IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27/6/2019

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Review Application No.46 of 2019
in
WA.No.412 of 2018

Tariq Glass Industries Ltd
128 J, Model Town
Lahore
Pakistan ... Petitioner

Vs

1. Saint - Gobain India Private Ltd
rep. by its Team Leader
Finance & Company Secretary
Mr.L.Venkateswaran
Sigapi Achi Building
7th Floor, 18/3 Rukmini Lakshmipathy Road
Egmore, Chennai 600 008.

2. Union of India
Ministry of Finance
Department of Revenue
North Block
New Delhi 110 001.

3. The Directorate General of
Anti Dumping and Allied Duties
(through the Designated Authority)
Ministry of Commerce
Udyog Bhawan
New Delhi 110 001. ... Respondents

Review Petition filed under Order 47 Rule 1 and 2 of the Code of Civil Procedure against the order passed in W.A.Nos.412 to 414 of 2018, dated 14/11/2018.

WA No.412 of 2018: Appeal filed under Clause 15 of Letters patent to set aside the Impugned Order dated 06.11.2017 in W.P.No.12950 of 2017, set aside the Final finding recommendation dated 10.04.2017 issued by the Second respondent and consequent Notification bearing No.30/2017 - Customs (ADD) dated 16/06/2017 issued by the first respondent.

WA No.413 of 2018:- Appeal filed under Clause 15 of Letters patent to set aside the impugned order dated 06.11.2017 in W.P.No.14346 of 2017, set aside the Final finding recommendation dated 10.04.2017 issued by the Second respondent and consequent Notification bearing No.30/2017 – Customs (ADD) dated 16/06/2017 issued by the first respondent.

WA No.414 of 2018: Appeal filed under Clause 15 of Letters patent to set aside the Impugned Order dated 06.11.2017 in W.P.No.17696 of 2017, set aside the Final finding recommendation dated 10.04.2017 issued by the Second respondent and consequent Notification bearing No.30/2017 – Customs (ADD) dated 16/06/2017 issued by the first respondent.

WP No.12950 of 2017: Petition filed under Article 226 of the Constitution of to issue a writ of certiorari to call for the records of the Final findings bearing F.No.15/16/2015-DGAD dated 10.4.2017 issued/passed by the Respondent No.2 as modified vide Corrigendum dated 12.4.2017 issued by the Respondent No.2 and quash the same.

WP No.14346 of 2017:Petition filed under Article 226 of the Constitution of India to issue a writ of certiorari to call for the records of the Initiation Notification bearing F.No.15/16/2015- DGAD dated 23.9.2015 issued/passed by the respondent No.2, and quash the same.

WP No.17696 of 2017:Petition filed under Article 226 of the constitution of India to issue a writ of certiorari to call for the records of the Notification bearing No.30/2017- Customs (ADD) dated 16.06.2017 issued by the respondent No.1 and quash the same.

For petitioner ... Mr.R.Parthasarathy
For respondent ... Mr.Karthick Sundaram for R.1.

Mr.A.P.Srinivas for R.2

Mr.T.L.Thirumalaisamy for R.3.

O R D E R
(Order of the Court was made by Subramonium Prasad,J)

Instant Review Petition has been filed against the common order passed in W.A.Nos.412 to 414 of 2018, dated 14/11/2018.

2. When the Review Petition came up for hearing, on 11/2/2019, learned counsel for the review petitioner submitted that submissions made by him, have not been taken note of in the common order, dated 14/11/2018, made in W.A.Nos.412 to 414 of 2018. Taking note of the said submission, notice was issued.

3. Learned counsel for the review petitioner contends that since none of the arguments raised by him, have not been noted in the impugned judgment, the only course open to him is to file the instant review petition. Learned counsel for the petitioner placed strong reliance, on a Constitution bench judgment, consisting of five Judges, in T Daman Singh v. State of Punjab, (1985) 2 SCC 670 at page 682, wherein at paragraph 13, the Hon'ble Supreme Court, held as under:-

> "13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and Counsel to raise innumerable grounds in the petitions and memoranda of appeal etc. but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or Counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not?"

4. Heard Mr.R.Parthasarathy, learned counsel for the petitioner, Mr.Karthick Sundaram for R.1, Mr.A.P.Srinivas for R.2 and Mr.T.L.Thirumalaisamy for R.3.

