture and export of stainless steel products such as pipes, tubes etc. to various countries. On 25.11.2008 a notification was issued by the second respondent for initiating Anti-dumping investigation concerning alleged dumping of 600mm or more width cold rolled flat products of stainless steel (CRC) of all series viz. the Product Under Consideration (“PUC”) originating in or exported from China PR, Japan, Korea, European Union, South Africa, Taiwan, Thailand and USA (“subject countries”). The period of investigation of the dumping was 01.01.2007 to 31.12.2007 in terms of the notification and the injury investigation period was specified as April 2004 to March 2007. On 27.03.2009 the second respondent (hereafter “DA”) issued its preliminary finding in reference to the initiation notification. These findings concluded that (i) PUC was exported to India from subject countries below their normal value, (ii) the domestic industry suffered material injury and (iii) injury was caused to the domestic industry by the dumped imports from the subject countries. During the course of proceedings relating to the said preliminary findings, various exporters and interested parties objected, seeking exclusion of CRSS with width above 1250 mm. However, in the preliminary findings dated 27.03.2009, the DA specifically observed that subject to further verification for the purpose of Preliminary determination and duties, the CRSS Coil with width more than 1250 mm was not excluded from investigations. Accordingly, the DA recommended imposition of provisional Anti-Dumping Duty (“ADD”) equal to lesser of margin of dumping and margin of injury on PUC which included CRSS with width above 1250 mm

also. However, the PUC excluded CRSS Coil with a combination of thickness above 2mm and width above 1500mm for use in fabrication, AISI 420 High Carbon (0.82%- 0.40%) grade. These preliminary findings were slightly modified by Notification 14/06/2008-DGAD dated 22.04.2009 to exclude CRSS of Grade 430 BA Silver Ice exported by ThyssenKrupp Stainless International, Germany.

3. Based on the recommendations of the DA, the Central Government issued Customs Notification No. 38/2009-Customs dated 22.04.2009 imposing provisional ADD on the PUC. In this background, on 24.11.2010, the DA recorded the final findings. These findings expressly rejected the arguments of the fourth respondent (the Jindal Stainless Steel Ltd, hereafter “Jindal” or “JSS”) relating to inclusion of CRSS with width of more than 1250 mm by rendering detailed findings in support of the exclusion. Further, the said Final Findings recommended imposition of ADD, on CRSS *inter alia*, excluding Coils with width above 1250 mm. The recommendations of the second respondent were accepted by the Central Government and ADD was imposed by Notification No.14/2010-Customs dated 20.02.2010. On 23.06.2010 mid term review proceedings were initiated at the request of the fourth respondent, through a notification (“mid term review initiation”) of the Final Findings dated 24.11.2009 for providing tolerance limits to the PUC. A mid term review dated 23.06.2010 was directed for the limited purpose of

“consideration in the original investigation was Cold-rolled Flat products of stainless steel of the width of 600 mm upto 1250 mm of all series further worked then Cold rolled (cold reduced) with a thickness of up to 4mm. However, the following were exclusions from the scope of the product:

- a) Grade AISI 4~0 High carbon (0.28%-0.40%), Grade 420, Grade 430 BA supplied by M/s Thyssenkrupp Stainless International, Germany, Grade AISI 441 and Grade AISI 443.*
- b) Duplex Stainless Steel grades 2205 (S31803), 2304(S32304), EN 1.4835, 1.4547, 1.4539, 1.4438, 1.4318 and 1.4833 and Ferritic Grades EN 1.4509 and 1.4512.*
- c) Product supplied under Indian Patent no. 223848 in respect of goods comprising Low Nickel containing Chromium-Nickel Manganese-Copper Austenitic Stainless steel and representing Grades YU 1 and YU 4, produced and supplied by M/s Yieh United Steel Corp (Yusco) of Chinese Taipei (Taiwan). ”*

