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W.P.Nos.20476 of 2018 etc. batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2024

DELIVERED ON : 26.04.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.Nos.20476, 20477, 20478 of 2018;
29498, 29502, 29504 of 2019 and 4653 of 2020

W.P.No.20476 of 2018:

Shapoorji Pallonji Infrastructure Capital Co. Private Ltd
70, Nagindas Master Road, Fort, Mumbai - 400023
Rep. by Authorized Signatory, K.Venkat Rao

.. Petitioner

Vs

- 1 The Union of India
Under Secretary, Ministry of Finance
North Block, New Delhi - 110001.
- 2 The Director General (Safeguards)
Directorate General of Trade Remedies
4th Floor, Jeevan Tara Building,
Parliament Street, New Delhi - 110001.
- 3 The Deputy Commissioner of Customs
Customs House, 60, Rajaji Salai
Chennai - 600001.



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- 4 The Commissioner of Customs
Customs House, 60, Rajaji Salai
Chennai – 600001.
- 5 The Directorate General of Systems
and Data Management
Hotel Samrat, Chanakyapuri
New Delhi – 110021.
6. Jupiter Solar Power Ltd
rep. by Managing Director,
Unnayanam, 20A,
Ashutosh Chowdhury Avenue
Kolkata – 700 019.
[Impleaded vide order dated 3.9.2018]

.. Respondents

Prayer in W.P.No.20476 of 2018 : Petition filed under Article 226 of the Constitution of India seeking issuance of a writ of certiorari calling for the records in the impugned notification No.1/2018 (SG), dated 30.07.2018 issued by the respondent No. 1 and quash the same as illegal, arbitrary, without authority of law and in complete contravention of the order dated 23.07.2018 of the High Court of Orissa in Writ Petition No. 12817 of 2018.

For the Petitioner
in W.P.No.20476/2018 : Mr.Sujit Ghosh
along with
Ms.Mannat Waraich
for Mr.Arun Karthik Mohan
and Amritha Satyajith

For the Respondents
in W.P.No.20476/2018 : Mr.Rabu Manohar, SCGPC
for Respondents 1 and 2



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- : Mr.AR.L.Sundaresan
Additional Solicitor General
assisted by
Mr.V.Sundareswaran, SPC
for respondents 3 and 4
- : Ms.Sunita Kumari, SCGSC
for 5th respondent
- : Mr.C.Seethapathy
for 6th respondent

and batch cases

COMMON ORDER

The Hon'ble Chief Justice

These petitions are based on similar set of facts and involve common questions of law and to avoid rigmarole are decided by the common judgment.

2. It is propitious to refer to the prayers made in these writ petitions, which read thus:

- (i) In W.P.No.20476 of 2018, the petitioner seeks
issuance of a writ of certiorari to call for the records in



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the impugned notification No.1/2018 (SG), dated 30.07.2018 issued by the first respondent therein and quash the same as illegal, arbitrary, without authority of law and in complete contravention of the order dated 23.07.2018 of the High Court of Orissa in Writ Petition No. 12817 of 2018.

(ii) In W.P.No.20477 of 2018, the petitioner seeks issuance of a writ of certiorari to call for the records in the impugned final findings no. F.No.22/1/2018-DGTR, dated 16.7.2018 issued by the second respondent therein and quash the same as illegal, arbitrary, unconstitutional, without authority of law and in contravention of the Customs Tariff Act read with the Safeguard Duty Rules.

(iii) In W.P.No.20478 of 2018, the petitioner seeks issuance of a writ of certiorari to quash the order of self assessment vide impugned BOE No.7474159, dated 2.8.2018 issued by respondents 3 to 5 therein to the extent it seeks to impose safeguard duty pursuant to the impugned notification, on the ground that the same is illegal, arbitrary, without authority of law and in complete



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contravention of the order dated 23.7.2018 of the High Court of Orissa in Writ Petition No.12817 of 2018.

- (iv) In W.P.No.29498 of 2019, the petitioner seeks issuance of a writ of certiorari to call for the records of the final findings F.No.22/1/2018-DGTR, dated 16.7.2018 issued by the second respondent and quash the same.
- (v) In W.P.No.29502 of 2019, the petitioner seeks issuance of a writ of certiorari to call for the records of the notification No.1/2018-Customs (SG), dated 30.7.2018 issued by the first respondent and quash the same.
- (vi) In W.P.No.29504 of 2019, the petitioner seeks issuance of a writ of certiorarified mandamus to call for the records of the order of self-assessment vide Bill of Entry bearing BE No/Dt/cc/Typ:4390442/06/08/2019/N/H, dated 6.8.2019 issued by the fifth respondent therein and quash the same and consequently direct the fifth respondent to release the goods thereunder without insisting on payment of safeguard duty and component of safeguard duty forming a part of the IGST.
- (vii) In W.P.No.4653 of 2020, the petitioner seeks issuance



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of a writ of certiorari to call for the records comprised in the impugned letter bearing File No.Smisc 92/2019-Gr.5A, dated 12.2.2020 issued by the first respondent therein and quash the same and the final assessment order dated 30.11.2018 referred therein, as being violative of the principles of natural justice and, therefore, arbitrary as also contrary to and without the authority of law.

