**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO(S). 3046-3048 OF 2020**
**(Arising out of SLP (C) NO(S). 22582-22584 OF 2019)**

**THE DESIGNATED AUTHORITY & ORS. ...APPELLANT(S)**

**VERSUS**

**M/S THE ANDHRA PETROCHEMICALS LIMITED ...RESPONDENT(S)**

**J U D G M E N T**

**S. RAVINDRA BHAT, J.**

**1.** Leave granted. With consent, the appeals were heard finally. The present appeals by special leave impugns three orders of the Telangana High Court, dated 28.08.2018, 22.07.2019 and 05.08.2019 respectively. These were in the context of the respondent/writ petitioners' (hereafter "Andhra Petro") challenge to orders of the Designated Authority (hereafter "DA"), which related to the question of imposition of anti-dumping duty.

**2.** The facts are that Andhra Petro applied to the Central Government, seeking imposition of anti-dumping duty on imports of normal *Butanol* or *N-butyl alcohol* originating in and exported into India from Saudi Arabia. Butanol is a basic organic chemical and a primary alcohol; it is an excellent solvent for acid-curable lacquers

and baking finishes. A large part of normal Butanol is converted into derivatives for use as solvents in coating industries. This application resulted in the initiation of investigation by the designated authority into the import of the subject articles from Saudi Arabia, by notification dated 02.09.2016.

**3.** Andhra Petro furnished import data for the period of three months. The period of investigation was from April, 2015 to March, 2016. The Designated Authority granted a public/oral hearing to interested parties on 23.06.2017 followed by written submissions. Andhra Petro also attended the hearing and filed detailed submissions on 30.06.2017. It alleged that the information given was not only for the period of investigation but also for the entire injury period, 2012-13 to 2014-15. Andhra Petro admitted that dumping from Saudi Arabia occurred in the last three months of the period of investigation, i.e., January to March, 2016, and that there were no imports from Saudi Arabia in the first nine months of the period of investigation, i.e., from April to December, 2015. It claimed that dumping of the same product also took place from Malaysia, Singapore, South Africa, the USA and the European Union. The period of investigation by the Designated Authority covered investigation in respect of imports from these exporting territories too. The application further claimed that though imports from Saudi Arabia started only in January, 2016, the volume of such dumped imports was significant enough to cause material injury to the domestic industry. This was to the extent of capturing 39% of the market share in India.

**4.** Andhra Petro asserted that the exports from Saudi Arabia into India were not casual exports but were made with the intention of grabbing the Indian market. Such exports into India from Saudi Arabia were undercutting and depressing the prices of the domestic industry to a significant extent, according to it, and performance of the domestic industry during the period, January to March, 2016,

was adverse in terms of profits and returns on investments. The following parameters, per the petitioner company, demonstrated the causal link between the said exports and the injury caused. The dumped imports from the subject country entered the Indian market in the period Jan-Mar 2016 [last 3 months of the period of investigation ("POI")] in such significant volumes that improvement in volume parameters seen in the performance of the domestic industry in the first 9 months of the POI (Apr-Dec 2015), was completely wiped off. There was significant difference between the prices offered by the domestic industry and the foreign producer. Thus, the domestic industry was unable to raise the prices above the costs as a result of dumping of the product in the country.

**5.** The domestic industry was able to increase its sales at the cost of sub-optimal prices in the first 9 months of the POI (Apr-Dec 2015). However, the sales volumes declined drastically in the period Jan-Mar 2016 (last 3 months of the POI) even when the domestic industry offered still lower prices as fresh dumping from Saudi Arabia started in this period. Nevertheless, it was alleged that the imports were significantly undercutting the domestic prices. Resultantly, the price undercutting was creating price pressure on the domestic industry, and the reduction in profits directly resulted in deterioration in returns on capital employed and cash flow. Thus, deterioration in profits, return on capital employed and cash flow was due to the dumped imports.

