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

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Judgement delivered on: 20th March, 2017

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W.P.(C) No.2540/2017 & CM Nos. 10959-60/2017

FOSHAN SHANSUI ROMANTIC CERAMICS CO. LTD. & ORS.

.....Petitioners

Through: Mr. Balbir Singh, Senior Advocate with
Ms. Rubal Maini and Ms. Pramila
Viswanathan, Advocates.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Anurag Ahluwalia, CGSC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.:-

CM No. 10959/2017 (for exemption)

1. Allowed, subject to all just exceptions.
2. The application stands disposed off.

W.P.(C) No.2540/2017 & CM No. 10960/2017

3. Issue notice. Mr. Anurag Ahluwalia, CGSC accepts notice on behalf of the respondents.
4. With the consent of the parties, the petition is taken up for final hearing.
5. The petitioner seeks quashing of the final order dated 25.01.2017 passed by the Customs Excise & Service Tax Appellate Tribunal (CESTAT)

in the petitioner's appeal, as well as the quashing of the Custom Notification dated 07.06.2016.

6. The facts of the case are that anti-dumping duties had been imposed against import of the Vitrified/Porcelain Tiles originating in or exported from the People's Republic of China (PRC). During the tenure of the said levy, a New Shipper Review (NSR) under Rule 22 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995 (hereinafter to be referred as 'the Rules') was notified on 01.05.2003. The review was sought before respondent No.2, the Designated Authority (DA) by the six petitioners, who are producers, shippers and importers of Vitrified/Porcelain Tiles. Petitioner Nos. 1 to 4 claimed that they had neither exported the said goods nor were they related to any of the exporters during the initial period of investigation, hence, they were eligible for an individual dumping margin under the aforesaid Rules. The anti-dumping duty continued vide Sunset Review (SSR) Notification dated 27.06.2008. The review application was filed on 19.04.2012 i.e. while the second SSR Notification was in existence. The NSR Investigation was initiated vide Notification dated 18.05.2012 for determination of the individual dumping margin for imposition of anti-dumping duties on the imports made by the petitioners No. 1 to 4. The period of investigation was for six months *inter alia* from 01.05.2012 to 31.10.2012. During the period of investigation, provisional assessment was recommended for the petitioners apropos the subject goods till completion of the review and Customs Notification No. 35/2012 in this regard was issued on 10.07.2012 imposing a provisional duty on all the imports of the petitioners originating from PRC till the completion of the review. The

tenure of the levy of anti-dumping duty under the first SSR Notification dated 27.06.2008 had expired on 26.06.2013. The second SSR application filed by the Indian Council of Ceramic Tiles and Sanitaryware was rejected by the DA. Nevertheless, the petitioners' NSR plodded along and a Verification Report/Disclosure Statement was issued on 07.05.2015 but after further verification of the data by the DA submitted by the petitioners and/or the Domestic Industry (DI), a second verification report was released on 16.03.2016. This, according to the petitioners, is an error in procedure and of substantive law.

7. It is the petitioners' case that only the name of the producer-2 /petitioner No.2 was changed while the company remained in existence from the year 2000 onwards as per information gathered from the website, and that it had several related companies, which were involved in the production and sale of the subject goods. A conclusion was also drawn of the relationship between petitioner nos. 1 to 4 on the basis that petitioner no.4 (the exporter) was being operated from the office of one M/s Swift Secretariat Services, a company which was owned by the Company Secretary. However, this by itself would not, in the absence of documentary evidence, show that the realization of export proceeds was from its related buyers. The petitioner nos. 1 to 4 contend that they made no exports during the earlier period, hence the observations of the DA with respect to either the exports to India or to the related companies were unfounded and irrelevant to the aspect of dumping and injury.

8. The petitioners contend that without considering or examining the relevant facts, the DA nevertheless issued Final Findings on 28.03.2016 recommending imposition of anti-dumping duty on all the imports made

through petitioner nos. 1 to 4 on the ground that they could not be treated as "New Shippers" under Rule 22 of the Rules. Subsequently, respondent No.1 vide Customs Notification dated 07.06.2016 imposed dumping duty on all imports of the subject goods produced by them.

