

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

WRIT PETITION No.7671 OF 2018

Between:

The Andhra Petrochemicals Limited ... Petitioner

and

Union of India, Secretary Revenue,
Ministry of Finance, New Delhi and another ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 31st JULY, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

T.AMARNATH GOUD, J

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AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

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> Head Note:

! Counsel for petitioner : Sri S.Ravi and
Sri Challa Gunaranjan

^ Counsel for respondents : Assistant Solicitor General for
India

CASES REFERRED: --



THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

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ORDER

(Per Sri Justice Sanjay Kumar)

The Customs Tariff Act, 1975 (*for brevity*, 'the Act of 1975') was enacted by the Parliament to consolidate and amend the law relating to Customs Duties. Section 9 thereof deals with countervailing duty on subsidized articles. Section 9A of the Act of 1975 deals with anti-dumping duty on dumped articles. Sub-Section (1) thereof states that 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. Clause (a) in the Explanation to this sub-section states that for the purposes of Section 9A 'margin of dumping', in relation to an article, means the difference between its export price and its normal value. 'Export Price' is defined under Clause (b) of the Explanation and 'normal value' is defined under Clause (c) thereof. Generally, normal value in relation to an article, as defined in Clause (c) means the comparable price, in the ordinary course of trade, for a like article when destined for consumption in the exporting country or territory. When there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country, or when such sales do not permit a proper comparison because of the market situation or low volume of sales in such domestic market, the normal value is either the comparable representative price of the like article when exported from the exporting country to an appropriate third country or the cost of production of the said article in the country of origin

along with reasonable addition for administrative, selling and general costs, and profit. Section 9A(3) empowers the Central Government, if it is of the opinion that there is a history of dumping in respect of the dumped article under inquiry which causes injury or that the importer was or should have been aware that the exporter practices dumping and that such dumping would cause injury and injury is caused by massive dumping of an article imported in a relatively short time which, in the light of the timing and the volume of the imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied, to levy anti-dumping duty retrospectively by way of a notification in the Official Gazette from a date prior to the date of imposition of the anti-dumping duty but not beyond ninety days earlier than the date of notification. Sub-section (6) provides that the margin of dumping shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of Section 9A and such rules may provide for the manner in which articles liable for any anti-dumping duty may be identified, and the manner in which the export price, the normal value and the margin of dumping in relation to such articles may be determined apart from assessment and collection of such anti-dumping duty. Section 9B stipulates certain cases in which no levy under Section 9 or Section 9A can be made. Sub-section (2) thereof empowers the Central Government to make rules for the purposes of Section 9B which provide for the manner in which an investigation is to be made, the factors to which regard should be had in any such investigation and for all matters connected with such investigation. Broadly, Section 9B provides that no

article shall be subjected to both countervailing duty and anti-dumping duty to compensate for the same situation of dumping or export subsidization.

The Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (*for brevity*, 'the Rules of 1995') were framed by the Central Government in exercise of power under Sections 9A, 9B and 9B(2) of the Act of 1975. The Rules of 1995 came into force on 01.01.1995 and superseded the earlier Rules of 1985. Rule 2 deals with definitions of various terms and phrases used in the said rules. Rule 3 deals with appointment of the designated authority and states that the Central Government may appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as it may think fit as the designated authority for the purposes of the rules. Rule 4 sets out the duties of the designated authority:

'4. Duties of the designated authority. – (1) It shall be the duty of the designated authority in accordance with these rules –

- a. to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article;
- b. to identify the article liable for anti-dumping duty;
- c. to submit its findings, provisional or otherwise to Central Government as to –
 - (i) normal value, export price and the margin of dumping in relation to the article under investigation, and
 - (ii) the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such article from the specified countries.
- d. to recommend to the Central Government –
 - (i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering principles laid down in the Annexure III to these rules; and
 - (ii) the date of commencement of such duty;
- e. to review the need for continuance of anti-dumping duty;'

Rule 5 deals with initiation of investigation and is also worthy of reproduction:

'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 may be 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 casual 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.