**6.** In the investigation proceedings, Andhra Petro submitted its written submissions on 27.10.2017, pursuant to the second oral public hearing held on 24.10.2017 owing to the change in the incumbent holding the office of the Designated Authority. It also filed rejoinder submissions on 01.11.2017. In terms of Rule 16 of the *Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Article and for Determination of Injury) Rules, 1995*

(hereafter the "Rules of 1995"), the Designated Authority disclosed essential facts under consideration, which would form the basis for his final conclusion under the Disclosure Statement dated 14.11.2017. Andhra Petro filed its comments on such statement, on 21.11.2017. The Designated Authority issued the Final Findings, by Notification dated 28.11.2017, terminating the investigation under Rule 14(b) of the Rules of 1995.

**7.** The Designated Authority recorded the following findings:

(i) Period of last 3 months of POI of exports of subject goods from Saudi Arabia was insufficient to evaluate injury to the domestic industry as material injury determination would require data on imports and domestic industry's sales for a longer duration.

(ii) The short period of production especially commercial production of just one month also constrained determination of a representative and realistic normal value for cooperating producers/exporters.

(iii) Causal link between imports from Saudi Arabia and injury to the domestic industry could not be conclusively established on the basis of three months of export period.

(iv) The Authority did not consider it appropriate to recommend levy of Anti-Dumping Duty on the subject goods from Saudi Arabia and terminated the investigation under Rule 14(b) of Anti-Dumping Rules.

**8.** Andhra Petro approached the Telangana High Court, complaining that its two applications, dated 18.10.2016 and 02.12.2016 had not been duly considered in accordance with provisions of the Customs Tariff Act, 1975, especially Rules 2(b) and 2(d) of the Rules of 1995. This writ petition was allowed by order dated 09.02.2018, directing the Designated Authority to consider the applications dated

18.10.2016 and 02.12.2016 afresh, after evaluation of the entire information placed before him in accordance with the provisions of the Customs Tariff Act, 1975 and the Rules of 1995, more particularly Rules 2(b) and 2(d) of the Rules of 1995 and pass appropriate orders within a time frame. Further to these directions, the Designated Authority passed an order dated 05.03.2018 declining to initiate anti-dumping investigation. This order was impugned by Andhra Petro in another writ petition (WP 11116/2018, hereafter "the second writ petition") before the Telengana High Court.

**9.** Before the High Court, Andhra Petro now contended that it was a producer of 2-EH which is a "like article" (as defined under Rule 2(d) of the Rules of 1995), to 2-PH and INA. It contended that it satisfied the criteria under Rule 2(b) read with Rule 2(d) of the Rules of 1995 to file a petition for imposition of anti-dumping duty concerning imports of the said alcohols on behalf of the domestic industry. It was further contended that in spite of a specific direction of this Court dated 09.02.2018 passed in WP 25988/2017, the Designated Authority did not determine whether the dumped products cause injury to the domestic industry in the commercial competition with like articles made in India and passed the impugned order declining to initiate anti-dumping investigation.

**10.** The Central Government, which filed its return, to the Writ proceeding argued that Andhra Petro produced only 2-EH, not INA and 2-PH, and as it filed the combined application for all the said products, the Designated Authority rejected the request of the petitioner. The letters produced by Andhra Petro to show that 2-EH, INA and 2-PH are 'like articles', were not issued by any independent/recognised agency/source and hence they could not be considered. It was further stated that though several opportunities were given to Andhra Petro seeking clarifications as to how the acyclic alcohols i.e., 2-EH, INA and 2-PH are

'like articles' when it does not produce INA and 2-PH, it did not submit any clarification, and it filed a combined application for imposition of anti-dumping duty for all three products.

**11.** The High Court disposed of the second writ petition on 28.08.2018 making the following observations and directions:

> *"7. In spite of specific direction of this Court in W.P.No.25988 of 2017 dated 09.02.2018, the second respondent has not dealt with the applications of the petitioner afresh in true letter and spirit of the said order and passed the impugned order. The second respondent, relying upon the order of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No.C/411/2000 dated 11.04.2001 whereby it held that Normal Hexanol is not one manufactured or produced by domestic industry, passed the impugned order stating that it is decided not to initiate anti-dumping investigation concerning imports of INA, 2-PH and 2-EH originating in or exported from Saudi Arabia, EU and Singapore, excluding 2-EH having carbon No.8 from EU. While passing the impugned order, the second respondent ignored the final findings dated 29.07.2003 and the order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dated 13.04.2006 in the case of Andhra Petrochemicals Ltd. Vs. Designated Authority 2006 (201) ELT 481 (Tri.-Del.) with regard to dealing of 'like articles' and to accept 2-EH supplied by the domestic industry is 'like article' to 2-PH and INA imported from subject countries. The petitioner is the producer of 2-EH which is a 'like article' to 2-PH and INA and it falls within the ambit of Rule 2(b) read with Rule 2(d) of the Rules of 1995. Rules 2(b) and 2(d) of the Rules of 1995 read as under.*
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> *"2(b) 'domestic industry' means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such term 'domestic industry' may be construed as referring to the rest of the producers:*