3. The petitioners are challenging the final finding dated 16.7.2018 issued by the second respondent and the notification dated 30.7.2018 imposing the safeguard duty and the consequential Bills of Entries issued by the respondent authorities.

4. The petitioner company in W.P.No.20476 of 2018 for setting up its 50 MV Solar Power Project in the State of Tamil Nadu imports solar cells and modules. The safeguard duty levied on the import of solar cells and modules is the moot challenge in these writ petitions.



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5. Mr.Sujith Ghosh and Mr.Swarnam J.Rajagopalan, learned counsel for the petitioners, eruditely canvassed the submissions. The contour of the submissions is culled out as under:

(i) The impugned notification is null and void and in defiance of the order of injunction passed by the Orissa High Court under its order dated 23.7.2018. Under the said order, the Orissa High Court prohibited the Union of India from issuing any notification under Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 [for brevity, "*the Rules of 1997*"] without the leave of the court. In violation of the said injunction order, the Union of India proceeded to issue the notification dated 30.7.2018 levying safeguard duty under the aegis of Rule 12 of the Rules of 1997. The impugned notification, being in flagrant violation of the interim orders of the Orissa High Court, is non-est, null and void.

(ii) The subsequent order of the Supreme Court dated 10.9.2018,



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whereby the Supreme Court directed that the interim order dated 23.7.2018 in I.A.No.10566 of 2018 passed by the High Court and further proceedings in W.P. (C) No.12817 of 2018 shall remain stayed, does not have the effect of reviving the impugned notification which is non-est, illegal and thereby a stillborn legislation. Reliance is placed on the judgment of the Apex Court in the case of *Shree Chamundi Mopeds Ltd v. Church of South India Trust Association*, (1992) 3 SCC 1. It is submitted that the stay of operation of an order would only mean that the order would not be operative from the date of passing of the stay order and it does not mean that the order has been wiped out from existence.

(iii) Even if the writ petition is ultimately dismissed, the same does not confer validity on the actions which have been taken in disregard of the order of the court. To fortify the said submission, reliance is placed on the decision of the Apex Court in the case of *Ravi S.Naik v. Union of India*, 1994 Supp (2) SCC 641.

(iv) The order passed by the Orissa High Court was an order of



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injunction and not stay. Had the notification been stayed, then, as a fortiori, such a notification would have been revived with effect from the date of the order of the Apex Court. In view of the order of stay granted by the Apex Court, the only recourse available to the Union of India was to issue a fresh notification.

(v) In spite of the injunction order, the respondent authorities had implemented the notification based on the order passed by this court on 10.8.2018 in W.P.No.20478 of 2018 directing the respondents herein to assess provisionally the safeguard duty in relation to the bill of entry and release the goods without insisting on payment of duty on executing a bond by the Authorised Officer of the company.

(vi) For the period post 13.8.2018, the instructions issued by the first respondent directing the officers not to insist on payment of duty and clearance of goods provisionally on furnishing Letter of Undertaking or Bond is in violation of Article 265 of the Constitution of India. Reliance is placed on the decision of the Apex Court in the



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case of *Harivansh Lal Mehra v. State of Maharashtra*, (1971) 2 SCC 54, wherein it has been emphasised that customs duty cannot be leviable on the basis of some administrative instructions.

(vii) No action being taken on the basis of the contempt proceedings has no relation with the validity of the action, which is contemptuous. The Contempt of Courts Act, 1971 operates in a different sphere.

(viii) As no fresh notification was issued, safeguard duty on the basis of the impugned notification, which is void ab initio and non-est, could not have been levied on the imports made even after the order was passed by the Apex Court staying the order of the Orissa High Court.

(ix) The initiation of investigation by the second respondent is predicated upon the existence of "*serious injury*" or "*threat of serious injury*" to the domestic industry. The existence of domestic industry, at whose behest the second respondent had



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assumed jurisdiction to conduct the entire investigation culminating in the recommendation of whether or not to levy safeguard duty, was a fundamental jurisdictional fact. Such jurisdictional fact has been erroneously assumed by the respondents on an erroneous application of law and fact as also a misapplication of law relating to anti-dumping to the proceedings under safeguard duty.