Rule 6 details the principles governing investigations. Under Rule 6(1) the designated authority shall, after it has decided to initiate an investigation to determine the existence, degree of effect of any alleged dumping of any article, issue a public notice notifying its decision, containing adequate information on various parameters mentioned in clauses (i) to (vi) thereunder. Rule 7 deals with confidential information provided to the designated authority. Rule 8 requires the designated authority to satisfy itself as to the accuracy of information supplied, upon which its findings are based. Rule 9 entitles the designated authority to carry out investigation in the territories of other countries, if the circumstances of the case warrant. Rule 10 deals with determination of normal value, export price and margin of dumping and provides that an article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances, the designated authority shall determine the normal value, export price and the margin of dumping taking into account, *inter alia*, the principles laid down in Annexure I to the Rules. Rule 11 mandates that the designated authority shall determine the injury to the domestic industry, threat of injury to the domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts. In exceptional cases, the designated authority is also empowered to give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if there is a concentration of dumped imports into an isolated market and such dumped articles are causing injury to the producers of all or almost all of the production within such market. Rule 12 requires the designated authority to proceed expeditiously with the conduct of the investigation and 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. On the strength of such preliminary findings, the Central Government is empowered under Rule 13 to levy provisional duty. Rule 14 deals with situations where the designated authority is entitled to terminate an investigation. This Rule reads 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.'

The final findings are to be rendered by the designated authority in terms of Rule 17 leading to levy of duty based thereon, if warranted, by the Central Government under Rule 18. It may be noted that under Rule 17, the designated authority is required within one year from the date of initiation of the investigation, extendable by six months in special circumstances by the Central Government, to determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final findings as to the export price, normal value and the margin of

dumping of the said article; 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; a causal link, where applicable, between the dumped imports and the injury; and whether a retrospective levy is called for and if so, the reasons therefor and the date of commencement of retrospective levy.

Annexure I to the Rules adumbrates the principles governing the determination of normal value, export price and margin of dumping. Thereunder, the designated authority, while determining the normal value, export price and margin of dumping is required to take into account the stipulated principles. Clauses (1) and (2) have relevance in the case on hand and are extracted hereunder:

'1. The elements of costs referred to in the context of determination of normal value shall normally be determined on the basis of records kept by the exporter or producer under investigation, provided such records are in accordance with the generally accepted accounting principles of the exporting country, and such records reasonably reflect the cost associated with production and sale of the article under consideration.

2. Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price. The designated authority may disregard these sales, in determining normal value, provided it has determined that –

- (i) such sales are made within a reasonable period of time (not less than six months) in substantial quantities, i.e. when the weighted average selling price of the article is below the weighted average per unit costs or when the volume of the sales below per unit costs represents not less than twenty per cent of the volume sold in transactions under consideration, and
- (ii) such sales are at prices which do not provide for the recovery of all costs within a reasonable period of time. The said prices will be considered to provide for recovery of costs within a reasonable period of time if they are above weighted average per unit costs for the period of investigation, even though they might have been below per unit costs at the time of sale.'

Annexure II deals with 'Principles for determination of Injury', while Annexure III deals with 'Principles for determination of Non-injurious Price'.

These, broadly, are the parameters of the statutory scheme obtaining under the Rules of 1995.

The grievance of Andhra Pradesh Petrochemicals Limited, the petitioner company, is with regard to the Final Findings dated 28.11.2017 recorded by the Designated Authority, Directorate General of Anti-Dumping and Allied Duties, Ministry of Commerce and Industry, Department of Commerce, Government of India, terminating the investigation undertaken by him under the Rules of 1995. A direction is sought to set aside the said findings and to direct the said designated authority to recommend to the Central Government to levy anti-dumping duty on imports of normal Butanol or N-butyl Alcohol, originating in and exported into India from Saudi Arabia.