*Provided that in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if –*

*(i) the producers within such a market sell all or almost all of their production of the article in question in that market; and (ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory."*

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*2(d) 'like article' means an article which is identical or alike in all respects to the article under investigation for being dumped in India or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation."*

*8. The second respondent has not considered the issue whether the imported products and the domestic products are technically and commercially substitutable and has not come to a conclusion on 'like article'. This action of the second respondent becomes absolutely ignoring the order of this Court dated 09.02.2018 in W.P. No. 25988 of 2017 and the impugned order is one without application of mind. There is no cogent reason pushing the petitioner to file repeated applications and the second respondent cannot pass orders in a routine and casual manner, in spite of sufficient material available with him.*

*9. In the light of the above, this writ petition is allowed, setting aside the order of the second respondent dated 05.03.2018. The second respondent is directed to take steps for initiating investigation to determine the anti-dumping in respect of import of INA having carbon No.9 from European Union and Singapore and 2-PH having carbon No.10 from European Union, in accordance with law, as expeditiously as possible. Pending miscellaneous petitions, if any, shall also stand closed. No order as to costs."*

**12.** Pursuant to the High Court's directions, the DA issued notices on 28.09.2018, 24.10.2018 and 03.12.2018. After noticing that Andhra Petro's initial application was in 2016 (i.e.18.10.2016 and 02.12.2016), the DA issued letters seeking updated data from Andhra Petro. However, Andhra Petro filed WP No.2639/2019 before the High Court against the DA's letters of 28.09.2018, 24.10.2018 and 03.12.2018. The DA filed its reply before the High Court, contending *inter alia* that first, the High Court's order dated 28.8.2018 did not prohibit it from calling for updated data and had directed it (DA) to initiate investigation in accordance with law; second, that it sought updated data to evaluate and comply with the High Court's order fairly; and lastly that Andhra Petro was silent on the fact that the data filed by it was 30 months old.

**13.** Apparently, in view of certain observations made during the proceedings by the High Court, the DA felt constrained to issue a notice of investigation on 09.07.2019 which *inter alia*, stated as follows:

> *"8. The writ petition was listed on 3.7.2019 wherein the Hon'ble High Court advised the law officer representing the Authority that requesting the industry to file fully documented application as per the prescribed proforma available on the website including all data related to recent, updated, period of injury and POI etc., is in violation of the orders passed by the Hon'ble High Court dated 28.8.2018 in WP No.11116/2017 and therefore was inclined to initiate suo moto contempt proceedings and directing the Designated Authority to appear before the Hon'ble High Court. The Hon'ble Court granted one weeks' time and posted the matter on 9.7.2019.*
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> *9. In view of the above, the Authority hereby initiates an AD investigation into the alleged dumping and consequent injury to the domestic industry in terms of rule 5 of AD rules to determine the existence, degree and effect of alleged dumping and to consider*

> *recommending the amount of anti-dumping duty which if levied, would be adequate to remove the injury to the domestic industry."*

**14.** Para 12 of the notice read as follows:

> *"The Petitioner has filed data for the period January 2016 to December 2016. In view of the High Court's order, the Authority initiates the investigation by prima facie evaluating dumping and injury based on the data provided by the applicant. However, to investigate further the POI is proposed to be considered, as 1.4.2018 to 31.3.2019 to evaluate dumping, injury and causality of injury to the petitioner due to alleged dumping."*

**15.** Later, on the same date, a corrigendum was issued and para 12 was amended by adding the following in the last line:

> *"The injury investigation period will however cover the periods April 2015-March' 2016, April 16-March 2017, April 2017-March 2018 and the period of investigation."*

