

CASE NO.:
Appeal (civil) 774-775 of 2001

PETITIONER:
Rishiroop Polymers Pvt. Ltd.

RESPONDENT:
Designated Authority & Additional Secretary & Ors.

DATE OF JUDGMENT: 23/03/2006

BENCH:
ASHOK BHAN & G.P. MATHUR

JUDGMENT:
J U D G M E N T

Bhan, J.

The present appeals have been filed with the leave of the Court against the final order No. 21/2000-AD and Corrigendum Miscellaneous Order No.1/2000-AD in C/322/99-AD with C/Stay/1383/99-AD dated 2nd February, 2000 and 3rd February, 2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short "the Tribunal"). By the order dated 2nd of February, 2000, the Tribunal rejected the appeals filed by the appellant except to the extent that it held that variable anti-dumping duty greater than dumping margin could not be imposed. The order dated 3rd of February, 2000 is merely a Corrigendum correcting the clerical mistake in the order No.21/2000-AD dated 2nd February, 2000.

The appellant \026 Rishiroop Polymers Private Limited is the authorised exclusive Intending Agents and Representatives of Messrs Korea Kumho Petrochemicals Company Limited (KKPC), Republic of Korea for the sale of their products, namely, Styrene Butadiene Rubber (SBR) and other products. The appellant has been authorised by KKPC under an authorization dated 6th May, 1998 to appear and plead on their behalf. The present appeals have been filed by the appellant in its capacity as an interested/aggrieved party and as also the representatives of KKPC.

Synthetics and Chemicals Limited (respondent no.3 herein) filed an Anti Dumping Petition on 9th of September, 1997 before the Designated Authority appointed under the Customs Tariff Act, 1975 (for short "the Tariff Act") against the imports of SBR originating in or exported from Japan, Korea, Turkey, Taiwan, USA, Germany and France. It was alleged therein that the import of SBR from the subject countries was causing injury to the domestic industry manufacturing SBR in India. Respondent No.3 furnished details regarding the normal value of the products in the subject countries and the margin of dumping. It w\as alleged that as a result of the dumped imports of SBR the domestic industry, namely, Respondent No.3, was incurring heavy losses on its SBR

activity. It was further alleged that in spite of the cost of production in the subject countries, exporters from there were reducing their export price consistently which has forced the domestic industry to reduce its selling price of various grades of SBR. That the selling price realised by the domestic industry is so low that it is unable to recover even the cost of production. That the dumped materials had retarded the growth of domestic industry in spite of installation of new plant and machinery. The expansion programme could not be commissioned as the dumped imports threatened to cause injury for future also due to sufficient freely disposable production capacity in the subject countries.

The Designated Authority, on the basis of the application filed by Respondent No.3, initiated anti-dumping investigation against the subject countries concerning imports of SBR classified under custom sub-heading 4002.19 of Schedule I of the Tariff Act, originating in or exported from the subject countries. The period of investigation was fixed by the Designated Authority for 17 months, i.e., from 1st April, 1996 to 31st August, 1997.

The Designated Authority on the basis of the material collected, published its preliminary findings as per Notification dated 21st January, 1999. By the said Notification anti-dumping duties were imposed on different grades of SBR originating from the subject countries. The Designated Authority further invited details and comments from all interested parties including the exporters from the subject countries. The Designated Authority submitted its final findings which were accepted by the Government of India, Ministry of Commerce and accordingly issued a Notification of final findings. By the said final findings, the Authority had concluded that:

(a) SBR had been exported from Japan, Korea R.P., Turkey, Taiwan, USA, Germany and France to India below its normal value resulting in dumping of SBR;

(b) The domestic industry has suffered material injury;

(c) Causal link between dumping and injury was established.

By Gazette Notification No. 421, the Ministry of Finance, issued a Notification No.107/00-Cus dated 24th August, 1999 in exercise of powers conferred by sub-section (2) of the Tariff Act, notifying the final anti-dumping duty on the basis of the recommendations in the final findings dated 2nd of June, 1999.

The appellant being aggrieved, filed appeals before the Tribunal against the final findings dated 2nd of June, 1999. In the Memorandum of Appeals, grounds were taken, inter alia, as to the issues of normal value dumping margin, injury causal link in the context of domestic industry and like articles. During the course of arguments, as noted by the Tribunal in paragraph 4 of its order, counsel appearing for the appellant did not urge

any ground other than that domestic industry has not suffered injury on account of import of SBR from the subject countries and that there was no causal link between the injury and import from the subject countries. Accordingly, the Tribunal did not go into the question as to whether the fixation of normal value and dumping margin of articles imported from the subject countries was correct or not. The Tribunal also did not go into the question as to whether the normal selling price fixed by the Designated Authority was correct. The Tribunal by the impugned order rejected the appeals except to the extent that variable anti-dumping duty greater than the dumping margin could not be imposed. As opposed to the variable duty imposed by the final findings, the Tribunal imposed fixed duties. Tribunal imposed fixed duty in respect of 1500 and 1700 series of SBR imported from Korea Kumho. By a Corrigendum Miscellaneous Order No. 1/2000-AD (which was certified on 16th of February, 2000 and communicated to the appellant on 21st February, 2000), anti-dumping duty was also imposed in respect of the 1900 series of SBR.