The petitioner company filed a substantiated petition seeking imposition of anti-dumping duty on dumped imports of normal Butanol or N-butyl alcohol originating in and exported into India from Saudi Arabia. According to the petitioner company, normal Butanol is a basic organic chemical and a primary alcohol which is an excellent solvent for acid-curable lacquers and baking finishes and a large part of normal Butanol is converted into derivatives for use as solvents in coating industries. On the strength of the petitioner company's application, the designated authority decided to initiate investigation into the import of the subject articles from Saudi Arabia, *vide* Notification dated 02.09.2016. At the time of filing the petition, the petitioner company provided import data for the period of three months. The period of investigation was from April, 2015 to March, 2016. The designated authority granted a public/oral hearing to interested parties on 23.06.2017 followed by written submissions. The petitioner company also attended the

hearing and filed detailed submissions on 30.06.2017. According to it, it provided information not only for the period of investigation but also for the entire injury period, 2012-13 to 2014-15. The petitioner company however admitted that dumping from Saudi Arabia occurred in the last three months of the period of investigation, i.e., January to March, 2016. The petitioner company admitted that there were no imports from Saudi Arabia in the first nine months of the period of investigation, i.e., from April to December, 2015. It claimed that dumping of the very same product also took place from Malaysia, Singapore, South Africa, the USA and the European Union. The period of investigation by the designated authority also covered investigation in respect of imports from these exporting territories also. The petitioner company further claimed that though imports from Saudi Arabia started only in January, 2016, the volume of such dumped imports was significant enough to cause material injury to the domestic industry. This was to the extent of capturing 39% of the market share in India.

The petitioner company asserted that the exports from Saudi Arabia into India were not casual exports but were made with the intention of grabbing the Indian market. Such exports into India from Saudi Arabia were undercutting and depressing the prices of the domestic industry to a significant extent, according to it, and performance of the domestic industry during the period, January to March, 2016, was adverse in terms of profits and returns on investments. The following parameters, per the petitioner company, demonstrated the causal link between the said exports and the injury caused.

- The dumped imports from the subject country entered the Indian market in the period Jan-Mar 2016 (last 3 months of the POI) in such significant volumes that improvement in volume parameters seen in the performance of the domestic industry in the first 9 months of the POI (Apr-Dec 2015), was completely wiped off.

- There was significant difference between the prices offered by the domestic industry and the foreign producer. Thus, the domestic industry was unable to raise the prices above the costs as a result of dumping of the product in the country.
- Even when the domestic industry offered sub-optimal prices, it was losing sales. Thus, decline in sales volumes was a direct consequence of dumped imports from the subject country.
- The domestic industry was able to increase its sales at the cost of sub-optimal prices in the first 9 months of the POI (Apr-Dec 2015). However, the sales volumes declined drastically in the period Jan-Mar 2016 (last 3 months of the POI) even when the domestic industry offered still lower prices as fresh dumping from Saudi Arabia started in this period.
- Despite sub-optimal prices offered by the domestic industry, the imports were significantly undercutting the domestic prices. Resultantly, the price undercutting was creating price pressure on the domestic industry.
- Reduction in profits directly resulted in deterioration in returns on capital employed and cash flow. Thus, deterioration in profits, return on capital employed and cash flow was due to the dumped imports.'

The petitioner company submitted written submissions on 27.10.2017, pursuant to the second oral public hearing held on 24.10.2017 owing to the change in the incumbent holding the office of the designated authority. It also filed rejoinder submissions on 01.11.2017. In terms of Rule 16 of the Rules of 1995, the designated authority disclosed essential facts under consideration, which would form the basis for his final conclusion under Disclosure Statement dated 14.11.2017. The petitioner company filed its comments thereon on 21.11.2017. However, the designated authority issued the impugned Final Findings, *vide* Notification dated 28.11.2017, terminating the investigation under Rule 14(b) of the Rules of 1995, holding as follows:

- i. Period of last 3 months of POI of exports of subject goods from Saudi Arabia is not sufficient to evaluate injury to the domestic industry as material injury determination would require data on imports and Domestic industry's sales for a longer duration.
- ii. The short period of production especially commercial production of just one month also constrains determination of a representative and realistic normal value for cooperating producers/exporters.