(x) The second respondent held that two industries, i.e., Indosolar Limited and Jupiter Solar Power Limited, collectively account for 38% of the total domestic production in the Domestic Tariff Area (DTA). Further, the respondents held that support of ISMA rendered through the resolution of its Managing Committee with no opposition qualifies the two applicant units meeting the requirement of major share of Indian industry. The respondents had erroneously held that the support of ISMA would be a relevant component in determining whether the said producers constitute a major share of the total production. Further, the respondents had misapplied the provisions of the anti-dumping law to the safeguard duty law. The safeguard duty law does not provide for the aspect



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of support by other domestic producers as a criteria for determination of domestic industry. Therefore, the finding of the second respondent holding the two domestic producers as domestic industry by placing reliance on the support tendered by the ISMA is an illegality. The second respondent, in the final finding dated 16.7.2018, has nowhere returned a finding that 38% per se qualifies as a major share. The respondents cannot be permitted to improvise their case by affidavit. To qualify as a major share, anything above 50% is warranted, as that is the notion of majority as understood in the common parlance and 38% cannot be considered as a majority.

(xi) The decision of the second respondent is erroneous and not warranted based on evaluation of facts on record. In such case, the courts will exercise its power of judicial review. Reliance is placed on the decisions of the Apex Court in the cases of (i) *Tata Cellular v. Union of India*, (1994) 6 SCC 651; (ii) *Cholan Roadways Ltd v. G.Thirugnanasambandam*, (2005) 3 SCC 241; and (iii) *Syed Yakoob v. K.S.Radhakrishnan and others*, AIR 1964 SC 477.



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(xii) The conclusion of the second respondent that it would be in public interest to recommend imposition of safeguard duty is irrational for the following reasons:

- (a) Number of companies: Where the entire levy is at the behest of injury being suffered by two companies, the levy cannot be treated in public interest;
- (b) Demand: Where the said two companies solely meet 3.5% of the total demand, the levy cannot be said to be in public interest.
- (c) Production: Where the two companies account for 38% of the total production requirement, the levy cannot be said to be in public interest.
- (d) Demand – Supply Gap: Where the installed capacity of the domestic industry is 373 MW and the demand is 10618 MW, such yawning gap of 10245 MV (demand being 8.46 times the domestic capacity) would per force be met by imports and thus the levy



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cannot be said to be in public interest.

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(xiii) Objections were raised before the second respondent and specific instances were pointed out, where in the past, when the demand – manufacturing capacity gap was much lower, the levy was not held to be in public interest. The second respondent has ignored that the domestic demand was 28.46 times the capacity of the domestic industry. However, in the most perverse manner, the second respondent ignored the final finding and relied upon a 2009 finding in the case of Oxo, even though in that case, the capacity of domestic industry was 50% of demand, unlike the present case, where the domestic industry is only meeting 3.5%.

(xiv) The second respondent also erroneously relied upon the 2013 order in the case of Sodium Nitrate. In that case, it was held that capacity of the domestic industry was adequate even though the utilization had reduced. However, in the present case, the capacity was certainly not adequate and the utilization had also increased from 48% to 85%.



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(xv) The aspect of public interest is vitiated on the ground that any increase in duties would translate into a direct increment to the power tariff thereby impacting the consumers at large. The moment electricity tariff gets affected, the consumer interest comes in and the public interest gets affected. Reliance is placed on the judgment of the Apex Court in the case of *All India Power Engineer Federation and others v. Sasan Power Limited and others*, (2017) 1 SCC 487.

(xvi) The Utilitarian theory propounded by Bentham to the effect that the greatest good to the greatest number is to be applied and the final finding of the second respondent is to be held against the public interest. The impugned finding seeks to protect the interest of two domestic producers merely having 3.5% of the total demand at the cost of causing deleterious increase in power tariff in hands of general consumers who are far in number.

(xvii) Reliance is placed on the recent decision of the Apex Court in



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the case of *M.K.Ranjitsinh and others v. Union of India and others*, wherein by order dated 19.4.2021 in I.A.No.85618 of 2020 in W.P. (Civil) No.838 of 2019, the earlier decision of the Apex Court in *T.N.Godavarman Thirumulpad v. Union of India and others*, (2012) 3 SCC 277, was referred to and it was observed that environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric.

(xviii) The parameters as considered by the second respondent starting from "*Share of Domestic Market*" to "*Sales*", "*Production*", "*Capacity Utilization*", "*Employment*" "*Profit/Loss*", "*Inventory*" have all shown an upward and positive trend and, hence, the finding in relation to serious injury or threat thereof appears to be outrageous and illogical.