4. In the meanwhile Jindal had approached the Punjab and Haryana High Court by filing Writ Petition (bearing No. 6544 /2010). The High Court, by its Order dated 08.10.2010 disposed the aforesaid Writ Petition by directing that the challenge raised in the petition be also considered. Eventually, the proceedings culminated in the final findings of the Mid- Term Review dated 08.06.2011 by the DA. In this mid term review proceeding, exporters had specifically objected to the inclusion of tolerance limits by stating that the scope of Review under Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 [“Anti Dumping Rules”] does not cover recommendation of duties on products on which no anti dumping duty was imposed in the first instance and therefore, the addition of tolerance would enhance the PUC. In the final findings, the DA held that there is no enhancement of the PUC that is being undertaken by the aforesaid Review. The DA held that the review was only for clarification with regard to prescribing tolerances in respect of width of the product under consideration and that neither has Jindal requested for enhancement of scope of the product, nor was it being considered. The DA, after noting that CRSS cannot

be produced to its exact dimension held that there is a need for tolerance. It therefore clarified its earlier Final Findings dated 24.11.2009 by adopting the international standard of width tolerance of +30mm on Mill edge products and + 4mm on Trimmed edge products. It also held that:

“The Domestic industry has submitted that they are manufacturing up to width of 1250 mm because of the demand of product having width up to 1250 mm only. The domestic industry, however, claims to have the facility to manufacture width up to 1550 mm in their plants and they can easily offer up to 1550 mm if an order is placed. The authority notes that this submission is contrary to facts on record. In another investigation concerning Hot rolled flat products from which cold rolled flat products are manufactured, the authority has found that a demand was raised on the petitioner for supply of Hot rolled flat products above 1250 mm which the petitioner failed to supply as per evidence placed on record in the said investigation (Final Findings No. 14/12/2010-DGAD dated 11th October, 2011 refers). Further the Authority notes that during the injury period spanning four years including POI in the original investigation concerning cold rolled products, the domestic industry has neither produced nor supplied the subject goods of width more than 1250 mm.

i. It is further submitted by the petitioner that the product can be imported in higher width and slit at very marginal cost. The Authority, however, notes that importing the product in higher width and then the process of slitting requires a complete operational setup calling for substantial investment on part of user industry, which is not commercially feasible for small and medium scale users as the same will result in wastages and higher costs.

j. It is submitted by domestic industry that once Authority has considered the domestic product as “technically and commercially substitutable” like articles to imported products the question of actual production and supply does not arise. The Authority has noted as aforesaid that although it is technically possible for users to slit the higher widths it may not

be commercially viable for the SME users in view of investment, wastages and higher costs involved.

k. Further it is noted that while determining the like article, application of substitutability test has two dimensions. First, the substitutability should be both technical and commercial. Secondly, the substitutability should be both the ways. In the present case even though it is claimed by the domestic industry that slitting of higher widths into smaller width is technically and commercially feasible, no evidence has been placed on record to substantiate and establish that it is technically and commercially feasible to convert the smaller widths into higher widths by the process of welding. In this regard, the authority notes that in critical and sensitive applications like high pressure/high temperature equipments used in sectors like oil & gas, petrochemicals, fertilizers etc. welding of smaller widths into higher widths is not technically feasible in view of safety considerations. Further weld joints are also not acceptable to customers in view of their proneness to corrosion. Thus feasibility of welding of smaller widths into higher widths is not established. Therefore, even if one may accept the claim of substitutability of higher width for lower widths on the basis of domestic industry's argument of nominal slitting cost, the vice versa is not established.

l. In regard to two way substitutability, the parameter has already been laid down by the Authority in its final findings concerning antidumping investigation in respect of Sodium Tripoly Phosphate(STPP) from China PR in the following terms:

“39. The information on record does not show any grade of technical STPP which is not being produced/supplied by the domestic industry. Further, with regard to difference between Food grade STPP and Technical grade STPP, the Authority notes that food grade STPP contains much less impurities and heavy metals than the technical grade STPP. The Authority further notes that certain exporters have acknowledged that the food grade STPP being more pure in nature and may replace technical grade STPP in its usage, but not vice versa. However,

considering the facts that the domestic industry does not manufacture the food grade STPP, the demand for food grade STPP in the domestic market and import of the same into the country being very low and negligible and because price of food grade STPP is around 25% higher than the technical grade STPP and usage of both the grades is not substitutable both the ways, the Authority holds that there is no need to include the food grade STPP within the purview of anti-dumping measures. In view of the above, the Authority notes that the recommendation of anti-dumping measures on imports of Food grade STPP is not warranted.”

m. Going by the ratio of STPP case, the Authority’s findings in MDF and SDH cases and the available jurisprudence in the matter, the Authority confirms its original findings dated 24.11.2009 in regard to the exclusion of subject goods of higher widths, i.e. widths higher than 1250 mm, from the scope antidumping duty.