**16.** By the first impugned order, the High Court initiated *suo motu* contempt proceedings after recounting the previous litigation and its directions, in those petitions. It noted that the DA, after disposal of the first petition, undertook the exercise only in relation to the period of investigation sought by Andhra Petro without enlarging it (i.e. the period); this led to the order of the DA rejecting the application on 5 March, 2018, and the filing of the second writ petition, which led to the second remand. The High Court said that the notification (dated 09-07-2019) therefore, *"cannot be countenanced"* and further observed that:

> *"The action of the Designated Authority in seeking to enlarge the period of investigation pursuant to the second remand order when it did not find any such necessity in relation to the first remand order clearly indicates its lack of bonafides, if not worse, and its intent to tamper with judicial orders.*

> *9. Further, the tone and tenor of the language used in para 8 of the Initiation Notification dated 09.07.2019, set out supra, clearly demonstrate the Designated Authority's disrespect towards the Court. It is indeed shocking to note that the Designated Authority thinks that the High Court is advising it in the scheme of things! Further, having termed the direction of this Court to be mere advice, the Designated Authority then proceeded to brush it aside.*
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> *10. In these circumstances, we deem it appropriate to initiate suo motu contempt proceedings against Sri Sunil Kumar, Additional Secretary & Designated Authority, Directorate General of Trade Remedies, Department of willful and deliberate disobedience to the order dated 28.08.2018 in W.P. No.11116 of 2018, as indicated supra, and for his utter lack of respect towards the Court. Registry is directed to take necessary steps in this regard and place the suo motu contempt case before this Court after numbering the same."*

**17.** Close on the heels of the order (dated 22.07.2009) initiating *suo motu* contempt, the High Court, by the second impugned order disposed of the writ petition [W.P.(C) 2639/2019]. The Court observed *inter alia* as follows:

> *"2. We may note at this stage that the matter arises under the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Article and for Determination of Injury) Rules, 1995. After filing of this writ petition, we were informed that Mr. Sunil Kumar, the present Additional Secretary & Designated Authority, Directorate General of Trade Remedies, Department of Commerce and Industry, Government of India, issued Initiation Notification dated 09.07.2019, demonstrating that the apprehension of the petitioner company was not without foundation. In the light of this development, this Court was constrained to initiate suo motu contempt proceedings against the said authority by name.*
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> *3. That being so, we are of the opinion that it would not be proper for the said authority to undertake the necessary exercise pursuant to the order dated 28.08.2018 passed in W.P. No.11116 of 2018. We*

> *are informed that there are three officers, viz. Mr. Mithileshwar Thakur, Mr. Satish Kumar and Ms. Shubhra, all of the rank of Additional Director General in the Department, who would be competent to take up the exercise pursuant to the aforesaid order.*
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> *4. Sri K. Lakshman, learned Assistant Solicitor General for India, would inform this Court that the designated authority would have to be appointed by the Union of India.*
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> *5. We accordingly dispose of the writ petition directing the Union of India, the third respondent herein, to choose one of the aforestated officers and appoint him/her as the designated authority to do the needful and undertake the exercise pursuant to the order dated 28.08.2018 passed in W.P. No.11116 of 2018. This exercise shall be completed expeditiously by the Union of India and in any event, not later than two weeks from the date of receipt of a copy of this order. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs."*

**18.** The learned Attorney General for India contends that both the impugned orders are unsustainable. It is urged that while issuing the notification on 09.07.2019, the DA acted within the framework of the law. The Attorney General highlighted the importance of Rule 5(3) of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Article and for Determination of Injury) Rules, 1995 as well as the relevant part of the Standard Operating Procedure (SOP) and submitted that consideration of contemporaneous if not the latest data is a per-condition for the launch of valid investigation by the DA.

**19.** It is submitted that the DA is duty bound to satisfy itself, upon being presented with evidence with respect that it adequately establishes dumping injury and causal link. Hence, adducing recent data for the purpose of evaluation of such

parameters is essential. Highlighting that the Standard Operating Procedure (SOP), especially para 5.9, has been consistently adopted in this regard, it was further stated that this method of investigation is in consonance with the WTO's jurisprudence as well as the recommendation of the Committee on Anti-Dumping Practices in the WTO.