- iii. Causal link between imports from Saudi Arabia and injury to the Domestic Industry is not conclusively established on the basis of 3 months of export period.
- iv. The Authority does not consider it appropriate to recommend levy of Anti-Dumping Duty on the subject goods from Saudi Arabia and terminated the investigation under Rule 14(b) of AD Rules.'

The petitioner company raised the following grounds in relation to these impugned final findings:

1. Having examined the petition and found sufficient *prima facie* evidence of dumping of the subject goods, causing injury to the domestic industry and a causal link between the dumping and the injury, it was incorrect on the part of the designated authority to hold that as the imports from Saudi Arabia occurred only in the last three months of the investigation, it was not sufficient to evaluate the injury to the domestic market.

2. The designated authority was not justified in fixing the period of investigation when the imports were only in the last three months of such period and it could have sought extension of the investigation period either at the initial stage or subsequently, if it found that the three month period was not sufficient.

3. There is no mandate in the rules that imports must be during the entire period of investigation and even three months imports, evidencing the capturing of the Indian market share to the extent of 39%, would be sufficient for the designated authority to draw necessary inferences. There is no requirement that such imports should be at least for a period of six or twelve months, as the designated authority is not required to establish whether the exporters were habitually dumping the goods.

4. Having determined the normal value in terms of the provisions of the Rules of 1995, the designated authority could not have baldly stated that the normal value so determined was not a representative and realistic

normal value. The petitioner company would allege that this conclusion contradicted the designated authority's own findings.

5. Though the designated authority terminated the investigation taking recourse to Rule 14 (b) of the Rules of 1995, termination thereunder is permissible only when the designated authority does not find evidence of dumping or evidence of injury. However, in the body of the impugned order, the designated authority recorded the dumping margin for exporters from Saudi Arabia, in para 35, which ranged from 35-45% to 85-95% and the injury caused to the domestic market was sufficiently demonstrated by the petitioner company before the designated authority owing to such dumping.

The petitioner company therefore asserted that the impugned final findings of the designated authority were contrary to the provisions of Act of 1995 and the Rules of 1995, as there was no requirement of continuity of imports throughout the period of investigation for an adverse inference to be drawn against the dumping activity by producers in the exporting territory. The petitioner company would assert that the designated authority failed to appreciate that the imports were substantial and it could not exclude a country from investigation on the ground that the imports from such country were not throughout the period of investigation. Existence of imports even during part of the period of investigation establishing a causal link between dumping of imports and injury suffered by the domestic industry is sufficient. The petitioner company would point out that during the period of investigation, the market share of imports from Saudi Arabia was 14.80% and the export price was Rs.36.24 ps. per kilogram, which is the lowest amongst all the importing countries and significantly lower than the domestic industry. The petitioner company would also assail the finding of the designated authority that the investigation was only for examining the

material injury and not for evaluating threat of injury or material retardation to domestic industry and that a reasonable duration of period is warranted for capturing the price of volume trend from Saudi Arabia so as to analyze the impact of factors other than dumped imports to exclusively establish a causal link between dumping and consequential injury. The petitioner company would point out that in terms of Rule 4(1)(c) of the Rules of 1995, the designated authority is required to submit its findings as to the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such article from the specified countries and therefore, the designated authority failed to live up to the statutory mandate. Lastly, the petitioner company contended that its own performance and that of the domestic industry improved slightly during the first nine months of the period of investigation when there was dumping of imports from other countries but its performance and that of the domestic industry deteriorated steeply during the last three months of the period of investigation when exporters from Saudi Arabia resorted to unprecedented dumping, causing material injury in terms of volume parameters such as production, sales, market share and capacity utilization. The petitioner company also contended that injury was caused in terms of price parameters which intensified losses and negated returns on investment. It is on these grounds that the petitioner company sought invalidation of the impugned final findings of the designated authority and a consequential direction to the said authority to recommend to the Central Government to levy anti-dumping duty on exports of normal Butanol or N-Butyl Alcohol into India from Saudi Arabia.