Conclusion:

21. On the basis of examination of the issues raised by various interested parties including the petitioner in oral hearing held on 14.3.2011 followed by their written submissions and rejoinders and the evidence submitted by the petitioner vide their letters dated 23rd November 2009 and 14th July 2011 and on the basis of examination of post disclosure submission of interested parties the Authority has held that:

a) The subject goods of width beyond 1250 mm were rightly excluded from the ambit of anti dumping duty as held in the Authority’s original findings No. 14/6/2008-DGAD dated 24-11-2009. The said exclusion is maintained in view of the foregoing examination by the Authority.”

5. In the above order, the DA accepted Jindal’s arguments regarding inclusion of grades 420, 430BA, EN 1.4512, duplex grades 2205 and 2304 in the scope of the product under consideration for the purpose of imposition of anti-dumping duty as Jindal supplied them during the POI. Therefore, the DA issued Corrigendum F.No. 15/16/2010-DGAD dated 05.12.2011. On the

basis of the said Corrigendum dated 05.12.2011, the Union of India also issued Customs Notification dated 07.02.2012. Later, in terms of Rule 23 of the ADD Rules and on the basis of the application filed by Jindal seeking continuance of the ADD imposed on the PUC, the DA by Notification No. 15/04/2014-DGAD dated 17.04.2014 issued 'Initiation Notification for Sunset Review' to analyze the effect of dumping of the PUC upon removal of the then prevailing Anti-dumping Duty and the recurrence of dumping injury upon the Domestic Industry on the removal of the said Anti-dumping Duty. The POI for the said Sunset Review was fixed by the DA to be 01.01.2013 to 31.12.2013 and further, the injury investigation period was considered as 01.04.2009 to the end of the POI viz. 31.12.2013. After considering the issue, by Notification No.15/04/2014-DGAD dated 12.10.2015 the DA issued 'Final Findings to the Sunset Review', recommending that there exists an imminent likelihood of increase in the amount of supply of the CRSS which was the PUC and this would eventually cause further injury to the Domestic Industry due to the dumping of the PUC. During the proceedings in the Sunset Review, Jindal had requested the DA to remove the restrictions placed on the final PUC in the prior investigations and requested for inclusion of CRSS of width more than 1250 mm. Jindal sought inclusion of CRSS of more than 1250 mm width on the grounds that since the domestic industry viz. Jindal herein, has now started producing and supplying the wider widths, there are no legal or logical reasons to not remove the restrictions placed on the PUC. The request for inclusion of CRSS with a width more than 1250 mm within the PUC was rejected by the DA, which observed that:-

“25. The Authority notes the arguments of the domestic

industry regarding inclusion of certain products within the scope of the product under consideration on the grounds that domestic industry has now started manufacturing the same and the criterion of actual supply and production set in the original findings is now fulfilled. The domestic industry has, in effect argued that the exclusion of certain grades/types etc. from the PUC at the time of the Final Findings did not really alter the scope of the PUC or the investigation. It has been further argued that the quintessential principle to define the scope of the PUC is whether the specific product is a “like article” to the product being imported or not. The underlying rationale of excluding certain product grades/types in the original investigation was that these products may not cause injury despite their being “like articles” on the premise that such products were not produced by the Domestic Industry. Now that the domestic industry produces and supplies these product types/grades/sizes continued exclusion of those product types/grades/sizes would adversely affect the domestic industry.

26. While there is some merit in the arguments of the domestic industry in a scenario where the product definition remains wide but certain restriction or exclusion has been placed only for the application and collection of duty. A careful examination of the case reveals that that is not the case here. The scope of the product under consideration itself has been restricted after detailed deliberation before proceeding for various determinations and the dumping and injury investigations are with respect to those included product types/grades/sizes only. Therefore, it is not a case where the scope of the PUC continues to be broad but application of the duty is restricted as has been argued.

27. It is further observed that in this case, the review has been initiated for the scope of the product as defined in the final finding and as modified by subsequent reviews. The Domestic Industry did not file any application for the review of the scope of the product under consideration as it did in 2011. The information supplied by the Domestic Industry did not include

information of excluded products. Even the cooperating interested parties were not asked to include the information relating to the excluded products. In view of this, the Authority cannot accept the arguments of the domestic industry for inclusion of the excluded grades within the scope of the product under consideration.”

6. Further, on the basis of the said Final Findings of the Sunset Review dated 12.10.2015, the Central Government issued Customs Notification 61/2015-Customs dated 11.12.2015 continuing the imposition of ADD on the PUC.