**20.** It is submitted that the question of whether any goods fall within the term "like article" is a technical one that is to be substantiated by relevant data. In these circumstances, the position adopted by the DA requiring the furnishing of such relevant data can never be contrary to law, much less the subject of issuing *suo motu* proceedings. It was argued lastly that the choice of an officer acting as DA is left to the discretion of the Central Government and the circumstance that the incumbent to that office sought to *"enlarge the period of investigation"* was not a justifiable reason for directing his removal and substitution with another. The learned Attorney General submitted that whether any article or goods fulfill or do not fulfill the description of "like article" are matters falling within the exclusive domain of the DA, who is a quasi-judicial authority exercising statutory powers. He urged that the Court cannot lightly direct the substitution of one official with another on the assumption that non-inclusion of some goods in the expression "like article" was *mala fide*. The learned AG urged the Court to review the impugned order on the two specific grounds, i.e. that the so-called "enlarged period" is contrary to law and consequently that non-inclusion of articles other than those notified, too was not justified. These fall within the exclusive domain of the DA and could not be interfered with in proceedings under Article 226 of the Constitution.

**21.** Mr. Mukul Rohatgi, learned senior counsel appearing for Andhra Petro argued that the impugned orders do not call for interference. It was argued that the

DA, despite repeated directions, failed to appreciate the submission by Andhra Petro, that the material on record disclosing that 2-Ethyl Hexanon (2-EH) supplied by the domestic industry is an article like 2-Propytheptyl Alcohol (2-PH) and Isononanol (INA) imported from the concerned countries. It is urged that commercially and technically, the two products can fall within the description of "like product" relatable to 2-Ethyl Hexanol offered by Andhra Petrochemicals Limited. Therefore, for a valid initiation of investigation, Andhra Petrochemicals Limited satisfied the criteria enumerated under Rule 2(8).

**22.** It was contended that the DA failed to appreciate that as long as the product is imported, duty can be imposed on all types of goods, provided such type of goods is in commercial competition with a like article. Highlighting that the domestic producer in terms of Rule 2(8) should be engaged in the manufacture of like articles to enable the filing of a complaint and seeking imposition of anti-dumping duty upon the dumped article, learned counsel submitted that the two products in question were kept out of the investigation. Mr. Rohatgi argued that the scope of the term "like article" includes those which have closely resembling characters with the one in question.

**23.** It was submitted that the deliberate and persistent omission of the DA to comply with the High Court's directions was contumacious and invited stringent action, meted out by the impugned order. Learned Senior Counsel highlighted that so far as the period of investigation was concerned, in none of the previous proceedings did the DA ever disclose that data other than the period mentioned in the complaint too required inclusion for the purposes of investigation. Not having done that in the earlier proceedings, the DA was precluded from insisting that a period or periods other than what were the subject of complaint too had to be

included and relevant data for that end had to be given. The approach of the DA likewise in regard to the question of "like article" is contrary to law.

***Analysis & Conclusions***

**24.** The relevant provision, i.e. Section 9A of the Customs Tariff Act is extracted in the footnote below[1]. Section 9C of the Customs Tariff Act provides for an appeal to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) against an order *"of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article."*

**25**. This court, in *S&S Enterprise v. Designated Authority*[2], observed that "*the purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market.*" It was noted that levy of anti-dumping duty is a move to remedy injury, recognized by GATT that balances

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1 ***"Section 9A. Anti-dumping duty on dumped articles.*** *— (1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.*

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*(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:*

*Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:*

*Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the antidumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.*

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2 (2005) 3 SCC 337

> *"the right of exporters from other countries to sell their products within the country with the interest of the domestic markets." Thus the factors to constitute 'dumping', are (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry*."

