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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgement reserved on: 16.01.2023

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Judgement pronounced on: 19.07.2023

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CUSAA 48/2021 & CM No.44762/2021

DOW CHEMICAL INTERNATIONAL PVT LTD Appellant

Through: Mr S. Ganesh, Sr. Adv. with Ms Shiraz Patodia, Mr Ashish Singh, Ms Juhi Chawla and Mr Mayank Singhal, Advs.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr Satish Kumar, Sr. Standing Counsel with Ms Vaishali Goyal and Mr Dhruv, Advs. for R-1.
Mr Sandeep Sethi, Sr. Adv. with Mr Jitendra Singh, Mr Anshumaan Sahni and Mr Akshay Soni, Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

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RAJIV SHAKDHER, J.:

PREFACE

1. This is an appeal preferred under Section 130 of the Customs Act,



1962 [in short, "the 1962 Act"] against an interim order dated 01.11.2021 passed by the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi [in short "the Tribunal"].

1.1 *Via* order dated 01.11.2021, the Tribunal disposed of two (2) interlocutory applications, preferred by the appellant i.e., Dow Chemical International Pvt. Ltd. [hereafter referred to as, "Dow"] and another entity, going by the name Sadara Chemical Company [hereafter referred to as "Sadara"] in their respective appeals instituted before the Tribunal i.e., Appeal nos. AD/50865/2021 and AD/50864/2021.

1.2 Dow and Sadara had sought a stay of the operation of the customs notification dated 05.04.2021 issued by respondent no.1 i.e., Union of India (UOI) through Ministry of Finance, Department of Revenue, and the final findings notification dated 01.09.2020 issued by respondent no.2 i.e., the Designated Authority [in short, "DA"] [hereafter collectively referred to as "impugned notifications" unless the context requires otherwise].

2. In line with the relief sought in the interlocutory applications, in the appeals preferred before the Tribunal, a direction was sought for setting aside the aforesaid notification dated 05.04.2021 issued by UOI, whereby the recommendation made by the DA to impose Anti-Dumping Duty ("ADD") on the goods imported into the country i.e., "Flexible Slabstock Polyol" ("FSP") originating from Saudi Arabia and United Arab Emirates ("UAE") was accepted. Resultantly, FSP originating from Saudi Arabia suffers ADD at the rate of USD 150.06 per MT.

2.1 The impugned notifications were issued, based on an application lodged by respondent no.3 i.e., Manali Petrochemicals Ltd. [hereafter



referred to as "MPL"].

2.2 This led to the initiation of an investigation, pursuant to a public notice being issued on 18.09.2019. It appears, that the period which was covered during the investigation spanned between 01.04.2018 to 31.03.2019 (12 months).

3. The investigation culminated in the DA recommending, as indicated above, the imposition of ADD, which is the subject matter of the notification dated 01.09.2020. As noticed above, UOI accepted the recommendation and issued the Customs notification dated 05.04.2021.

4. In the appeal lodged by Dow before the Tribunal, which we are told is pending adjudication, according to MPL, broadly, the following grounds of challenge have been raised. These grounds have been captured in the counter-affidavit filed on behalf of MPL, which have not been refuted by Dow.

(i) The impugned Customs notification was issued without application of mind, and was bad in law; the principles of natural justice were violated while issuing the notification dated 01.09.2020, as documents and material taken into account were not put to Dow.

(ii) The dumping margin has been arrived at by the DA, in contravention of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 [in short, "the ADD Rules"].

(iii) The recommendation made *via* notification dated 01.09.2020 was illegal, and contravened the provisions of the Customs Tariff Act, 1975 [in short, "CTA"] and the ADD Rules. The recommendation contained in the



notification dated 01.09.2020 was flawed, for the reason that exports from Singapore were not considered; price undercutting, suppression and depression were not taken into account; there was no determination of causal link or return on capital employed, non-injurious price and injury margin; no basis is provided in computing the rate of duty for other exporters located in Saudi Arabia.

(iv) The disclosure statement violated principles of natural justice, and depicted bias and arbitrariness.