The Additional Director General (Foreign Trade), Directorate General of Anti-Dumping and Allied Duties, Ministry of Commerce and Industry,

Government of India, New Delhi, filed a counter-affidavit on behalf of the respondents, wherein he stated as follows: Mere initiation of investigation under the Rules of 1995 does not cast any obligation upon the designated authority to recommend imposition of anti-dumping duty. During 2017 and 2018, four such investigations were terminated. He stated that the petitioner company was incorrect in assuming that the only reason for termination of the investigation was that the imports had been made during the last three months of the period of investigation and were insufficient to evaluate injury. He would state, on the other hand, that the designated authority gave detailed reasons and conclusions as to why imposition of anti-dumping duty was not warranted in the case on hand. According to him, detailed analysis by the designated authority did not show existence of any causal link between the alleged dumping from Saudi Arabia and the injury claimed by the petitioner company. The Additional Director stated in para 12 of the counter-affidavit that the data presented showed imports of the goods from Saudi Arabia only during the last three months of the period of investigation and such period was insufficient to evaluate injury to the domestic industry. He asserted that the petitioner company is reading the provisions of Rule 14(b) of the Rules of 1995 incorrectly as it has to be read with the opening paragraphs of Annexure II to the Rules to appreciate the full import of the underlying scheme of the provision. According to him, a conjoint reading of the same would require the designated authority to consider the following:

1. The volume and price effect of dumped imports;
2. The consequent impact of these imports on domestic producers of such products; and
3. Causal link between dumped imports and injury.

He would further assert that mere calculation of dumping margin and injury margin in the impugned final findings did not establish that there was a causal link between dumping and injury. A clear causal link between

dumped imports and material injury suffered by the domestic industry had to be established and there was a clear lack of such causal link in this case. He conceded that the investigation conducted by the designated authority was only for determination of material injury and not for evaluating threat of material injury or material retardation to the domestic industry. He contended that the petitioner company never requested in its petition that it wanted the designated authority to examine any threat of material injury and the same was filed only for examination of dumping and material injury. According to him, the designated authority could not have expanded the scope of the investigation beyond the request made by the petitioner company in its petition. He further alleged that the petitioner company had quoted a hypothetical figure of Rs.36.24 ps. per kilogram as the export price from Saudi Arabia. As such, an export price calculation was not mentioned in the impugned final findings, being confidential in nature. He concluded by stating that the petitioner company was not entitled to any relief as it had failed to establish any grounds requiring interference with the impugned final findings and prayed for dismissal of the writ petition.

The Initiation Notification dated 02.09.2016 published in the Gazette of India Extraordinary indicates that the Additional Secretary and Designated Authority, Directorate General of Anti Dumping & Allied Duties, Department of Commerce, Ministry of Commerce & Industry, Government of India, recorded therein that he found sufficient *prima facie* evidence of dumping of Normal Butanol by exporters from Saudi Arabia and stipulated the period of investigation as 01.04.2015 to 31.03.2016.

Perusal of the impugned final findings dated 28.11.2017 reflects the following salient points: The designated authority noted that the petitioner company was the only one producing the product in the entire country and,

therefore, constituted domestic industry. Six exporters/producers from Saudi Arabia responded to the Initiation Notification issued by the designated authority. The product under consideration was Normal Butanol or N-Butyl Alcohol, a basic primary alcohol, whose derivatives are used as solvents in coating industries. The designated authority concluded that for the purpose of investigation the subject goods produced by the petitioner company were like articles to the subject goods, *viz.*, Normal Butanol, being imported from the subject country, Saudi Arabia.