7. It is contended that in the above background and in the light of specific submissions of Jindal and the DA's findings, it is clear that 1250 mm and more width CRSS related issues for imposition of ADD was examined and had been specifically excluded from the scope of PUC by the Central Government on the basis of detailed findings. Jindal's arguments on the effect on the capability of slitting CRSS with a width of 1250 mm, or to manufacture PUC too were rejected. The petitioner argues that despite these previous findings, but on the basis of same facts and figures, Jindal, by urging the same grounds, once again approached the DA by an application alleging circumvention of the ADD imposed on the PUC. According to the petitioner, this application while raising the same grounds, has alleged circumvention by import of CRSS of width above 1250 mm by relying upon the data of import relating to the period 2008-09 to 2014-15 despite the fact that the imports made during that period were already considered by the Respondent No. 2 during the earlier proceedings of rendering Final Findings and the recent Sunset Review proceedings. It is argued that though the DA had rejected similar submissions on earlier occasions through its detailed

findings and gave its recommendations, thus rendering it *functus officio*, it has, in complete arbitrary and illegal exercise of its powers and without jurisdiction, issued the Impugned Notification No.14/01/2014-DGAD dated 19.02.2016 initiating investigations into alleged circumvention of ADD on CRSS, stating that CRSS of more than 1250 mm width are being imported and thereafter are being slit down, to similarly use these slit down CRSS Flat products as that of width equal to or less than 1250 mm and this entire process in question is an attempt to circumvent the prevailing Anti dumping Duty imposed under Notification 61/2015- Customs dated 11.12.2015. The Petitioner had filed a letter along with authorization seeking inspection of the public file. Further, the DA, by its letter, dated 06.04.2016, had extended the time for filing response to the Questionnaire and the last date for filing the same was 02.05.2016.

8. The DA, which is the second respondent, defends its jurisdiction to carry out the anti circumvention investigation. It states that in the sunset review investigations final findings F. No. 15/04/2014-DGAD, dated 12.10.2015, despite observing that the anti-dumping duties are being circumvented by bringing widths above 1250 mm for eventual slitting into narrow widths, it could not have extended the duties to widths above 1250 mm as the object and purpose of sunset review investigation is limited in scope in terms of Section 9A(5) read with rule 23(1B) of the Anti-Dumping Rules. Reliance is placed on the Supreme Court's decision in *Rishiroop Polymers* [2006 (196) ELT 385 (S.C.)]. The Authority points out that in the sunset review investigation the information used related to imports of widths above 1250 mm to analyze "likelihood" of dumping and injury, which is a legal obligation under Section 9A(5), and not for circumvention. It is stated

that the new Anti-circumvention rules provide remedy in situations where circumvention of an existing anti-dumping duty is taking place. Rule 25 of the Anti-Dumping Rules addresses the specific issues concerning articles that are subject to anti-dumping which are imported in unassembled, unfinished or incomplete form and are assembled, finished or completed in India subject to conditions specified therein and where (a) the operation started or increased after, or just prior to, the anti dumping investigations and the parts and components are imported from the country of origin or country of export notified for purposes of levy of anti-dumping duty; and (b) the value consequent to assembly, finishing or completion operation is less than thirty-five percent of the cost of the assembled, finished or completed article. Rule 25 (2) is also relied on to say that circumvention measures are justified wherever the article in question is “*subject to any process involving alternation of description, name or composition (even though in minor forms regardless of variation of tariff classification if any).*” Likewise, when exporters change their “*trade practice, pattern of trade or channels of sale*” “to circumvent duty on the article subject to anti-dumping circumvention, an investigation is triggered.

9. Before initiation of the anti-circumvention investigation, the Authority satisfied itself *prima facie* about the evidence produced in the application seeking initiation of investigation in terms of Rule 26. The Authority undertook verification of the claims made by the Domestic Industry at a slitting plant of the related company of the domestic industry, to verify physical slitting operations, commercial viability of the slitting operations, actual cost of slitting and current prices of the finished products as well as the incidence of anti-dumping duties on the viability of the slitting

operations. Only on being *prima facie* satisfied that the cost of slitting widths above 1250 mm would have price advantage rather than importing widths below 1250 mm on payment of anti-dumping, the investigation was initiated. It is argued that the DA has appreciated that Rule 25 (1) requires that the circumvention have started, or increased after, or just prior to, the antidumping investigations. The DA examined the trade trend from 2008-09 onwards as the initial anti-dumping duties were levied by Customs Notification No. 14/2010 dated 20.02.2010. The impugned notification in paragraph 4 under existing measures recognizes the measures levied under both the original and sunset review investigations.

