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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 13.02.2018

+ W.P.(C) 1366/2018 & CM APPL. 5661-5662/2018

STEEL AUTHORITY OF INDIA LIMITED Petitioner

Through: Mr. S K Bagaria, Sr. Advocate
with Mr. Sunil K Jain, Mr.
Pawanshree Agrawal & Ms. Reeta
Chaudhary, Advocates

versus

DESIGNATED AUTHORITY DIRECTORATE GENERAL OF
ANTI-DUMPING & ORS. Respondents

Through: Mr. Jitendra Singh &
Mr. Vaibhav Sharma, Advocate for R-3 and 4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. This writ petition questions and seeks the quashing of para 7 of Annexure-1 of the Anti- Dumping Rules as being *ultra vires* Section 9A of the Customs Tariff Act, 1975 and for a direction to not levy anti-dumping duty charged on the graphite electrode imported from China. According to the Petitioner the Customs, Excise and Service Tax Appellate Tribunal (“CESTAT” hereafter) incorrectly assessed the anti-dumping duty without proper appreciation of the law. The Petitioner also consequently questions the CESTAT’s final order dismissing its appeal and confirming the findings of the Designated Authority for imposition of anti-dumping duty on Graphite Electrode (“the product”).

2. The first respondent (the Designated Authority “DA”) had, by Public Notice/Notification dated 20.05.2013 initiated an anti-dumping investigation on the import of the product from the People’s Republic of China. The Petitioner filed its comments dated 05.11.2014 to the disclosure statement questioning the imposition of anti-dumping duty as illegal. The DA heard and recommended the imposition of duty; aggrieved by the final finding of DA and the impugned Customs Notification dated 13.02.2015 issued by the Union Ministry of Finance (“MoF”), the Petitioner appealed to the CESTAT. The CESTAT dismissed the appeal of the Petitioner by summarily concurring with the findings of the DA. The Petitioner thereafter appealed under section 130E of the Customs Act, 1962 (hereafter, also referred to as the “Customs Act”) read with section 9A(8) of the Customs Tariff Act, 1975 (hereafter, also referred to as the “CTA”) to the Supreme Court. The Supreme Court by its judgment dated 17.04.2017, examined section 130 of the Customs Act, in light of reference jurisdiction and proceeded to hold as follows:

“10. What is required to be noticed at this stage is that under the Customs Act, 1962, (as amended), against an order of the appellate tribunal on a question not relating to duty or to classification of goods, an appeal lies to the High Court on a substantial question of law. A reference, again, on a question of law, may also be made to the High Court in respect of similar orders of the appellate tribunal (not relating to determination of duty or classification of goods) passed on or before 1.7.2003. At the same time, a direct appeal to the Supreme Court against an order of the appellate tribunal on a question relating to the rate of duty or classification of goods has also been provided for. No conditions, restrictions or limitations on the availability of the appellate remedy before the Supreme Court is envisaged

in the main Section [130E (b)] though under Section 130F conditions to the exercise of the appellate power seem to have been imposed, the precise application of which is the determination i.e. required to be made by us.

19. On the basis of the discussion that have preceded, it must therefore be held that before admitting an appeal under Section 130E (b) of the Customs Act, the following conditions must be satisfied:

(i) The question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the determination of the value of the goods for the purposes of assessment of duty. This is a sine qua non for the admission of the appeal before this Court under Section 130E(b) of the Act.

(ii) The question raised must involve a substantial question of law which has not been answered or, on which, there is a conflict of decisions necessitating a resolution.

(iii) If the tribunal, on consideration of the material and relevant facts, had arrived at a conclusion which is a possible conclusion, the same must be allowed to rest even if this Court is inclined to take another view of the matter.

iv) The tribunal had acted in gross violation of the procedure or principles of natural justice occasioning a failure of justice.”