5. At the outset, it should be made clear that though it is contended that the precise argument raised by the review petitioner has not been noted, but reading of the judgment made in Common Order W.A.Nos.412 to 414 of 2018, dated 14/11/2018, would indicate that essence of the argument has been considered.

6. Learned counsel for the review petitioner would argue that the period of investigation for the purposes of New Shipper Review is from 1/7/2015 to 31st March 2016. Initiation Notification was issued on 23rd September 2015. The initiation notification stated that any information relating to the present investigation should be sent in writing, so as to reach the authority, not later than 40 days, from the date of completion of the period of investigation. It further states that, if no information is received within the prescribed time limit, or the information received is incomplete, the Authority may record its findings, on the basis of the facts available on record, in accordance with Anti-Dumping Rules. He would contend that since information can be given till 10th May 2017, the period of calculating the limitation should be reckoned from 10.05.2017 and the impugned order, which has been passed, on 10th April 2017, is within a period of one year. He would contend that the impugned judgement therefore suffers from an error apparent on the face of record.

7. Learned counsel for the review petitioner would argue that provisional assessment is always prospective and time has to be reckoned only, after the period of furnishing the information by the petitioner, which has been done.

8. Before adverting to the grounds and submissions for review of the common order, made in W.A.Nos.412 to 414 of 2018, dated 14/11/2018, let us consider the law on review.

(i) In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma reported in AIR 1979 SC 1047, the Supreme Court held that,

> "there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors

committed by the subordinate court."
(emphasis supplied)

(ii) In Union of India v. Kamal Sengupta reported in 2008 (8) SCC 612, the Supreme Court, at Paragraphs 14 and 15, held that,

> "14. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justiciae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court earlier.
>
> 15. The term `mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the power of review, the concerned Court/Tribunal cannot sit in appeal over its judgment/decision."

9. Notification No.14/25/2012-DGAD, dated 11/4/2013, was issued for initiating investigation, under Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter called as ADD Rules for short), on imports of Float Glass, exported from Pakistan, Saudi Arabia and UAE. The period of investigation was fixed from 1/10/2011 to 31/12/2012 i.e., 15 months. The Anti-Dumping duty was issued under Rule 18 of ADD Rules, at the rate of Rs.123.61 for Float Glass, from Pakistan.

10. M/s. Tariq Glass Industries Ltd., filed an application, requesting for review of Anti Dumping Duty of Float Glass exported by them, from Pakistan. The said application was

styled as New Shipper Review. The said application was considered under Rule 22 of the ADD Rules. The authority decided to initiate New Shipper Review with regard to the import of Clear Float Glass, in respect of M/s. Tariq Glass Industries Ltd. The period of investigation was fixed from 1/7/2015 to 31/3/2016 i.e., for a period of nine months.

11. Notification bearing No.53/2015-Cus (ADD), dated 30/10/2015, was issued, ordering provisional assessment, for Tariq Glass Industries Ltd., till the completion of New Shipper Review, initiated by the authority. Final Notification was issued on 10/4/2017. Since the amount was left blank, a Corrigendum Notification was issued, on 12/4/2017, recommending ADD, at the rate of 23.54 per MT, for the import of Clear Float Glass of nominal thickness, ranging from 4mm to 12 mm. It is this Notification, dated 10/4/2017, published on 12/4/2017, which is after 15 months of the date of the newspaper review.

12. The issue in the writ appeals was, as to whether the time limit for completing the New Shipper Review, under Rule 22 of the ADDR must be read into Rule 22 or not and the said issue has been answered, at paragraph No.47, in W.A.Nos.412 to 414 of 2018, reads as under:-

> “The time limit for completing the New Shippers Review must be read into Rule 22 of ADD. In the present case, the procedure under Rule 22 was initiated on 23/9/2015 and it culminated on 12/4/2017 after 18 months, which is more than the time prescribed in Rule 17 and Rule 23. The New Shippers Review initiated by Notification dated 23/9/2015, and culminating in final finding dated 10/4/2017, is clearly barred by time. Even in the absence of time limit fixed in Rule 22, a review undertaken under Rule 22 is required to be completed on an accelerated basis i.e, definitely before the time period prescribed in Rule 17 of Rule 23.

13. Rule 17 of the ADD Rules stipulates that the designated authority shall, within one year from the date of initiation of investigation, determine as to whether or not, the goods under investigation is being dumped in India.