(v) The DA failed to take into account the interests of users and the downstream industry by ignoring the demand and supply gap in India.

5. In the appeal preferred before us, the only ground which has been raised veers around sub-rule (1) of Rule 18 of the ADD Rules. The said Rule reads as follows:

"18. Levy of duty- (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17."

6. Arguments in the matter have largely centred around the interpretation to be given to sub-rule (1) of Rule 18 of the ADD Rules, in the backdrop of the facts obtaining in the instant matter.

BACKGROUND

7. Therefore, it would be relevant to bear in mind the following undisputed facts, apart from the ones already referred to hereinabove.

7.1 The notification dated 01.09.2020 issued by the DA was assailed by



way of two writ actions i.e., W.P.(L) No.4079/2020 and W.P.(L) No.4058/2020, which were preferred by Dow and another entity, going by the name Expanded Polymer Systems Pvt. Ltd. [in short, "EPL"] before the Bombay High Court.

7.2 On 13.10.2020, the Bombay High Court passed the following interim direction:

"3] Since we are in the midst of hearing, we direct that no decision shall be taken on the final findings (recommendations) dated 01.09.2020 of Respondent no.1."

7.3 On account of the fact that the final hearing in the writ petitions was ensuing, the interim order dated 13.10.2020 was continued by the Bombay High Court *via* orders dated 15.10.2020, 21.10.2020 and 23.10.2020.

8. The final judgment in the writ petitions was rendered by the Bombay High Court on 06.01.2021. The Bombay High Court, via the said judgment disposed of the writ petitions with the following operative directions:

"33. Thus on a thorough consideration of the matter, we are of the view that filing of the two writ petitions at this stage appears to be premature. Respondent No.2 is yet to take a decision on the impugned findings. Certainly, respondent No.2 will have to apply its own independent mind taking into consideration relevant factors and thereafter take a decision on the recommendations one way or the other. Needless to say, representations submitted by the parties including the one submitted by Indian Polyurethane Association on 28.09.2020 shall be considered by respondent No.2 before taking such [a] decision. Respondent No.2 may even consider hearing the parties while carrying out the above exercise."

9. It is pursuant to the aforesaid final judgment of the Bombay High Court that Dow, on 25.01.2021, lodged a representation with UOI, *inter alia*, emphasising procedural flaws, as well as the failure of the DA to act as per statutory provisions.



9.1 Likewise, Sadara also lodged a representation with UOI on 19.02.2021, in view of the leeway given by the Bombay High Court.

10. It appears, that these representations were considered, and thereafter, the notification dated 05.04.2021 was issued by UOI.

11. As noticed at the very outset, the notifications dated 01.09.2020 and 05.04.2021 i.e., the impugned notifications were assailed both by Dow and Sadara by preferring two separate appeals before the Tribunal.

11.1 The arguments in the interlocutory application preferred by Dow were heard by the Tribunal on 06.09.2021 and 27.09.2021.

11.2 The Tribunal *via* the detailed impugned order dated 01.11.2021 refused to grant interim relief, as sought by Dow and Sadara, while making it clear that any observations made would not prejudice any of the parties when the appeals are finally heard on merits.

12. It is against this backdrop that the instant appeal was preferred in this Court by Dow.

13. Submissions in support of the appellant's stand were advanced by Mr S. Ganesh, learned senior advocate, instructed by Ms Juhi Chawla, Advocate, while on behalf of respondent no.1/UOI, submissions were made by Mr Satish Kumar, learned senior standing counsel.

13.1 MPL i.e., respondent no.3 was represented by Mr Sandeep Sethi, learned senior counsel, instructed by Mr Jitendra Singh, Advocate.

SUBMISSIONS ADVANCED ON BEHALF OF THE APPELLANT

14. The submissions of Mr Ganesh can be, broadly, paraphrased as follows:

(i) The timeline fixed in Rule 18 of the ADD Rules is specific and



mandatory. Since the DA made its recommendation for the imposition of ADD on FSP via the notification dated 01.09.2020, UOI was mandatorily required to take a view in the matter on or before 01.12.2020. [See *Association of Synthetic Fibre Industry Vs. J.K. Industries Ltd. & Ors.* (2005) 11 SCC 482 and *Nirma Ltd. Vs. Union of India* (2017) 346 ELT 328 (Guj)].