(xix) The possible surge in imports was long foreseen and it cannot be said to be a result of unforeseen developments, unlike what has been held by the second respondent.



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(xx) The levy of safeguard duty is against the principles under Article XIX of the GATT because India can impose safeguard duty only if increased imports are due to (i) unforeseen developments; and (ii) effect of obligations incurred including tariff concessions. The DGTR has failed to establish the presence of any unforeseen development for the following reasons:

(a) As per DGTR, India's withdrawal of Domestic Current requirement (DCR) pursuant to challenge by USA resulted in substantial increase in imports of the PUC, which could not have been foreseen. DGTR's analysis is incorrect because India's withdrawal of DCRS (14 Dec 2017 pursuant to mutual agreement between India and USA to demonstrate compliance with WTO Appellate Body's report on 16 Sep 2016 against India) is subsequent to the period of investigation 2014-15 to 2017-18 (up to September 2017 i.e. H1) during which imports had already happened.

(b) DGTR's conclusion that India's commitments



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under the Paris Agreement led to India setting up a target of 100 GW solar grid connectivity is incorrect and does not qualify as an unforeseen development because India adopted the JNNSM pursuant to commitments under the UNFCCC and revised the solar grid connectivity target to 100 GW in 2015 under the JNNSM and not Paris Agreement, which was more than a year before India ratified the Paris Agreement in Oct 2016.

(xxi) DGTR investigation period is 2014-2015 to 2017-2018, i.e., ten years after 2005. The imports increased not because of the GATT obligation, but because India adopted JNNSM in 2010 and subsequently demand for solar modules picked up in India. Indian manufacturing capacity was less than 10% of the demand in India, so the balance demand had to be met by imports.

(xxii) The final finding and the impugned notification are otherwise illegal.



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6. Learned Additional Solicitor General, in his usual lucid style, countered the submissions of learned counsel for the petitioners and put forth the following submissions:

(i) Section 8B of the Customs Tariff Act, 1975 [for brevity, "*the Act of 1975*"] empowers the Central Government to impose safeguard duty. If upon an enquiry, if the Central government is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry, then it may by notification in the official gazette impose a safeguard duty on that article.

(ii) The two manufacturers constituting 38% of the domestic market share would come within the definition of "*domestic industry*" as enshrined under Section 8B(6)(b) of the Act of 1975. The "*domestic industry*" means the producers as a whole of the like article or a directly competitive article in India or the producers whose collective output of the like article or a directly competitive



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article in India constitutes a major share of the total production of the said article in India.

(iii) The provisions of the Act of 1975 and the Rules of 1997 have been scrupulously adhered to while arriving at the final finding and issuing the impugned notification. The domestic industry is now restricted to Indosolar Limited and Jupiter Solar Power Limited, which collectively account for 38% of the total domestic production in the DTA. The support of ISMA rendered through the resolution of its Managing Committee qualifies the two applicant units meeting the requirements of major share of Indian industry.

(iv) The surge in imports was unforeseen. In 2015, India committed to the Paris Agreement on climate change for reduction of CO₂ emissions by 33-35% from 2005 levels, to address global warming. In line with this commitment, India established a target of achieving 100 GW of Solar power generation by the year 2022. This commitment pushed up the demand for Solar power generation projects in India. Similarly, the huge increase in the demand for



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the PUC in India in a short period of time which has in part fuelled the surge in imports was also unforeseen. The surge in imports at consistently falling landed price changed the competitive relationship between imports and domestic production, to the disadvantage of the latter. This has hampered the DI's ability to compete and make and sell the PUC. The total domestic sales, the domestic demand, the imports, the domestic sales by the applicants/DI; and domestic sales by other Indian producers were all considered and a comparative study was made.

(v) The domestic industry had made significant investment to cater to the domestic market and for backward integration. It must be protected against the sudden and sharp surge in imports. Further, the safeguard duty is not a quantitative restriction.

(vi) The Court would not sit as an appellate authority over the decision taken by the second respondent and the notification issued by the government.



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(vii) Reliance is placed on the judgment of the Apex Court in the case of *Narayan Govind Gavate and others v. State of Maharashtra and others*, (1977) 1 SCC 133, to substantiate the submission that in case of formation of a subjective opinion, the presumption is in favour of the regularity of the order. The test would only be whether the authority concerned was acting within the scope of his power. Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the Courts should not and will not interfere.