10. The initiation of investigation has not caused any prejudice to any of the parties including the petitioner as the determination in terms of Rule 27 would only be made after full data and material is obtained from all the parties. The Authority has no jurisdiction to recommend anti-circumvention duty on any of the importers including the petitioner if the Petitioner through the questionnaire response substantiates that the imports of widths above 1250 mm is not circumvention of existing anti-dumping duties.

11. Learned counsel for the petitioner urged that the DA in its notification and final findings held that since the consumer would purchase the article/product in the desired width to minimize losses, Jindal's contention with respect to interchangeability or use of strips with a larger width with those of the smaller width was considered. It is pointed out that Jindal did not address the fact that if sheets with greater width are used in applications where small width sheets are required, the result would be higher costs at the consumer's end. On this basis, Jindal's contentions were substantially rejected as commercially unviable and technically unfeasible. Reliance is

also placed upon the DA's findings dated 05.12.2011 where it was observed that importing products of higher width and slitting it required a completely different operational set-up, in turn calling for substantial investment by the user, which too was commercially unfeasible especially for small and medium scale users due to the wastages and higher costs involved.

12. Sh.Tarun Gulati, learned counsel appearing for interveners in support of the petitioners, next submitted that as far as the question of change in the pattern of trade involving exports from subject countries is concerned, Jindal referred to and relied upon alleged imports of CRSS with width of more than 1250 mm during 2009-10 and 2014, alleging that there was an increase in the import of such goods on account of imposition of anti-dumping duty by the DA on the other products. It is submitted that the DA in earlier proceedings rejected these allegations and their basis, and accordingly, the present application itself should be rejected. The petitioners and the interveners also argued that the power of reconsideration is conferred by way of review under Rule 23 and even in such proceedings, it is not open to the DA or the applicant to expand the scope of the PUC. Given that the DA's findings were obviously challenged before the CESTAT and the Punjab and Haryana High Court on the ground of inclusion of CRSS with width greater than 1250 mm, and was rejected, the matter cannot be reopened as it would subvert the judicial process. In fact in such a case, circumvention itself would result in reopening of findings that were subject to judicial scrutiny and have subsequently attained finality. It is contended that even in review proceedings, it is not open to the DA to extend the scope of goods that were the subject matter of the original proceedings; the impugned notice and proceedings are, therefore, without authority of law.

13. It is pointed out that the recourse to anti-circumvention procedure by Jindal is disingenuous given the fact that such proceedings are premised upon a very low threshold for initiation. Learned counsel points out that the DA's questionnaire not only requires cost and sale for width above 1250 mm but requires such information relating to PUC in earlier investigations, making it more burdensome than preparing for and filing of questionnaire in an anti-dumping investigation. Learned counsel also points that Rule 25 which the respondents relied on in the present case, can only be invoked upon fulfillment of specified conditions, i.e. firstly it should be in respect of an article that is subject to ADD; secondly that such article should be imported in unassembled, incomplete, unfinished or unassembled manner; thirdly, such operation of assemblage should have started or increased before or just after ADD investigations and the parts and components must be exported from subject countries, and lastly, the value consequent to such assembly, finishing or completion etc. should be less than 35% of the cost of the assembly, finished or completed article. Sh. Gulati submitted that none of these preconditions are met in this case because the product, i.e. CRSS with width greater than 1250 mm has entirely different commercial usage that was specifically excluded from levy of ADD; they are not unfinished or unassembled or incomplete, and in any event, the alleged portion of completion or finishing was not started just after or prior to the ADD investigations. In fact, the period claimed by Jindal for alleged circumvention was considered during the initial investigations and later during the sunset review. Furthermore, the DA, in the earlier findings conclusively held that it is commercially unfeasible to undertake slitting of CRSS to width greater than 1250 mm.