(ii) Even if the period for which the interim order dated 13.10.2020 issued by the Bombay High Court operated is taken into account, UOI could not have issued the notification after 23.02.2021. In other words, since the total time available to UOI for giving its view in the matter was 91 days, commencing from 01.09.2020, the time left with it for issuing the notification was 49 days, spanning between 06.01.2021 and 23.02.2021. The period which, if at all, could be excluded was 42 days, which spanned between 01.09.2020 and 13.10.2020.

(iii) The Tribunal erroneously distinguished and failed to appreciate the judgments rendered in *J.K. Industries Ltd.* and *Nirma Ltd.* and hence, arrived at an incorrect conclusion.

(iv) UOI's obligation to issue duty notification within the timeframe prescribed in Rule 18 of the ADD Rules, having received the *imprimatur* of Courts, is "fixed, rigid and carved in stone".

(v) The judgment rendered by the Supreme Court in *Indore Development Authority vs. Manohar Lal & Ors* (2020) 8 SCC 129 has no applicability to the facts obtaining in the instant case. The said judgment concerns the Land Acquisition Act; the scheme, object and purpose of the said Act are different from the CTA and ADD Rules, and hence, are distinguishable. The Tribunal



- disregarded the judgments on the issue, and thus, committed an error in law.
- (vi) Even if the ratio of the judgment in *Indore Development* is applied, it would only result in the exclusion of that period for which the interim order passed by the Bombay High Court remained operable. As indicated above, even if the period obtaining between 13.10.2020 and 06.01.2021 is excluded, the timeline provided under Rule 18 of the ADD Rules expired on 23.02.2021, whereas UOI issued the Customs notification only on 05.04.2021.
- (vii) The Tribunal's view, that the timeframe fixed under Rule 18 of the ADD Rules would stand extended up to the date of receipt and disposal of the representations was a "glaring" and "patent" error, apart from constituting a "brazen difference" [*sic*: "defiance"] of the law laid down in *J.K. Industries Ltd.* and *Nirma Ltd.*
- (viii) The objection raised on behalf of the respondents, concerning the maintainability of the appeal, is untenable, as an appeal can be preferred even against an interim order, provided it raised a substantial question of law. The instant appeal does raise a substantial question of law.

SUBMISSIONS ADVANCED ON BEHALF OF THE RESPONDENTS

15. Mr Satish Kumar, who defended the interim order dated 01.11.2021 passed by the Tribunal, on behalf of respondent no.1/UOI, adverted to the background in which the notification dated 05.04.2021 was issued. It was submitted, that after taking into account the facts available and contentions raised, the DA had concluded that the FSP exported to India from Saudi Arabia and UAE was priced below its associated normal value, thus, causing material injury to the domestic industry.



15.1 The recommendation made by the DA under Rule 17 of the ADD Rules, imposing ADD on FSP to remove the injury caused to the domestic industry was considered by UOI.

15.2 In arriving at its conclusion, UOI also took account of the representations lodged by Dow and Sadara on 25.01.2021 and 19.02.2021 respectively, in line with the directions issued by the Bombay High Court *via* judgment dated 06.01.2021.

15.3 UOI could not start the process of taking a decision on the recommendation made by DA after 13.10.2020, because of the interim order passed by the Bombay High Court, which was vacated only after the final judgment was rendered by it on 06.01.2021. Since the Bombay High Court, *via* its final judgment, directed that the representations filed would be considered, the argument advanced on behalf of Dow, that the notification dated 05.04.2021 was bad in law as the prescribed period of limitation had been crossed, is misconceived.

15.4 The Tribunal rightly applied the ratio of the judgment rendered by the Supreme Court in *Indore Development Authority* while excluding the period spanning between 13.10.2020 and 06.01.2021, when the final judgment was rendered by the Bombay High Court in the writ petitions instituted before it.