(viii) In support of the proposition that the principles of natural justice is not required when the act is legislative in nature, reliance is placed on the decision in the case of *State of Tamil Nadu and another v. P.Krishnamurthy and others*, (2006) 4 SCC 517 and the judgment of a Division Bench of this court in the case of *Union of India and others v. Dindigul Spinners Association* , [W.A.No.1552 of 2013, dated 21.1.2022].



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(ix) Once the prohibitory order passed by the Orissa High Court is stayed, the effect of the order of stay is that the order is not operative. Reference is made to the judgment of the Apex Court in the case of *V.P.Sheth v. State of M.P. And others, (2004) 13 SCC 767*.

7. We have considered the submissions canvassed by learned counsel for the respective parties.

8. The horizon of the debate amongst the parties is the final finding arrived at by the second respondent and the notification issued by the Central Government pursuant to the final finding of the second respondent.

9. Before we proceed to deal with the contentions raised by the respective counsel, it would be necessary to refer to the relevant provisions:

"Section 8B. Power of Central Government to impose safeguard duty. —



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(1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry, then, it may, by notification in the Official Gazette, impose a safeguard duty on that article:

Provided that no such duty shall be imposed on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing countries, then, so long as the aggregate of the imports from developing Countries each with less than three per cent. import share taken together does not exceed nine per cent of the total imports of that article into India:

Provided further that the Central Government may, by notification in the Official Gazette, exempt such quantity of any article as it may specify in the notification, when imported from any country or territory into India, from payment of the whole or part of the safeguard duty leviable thereon.



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(2)The Central Government may, pending the determination under sub-section (1), impose a provisional safeguard duty under this sub-section on the basis of a preliminary determination that increased imports have caused or threatened to cause serious injury to a domestic industry:

Provided that where, on final determination, the Central Government is of the opinion that increased imports have not caused or threatened to cause serious injury to a domestic industry, it shall refund the duty so collected:

Provided further that the provisional safeguard duty shall not remain in force for more than two hundred days from the date on which it was imposed.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any safeguard duty imposed under sub-section (2), shall not apply to articles imported by a hundred per cent. export-oriented undertaking or a unit in a special economic zone unless,—



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- (i) specifically made applicable in such notifications or such impositions, as the case may be; or*
- (ii) the article imported is either cleared as such into the domestic tariff area or used in the manufacture of any goods that are cleared into the domestic tariff area and in such cases safeguard duty shall be levied on that portion of the article so cleared or so used as was leviable when it was imported into India.*

Explanation. - For the purposes of this section, the expressions "hundred per cent. export-oriented undertaking", and "special economic zone" shall have the meanings assigned to them in Explanation 2 to sub-section (1) of section 3 of Central Excise Act, 1944 (1 of 1944).

(3) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(4) The duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition:



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Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the safeguard duty should continue to be imposed, it may extend the period of such imposition:

Provided further that in no case the safeguard duty shall continue to be imposed beyond a period of ten years from the date on which such duty was first imposed.

(4A) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

(5) The Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality



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of the foregoing, such rules may provide for the manner in which articles liable for safeguard duty may be identified and for the manner in which the causes of serious injury or causes of threat of serious injury in relation to such articles may be determined and for the assessment and collection of such safeguard duty.

(6) For the purposes of this section,-

(a) "developing country" means a country notified by the Central Government in the Official Gazette for the purposes of this section;

(b) "domestic industry" means the producers -

(i) as a whole of the like article or a directly competitive article in India; or

(ii) whose collective output of the like article or a directly competitive article in India constitutes a major share of the total production of the said article in India;

(c) "serious injury" means an injury causing significant overall impairment in the position of a domestic industry;



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(d) *"threat of serious injury" means a clear and imminent danger of serious injury.*

(7) *Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament."*

10. It is beyond any cavil that the Central Government has the power to issue notification on the basis of the final finding arrived at by the second respondent for imposition of the safeguard duty.

11. Section 8B of the Act empowers the Central Government to impose safeguard duty on an article if it is satisfied after conducting such enquiry, as it deems fit, that the article imported into India is in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to the domestic industry.

12. The said section is circumscribed by a proviso. The



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proviso to the said section puts an embargo on the power of the Central Government under Section 8B(1) of the Act of 1975 from imposing a safeguard duty on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing countries, then, so long as the aggregate of the imports from developing Countries each with less than three per cent. import share taken together does not exceed nine per cent of the total imports of that article into India.

13. The circumstance enumerated in proviso to Section 8B(1) of the Act of 1975 does not exist in the present matter, nor the same has been agitated by the petitioners. The enquiry is conducted prior to the issuance of the notification imposing the safeguard duty on the solar cells and modules.