3. The Supreme Court, *inter alia*, by the above examination of sections 130, 130A, 130E and 130F of the Customs Act, and in light of *Navin Chemicals Mfg. and Trading Co. Ltd. v. Collector of Customs*(1993) 4 SCC 320 and *Collector of Customs, Bombay v Swastic Woollen (P) Ltd. and Ors.* AIR 1988 SC 2176 upheld the findings recorded by the Appellate Tribunal and refused admission to the

Petitioner. The Petitioner thereafter moved an application seeking clarification of the judgment dated 17.04.2017, regarding whether the Petitioner is at liberty to move either before the High Court under Article 226/227 of the Constitution or before the Supreme Court under Article 136 of the Constitution; that was dismissed by the Supreme Court by its order dated 23.10.2017, and the Petitioner has thereafter, preferred this writ petition.

4. The relevant sections/rules are as follows:

Section 9A of the Customs Tariff Act, 1995

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

(1) Where any article is exported by an exporter or produced from any country or territory (hereinafter 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 (c) defines for this section the meaning of the phrase “normal value” to mean as under:-

“(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 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 representatives 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 transshipped 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.”

Paragraph 7 of Annexure-1 of the Anti- Dumping Rules reads as follows:

“7. In case of imports from non-market economy countries, normal value shall be determined on the basis if the price or constructed value in the market economy third country, or the price from such a third country to other countries, including India or where it is not possible, or on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin. An appropriate market economy third country shall be selected by the designated authority in a reasonable manner, keeping in view the level of development of the country concerned and the product in question, and due account shall be taken of any reliable information made available at the time of selection. Accounts shall be taken within time limits, where appropriate, of the investigation made in any similar matter in respect of any other market economy third

country. The parties to the investigation shall be informed without any unreasonable delay the aforesaid selection of the market economy third country and shall be given a reasonable period of time to offer their comments.”

5. The Supreme Court, in its judgment dated 17.04.2017 observed that no challenge to the validity of any provision 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”), which sets out the procedure for determination of the margin of dumping, was laid before the Appellate Tribunal, and the CESTAT, after due consideration, concluded that the report of the Designated Authority neither suffered from excessive imposition of confidentiality, nor from the non-consideration of any of the grounds urged on behalf of the Petitioner.

6. The Tribunal further observed that, the final findings of the Designated Authority show that to determine the margin of dumping the said authority undertook an exercise to find out the normal value of graphite electrodes in the Republic of China and then proceeded to compare the same with the export price of the product. The Designated Authority on conclusion of an arduous determination process held that the margin of dumping varies from one exporter to the other and the percentage thereof varies from 20 to 95 per cent, in addition to methodically establishing that the domestic industries are suffering material injury due to dumping of graphite electrodes from exporters within China. In light of the above narration, the Supreme Court held that the findings recorded by the Appellate Tribunal on the basis of which the

appeal of the Petitioner has been dismissed, are findings of fact arrived at on due consideration of all relevant materials on record.

7. In the present proceedings, the Petitioner again questions the CESTAT's order dated 06.09.2016; this time saying that the determination of 'normal value' as provided in para 7 of Annexure -1 read with Rule 10 of the Anti- Dumping Rules is *ultra vires* section 9A of the Customs Tariff Act, as the Act does not provide for determining the normal value on the basis of actual price paid or payable in India as the same would be contrary to the very purpose of imposing anti-dumping duty which is on the basis that the exporter should not be dumping the goods less than the price which is paid in the ordinary course of trade in the exporting country. The Petitioner urges for the quashing of para 7 of Annexure-1 of the Anti- Dumping Rules as being *ultra vires* Section 9A of the Customs Tariff Act, and thereby, has also prayed for the removal of the anti-dumping duty charged on the graphite electrode imported from China, since, according to their submissions, the CESTAT has incorrectly assessed the anti-dumping duty without proper appreciation of the law.