16. Insofar as respondent no.3/MPL was concerned, the following submissions were advanced by Mr Sandeep Sethi, learned senior counsel.

(i) The instant appeal is not maintainable, as no substantial question of law arises for consideration by this Court. This is evident upon a perusal of the grounds raised in the appeal and the fact that no final determination has



been made by the Tribunal. The Tribunal, in fact, in paragraph 70 of the impugned order has categorically indicated that observations made therein would not cause prejudice to any of the parties when the appeal lodged before it is finally heard on merits.

(ii) The appeal should be rejected on the ground of *forum non-conveniens*. Dow, in the first instance, had approached the Bombay High Court when the notification dated 01.09.2020 was issued by the DA, at which point in time, it had sought to invoke the jurisdiction of the Bombay High Court on the ground that its registered office was located in Mumbai. The *situs* of the Tribunal cannot be the basis for choosing this Court for lodging a statutory appeal under Section 130 of the Customs Act. [See ***Brindavan Beverages*** 2009 (237) ELT 658 (Del)].

(iii) Dow has indulged in forum shopping and abused the process of law. Apart from the fact that against the notification dated 01.09.2020 issued by the DA, Dow sought to ventilate its grievance before the Bombay High Court, it not only took advantage of the interim stay issued in its favour but also the directions contained in the final judgment passed by the said Court. Consequently, Dow and Sadara filed representations before UOI and once they failed in securing a result in their favour, they raised the issue before the Tribunal, contending that the customs notification dated 05.04.2021 was null and void since it had been issued after the limitation prescribed under Rule 18 of the ADD Rules had been crossed.

(iv) The notification dated 05.04.2021 is aligned with the maxim *Lex Non Cogit Ad Impossibila* i.e., the law does not compel a man to do that which he cannot possibly perform and *Actus Curiae Neminem Gravabit* i.e., an act of



Court shall prejudice no man. These maxims were taken into account by the Supreme Court in *Indore Development Authority* while concluding that where an interim order is issued by the Court, the period for which it is operable would have to be excluded, even if it is not expressly stated in the given Act, Section, Rule or Regulation.

(v) The ratio of the judgments rendered in *J.K. Industries Ltd.* and *Nirma Ltd.* has been misconstrued. In *J.K. Industries Ltd.*, the DA had not issued a notification under Rule 17 of the ADD Rules. The Court, bearing in mind this fact and that no prejudice would be caused to the disputants, vacated the interim orders passed by the High Court.

(vi) The timeline provided in Rule 17 is governed by the timeline prescribed by the WTO, whereas the timeframe provided under Rule 18 of the ADD Rules is governed by domestic law, and therefore, it is required to be considered whether the said Rule could impose a timeline for issuance of notification by UOI when Section 9A of the CTA does not advert to any timeframe. [See *Deepak Fertilizers & Petrochem v. Designated Authority & Ors* (2006) 203 ELT 370].

(vii) The judgment rendered by the Gujarat High Court in *Nirma Ltd.* is no longer good law, given the judgment of the Constitution Bench in *Indore Development Authority*. Furthermore, the Supreme Court has expressly overruled all judgments which have taken a different view on the exclusion of the period during which interim orders passed by the Courts remain operable. The reasoning in *Nirma Ltd.* was, *inter alia*, based on the provisions of Section 11A of the Land Acquisition Act, 1894 which specifically allowed for exclusion of that period for which interim orders



passed by the Court remained operable.

REASONS AND ANALYSIS:

17. Having heard the learned counsels for the parties and perused the record, the central issue which arises for consideration is: whether the notification dated 05.04.2021 issued by UOI was void in law, as it was issued after the timeframe prescribed under Rule 18 of the ADD Rules had been crossed?

17.1 We are consciously not, at this juncture, touching upon the other issues concerning the maintainability of the instant appeal (on the grounds of *forum non conveniens* and forum shopping), given the fact that the appeal was filed in this Court sometime back, and therefore, in our view, a decision *qua* the aforementioned issue is required. We have taken this decision, as, otherwise, it is quite possible that another round of litigation would commence, *albeit*, before another Court, which would, perhaps, disable the Tribunal from rendering a decision on the merits of the appeal lodged before it.