14. The final finding arrived at is also assailed in the present writ petitions. It is trite that judicial review in such cases would be



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in a narrow compass. The Court would not sit as an appellate authority over the decision taken by the authorities. The courts would invoke its power of judicial review only if it is established that the impugned notification is issued without authority; irrational or arbitrary. Arbitrariness has no role in the society governed by rule of law. Arbitrariness is antithesis to the Rule of Law, fair-play, equity and good conscience.

15. As observed above, the Central Government has power to impose the safeguard duty in the manner and circumstances laid down under the Act of 1975 and the Rules of 1997.

16. The thrust is on the existence of the relevant material, situation and the conditions for imposition of the safeguard duty.

17. The main thrust in issuance of the notification imposing the safeguard duty is protection of the domestic industry. The same, it appears, to be was the paramount consideration in issuance of the impugned notification. The protection of the



domestic industry is certainly a circumstance to be considered while imposing the safeguard duty. As referred to in Section 8B(1) of the Act of 1975, if the Central Government upon enquiry comes to the conclusion that there is a serious injury to the domestic industry and/or threat of serious injury exists, then it may impose the safeguard duty.

18. A "*serious injury*" has been defined under Section 8B(6)(c). Serious injury means an injury causing significant overall impairment in the position of a domestic industry.

19. A "*threat of serious injury*" as contemplated under Section 8B(6)(d) of the Act of 1975 means a clear and imminent danger of serious injury.

20. The import of solar cells and modules at a lower rate from countries like China and Malaysia was threatening the domestic market. The second respondent while arriving at the final finding has placed reliance on the facts and figures of the various years.



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Though the demand has increased because of the import at a lower rate, the supply could not be made by the domestic industry. To preserve and encourage the domestic industry is the policy of the government.

21. The Government of India has always endeavoured to promote domestic industry over imports for various fiscal and economic reasons. The key challenge faced by the Government of India in this has been that while India has done away with protectionism in the economic liberalization of 1990's, other countries like China had already developed industrial capacities far exceeding those of India. Moreover, with India joining the World Trade Organisation, India became bound by the norms of the WTO with some concessions meant for the developing world.

22. Challenge by China was mounted to a similar duty imposed by USA before the WTO, but the WTO has found the duty to be lawful. Moreover, while India has been at the receiving end of such complaints, no dispute qua the safeguard duty has been raised



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by any WTO member country in the present issue. The findings issued by DG safeguards, appear to have been prepared keeping a potential WTO challenge in mind.

23. The government has two-fold measures to promote local industry: (i) To incentivize local industry by preference in purchasing, grants, aid, etc. through various schemes and cheap financing options. (India lost its case at WTO and settled with USA qua Solar Cells); (ii) By imposing levy, duties on foreign imports within the constraints of the WTO.

24. On these very lines, safeguard duty was imposed to combat the imports from China and Malaysia which due to their well established and advanced assembly lines could sell at much cheaper price compared to the domestic producers. Moreover, the Chinese supply of solar cells has flooded global markets and with the rate of imports being much more than 90 percent despite manufacturing capacity exceeding 10 percent, in order to protect domestic industry (energy being a sector of strategic importance), the government



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had levied the impugned duty.

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25. To arrive at a subjective satisfaction on an objective assessment of all the relevant facts and considerations as required under Section 8B of the Act of 1975 and Rule 12 of the Rules of 1997, it appears, the authority has considered the surfeit of import and the same was unforeseen. It had considered that in 2015, India committed to the Paris Agreement on climate change for reduction of CO₂ emissions by 33-35% from 2005 levels, to address global warming. India established a target of achieving 100 GW of Solar power generation by the year 2022. The said commitment pushed up the demand for Solar power generation projects in India. Similarly, the huge increase in the demand for the PUC in India in a short period of time has in part fuelled the surge in imports. The same was also unforeseen. The imports of the PUC were taking place at very low prices. There was a sudden and appreciable drop in the landed value of the imported PUC. The immediate impact of this has been that the domestic industry faced a drop in sales realization of their products. The surge in imports at consistently



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falling landed price changed the competitive relationship between imports and domestic production, to the disadvantage of the domestic industry. This hampered the domestic industry's ability to compete and make and sell the PUC. This change in the competitive relationship was entirely unforeseen. The authority has examined various parameters to assess whether or not the increased imports of the PUC during the POI have caused and / or are threatening to cause serious injury to the Domestic Industry. The total domestic sales, the domestic demand, the imports, the domestic sales by the applicants/DI; and domestic sales by other Indian producers were all considered and a comparative study was made.

26. Though the two domestic industries share only 38% of the market, ISMA had also supported the said industries. There were also other small manufactures supporting them. Though the support of ISMA would not have been a clinching factor, the same is also a fact relevant for consideration by the second respondent.