9. Thereafter, six appeals were filed before the CESTAT by the petitioners contending that the DA had failed to verify the relevant details before confirming the levy of anti-dumping duty. The petitioners were informed of the final hearing of the case vide a notice dated 03.12.2016 wherein the case was listed two days later i.e. on 05.12.2016. The petitioners' counsel who was located in Chennai had requested for an adjournment through his colleague in Delhi, the request was acceded to subject to payment of costs of Rs.1,000/- per petitioner and the case was adjourned to 12.01.2017. The petitioners further contend that on the said date of hearing, at the outset, the Departmental Representative had sought an adjournment on the ground that since the Registry had not served the relevant appeal files on them, they would not be in a position to effectively represent the Department. However, the adjournment was not granted, the petitioners' counsel was heard, the case was reserved for pronouncement of orders and the Departmental Representative was asked to file its written submissions. On 25.01.2017, the petitioners' appeals were rejected by a Common Final Order on the ground that the DGAD had examined all the details but oddly without recording any contentions relating to filing of written submissions by the Departmental Representative. The petitioners contend that although the respondents' written submissions were taken into consideration in the impugned order, a copy of the same was never supplied to them, which itself constitutes a breach of natural justice. It is the

petitioners' contention that on merits also, the case against them should have been dropped because the dumping margin against them as *de minimis* i.e. less than 2% and this was clearly demonstrated in the Disclosure Statement. Yet strangely, the Final Findings had recommended imposed anti-dumping duty against them without any justification. The petitioners also contend that the impugned order erred on facts and does not refer to their oral submissions nor does it truly record their contentions apropos the on-the-spot verification and other written submissions and pleadings.

10. The Court would note that the written submissions submitted by the Departmental Representative were taken into consideration for the purposes of the impugned order (para 7). The reasoning of the CESTAT is contained in para 9 to 12, which read as follows:-

"9. We note that the DA has examined the status of the appellants for a claim of New Shipper Review under the said Rules. It is seen that the appellant No.1 and 2, who are related producers were not new players in the business but were actually in existence, in different names, earlier. The on the spot verification conducted by the DA revealed the said fact. In fact appellant No.2, though declared to have been set up in 2009, was in fact, in existence from 2001. This fact was not disclosed in the declaration filed by the appellant. Similarly, it was also recorded that these Producers have a much wider relationship network than what was declared by them. This puts the whole claim and basis of New Shipper Review under jeopardy. Further, the appellant No.3 is actually exporter of subject goods and realised export proceeds directly from the Indian buyers. There is no supporting evidence to their sale transaction with appellant no. 4.

10. After careful consideration of the relationship and commercial transaction, the DA concluded that it will not be

appropriate to clear the subject goods made by the applicants without payment of AD duty.

11. We also note that Rule 22 did not provide for any time schedule for completion of New Shipper Review. In the present case, though there is considerable delay in issuing the final findings, the backgrounds and circumstance for such delay has been explained by the DA. First of all, the appellant refused for on the spot verification. It was only after the issuance of First disclosure statement, they have consented for such verification. Later, change of DA necessitated a second oral hearing. The appellants did not participate in the first oral hearing. We note that the appellants did not diligently follow up their application for review. They did not appear for oral hearing when the case was posted and did not submit any brief in support of their case. It is only after the second oral hearing, further progress could be made in the investigation. Regarding the reasons for not finding merit in New Shipping Review by the DA, we have specifically examined the observations of DA in paras-25 to 27 of the final findings. We find that the appellants herein did not have supporting facts to counter the findings recorded by the DA. We also note that the appellants did not make full and complete declaration regarding their period of existence and relationship among themselves. There are several related companies involved in production and sale of subject goods from China, PR. In the absence of full and complete disclosure and transparent cooperation, it will not be possible for the DA to agree with the plea of the appellant for a New Shipper Review or individual dumping margin. We note that absence of the second sunset review or termination of AD duty on the subject goods is of no direct relevance to the material period relevant to the present cases. The provisional AD duty, which was later confirmed if for the period 10.07.2012 to 26.06.2013 only. During that time, AD duty was in force pursuant to first sunset review.

12. On careful consideration of the grounds of appeal, we find no reason to interfere with the findings of the DA. Accordingly, the appeals are dismissed. The misc. applications and the applications for stay filed in respect of these appeals are also disposed of.”