18. Thus, we intend to deal with the issue raised before us, squarely, in the interest of hastening the decision on merits.

19. The undisputed facts which have emerged from the record, to which we have referred to hereinabove, demonstrate, that once the DA had completed its investigation *vis-à-vis* the application lodged before it (and arrived at a final finding of fact that a material injury had been caused to the domestic industry with the export of FSP from Saudi Arabia and UAE below its normal value), a notification dated 01.09.2020 was issued. Via this notification, the DA recommended the imposition of ADD on FSP



originating from Saudi Arabia, at the rate of 150.06 per MT.

20. The said decision of the DA was assailed by Dow and EPL, by way of writ action(s) filed in the Bombay High Court, although they were premature, as no final decision had been taken at that juncture by UOI.

21. Although the Bombay High Court granted an interim order on 13.10.2020, which was continued, having regard to the fact that the writ petitions were being heard, it was ultimately vacated, on the ground that the writ actions were premature, since UOI had not taken a final decision in the matter.

21.1 The Bombay High Court, however, went further and directed UOI to consider the representations, which sought to assail the view taken by the DA, before rendering its final view on the matter. Concededly, Dow and Sadara filed representations, pursuant to the directions issued by the Bombay High Court via its final judgment dated 06.01.2021, on 25.01.2021 and 19.02.2021 respectively.

22. The representations filed by Dow and Sadara, it appears, did not cut much ice with UOI, as it accepted the recommendation made by the DA via a notification dated 01.09.2020. The UOI's decision stands incorporated in the notification dated 05.04.2021.

23. The question which immediately crops up is: could UOI have, firstly, taken any final decision in the matter while the interim order dated 13.10.2020 was operable, and secondly, disregard the directions contained in the final judgment issued by the Bombay High Court on 06.01.2021?

23.1 The answer to both limbs of the said question is, without doubt, in negative. UOI was, in a figure of speech, caught between a hard place and a



rock. It could not have taken any steps in the matter once the interim order dated 13.10.2020 was passed, and till such time it remained in operation.

24. Likewise, upon the Bombay High Court vacating the said interim order once it rendered a final judgment in the matter on 06.01.2021, it was duty-bound to comply with the directions issued therein.

25. At no stage did Dow or any other party seek recourse to an appropriate remedy for vacation or variation of the interim order dated 13.10.2020.

25.1 As demonstrated hereinabove, Dow and Sadara, who were similarly circumstanced, allowed the interim order dated 13.10.2020 to operate and went on to take benefit of the directions contained in the final judgment dated 06.01.2021 rendered by the Bombay High Court. It was only after Dow and Sadara failed to persuade UO, that the recommendation made by the DA should not be accepted, did they, for the first time, raise the issue before the Tribunal that since the timeframe provided in Rule 18 of the ADD Rules having expired, the notification dated 05.04.2021 was void in law.

26. Notably, the time taken by UOI in issuing the notification dated 05.04.2021 from the date when the final judgment was passed i.e., 06.01.2021 is reasonable. Incidentally, the gap between the two dates is less than three months, and if one were to take into account, the date when Sadara lodged its representation, which was on 19.02.2021, one cannot but accept that there was reasonable alacrity shown by UOI in taking a final view in the matter.

27. Therefore, even if we were to assume, for the sake of argument, that the limitation prescribed in Rule 18 of the ADD Rules was mandatory, the



affected party ought to have taken recourse to an appropriate remedy for vacation/variation of the interim order dated 13.10.2020. As noticed during the narration of facts, the order dated 13.10.2020 was continued on 15.10.2020, 21.10.2020 and 23.10.2020, *inter alia*, at the behest of Dow.

28. The record discloses that on 23.10.2020, when the concerned bench of the Bombay High Court reserved judgment in the writ actions, it specifically directed that the interim order dated 13.10.2020 would continue to operate till a final decision is rendered in the matters.