14. Rule 23 of the ADD Rules which deals with Review, states that designated authority shall from time to time review the need for the continued imposition of ADD and shall, if it is satisfied on the basis of information received by it that, there is no justification for the continued imposition of such duty, recommend to the Central Government for its withdrawal. It specifies that provision of Rule 17 shall be applicable, in the case of review. We deem it to extract the proviso to Rule 17

and Rule 23 of the ADD Rules,

Rule 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, 5 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.

(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.

Rule 23:- Review. - (1) The designated authority shall, from time to time, review the need for the continued imposition of the anti-dumping duty and shall, if it is satisfied on the basis of information received by it that there is no justification for the continued imposition of such duty recommend to the Central Government for its withdrawal.

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

(3) The provisions of rules 6, 7, 8, 9/10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review.

15. Rule 22 deals with Mid Shippers Review, and it deals with only such of those exporters who were not investigated by the authority under Rule 17, and the same is extracted hereunder:-

Rule 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 antidumping 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.

16. Article 9.5 of the General Agreement specifically states that Mid Shippers review shall be initiated and carried out, on an accelerated basis and then compared to the normal duty assessment and review proceedings in the importing member. Article 9.5 of the General Agreement, reads as under:-

a. If a product is subject to anti-dumping duties, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping, for any exporters or producers in the exporting Country who have not exported the product to the importing member during the period of investigation.

b. These exporters 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.

c. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member.

d. No anti-dumping duties shall be levied on imports from such exporters or producers while the review has been carried out.

e. The authorities may, withhold appraisement and/or request guarantees to ensure that should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

17. It has been the specific stand of that New Shippers Review would be dealt with promptly.

18. The whole exercise is to ensure that foreign exporters must not be allowed to dump their goods into India, on the basis of provisional assessment to the detriment of Indian Domestic Industry. A foreign exporter, not a party to the Initiation Notification alone, is entitled to avail Rule 22 of the ADD. Petitioner knows the pricing of other importers, who are importing their goods into India. He can therefore manipulate the accounts to ensure a lower anti-dumping duty. Further if the time limit for Mid Shippers Review is longer, then such an importer would be in a position to dump the goods, on the basis of provisional assessment into India to the detriment of Indian Domestic Industry.

19. Reliance of the learned counsel for the petitioner, to paragraph 13 of the Initiation Notification, dated 23/9/2015, to contend that time limit for counting the period of investigation must begin only after 40 days, after the completion period of investigation, cannot be accepted. Paragraph 13 of the Initiation Notification, dated 23/9/2015, reads as under:-

> “Any information relating to the present investigation should be sent in writing so as to reach the Authority at the address mentioned above not later than forty days (40 days) from the date of the completion of the Period of Investigation. If no information is received within the prescribed time limit or the information received is incomplete, the Authority may record its findings on the basis of the facts available on record in accordance with the AD Rules."

20. Paragraph 13 in the Initiation Notification only states that any information relating to investigation, should be sent in writing within 40 days from the date of completion of the period of investigation. This cannot be understood to mean that the period of determining the anti -dumping duty must be reckoned only after the 40th day after the period of investigation is over. Such an interpretation will go against the mandate of Rule 17 of the ADD Rules, Article 9.5 of the General Agreement and the stand of the country on this appeal.

21. We are therefore of the view that the period of one year therefore, cannot be counted, after the date of last period of time limit.

22. It is also pertinent to mention that clause, similar to clause 13 is also there in the Initiation Investigation, under Rule 17. When such a clause is present, it is mandated that the exercise has to be completed within the time stipulated in Rule 17 and the period within which the anti-dumping duty has to be arrived at, cannot be reckoned after 40 days of the completion of the investigation. If such a view is taken, then it would amount to rewriting Rule 17. The same interpretation is therefore, to be given, while considering the Mid Shippers Review also. Going through the entire material on record, we are of the view that, Review Petitioner has pointed out, any error apparent, on the face of the record.

23. In view of the above observation, Review Petition is dismissed. No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

Mvs

To

1. Union of India
Ministry of Finance
Department of Revenue
North Block
New Delhi 110 001.

2. The Directorate General of
Anti Dumping and Allied Duties
(through the Designated Authority)
Ministry of Commerce
Udyog Bhawan
New Delhi 110 001.

+1cc to Mr.Karthik Sundaram, Advocate, S.R.No. 53266
+1cc to Mr.Lakshmikumaran, Advocate, S.R.No. 53590

Review Application No.46 of 2019

MR(CO)
GN(23/07/2019)