The submission of the counsel appearing for the appellant that the Designated Authority while assessing injury to the domestic industry in case of certain parameters, had taken into consideration the data relating to the year immediately preceding the period of investigation was rejected by the Tribunal by observing, thus:

"..... Even though data for 1994-95 was also noted in the work-sheet, assessments were made based on the data relating to the year 1995-96 only. Compared to 1995-96 there was noticeable increase in stock of various grades of SBR with the domestic industry; that there was considerable increase of imports from subject countries; there was loss in the profitability on the manufacture of SBR and in relation to average realization. On going through those data we are convinced that the domestic industry suffered drastic decline in all the relevant parameters during the period of investigation compared to those of the immediately preceding financial year, namely, 1995-96.

(emphasis

supplied)

Another finding recorded by the Tribunal was that "the Designated Authority wanted to impose anti-dumping duty on all grades of Styrene Butadiene Rubber irrespective of whether it is put under Heading 3903 or 4002. But while concluding the final finding, anti dumping duty has been imposed on SBR falling under sub-heading 4002.19 only. This is a clerical omission which is required to be corrected. Thus, we make it clear that Anti Dumping duty is on all grades of SBR, whether falling under sub-heading 4002 or 3903.

Customs Authorities have to impose duty on all types of SBR, irrespective of their classification."

Learned Counsel appearing for the appellant did not put a challenge to the finding recorded by the Tribunal as regards the causal link between injury suffered by the domestic industry on account of import of SBR from the subject countries.

Learned counsel appearing for the appellant put forth three-fold submissions. Firstly, that the Designated Authority while assessing injury to the domestic industry in case of certain parameters, had taken into consideration the data relating to the year immediately preceding the period of investigation whereas the Tribunal in para 12 of the impugned order has held that the injury assessment by the Designated Authority was based on the data relating to the year 1995-96 only. According to him, finding recorded by the Tribunal was factually incorrect. The second submission relates to the imposition of duty on products falling under Tariff Entry 3903.90 by the Tribunal. It was submitted that against the finding recorded by the Designated Authority that the products in question fell under heading 4002.19, neither the Union of India nor Respondent No.3 or any other interested party had filed appeal or objections to the finding recorded by the Designated Authority; that the Tribunal had come to this conclusion suo motu and hence this portion of the order was liable to be set aside. The third and the last argument deals with the point that the Tribunal has converted the duty imposed in US dollar term from the rupee value term without there being any appeals/prayer either by the Union of India or any other interested party.

We do not find much substance in the submission relating to the first point. The Tribunal in its order has noted that even though data for the year 1994-95 was also noted in the work-sheet, assessment was based on the data relating to the year 1995-96 only. In order to satisfy ourselves, we sent for the original confidential file. After going through the same, we find that though data for 1994-95 was noted by the Designated Authority in the work-sheet, but the assessment was made on the basis of the data relating to the year 1995-96 only. Compared to 1995-96 there was considerable increase in the stock of various grades of SBR with the domestic industry. There was a loss in the profitability in the manufacture of SBR in relation to the average realization. Having gone through the confidential records produced before us and the data for the years 1995-96 and 1996-97, we are satisfied that the domestic industry suffered drastic decline in all the relevant parameters during the period of investigation compared to those of the immediately preceding Financial Year 1995-96. We find no justification to take a view other than what has been taken by the Designated Authority and the Tribunal. Accordingly, the findings recorded by the Designated Authority as

well as by the Tribunal on this point are confirmed.

Coming to the second point, it may be noted that the subject under consideration by the Designated Authority was "Styrene Butadiene Rubber". Chapter 40 of the Tariff Act deals with "Rubber and Articles thereof". Tariff entries 40.01 and 40.02 read as follows:

Tariff Entry 40.01

"Natural Rubber, balata, gutta percha, Guayule, chicle and similar natural gums, in primary forms or in plates, sheets or strip."

Tariff Entry 40.02

"Synthetic rubber and factor derived from oils, in primary forms or in plates, sheets or strip; mixtures of any product of heading No.40.01 with any product of this heading, in primary forms or in plates, sheets or strip."

Tribunal after noticing the following observations of the Designated Authority in para 7 of its order:

"The Authority thus holds that whereas it is not justified to cover all items falling under the sub-heading 3903.90, for the purpose of imposing anti-dumping duty in present case the anti-dumping duty however is payable on Styrene Butadiene Rubber of specified series as stated, even if it is sought to be cleared under any other heading of the Custom Tariff Act. The Custom Authority is at liberty and expected to classify the goods correctly, if the goods offered for clearance are not classified correctly."

held that the Designated Authority wanted to impose anti-dumping duty on all grades of SBR irrespective of whether it fell under heading 39.03 or 40.02. The Designated Authority imposed the anti-dumping duty on the SBR falling in sub-heading 4002.19 only which was a clerical omission and required to be corrected. Accordingly, the Tribunal held that anti-dumping duty was liable to be imposed on all grades of SBR falling under sub-heading 4002.19 or 3903.90. That the Customs Authorities have to impose duty on all types of SBR irrespective of their classification. After going through the order of the Designated Authority and the Tribunal, we are of the opinion that the Tribunal has quoted and relied upon the observation of the Designated Authority in paragraph 7 reproduced above, out of context. The Designated Authority in paragraph 5 of its order observed, thus:

"The Authority observes that items falling under 3903.90 are not product under consideration and SBR in 1000 series is not produced by the

petitioner and thus are not product under consideration."