11. The impugned order refers to the Final Findings of the DA which had concluded that producers had a much wider relationship network than what was declared by them in this regard; that the petitioners did not appear for oral hearing when the case was posted. It also records that the petitioner neither cooperated in the proceedings nor in the on-the-spot verification and that the petitioners had failed to submit the relevant documents to make full and complete declaration regarding their period of existence and the relationship between them and the related companies. However, the said conclusion of the Tribunal is not supported by any reasoning except for mere reference to paras 25 to 27 of the Final Findings. Indeed, there is no reference to the contentions of the petitioners. For example, in para 5 of their Appeal before the Tribunal, the petitioners had pleaded that they had not exported during the earlier investigation period and were not related to any of the companies/producers, which had exported the subject goods to India during the investigation period.

12. Mr. Balbir Singh, the learned Senior Advocate for the petitioners contends that the CESTAT's Final Findings ought to have been concluded within one year from the date of initiation of the investigation in terms of Rule 17(1) of the Rules, which reads as under:-

*“17. **Final findings.**- (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to*

the Central Government its final finding –

(a) as to, -

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

Provided that the Central Government may, [in its discretion in special circumstances] extend further the aforesaid period of one year by six months:

Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,

[(b) recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry [after considering the principles laid down in the Annexure III to these rules.]]

(2) The final finding, if affirmative, shall contain all

information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information regarding -

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

(ii) a description of the product 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.

(3) The designated authority shall determine an individual margin of dumping for each known exporter or producer concerned of the article under investigation:

Provided that in cases where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, and any selection, of exporters, producers, or types of articles, made under this proviso shall preferably be made in consultation with and with the consent of the exporters, producers or importers concerned:

Provided further that the designated authority shall,

determine an individual margin of dumping for any exporter or producer, though not selected initially, who submit necessary information in time, except where the number of exporters or producers are so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.

(4) The designated authority shall issue a public notice recording its final findings.”

13. He further contends that the aforesaid Rule is unambiguous and clearly mandates that the DA has to issue the Final Findings within one year from the date of initiation of the investigation except that only in special circumstances, the said period of one year could be extended by another six months. He contends that the NSR was initiated on 18.05.2012 and the Final Findings, instead of being notified by 17.05.2013 or in the extended period of six months i.e. by 17.11.2013, were actually notified on 09.09.2016; more than four years had elapsed since the promulgation of the NSR Notification. Hence, both the Final Findings and the Customs Notification for levy of anti-dumping duty upon the petitioners were not sustainable in law.

14. The statutory provisions relating to *de minimis* anti-dumping margin or to insufficient evidence of injury to the domestic industry, are embodied in Rule 14 of the Rules. The procedure for calculating dumping margins etc. in NSR is stipulated in Rule 22. They read as under:

“14. Termination of investigation.-

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

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

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

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

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

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

22. *Margin of dumping, for exporters not originally investigated.-*

(1) *If a product is subject to anti-dumping duties, the designated authority shall carry out a periodical review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to India during the period of investigation, provided that these exporters or producers show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product.*

(2) *The Central Government shall not levy anti-*

dumping duties under sub-section (1) of section 9A of the Act on imports from such exporters or producers during the period of review as referred to in sub-rule (1) of this rule:

Provided that the Central Government may resort to provisional assessment and may ask a guarantee from the importer if the designated authority so recommends and if such a review results in a determination of dumping in respect of such products or exporters, it may levy duty in such cases retrospectively from the date of the initiation of the review.”

15. The learned counsel for the respondents submits that since appeals of the Domestic Industry against the aforesaid Final Findings and the Customs Notification are pending before the CESTAT, therefore, any order passed by this Court on the merits of the case could well jeopardise or affect those appeals.

16. Having examined the aforesaid contentions, and the Court being mindful of the fact that the CESTAT was set up as a judicial body for hearing the appeals i.e. to deal with an order impugned before it on merits after discussing the details of the case. It is supposed to return a finding on the issues framed or raised before it. The impugned order evidently is shorn of such details or the rationale for arriving at the conclusion it has. Mere reference to paragraphs numbers of the Final Findings *ex facie* does not satisfy the requirements of passing a reasoned order.

17. The impugned order has not examined either the specified procedure, the strict timelines or the matter or merits; especially the *de minimis* claim. Furthermore, when the DI's second SSR request was rejected by the DA and

the subject goods were no more subject to anti-dumping duty, then what would be the effect of the NSR which was to be only for the remainder period of the five years of the 1st SSR anti-dumping duty levy? Could the NSR or its corollary provisional anti-dumping duty be sustained when the main anti-dumping duty itself was not payable after June, 2013? Furthermore, the written submission of the respondents could not have been taken into consideration by the Tribunal without a copy of the same being furnished on the petitioners. This deprived the latter of an opportunity for effective representation, hence there was denial of natural justice.