14. Learned counsel for the respondents argued that this Court should not intervene in writ proceedings given the nature of jurisdiction under Rule 25 and the preliminary stage at which the DA armed it. Learned counsel reiterated the submissions made in the counter affidavit of the UOI and pointed out that the pattern of imports has drastically changed after imposition of duty on CRSS and coils of width upto 1250 mm. It is stated that earlier most imports were all products with lesser width whereas after imposition of duty, despite no significant change in the market demand, the pattern of imports shifted too significantly; there has been considerable change in the volume of imports in the CRSS coils with width greater than 1250 mm. This gives rise to the plea that such greater width products are merely slit or cut in India and used as PUC. This *per se* requires investigations into circumvention. Once the DA was satisfied as to the possibility of circumvention and was able to justify it, in the absence of pattern and manifest lack of jurisdiction, this Court should not intervene and quash these proceedings. It is further stated that the mere omission to include CRSS of greater width in the anti-dumping proceedings – including the sunset review proceedings, does not preclude investigation of the methods adopted by the industry to circumvent the duty imposed and prevailing upon the PUC. It is a matter of common sense and logic that circumvention is not always through a simple method and that it involves resorting to indirect patterns of market behavior. Therefore, circumvention investigation is entirely different from enquiry and investigation into the PUC leading to imposition of an anti-dumping duty. It is furthermore argued that even though in the ADD proceedings, the DA concluded that it was technically and commercially unfeasible for the importers to use sheets of greater width

over PUC, the significant change in the import pattern coupled with no significant change in the consumption requirements needed to be looked into closely, for which circumvention investigation was essential. Thus, there is no bar to such an investigation.

Analysis and Conclusions

15. It is common ground that ADD has been levied on CRSS with a width less than 1250 mm; that duty was maintained in final findings, review of such findings and sunset review proceedings. The petitioner (and interveners) complains that initiation of circumvention proceedings is factually unfounded and also legally indefensible. It is also common ground that anti circumvention measures can be taken under Rule 25-26 of the Anti-Dumping Rules. Therefore, the grievance here is not regarding the complete *absence of jurisdiction*, rather, to its unwarranted exercise, given – what according to the petitioners is, the history of the case. The petitioners rely on the observations- repeated at least in two proceedings, by the DA, about the technical and commercial unviability of importing 1250 mm or more wide CRSS and then cutting or slitting it to smaller width for use in India.

16. Section 9A of the Customs Tariff Act, 1975, which is relevant for a decision in this case, reads as follows:

“Section 9A. Anti - dumping duty on dumped articles

(1) Where any article is exported by an exporter or producer from any country or territory (hereafter in this section referred to as the exporting 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.

Explanation.-For the purposes of this section,-

(a) “margin of dumping” in relation to an article, means the difference between its export price and its normal value;

(b) “export price”, in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) “normal value”, in relation to an article, means-

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub- section(6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(1A). Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, either by altering the description or name or composition of the article subject to such anti-dumping duty or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined,-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti- dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

Explanation. - For the purposes of this section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in Explanations 2 to sub-section (f) of section 3 of Central Excise Act, 1944."

17. Two decisions of the Supreme Court have explained the motivation for imposition of anti dumping duties. In *S&S Enterprise v. Designated Authority &Ors*, (2005) 3 SCC 337, the Court noted that “*the purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of dumping duty is a method recognized by GATT, which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets. Thus the factors to constitute 'dumping', are (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry.*” Again, in *Reliance*

Industries Ltd. v. Designated Authority & Ors (2006) 10 SCC 368 it was explained that industries built after independence with great difficulty should not be allowed “*to be destroyed by unfair competition of some foreign companies. Dumping is a well-known method of unfair competition which is adopted by the foreign companies.*” The Court also said that:

“The purpose of Section 9-A is, therefore, to maintain a level playing field and prevent dumping, while allowing for healthy competition. The purpose is not protectionism in the classical sense (as proposed by the German economist Friedrich List in his famous book 'National System of Political Economy' published in 1841) but to prevent unfair trade practices. The 1995 Amendment to Section 9A was apparently made in pursuance to Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) which permitted anti-dumping measures as an instrument of fair competition.

The concept of anti-dumping is founded on the basis that a foreign manufacturer sells below the normal value in order to destabilise domestic manufacturers.”

18. An anti-dumping proceeding, leading to a determination as to whether any injury exists and if so, its margin, involves (through Rule 11 of the Annexure to the Anti Dumping Rules and other provisions under such rules) examination of “*the causal relationship between the dumped imports and the injury to the domestic industry*”. In this regard, the DA has to examine known factors

“other than the dumped imports which at the same time are injuring the domestic industry, and the injury caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping

prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and the productivity of the domestic industry.”