In terms of Section 9A(1)(c) of the Act of 1975, the designated authority undertook determination of the normal value in relation to the subject goods. Such determination was on the strength of the domestic sales made by the two co-operating foreign producers in Saudi Arabia, being in sufficient volumes when compared with exports to India. The normal value was accordingly determined on the basis of cost of production, selling and general costs as verified, including a reasonable profit margin. As regards the export price for non-cooperating producers and exporters from Saudi Arabia, the normal value was determined at ex-factory level on the basis of best available information by referencing the highest normal value amongst the co-operating producers/exporters as depicted in the dumping margin table set out in page 23 of the final findings. The export prices for the two co-operating producers from Saudi Arabia were determined on the strength of weighted average export price at ex-factory level for the subject goods. The export price for the other producers/exporters from Saudi Arabia was determined on the basis of best available information by referencing the least ex-factory export price amongst the co-operating producers/exporters as depicted in the said dumping margin table. The dumping margin for M/s.Sadara Chemical Company, a co-operating producer from Saudi Arabia,

was determined at 85–95% while the dumping margin for M/s.Saudi Acrylic Acid Company, another co-operating producer from Saudi Arabia, was determined at 35–45%. The dumping margin for two other exporters was determined at 35–45% and for last producer/exporter at 85–95%. Though the designated authority noted that imports from Saudi Arabia had occurred only in the last quarter of the period of investigation i.e., from January to March, 2016, the volume of such exports from Saudi Arabia were recognized to have marked a significant increase in imports in absolute terms from the said country. The imports from Saudi Arabia constituted 15% of the total import of the subject goods from countries with anti-dumping measures and other countries.

Be it noted that imports from countries with anti-dumping measures stood at 50,606 metric tonnes while from other countries, other than Saudi Arabia, it constituted a mere 0.32 metric tonnes. However, the imports during the last three months, January to March, 2016, from Saudi Arabia stood at 8,791 metric tonnes. The designated authority also found that there was price cutting by the Saudi Arabia exporters/producers during these three months to the extent of 25–35%. The landed price was shown at Rs.39.43 Ps. per kilogram by the designated authority in the table at page 33. The authority also determined that there was price underselling to the extent of 55–75% with reference to this landed price. The landed price of the product in Saudi Arabia was found to be significantly lower than the NIP determined for the domestic industry. The authority also noted that losses were reported by the domestic industry during the period of investigation. The domestic industry was stated to have a market share of 16% while countries with anti-dumping measures stood at 72% and Saudi Arabia, by itself, had 12%.

Factors affecting domestic prices were dealt with by the designated authority in para 72 at page 38 of the final findings. The primary factor, according to the designated authority, affecting domestic prices was the landed value of the subject goods from countries like the European Union, Malaysia, Singapore, South Africa and the USA, subjected to anti-dumping investigation earlier, along with Saudi Arabia for a duration of three months i.e., January to March, 2016.

As to his conclusions on injury, the designated authority noted that imports from Saudi Arabia had entered India in significant volume in the last three months of the period of investigation, both in absolute terms and in relation to production and consumption in India. He also noted that these dumped imports were undercutting the prices of the domestic industry in the market. He further noted that dumped imports from Saudi Arabia as well as other countries had adversely impacted the performance of the domestic industry in respect of production, domestic sales, capacity utilization, inventories, market share, profits, cash profits and returns on investment. He noted that performance of the domestic industry had improved when investigations for imposition of anti-dumping duty on other sources were still under process in the first nine months of the period of investigation but the anti-dumping measures were imposed post period of investigation. Performance in respect of the parameters of sales, production and capacity utilization deteriorated in the last quarter of the period of investigation, i.e., January to March, 2016, as fresh imports from Saudi Arabia started. During the first nine months of investigation, the designated authority found that the domestic industry's market share was 22% while other countries, contracting anti-dumping duty, had a market share of 78%. Positive price undercutting was established only from Malaysia but the price depreciation