27. It is not that the decision of the authority while arriving at



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the final finding was not based on some substance. It has discussed about various materials before it and has delved into detail. In writ jurisdiction under Article 226 of the Constitution of India, we cannot sit as an appellate authority over the decision taken by the second respondent and, inter alia, the notification issued by the government. The authority after considering the various aspects of the matter, in its wisdom, has arrived at a conscious decision for survival of the domestic industry and, that too, for a temporary period. A presumption can also be drawn that the statutory authority would not exercise the power arbitrarily. We do not find that the authority has eschewed relevant considerations and/or has relied upon irrelevant considerations while arriving at the final finding.

28. This Court has to consider whether the statutory scheme contained in the provisions of the Act of 1975 and the Rules of 1997 have been complied with. On appreciation of the final finding of the second respondent, it does appear that the scheme envisaged under the Act of 1975 and the Rules of 1997 for imposition of the



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safeguard duty has been adhered to.

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29. We need not enter into a debate as to whether the final finding arrived at by the second respondent is an administrative act or a quasi-judicial one, as nowadays the distinction between the administrative act and the quasi-judicial act has almost obliterated. On navigating through the discussion and the consideration of the various aspects before arriving at the final finding, it is evident that all the pleas raised by the stakeholders were considered and opportunity was given to all the stakeholders to represent their stand. The principles of natural justice are also complied with. The said final finding thereafter is accepted by the Central Government by issuing the notification. The said issuance of the notification imposing safeguard duty is a legislative act. The courts will adopt a liberal attitude in upholding the delegation when taxing power is conferred. The impugned notification is a piece of a subordinate legislation, more particularly, when the said notification imposes the safeguard duty not in reference to a particular importer, exporter or a specific country.



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30. The said legislation imposing safeguard duty is open to the scrutiny of the court. It can be declared invalid particularly on the grounds that the legislation is in (a) violation of the Constitution of India; (b) violation of the enabling Act; (c) contrary to the other statutory provisions or that it is so arbitrary that it cannot be said to be in conformity with the statute or Article 14 of the Constitution. In the case on hand, the impugned notification cannot be faulted on any of the aforesaid grounds.

31. This leads us to the next contention of the petitioners that the notification was issued during the subsistence of the order of injunction issued by the Orissa High Court and, as such, is non-est, void and inoperative.

32. The final finding was arrived at by the second respondent on 16.7.2018. The interim order of injunction was passed by the Orissa High Court in W.P. (Civil) No.12817 of 2018 on 23.7.2018. The notification was issued by the Central Government imposing



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safeguard duty on 30.7.2018, during the subsistence of the order of interim injunction prohibiting the respondents from issuing the notification. The Supreme Court stayed the interim order of injunction passed by the Orissa High Court on 10.9.2018.

33. At the first instance, during the subsistence of the interim order of injunction, the first respondent ought not to have issued the impugned notification imposing safeguard duty. The interim order of injunction was in force up to 10.9.2018. The impugned notification cannot be operative during the subsistence of the interim order of injunction, which was stayed by the Apex Court on 10.9.2018.

34. The Apex Court in the case *Mulraj v. Murti Raghunathji Maharaj*, AIR 1967 SC 1386, considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal. Subsequent action would be a nullity.



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35. In *Surjit Singh v. Harbans Singh*, (1995) 6 SCC 50, the Apex Court considering the fact that in defiance of the restraint order, the alienation/assignment was made, observed that if the Court was to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the court orders otherwise. The court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes.

36. In *All Bengal Excise Licensees' Assn. v. Raghabendra Singh*, (2007) 11 SCC 374, the Apex Court held that a party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof. The wrong perpetrated by the respondent contemnors in utter disregard of the order of the High Court should not be permitted to hold good.



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37. In *DDA v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622, the Apex Court after making reference to many of the earlier judgments held that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them.

38. In the case of *Shree Chamundi Mopeds Ltd v. Church of South India Trust Association*, (1992) 3 SCC 1, the Apex Court observed that the stay of operation of an order only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

39. In the case of *Ravi S.Naik v. Union of India*, 1994 Supp (2) SCC 641, the High Court had stayed the operation of the order of disqualification passed by the Speaker. The Apex Court held that the effect of the stay of the order of disqualification was that with effect from 14.12.1990, the declaration that Bandekar and



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Chopdekar were disqualified from being members of Goa Legislative Assembly was not operative and, on the date of alleged split, it could not be said that they were not members of the Goa Legislative Assembly.