19. In the case of anti-circumvention proceedings under Section 9A (1A) - the procedure for which is prescribed in Rules 25-28 of the Anti-Dumping Rules, the object is entirely different. Section 9A (1A) contemplates enquiry into whether there is circumvention of anti-dumping duty imposed under Section 9A (1), either by alteration of the article's description or its composition, or by its import *“in an unassembled or disassembled form”*. However, in the case of an anti dumping investigation, the methodology adopted is geared to see if there is injury on account of the dumping practice.

20. The kinds of proceedings contemplated by Parliament and the Central Government – as is evident from a reading of the provisions and the Rules, is threefold: first, anti dumping investigation resulting in final findings and possible levy of anti dumping duty; second, mid term review and third, sunset review. In each of these three proceedings, the focus is on *the existence of injury and its extent or continuance of injury (that already stands established) and its extent*. The uniqueness of the levy is that it is product, origin and even entity specific (if so required) and constitutes a calibrated, even a proportionate response by the State, having regard to the predatory export practices adopted in depressed pricing that would undermine or destroy the domestic market. The review and sunset proceedings highlight that only such response as is needed is in fact notified as a levy. Another unique feature of this levy is that unlike imposts that are

not preconditioned by any natural justice or fairness requirement, this levy is the culmination of an elaborate procedure, triggered by notice, investigation, findings and finally a levy based on the Central Government's exercise of discretion. These provisions are (as noted by the Supreme Court) the result of the country's obligation to enact GATT and WTO compliant legislation.

21. Anti circumvention proceedings are part of the larger scheme of anti dumping procedures. They are premised not only on the fact that there is an anti dumping duty and the existence of injury, but that despite such levy, there is an attempt by some importers to thwart and escape the levy (on the product, by resorting to other methods). Rules 25 to 28 of the Rules were introduced, by the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Amendment Rules, 2012. Under Rule 26, the DA is empowered – upon receipt of application disclosing particulars regarding circumvention practices (that are covered by Rule 25) to investigate into the matter. Rule 26 (3) empowers the DA to *suo motu* assume jurisdiction to inquire if, and to what extent, there is circumvention. The procedure that is to be followed is the same (*mutatis mutandis*) as the procedure involved before levying anti dumping duty.

22. The petitioner is correct in contending that the DA had gone into the question, and returned specific findings with respect to the improbability of importation of CRSS strips wider than 1250 mm and their size reduction for use as articles that are the subject of ADD. However, the nature of the inquiry that led to those findings (and observations) were in the context of likelihood of injury. The period covered in respect of those proceedings were 2009-2015. The nature of materials considered during those investigations

focused on all those elements that make up the injury. However, in circumvention proceedings, the trajectory of the inquiry is altogether different. It is whether, given the existence of ADD (and the established existence of injury), there is any behavior – in the form of import of other products, which can be adapted or altered for use as the product or articles that are subject to ADD. Whilst the decisive nature of the observations of the DA in past instances is facially compelling for a court to hold that there should not be a fresh inquiry, yet one cannot be oblivious to the nuanced nature of the circumvention procedure. The power to resort to it should be based on objective material. In the present case, the information, which the respondents rely upon is the stagnancy in demand of the article which is subject to ADD, and the pattern of increase in import of CRSS that is wider than 1250 mm. The Petitioners' argument that the subject matter of the previous orders and observations are the same in circumvention proceedings, is unpersuasive to this court. A superficial analysis no doubt could lead one to conclude it to be so; however, for doing that, this court would have to assume that reduction of size from 1250 mm width to lower than that, is not a process of assembling or making of a new article. That would involve interpretation of the relevant provisions of the Customs Tariff Act and the relevant entries to the schedule, which impose the duty. The inquiry of the process of slitting and cutting of a steel strip, as well as if it amounts to "assembling" a disassembled or incomplete article, would then become an issue in respect of which neither party addressed arguments on merits, nor presented the necessary facts. Given the fact that this would be the subject matter of inquiry and arguments before the competent forum, a ruling in this proceeding is neither desirable nor warranted having regard to the

established limitations of judicial review under Article 226, which is confined to questions of legality, procedural regularity, fairness and a reasonable decision.

23. In view of the above observations and findings, the court is of the opinion that there is no merit in the petition, and it has to fail. All rights and contentions of the parties however, are reserved; no observation made in this judgment therefore, shall be construed as an expression on the merits of the case (including the justification for initiation of circumvention proceedings in the facts of this case). The writ petition is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MARCH 08, 2017