29. Between 23.10.2020 and 01.12.2020, Dow chose not to approach the Bombay High Court for vacation/variation of the interim order dated 13.10.2020. Pertinently, as noticed above, after the final judgment was delivered on 06.01.2021, representations were made by both Dow and Sadara, in line with the directions contained therein.

30. To our minds, it is well settled, that Courts and Tribunals which have jurisdiction to decide a matter, are, as characteristically stated by the Supreme Court in a Constitution Bench judgment, empowered to decide both correctly and wrongly.¹

30.1 In other words, if an order or a view taken does not align with the law, a litigant needs to take recourse to an appropriate remedy to have such an order declared illegal and/or have it set aside. Thus, it is the failure of Dow, if one were to accept Mr Ganesh's submission, that has resulted in the issuance of the notification dated 05.04.2021.

31. *De hors* what is stated above, this brings us to the other issue, i.e., whether the time spanning between 13.10.2020 and 19.02.2021, when

¹ Ujjam Bai vs State of Uttar Pradesh AIR 1962 SC 1621.



Sadara's representation was lodged, should be excluded.

31.1 In our view, the aforementioned timespan should be excluded, for the simple reason that no litigant, in this case, UOI, which represents the domestic industry and the interests that are linked to it, such as the labour force, and those who are engaged in business transactions with the industry, should be made to suffer, on account of an act of Court.

31.2. The interim order, which was passed, *inter alia*, continued at the behest of Dow, and therefore cannot now be allowed to work to the prejudice of UOI, which, as noticed above, represents the domestic industry. Resultantly, the period which would have to be excluded, even if we were to apply the timeframe of three (3) months, would go beyond the date of judgment and up until when Sadara's representation was lodged i.e., 19.02.2021. If this is taken as the period of exclusion (i.e., the period spanning between 13.10.2020 and 19.02.2021), then, based on Dow's own logic and calculation, which is that the period available for issuing the notification was only 49 days, the end date would be 09.04.2021.

31.3 Dow, though, offers this concession, only as an alternate plea, and has calculated the end date by taking the date of the final judgment as the base point. Therefore, as far as Dow is concerned, if 49 days are added to the date when the final judgment was rendered i.e., 06.01.2021, the end date for issuing the notification expired on 23.02.2021.

31.4 This is, in our view, both a self-serving and unsustainable argument, as it glosses over the fact that positive and clear directions were issued by the Bombay High Court *via* its judgment dated 06.01.2021, to entertain and dispose of the representations. The fact that representations were filed both



by Dow and Sadara, are not in dispute; which is why we have arrived at the end date, after taking into account the last date of the representations filed, which was 19.02.2021.

32. In view of the foregoing, it is our opinion that the 42 days of limitation which ran between 01.09.2020 and 13.10.2020 can have no impact on the conclusion reached by us, that the final notification dated 05.04.2021 issued by respondent no.1 was within the timeframe prescribed under Rule 18 of the ADD Rules.

33. It is to be borne in mind that the ADD Rules have been framed by the UOI/Central Government, in the exercise of powers conferred upon it under sub-section (6) of Section 9A and sub-section (2) of Section 9B of the CTA.

33.1 The ADD Rules empower UOI/Central Government to appoint a person, not below the rank of a Joint Secretary to the Government of India or such other person which it thinks is fit to act as the DA and notify such appointment via the official gazette. The UOI/Central Government is also empowered to provide the DA, the services of such other persons and other facilities as it deems fit.²

33.2 The duties of the DA are captured in Rule 4 which, *inter alia*, require investigation as to the existence, degree and effect of any alleged dumping in relation to the import of any article; identification of any article liable for ADD; submissions of findings, provisional or otherwise, to the Central Government concerning the normal value, export price and the margin of dumping in relation to the article under investigation; the injury or threat of injury to an industry or material retardation to the establishment of an

² Rule 3 of the ADD Rules.



industry in India as a consequence of import of such article under investigation from specified countries, to recommend the amount of ADD which ought to be levied being equal to the margin of dumping or less which if levied would remove injury to the domestic industry; the date of commencement of imposition of levy of ADD and where ADD is already imposed, to review the need for its continuance.