8. In the opinion of this court, the question cannot be considered as it would be affording the Petitioner a fresh round to litigate the self same cause of action. The Petitioner is a corporation; one of the largest public sector companies, no less. It was well aware about the applicable law; especially the impugned Para 7 of Annexure I to the Anti Dumping Rules. Yet, in the previous round of litigation, it did not urge about the alleged *ultra vires* of the said rule; it could well have urged it, at least as a contention. *Res judicata* and constructive *res judicata* are well recognized

principles that the courts in India follow, to screen out multifarious litigation by the same parties on the same issue.

9. In *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735, the Supreme Court explained the *rationale* and working of Order 2, Rule 2 as follows:

“Both the principle of res judicata and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of Mohd. Khalil Khan v. Mahbub Ali Mian³ the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, “whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit”. If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in Kewal Singh v. Lajwanti⁴ (SCC at p. 295 : AIR at p. 163) and in Inacio Martins case².

10. It is well settled that the cause of action for a suit comprises all those facts which the plaintiff must aver and, if traversed, prove to support his right to the judgment.”

Likewise, in *Forward Construction Co & Ors v. Prabhat Mandal* AIR 1986 SC 391 the Supreme Court held that:

"The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."

In the present case, there is no dispute that the Petitioner had sufficient opportunity to challenge the provisions it impugns here. Therefore, its failure to do so, now results in this court's exercise of discretion not to entertain the challenge on substantive basis.

10. Furthermore, even otherwise, to assess whether a rule is *ultra vires* the parent act, it is necessary to read the sub-ordinate legislation within the larger meaning of the parent statute. This was highlighted in *Commissioner of Central Excise & Customs v. Venus Castings (P) Ltd.* AIR 2000 SC 1568, as follows:

“In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment.”

11. Again, in *State of Tamil Nadu and Anr. v. P. Krishnamurthy and Ors.* AIR 2006 SC 1622 the court citing a catena of related decisions enunciated the reasons for challenge to sub-ordinate legislation and held as follows:

“12. There is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a sub-ordinate legislation can be challenged under any of the following grounds:-

a) Lack of legislative competence to make the sub-ordinate legislation.

b) Violation of Fundamental Rights guaranteed under the

Constitution of India.

c) Violation of any provision of the Constitution of India.

d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

e) Repugnancy to the laws of the land, that is, any enactment.

f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

The court considering the validity of a sub-ordinate Legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate Legislation conforms to the parent Statute. Where a Rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non- conformity of the Rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity.”

12. In the present case, as observed above, the Supreme Court in its judgment dated 17.04.2017 has made the following pertinent observations:

(i) That no challenge to the validity of any provision of the Anti Dumping Rules which sets out the procedure for determination of the margin of dumping was laid before the Appellate Tribunal.

(ii) That, the Tribunal, on due consideration, came to the conclusion that the report of the Designated Authority neither suffers from any excessive imposition of

confidentiality nor from the alleged non-consideration of any of the grounds urged on behalf of the appellant (the Petitioner).

(iii) That the findings recorded by the Appellate Tribunal on the basis of which the Petitioner's appeal was dismissed, were findings of fact arrived at on due consideration of all relevant material on record.

13. The Supreme Court in its decision has already examined and apprised the correctness of the method, employed by the Designate Authority of determining the normal value of electrodes within China by comparing individual work undertaken by an exporter *vis-a-vis* the export price imposed, as follows:

“22. The learned Tribunal, on due consideration, came to the conclusion that the report of the Designated Authority neither suffers from any excessive imposition of confidentiality nor from the alleged non-consideration of any of the grounds urged on behalf of the appellant. The tribunal further held that the Designated Authority had followed an acceptable method of determining the normal value of electrodes within China by comparing individual work undertaken by an exporter vis-a-vis the export price imposed and that there was no infirmity in the matter of such determination.