Para 7 of the final finding of the Designated Authority reads thus:

"The Authority observes that, in the preliminary findings it was inter-alia held that product under consideration in the present investigation is Styrene Butadiene Rubber (SBR) originating in or exported from the subject countries classified under Custom sub-heading 4002.19 of the Custom Tariff Act which was explained at para 5 of the preliminary findings dated 21st January, 1999. The Authority had inter alia held that product under consideration is SBR of 1500 series, 1700 series and 1900 series under Custom sub-heading 4002.19 of Custom Tariff Act. None of the interested parties has raised any argument in this regard and therefore the Authority confirms its preliminary findings in this regard.

The Authority notes that petitioner is claiming that SBR is also being cleared under custom chapter 39 Entry no.3903.90 (polymers of styrene in primary forms) and therefore the anti-dumping duty should be imposed under this head also. On the contrary it is argued by exporter and importer that chapter 39 relates to plastic and does not cover SBR and therefore duty should not be imposed on products covered under chapter 39 Entry no. 3903.90. The Authority observes that chapter 39 covers "Plastic & Articles Thereof" whereas chapter 40 covers "Rubber & Articles Thereof" Styrene Butadiene Rubber as the name suggest is a synthetic rubber and is covered under chapter 40. It is also observed that as per note no. 2(h) of chapter 39, the synthetic rubbers and articles thereof which are covered under chapter 40, do not fall under chapter 39. It is also observed that while giving the import statistics, the petitioner had submitted information in respect of custom heading No.4002.19 only. While submitting the evidence that SBR 1900 series is also being imported under chapter 39, the Authority observes that the items cleared under chapter 39 is "Elastomer Resin KHS 68" and thus is not under the nomenclature of "Synthetic Rubber". In view of this, the Authority does not find justification to cover item falling under sub-heading 3903.90 for the purpose of imposing anti-dumping duty. However, the Authority agrees with the

argument of the petitioner to the extent that product under consideration is styrene butadiene rubber of specified series as stated irrespective of custom heading. The Authority thus holds that whereas it is not justified to cover all items falling under the sub-heading 3903.90 for the purpose of imposing anti-dumping duty in present case the anti-dumping duty however is payable on Styrene Butadiene Rubber of specified series as stated even if it is sought to be cleared under any other heading of the Custom Tariff Act. The Custom Authority is at liberty and expected to classify the goods correct if the goods offered for clearance are not classified correctly."

(Emphasis supplied)

The findings recorded by the Designated Authority in para 7 of its order clearly indicate that the Designated Authority did not intend to cover SBR which was being imported under sub-heading 3903.90 for the purpose of imposing duty; what the Designated Authority held was, that if the goods were being imported by wrongly classifying them under sub-heading 4002.19, then the Customs Authorities are at liberty and expected to classify the goods correctly. It was held by the Designated Authority that while giving the import statistics, Respondent No.3 had submitted information in respect of Custom Heading 4002.19 only; that Chapter 39 covers "Plastic and Articles thereof" whereas Chapter 40 covers "Rubber and Articles thereof" Styrene Butadiene Rubber, as the name suggests, is a synthetic rubber and would be covered under Chapter 40 and not 39; that as per note no. 2(h) of Chapter 39, synthetic rubbers and articles thereof, which are covered under Chapter 40, do not fall under Chapter 39. The Designated Authority had recorded a firm finding that "Elastomer Resin KHS 68" was not covered for the purpose of imposing duty. The finding recorded by the Designated Authority was categorical and not a clerical omission, as has been observed by the Tribunal. It was not correct on the part of the Tribunal to hold on its own motion that "this is a clerical omission which is required to be corrected." Finding recorded by the Tribunal in this respect deserves to be set aside. We do so. Finding recorded by the Designated Authority in this respect is restored.

Dealing with the penultimate argument, it may be stated that the Designated Authority had imposed the duty in rupee value but the Tribunal converted the same in US dollar terms, without there being any prayer for such conversion by either of the parties. Learned counsel appearing for the Department conceded that the Tribunal was not justified in converting the anti-dumping duty in US dollar terms and, after taking instructions, stated that he has no objection to the setting aside of the order passed by the Tribunal in imposing anti-

dumping duty in terms of US dollars and to the restoration of the order passed by the Designated Authority in imposing the anti-dumping duty in rupee terms.

Accordingly, these appeals are allowed partly to the extent indicated above. No costs.

JUDIS