33.3 The procedure for investigation is outlined in Rule 5. The principles governing the investigations are given in Rule 6.

33.4 As to how normal value, export price and margin of dumping are to be taken into account is, *inter alia*, provided in Annexure I referred to in Rule 10. The requirement to reach a finding with regard to the existence of injury is provided in Rule 11. The DA is entitled to return preliminary findings in appropriate cases.

33.5 Based on such preliminary findings, the UOI/Central Government, under Rule 13, is entitled to impose a provisional duty, not exceeding the margin of dumping. The first proviso to Rule 13 makes it clear that provisional duty cannot be imposed before the expiry of 60 days from the date of public notice issued by the DA, regarding the decision to initiate investigations.

33.6 The second proviso appended to the very same Rule places an embargo on provisional duty not being imposed beyond six months, which, on a specific request by a significant percentage of exporters representing the trade can be extended by UOI/Central Government to nine months.

33.7 Rule 14 provides for termination of investigation by the DA in certain circumstances, while Rule 15, *inter alia*, empowers the DA to suspend and



even terminate the investigation, if an undertaking is given by the person/entity exporting the goods into India that the article would not be exported to India at dumped prices.

34. Rule 17 grants one (1) year from the date of initiation of the investigation to determine, whether the article which is the subject matter of investigation is being dumped in India. This period can be extended by UOI/Central Government at its discretion, in special circumstances, by a further period of six months. For the sake of convenience, the said rule is extracted hereafter:

“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 causal link, where applicable, between the dumped imports and injury;

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

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

34.1 Interestingly, the second proviso appended to the said Rule states that where the DA has suspended the investigation on acceptance of a price undertaking as provided in Rule 15, and, subsequently, the person/entity violates the terms of the said undertaking, the period for which investigation



was kept under suspension shall not be taken into account while calculating the defined period for completing the investigation i.e., one (1) year.

35. Sub-rule (1) of Rule 18 confers power on UOI to impose ADD, not exceeding the margin of dumping as determined by the DA under Rule 17, and notify the same by having the decision published in the official gazette.

36. Clearly, the broad scheme of the ADD Rules is to give leeway to UOI to arrive at its own decision i.e., whether or not to accept the recommendation of the DA with regard to the amount of ADD, which, if levied, would remove the injury where applicable caused to the domestic industry.³

37. The moot point is that the ADD Rules, which are a delegated legislation framed by UOI/Central Government under the powers given to it by the Legislature under the above-referred provisions of the CTA, failed to envisage a scenario where a party, dissatisfied with the final findings returned by the DA could approach a Court and obtain an order that could disrupt the timelines provided in the said Rules.

38. Having regard to the scheme of the ADD Rules and the provisions of the CTA concerning dumped articles, it is clear that both the parent legislation and the delegated legislation seek to protect the industry established in India from injury or threat of injury or material retardation, consequent upon articles being dumped in India from specified countries.

39. Therefore, while it is essential to ensure that investigations if started, should be concluded within defined timelines, and the decision as to whether or not ADD should be imposed be taken at the earliest, the timelines so

³ Rule 17(1)(b) of the ADD Rules.



prescribed have to factor in other vagaries, including the exporter of the subject goods approaching courts in India for redressal of his/its grievance and obtaining interim orders/final judgments which may have the impact of extending the timeframe provided in Rule 18.

40. Thus, keeping the underlying purpose in mind, it would not be out of place to read into Rule 18, the requirement to extend the timeframe given therein, for UOI/Central Government to decide on the recommendation made by the DA by excluding the period for which orders of the Court remained operable. This would, in our view, not amount to supplanting the Rule, but would, on the other hand, balance the interests of both the exporter of the subject article which is under investigation as well as the domestic industry. Any other view would tantamount to punishing the party which adhered to the orders of the Court

40.1 It was always open to DOW to seek vacation or variation of the interim order. DOW, on the other hand, took advantage of the directions contained in the final judgement passed by the Court and accordingly, made representation to the DA. It is only after it failed to persuade the DA to its point of view, that it sought to agitate that the timeframe provided under Rule 18, having expired, the impugned notification dated 05.04.2021 was *non est* in law.