40. In the present case, though the interim order of injunction was in force when the notification was issued, the said order was stayed by the Apex Court on 10.9.2018 and on and from 10.9.2018, the notification would become operative, as the prohibitory order did not exist. The contention of the petitioners that as the notification was issued during the subsistence of the prohibitory order, even after the prohibitory order was stayed by the superior court still the notification would be inoperative, cannot be comprehended.

41. The notification issued is legislative in character. The executive exercised the powers of delegated legislation. The notification, during the subsistence of the interim order of injunction, is certainly inoperative, but on and from the date the



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stay was granted by the Apex Court to the prohibitory order passed by the Orissa High Court, the notification will become operative and binding upon the parties. The Central Government would not be required to issue a fresh notification after the order of injunction was stayed.

42. In the case of *V.P.Sheth*, supra, the appellant therein was compulsorily retired on 10.1.1989. The Central Administrative Tribunal set aside the order of compulsory retirement. The respondents filed a SLP before the Apex Court. The Apex Court stayed the final order passed by the Central Administrative Tribunal. The Apex Court in the said case observed that the effect of the stay is that the order of the Central Administrative Tribunal is not operative and the order of compulsory retirement remains in force.

43. In view of the law enunciated by the Apex Court in a catena of decisions, referred supra, it can safely be held that on and from the date the order of injunction passed by the Orissa High Court was stayed by the Apex Court, i.e., 10.9.2018, the



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notification became operative and effective.

44. In W.P.No.20478 of 2018, the petitioner has been assessed for safeguard duty vide Bill of Entry dated 2.8.2018. The same was during the subsistence of the prohibitory order passed by the Orissa High Court and before the stay was granted by the Apex Court. The respondents, certainly, could not have assessed the same, as during the said period the notification could not have been issued. The respondents also suggest that the same should not be assessed. Therefore, the order of self-assessment, vide the impugned Bill of Entry No.7474159, dated 2.8.2018, to the extent it seeks to impose safeguard duty pursuant to the notification dated 30.7.2018, is illegal and arbitrary, inasmuch as it was issued during the subsistence of the order of injunction, and accordingly the same is quashed and set aside.

45. For the foregoing reasons, we pass the following order:

(a) W.P.Nos.20477 of 2018 and 29498 of 2019 challenging the final finding dated 16.7.2018 are



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dismissed;

(b) W.P.Nos.20476 of 2018 and 29502 of 2019 challenging the notification dated 30.7.2018 are disposed of holding that the notification will be operative from 10.9.2018, i.e., from the date the stay order was passed by the Apex Court;

(c) W.P.No.20478 of 2018 challenging the Bill of Entry dated 2.8.2018 passed during the subsistence of the interim order passed by the Orissa High Court is set aside and the writ petition is allowed;

(d) W.P.No.29504 of 2019 challenging the Bill of Entry dated 6.8.2019 is dismissed, as the same was issued when the notification is in vogue; and

(e) W.P.No.4653 of 2020 challenging the final assessment dated 30.11.2018 and the final letter dated 12.2.2020 is allowed, as the Bills of Entry pertain to the period during which the interim order passed by the Orissa High Court was in force.



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There shall be no order as to costs. Consequently,
W.M.P.Nos.24061, 24062, 24065, 27946, 27947 of 2018; 29366,
29365, 23227, 29370, 29372, 29359, 29361, 23231 of 2019; 5513,
5515, 5516 of 2020; and 5252 of 2021 are closed.

(S.V.G., CJ.)

(D.B.C., J.)

26.04.2024

Index : Yes
Neutral Citation : Yes
sasi

To

- 1 The Under Secretary
Union of India
Ministry of Finance
North Block, New Delhi – 110001.
- 2 The Director General (Safeguards)
Directorate General of Trade Remedies
4th Floor, Jeevan Tara Building,
Parliament Street, New Delhi – 110001.
- 3 The Deputy Commissioner of Customs
Customs House, 60, Rajaji Salai
Chennai – 600001.
- 4 The Commissioner of Customs
Customs House, 60, Rajaji Salai
Chennai – 600001.
- 5 The Directorate General of Systems
and Data Management
Hotel Samrat, Chanakyapuri
New Delhi – 110021.



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THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY,J.

At this stage, Mr.Arun Karthik Mohan, learned counsel appearing on behalf of some of the petitioners, seeks stay of the judgment.

During the pendency of the writ petitions, there was no stay to the operation of the final finding and the notification. We are not inclined to accede to the request made.

(S.V.G., CJ.)

(D.B.C., J.)

26.04.2024

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W.P.Nos.20476 of 2018 etc. batch

THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY,J.

(sasi)

W.P.Nos.20476, 20477, 20478 of 2018;
29498, 29502, 29504 of 2019 and 4653 of 2020

26.04.2024