**26.** *Reliance Industries Ltd. v. Designated Authority*[3] explained that industries built after independence with great difficulty should not be allowed *"to be destroyed by unfair competition of some foreign companies. Dumping is a well-known method of unfair competition which is adopted by the foreign companies."* The Court also said that,*"The purpose of Section 9-A is, therefore, to maintain a level playing field and prevent dumping while allowing for healthy competition."*

**27.** The DA, no doubt, follows a prescribed quasi-judicial procedure where a determination on whether to impose or not to impose anti-dumping duty takes place (through a report).[4] However, this proceeding culminates with a recommendation; the Central Government finally decides whether to impose such a duty, the extent of such duty, and its duration.[5] Under Rule 4, the DA is duty bound to conduct i) investigation of the existence, degree and effect of any alleged dumping in relation to imports of any article ; (ii) identify the article(s) on which anti-dumping duty is to be imposed; (iii) submit findings, provisional or otherwise to Central Government; (iv) determine the normal value, export price and the margin of dumping in relation to the article under investigation; and (v) determine the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of article from specified countries. The meaning

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3 (2006) 10 SCC 368

4 *Tata Chemicals* v. *Union of India*, (2008) 17 SCC 180; *Automotive Tyre Manufacturers Association* v. *the Designated Authority* (2011) 2 SCC 258

5 *Rule 17 which speaks of "recommendation" by the DA. Also, the power to levy duty is discretionary, evident from Rule 18 which leaves it to the Central Government to levy anti-dumping duty, by following the prescribed methods*

of dumping is defined by Rule 10.[6] Rule 17, which speaks of the findings of the DA, obliges that authority to make its final findings *"not later than one year from the initiation of investigation"* through a report that outlines the export price, normal value and margin of dumping, whether import of the article into India from specified countries causes material injury, or threatens injury, or materially retards the establishment of any industry in India, the causal link between the dumped import, etc. The proviso to Rule 17 (1) empowers the Central Government in its *"discretion in special circumstances"* to extend further the said period of one year by six months, within which the investigation is to be completed.

**28.** Rule 20 is important, and reads as follows:

> *"20. Commencement of duty. - (1) The anti-dumping duty levied under rule 13 and rule 19 shall take effect from the date of its publication in the Official Gazette.*
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> *(2) Notwithstanding anything contained in sub-rule (1) - (a) where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or where the designated authority has recorded a final finding of threat of injury and a further finding that the effect of dumped imports in the absence of provisional duty would have led to injury, the anti-dumping duty may be levied from the date of imposition of provisional duty;*
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> *(b) in the circumstances referred to in sub-section (3) of section 9A of the Act, the antidumping duty may be levied retrospectively from the date commencing ninety days prior to the imposition of such provisional duty: Provided that no duty shall be levied retrospectively on imports entered for home consumption before initiation of the investigation:*

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6 Rule 10 reads as follows:
***"10. Determination of normal value, export price and margin of dumping***. *– An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules."*

> *Provided further that in the cases of violation of price undertaking referred to in sub-rule (6) of rule 15, no duty shall be levied retrospectively on the imports which have entered for home consumption before the violation of the terms of such undertaking.*
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> *Provided also that notwithstanding anything contained in the foregoing proviso, in case of violation of such undertaking, the provisional duty shall be deemed to have been levied from the date of violation of the undertaking or such date as the Central Government may specify in each case."*

**29.** Section 9A of the Customs Tariff Act and the procedure prescribed by the Rules of 1995, clearly disclose an intent that investigations should be completed within pre-determined time limits and the levy itself (which can be specific to foreign exporter or country – or combination of both-) cannot be more than five years – which may, after due review in accordance with prescribed procedure, before expiry of the said period, be extended by another period not more than five years. These timelines are crucial; the DA is duty bound to follow them. The analysis of the particular market behaviour by the allegedly offending foreign exporters, involves sifting of a great deal of evidence, such as manufacturing capacity, financial abilities, overall capacity of the country in the like field, prices, and the margin of acceptable delinquent behaviour, as well as domestic capacity, efficiency, etc, while determining if an injury exists, the margin of such injury and its likely duration. The judgment of this court in *Union of India v. Kumho Petrochemicals*[7] has noticed that as a signatory to GATT and the Marrakesh Agreement, the Anti-Dumping Rules (ADA) are to be assimilated into domestic laws. The provision of Article 5.10 of the Marrakesh Agreement is strict with respect to the timeline for taking up and conclusion of investigation.[8] Article 10

7 (2017) 8 SCC 307.