41. We are conscious of the fact that there are statutes which expressly provide for the exclusion of timeframes provided in the statute for completion of certain acts, on account of order(s) issued by a court. One such example is the provisions of Section 11A of the Land Acquisition Act, 1894.



41.1 The fact that there is no such provision, in our opinion, should not deter a court from applying the principle that no litigant/party can be made to suffer on account of order(s) or acts of the court, which require peremptory adherence.

41.2 Holding otherwise would act to the detriment of parties, who are bound down by orders passed by the court, which they can ignore only at their peril. The petitioner's argument, in this behalf, in a figure of speech, amounts to "heads I win, tails you lose".

42. Thus, we respectfully disagree with the reasoning given in this behalf by the Division Bench of the Gujarat High Court in the *Nirma Ltd.* case. The following observations made by Hon'ble Mr. Justice Lahoti [as he then was] in the case of *Karnataka Rare Earth v. Deptt. of Mines & Geology* (2004) 2 SCC 783 being apposite, are extracted hereunder:

"10. In South Eastern Coalfields Ltd. [(2003) 8 SCC 648] this Court dealt with the effect on the rights of the parties who have acted bona fide, protected by interim orders of the court and incurred rights and obligations while the interim orders stood vacated or reversed at the end. The Court referred to the doctrine of actus curiae neminem gravabit and held that the doctrine was not confined in its application only to such acts of the court which were erroneous; the doctrine is applicable to all such acts as to which it can be held that the court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. The successful party can demand: (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost."



43. The judgment of the Supreme Court rendered in the *J.K. Industries* case, in our view, is clearly distinguishable, as the observations made therein have to be understood in the context in which they were made. This was a case where a notification for the levy of provisional ADD was issued, which had come to an end due to efflux of time. The levy of provisional duty and other proceedings were challenged before the concerned High Court.

43.1 The High Court, on a prayer made by the petitioner in an action taken out under Article 226 had stayed the hands of the DA from returning final findings during the pendency of the writ action. This order was subsequently modified by the High Court, to the effect that while the DA could proceed to record final findings, it would keep the same in a "sealed cover" and that the recommendations made by the DA would be subject to the final outcome in the writ petition. It was while the final hearing in the writ petition was in progress, that the Supreme Court was moved.

43.2. The Supreme Court, having regard to the fact that the DA only recommends a course of action in the exercise of powers under Rule 17, which may or may not be accepted by UOI/Central Government, concluded that since no prejudice would be caused to any party by mere communication or publication of final findings returned by the DA *via* a notification, the interim order of the High Court should not continue.

43.3 It is in this context that the Supreme Court noted that if the process is delayed, the timelines laid down under the Rules for each stage, without accomplishment, may frustrate the entire proceedings.

43.4 In our view, the ratio of the judgment has been misunderstood. The Supreme Court was not dealing with a situation where the party which had



obtained an interim order and/or directions in its favour was seeking to invoke limitation when it failed to get a favourable result from UOI/Central Government, pursuant to the steps taken in line with the directions issued by the Court.

44. In our opinion, the Tribunal was right in concluding that the time for which the interim orders were operable had to be excluded. The Tribunal was also right in concluding that given the fact that representations had to be considered, as directed by the High Court, it could not be said that the notification dated 05.04.2021 was void in law, as it was not issued within the timeframe provided in Rule 18 of the ADD Rules.

45. Before we conclude, although we have not rejected the appeal on the ground that this Court may not be a convenient forum, having regard to the circumstances detailed out above, there is, to our minds, much weight in the argument advanced in this regard on behalf of MPL.

CONCLUSION

46. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned order dated 01.11.2021 passed by the Tribunal.

47. The appeal is, accordingly, dismissed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

JULY 19th, 2023/aj