23. Specifically, the final findings of the Designated Authority disclose that to determine the margin of dumping the said authority undertook an exercise to find out the normal value of graphite electrodes in the Republic of China and then proceeded to compare the same with the export price of the product. The Designated Authority on conclusion of an arduous determination process came to the conclusion that the margin of dumping varies from one exporter to the other and the percentage thereof varies from

20 to 95 per cent. The Designated Authority also found that the demand for graphite electrodes from the domestic industries had increased by 37% during the period of investigation (2009-2012) whereas the demand from particular exporters in China had increased by 177 per cent during the same period. The Designated Authority further found that during the period of investigation the production of graphite electrodes by the domestic industry had decreased whereas the import of the same from China had increased substantially and, therefore, the domestic industries are suffering material injury due to dumping of graphite electrodes from exporters within China. It is on the basis of the aforesaid findings that the Designated Authority had recommended that anti-dumping duty be imposed which found manifestation in the Gazette Notification dated 13.2.2015.

24. The above narration clearly disclose that the findings recorded by the learned appellate tribunal on the basis of which the appeal of the present appellant has been dismissed are findings of fact arrived at on due consideration of all relevant materials on record. If that is so, on the ratio of the decision of this Court in the case of *Swastic Woollen (supra)* we will have no occasion to have a re-look into the matter in the exercise of our appellate jurisdiction under Section 130E(b) of the Act.

25. The appeal, consequently, is dismissed refusing admission.”

14. The Supreme Court, thus, found no infirmity in the process of such determination of the normal value, and did not interfere with the Appellate Tribunal's decision to uphold the final findings of the Designated Authority. The Apex Court did not find any repugnancy in the congruity of the Anti- Dumping Rules with the Customs Tariff Act; specifically in the determination of the normal value. It is established that there emerges no lack of legislative competence to make the Anti-

Dumping Rules or violation of fundamental rights or any provision of the Constitution of India; neither has there been any repugnancy to the laws of the land or demonstration of manifest arbitrariness/ unreasonableness. *Per contra*, the levy, exactitude of the rate of the anti-dumping duty, and the correctness of the procedure to be followed by the specific authorities has only been reaffirmed to subscribe to the true purpose of the Customs Tariff Act (the parent statute of anti- dumping law).

15. Thus, the Anti-Dumping Rules cannot be impugned as contrary to the larger purpose and spirit of anti-dumping law; a determining requirement in deciding the legitimacy of sub-ordinate legislation, as cited in the case law above. Therefore, it logically follows, that the Petitioner's submission that the determination of 'normal value' as provided in para 7 of Annexure-1 read with Rule 10 of the Anti-Dumping Rules is *ultra vires* section 9A of the Custom Tariff Act 1975 is invalid.

16. In light of the decision of the Supreme Court in its judgment dated 17.04.2017, wherein the Supreme Court confirmed the upholding of the final findings of the Designated Authority by the CESTAT; including the procedure used to determine the normal value, and the rate of anti-dumping duty; it is not for this Court to now re-examine any repugnancy in the Anti Dumping Rules in light of the Customs Tariff Act, since there is no vagueness about whether Rule 10 of the Anti- Dumping Rules is *ultra vires* of the Customs Tariff Act. In other words, it is now established that there is no inconsistency or non- conformity of Rule 10 of the Anti- Dumping Rules, (that provides that normal value, export price and margin of dumping is to be determined taking into account the

principles laid down in Annexure 1 to these Rules) with section 9A of the Customs Tariff Act, and the subordinate legislation in the present case is not contrary to the purpose of imposing anti- dumping duty as imbibed in the parent act.

17. After considering the materials on record and the submissions of the Petitioner, it is also evident that the Petitioner is seeking to agitate the same grievance, but now in the guise of challenging the *vires* of rules, which are alleged to have prejudiced its case. This challenge could have been made at the stage when the grievance first arose, i.e., when the initiation of anti-dumping proceedings was undertaken. Having undertaken the entire process, participated in the process and suffered an order on the merits, which was upheld by the Supreme Court, it is now not open to the Petitioner to initiate a fresh round, albeit with a new ground, on the pretext that it seeks to challenge the *vires* of a rule.

18. For the foregoing reasons, it is held that the petition lacks merit; it is accordingly dismissed. There shall be no order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 13, 2018