8 Article 5.10 reads as follows:
*"5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation."*

empowers states to levy duties, with retrospective effect, only for a limited period (90 days subject to fulfilment of prescribed conditions) *"prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:.."*[9] This has been given effect to by Rules 17 and 20 of the Rules of 1995[10].

**30.** Keeping the imperative of completion of investigation within a pre-determined timeline, the guidelines contained in the *Manual of Operation for Trade Remedy Investigations (Period of Investigation and Injury Investigation period)* as to the contemporaneousness of the data necessary to carry out the investigation, assume importance. The relevant provisions of the Manual are extracted below:

> *"5.9 The POI proposed in the application should be as latest as possible, and in any case not more than six months old as on date of initiation. If the proposed POI is more than six months old, then applicant may be asked to furnish revised application with fresh data.*
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> *5.10 The POI should normally be twelve months. As far as possible attempt should be made to identify POI as per the financial year, as it will make analysis easier and more accurate. An attempt should be made to select POI in such a way that at least one complete financial year is included in the POI to ensure availability of audited details at least for a part period of POI. It is always desirable to add period in terms of quarters (as the financial results*

9 *Article 10.6, Marrakesh Agreement.*

10 Ref *Commr. of Customs v. G.M. Exports*, (2016) 1 SCC 91at page 118, where it was observed that:

*"32. Under Rule 17, the Designated Authority is given one year from the date of initiation of an investigation to come out with its final findings. This is extendable by the Central Government only in special circumstances, and only by a further period of 6 months, and no more (Clause 5.10 of the WTO Agreement). Significantly, the Designated Authority, in its final finding, may also provide for a retrospective levy of duty, the reasons therefor, and the date of commencement of such retrospective levy. This is obviously referable to Section 9-A(3), which reproduces Clause 10.6 of the WTO Agreement. The reasons must be the reasons mentioned in the said sub-section, and, as mentioned in the said sub-section, such retrospective levy cannot commence beyond 90 days from the date of the notification imposing provisional duty."*

> *are prepared quarter wise only) instead of any odd number of months as it may be difficult for other interested parties to submit their audited figures for such odd period."*

**31.** The *rationale* for these guidelines is self-evident: any investigation carried out for past periods would in all likelihood, result in minimal levy. For instance, if in 2020, investigation is initiated for the period 2013-14, with the object of determining anti-dumping, even if injurious behavior is found, the levy can be only of limited duration. Further, to levy duty for the period after findings are rendered, the POI would yield stale results, and cannot justify levy for later periods. Keeping this in mind, the DA, apparently in the present case, having regard to Para 5.9 (quoted above) required Andhra Petro to furnish relatively contemporary data. Such an action cannot be termed as arbitrary. In this court's opinion, the impugned orders were plainly erroneous in chastising the DA, and even directing his replacement, for what appears to be his adherence to prescribed procedure.

**32.** Access to judicial review is a valuable right conferred upon citizens and persons aggrieved; the Constitution arms the High Courts and this court with powers under Articles 226 and 32. At the same time, barring exceptional features necessitating intervention in an ongoing investigation triggered by a complaint by the concerned domestic industry, judicial review should not be exercised virtually as a continuous oversight of the DA's functions. This court has cautioned more than once, that judicial review is to be exercised in a circumspect manner, especially where final findings are rendered by the DA.[11]

**33.** For the foregoing reasons, this court is of the opinion that the impugned orders, i.e., the order dated 28.08.2018 issuing specific directions for anti-dumping investigation into articles imported from EU; the order dated 22.07.2019 (initiating

11 *Directorate General of Anti-Dumping v Sandik International* (2018) 13 SCC 402; *Association of Synthetic Fibre Industries v Apollo Tyres Ltd* (2010) 13 SCC 733.

contempt proceedings against the DA) and the order dated 05.08.2019 have to be set aside. The first two orders are accordingly set aside. The third order (dated 05.08.2019), to the extent that it directs the replacement of the incumbent DA, is set aside. The appeals are allowed in the above terms, without order on costs.

**.....J.**
**[ARUN MISHRA]**

**.....J.**
**[VINEET SARAN]**

**.....J.**
**[S. RAVINDRA BHAT]**

**New Delhi,**
**September 1, 2020.**