18. Recently, while dealing with another impugned order of the CESTAT, this Court in ***Manali Petrochemicals Ltd. vs Union of India & Ors.*** in WP(C) 11548/2016 decided on 06.12.2016, had observed:

“..... 8. It is axiomatic that every order of a judicial or quasi judicial authority who is responsible for deciding disputes concerning citizens as well as myriad body of litigants before it, should indicate the reasons which impelled the decision maker (judicial authority, judge, etc) to hold what it did. Courts rigorously enforce – as an attendant value to the rule of law minimum standards of fairness of procedure (adequate notice, fair opportunity of hearing, a decision on the merits, by an unbiased tribunal or authority, based on reasons). These values are in fact the bedrock of judicial functioning. Bereft of reasons, an order, which might have momentous consequences to those affected by it, is incapable of redress; its sphinx like inscrutability would likely mask untenable reasons and considerations that lay buried forever in the mind of the maker. Unlike the executive and legislative branches whose functioning does not always mandate open scrutiny, courts are always obliged to dispense justice in the public gaze. Rather than ply this order with a surfeit of judgments and

past wisdom, this court prefers to quote one decision, apt under the circumstances, of the Supreme Court, M/S Kranti Asso. Pvt. Ltd. & Anr vs Masood Ahmed Khan & Ors (2010) 9 SCC 496, which observed as follows, after considering a welter of previous authorities:

“47. Summarizing the above discussion, this Court holds:

- a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
- b. A quasi-judicial authority must record reasons in support of its conclusions.*
- c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
- d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
- e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
- f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
- g. Reasons facilitate the process of judicial review by superior Courts.*
- h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.*
- i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common*

purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny."

9. There is no doubt that the provision empowering CESTAT to act as an appellate forum is an appeal of right; Section 9C of the CTA reads as follows:

"Section 9C Appeal

(1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Service tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal).

(2) Every appeal under this section shall be filed within ninety days of the date of order under appeal: Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal

in time.

(3) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

(4) The provisions of sub-sections (1), (2), (5) and (6) of section 129C of the Customs Act, 1962 (52 of 1962) shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962 (52 of 1962).

(5) Every appeal under sub-section (1) shall be heard by a Special Bench constituted by the President of the Appellate Tribunal for hearing such appeals and such Bench shall consist of the President and not less than two members and shall include one judicial member and one technical member.”

10. Parliamentary intent in the creation of an appellate forum in respect of findings by the designated authority was to provide meaningful redress by a competent appellate body. The order impugned is not only cryptic but mistaken in its assumption that the pending writ petitions (of others) can provide adequate redress to the petitioner- an entirely erroneous assumption, because those writ petitions are merely pending and depend upon exercise of discretion. The availability of an appellate remedy in this case, is conferment of a right to approach the higher forum for correction, on facts and law, whereas exercise of judicial review is within a restricted canvas. The CESTAT has in essence, treated an appellate remedy (otherwise a compulsive jurisdiction) to be alternative and discretionary, robbing it of substantial content...”

19. For the aforesaid reasons, the impugned order and the petitioners’ case warrant a deep analysis and thorough adjudication. However, considering that the order on merits by this Court could well affect the

pending appeals of the Domestic Industry, the Court is of the view that the case be remanded back to be heard and disposed off on its merits. Accordingly, the order of the CESTAT is hereby set aside. The case is remanded back to the CESTAT, which shall decide the appeals on the merits after dealing with all submissions of the parties including the period of limitation etc. as discussed in para 11 and 17 supra. As regards the petitioners contention that neither the Final Findings nor the Customs Notification could have been notified after the lapse of 18 months and that it fell outside the purview of such levy because its dumping/injury margin was diminished i.e. less than 2% would be adjudicated upon as a preliminary issue *de hors* the contentions of the Domestic Industry in its appeal before the CESTAT. Since the period of anti-dumping duty is itself limited, and lest the anti-dumping appeals become partially infructuous, the CESTAT would endeavour to hear the parties and dispose of the appeals by 30.06.2017. Nothing stated in this order shall be construed as an expression of the merits; the parties' liberty to canvass all contentions are reserved.

21. The writ petition alongwith pending application stands disposed off on the above terms.

NAJMI WAZIRI, J.

S. RAVINDRA BHAT, J.

MARCH 20, 2016

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