effect was quite significant. In relation to the last three months of the period of investigation, January to March, 2016, the designated authority noted that price undercutting was positive for all major countries, including Saudi Arabia, excepting the European Union which was negative even during the earlier nine months. The price depreciation was found to be slightly less as compared to the previous nine months but the market share of the domestic industry fell from 22% to 3%. Injury parameters in terms of market share were set out by the designated authority in a tabular form at page 41 of the final findings. The domestic industry's market share stood at a paltry 3% while the Saudi Arabia had captured 39% market share while other countries who attracted anti-dumping duty stood at 58%. In actual terms, sales by the domestic industry stood at 792 metric tonnes while imports from countries attracting anti-dumping duties stood at 13,104 metric tonnes and imports from Saudi Arabia stood at 8,791 metric tonnes. The injury margin for each of the five exporters/producers was considered for determination of the weighted average injury margin and stood at 70–80% for three of them and at 80–90% for the other. These exporters/producers were represented by counsel who specifically raised the contention that import duty of three months was insufficient for identification of injury. In relation to this issue, the designated authority concluded in the disclosure statement that imports from Saudi Arabia had entered in India in significant volume in the last three months of investigation, both in absolute terms and in relation to production and consumption in India, and these dumped imports were undercutting the prices of the domestic industry in the market. In its examination of various issues in para 93, the designated authority noted as under:

- '(i) ...
- (ii) ...
- (iii) ...

(iv) The market entry price by any new player in a global market tend to match and compete with the existing prices in the importing market. The prices available to Saudi Arabia for reference during January – March 2016 were the uncorrected prices from 5 countries viz. EU, Malaysia, Singapore, South Africa and the USA which got corrected to a fair level in April 2016 after levy of AD measures. The prices in January – March 2016 were therefore not set by producers/exporters from Saudi Arabia but given to them. The export price pattern of exports from Saudi Arabia in a situation where other prevailing prices in India were restored to a fair level can only be evaluated if a larger period beyond Pol was available to consider export pattern/prices from Saudi Arabia. The Pol under present investigation therefore constrains a fair and objective assessment of causality between the exports by Saudi Arabia to India and consequential injury to Domestic Industry during the considered Pol.

(v) Since the investigation is for examining material injury and not for evaluating threat of injury or material retardation to Domestic Industry, a reasonable duration of period is warranted to capture the price and volume trend from Saudi Arabia and to analyse impact of factors other than dumped imports to exclusively establish a causal link between dumping and consequential injury. The 3 months of exports from January – March 2016 is not sufficient enough in this case to conclusively establish a causal link between exports from Saudi Arabia and injury to Domestic Industry. The Authority holds that post Pol data cannot be referenced for the above analysis as for the current investigation Pol is fixed as 1st April, 2015 to 31st March, 2016, for determining material injury to Domestic Industry on account of dumping during this period.

(vi) ...

(vii) ...

It is on the strength of this reasoning that the designated authority returned its conclusions and recommendations in para 94, as set out *supra*.

It may be noted that though the designated authority seems to have proceeded under the assumption that the scope of the investigation was circumscribed by the prayer of the petitioning domestic industry, the petitioner company, the Rules of 1995 do not support such a narrow interpretation. Rule 4 thereof, as already stated, sets out the duties of the designated authority and requires it to submit its findings, provisional or otherwise, to the Central Government not only as to the injury but also the threat of injury to an industry established in India or the material retardation to the establishment of an industry in India, consequent upon import of a like article from the specified countries. Therefore, the designated authority

was wholly unjustified in holding that it had no mandate to look into the possible threat of injury to or material retardation of the domestic industry consequent upon the import of the product from Saudi Arabia. Rule 5(2) of the Rules of 1995 merely requires the application to specify the injury, where applicable, but that by itself would not circumscribe the duty of the designated authority under Rule 4(1)(c). Rule 11 also makes this clear as the designated authority is required thereunder to record a finding that import of the like article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India. This Rule is captioned 'Determination of injury' and therefore makes it clear that the scope of the investigation is not dictated or restricted by the contents of the application made by the domestic industry under Rule 5(2). Rule 11(2) categorically states that the designated authority shall determine the injury to domestic industry, the threat of injury to domestic injury, the material retardation to establishment of domestic industry and a causal link between the dumped imports and injury, taking into account all relevant factors. The refusal by the designated authority in the case on hand to look into any possible threat of injury or material retardation to the establishment of any industry in India therefore falls short of the statutory mandate. That apart, the specific conclusion of the designated authority was that the investigation had to be terminated in accordance with Rule 14(b) of the Rules of 1995. Rule 14(b) reads as under:

'14. Termination of investigation.- The designated authority shall, by issue of a public notice, terminate an investigation immediately if –

- (a) ...
- (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) ...
- (d) ...

(e) ...'

It is evident from the aforestated provision that it is only when the designated authority does not find sufficient evidence of dumping or, where applicable, injury to justify the continuation of the investigation that it can terminate it. In the case on hand, as already noted *supra*, the findings recorded by the designated authority clearly demonstrated sufficient evidence of dumping within the short span of three months by the exporters/producers from Saudi Arabia and also the injury caused to the domestic industry thereby. Therefore, the designated authority could not have taken recourse to this clause for justifying the termination of investigation. In fact, none of the clauses in Rule 14, which deals with termination of investigation, had application whereby the designated authority could have taken such a step.

Significantly, the purport of anti-dumping law is not to protect any particular industrial company in India but to safeguard national interest by preventing foreign exporters/producers from extinguishing domestic initiative and industry by monopolizing the market through dumping of their products, making the domestic industry unviable through unfair competition. The designated authority seems to have lost sight of this perspective and treated the matter as one personal to the petitioner company and not to national interest. When the designated authority found that several other countries who were exporting the very same product to India had been subjected to anti-dumping measures, allowing exporters/producers from Saudi Arabia to do so without subjecting them to the same anti-dumping measures, even though their activities within a short span of three months clearly indicated their invasive capturing of the domestic market and the consequential injury to domestic industry, was clearly not warranted. Though the

counter-affidavit stressed upon the designated authority not rendering final findings and recommendations only on the ground that the dumping took place for three months during the period of investigation, the final findings, as set out *supra*, clearly indicate to the contrary. It may also be noted that the Rules of 1995 specifically provide for extension of the period of investigation but despite the same, the designated authority did not deem it appropriate to seek such extension.

Though the learned Assistant Solicitor General for India appearing for the respondents would contend that Annexure-I to the Rules of 1995 would indicate that at least six months sales need to be taken into account, we are of the opinion that the argument is misconceived. Annexure-I relates to determination of normal value, export price and margin of dumping and in respect of all these three aspects, the designated authority had no difficulty in determining the normal value, export particulars and margin of dumping in relation to exporters/producers from Saudi Arabia. Further, Clause (2) in Annexure-I speaks of the period of six months in the context of sales made by such exporters/producers of the like product in their domestic market or to a third country for the purpose of determining the normal value and no more. This clause therefore does not indicate any requirement of the dumping being in excess of three months during the period of investigation, as wrongly assumed by the designated authority in its final conclusion. There is no mention of any length of duration being required in the context of the Rules of 1995 for ascertaining or evaluating the injury to the domestic industry by dumping of like products by exporters/producers from foreign countries, but all through, the designated authority linked the three months period, January to March, 2016, to justify his termination of the investigation, which is wholly unsustainable.

On the above analysis, this Court finds that the designated authority, having recorded findings in support of the injury sustained by the domestic industry by dumping of like products by exporters/producers from Saudi Arabia, failed to carry through on the same note and strangely did a *volte-face*, when it came to the final recommendation. This was on the strength of his misconceived notion that a three month span of dumping was insufficient for recording a finding. As we have already noted that there is no such mandate in the Rules of 1995, the Final Findings dated 28.11.2017 are set aside and the matter is remitted to the designated authority for consideration afresh, taking into account the scheme and structure of the Rules of 1995 and the observations made hereinabove. This exercise shall be completed expeditiously and, in any event, not later than two months from the date of receipt of a copy of this order.

The writ petition is accordingly allowed to the extent indicated above. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

T.AMARNATH GOUD,J

31st JULY, 2018

Note: L.R. copy to be marked.
(B/ o) PGS