ü‘ REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2242 OF 2006

M/s. Alkali Manufacturers Assn. of India ... Appellant

VERSUS

Designated Authority, D.A.D.A.S. & Ors. ... Respondents

WITH

CIVIL APPEAL NO. 3481 OF 2006

Designated Authority ...Appellant

VERSUS

M/s. Alkali Manufacturers Assn. of India & Ors. ...Respondents

JUDGMENT

Dipak Misra, J.

The appellant in Civil Appeal No. 2242 of 2006, namely, M/s. Alkali Manufacturers Association of India, filed a petition under Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (for short, "Anti-Dumping Rules") before the Designated Authority (DA) on behalf of the domestic industry alleging dumping of caustic soda originated in and exported from People’s Republic of China and Korea. On the basis of the said petition/complaint, DA issued a notification initiating anti-dumping investigation covering the period from 01.04.2001 to 31.03.2003. The interested parties were required to place their views in writing before

the said authority and after causing a preliminary inquiry, the findings were sent to the known exporters, importers and embassies of the two countries and exporters in the other countries to furnish their views to the DA. Opportunity of public hearing was afforded to the interested parties on 18.02.2003 and the parties were asked to submit their written submissions. On 14.07.2003, the DA issued a disclosure statement under Rule 16 of the Anti-Dumping Rules. The appellant in Civil Appeal No. 2242 of 2006 filed its comments on the disclosure statement before the DA and requested the said authority to disclose the reasons in detail for the determination of the preliminary findings recorded on 21.09.2002. Be it stated, the DA had notified its

preliminary findings stating that the caustic soda had been dumped into India except from one exporter from Korea, M/s. Hanwha Chemical Corporation at less than its normal value as a result of which the Indian manufacturers of caustic soda had suffered injury. The DA provisionally recommended imposition of anti-dumping duty as the difference between $353.20 per MT and landed price of imports on every exporter from Korea except M/s. Hanwha Chemical Corporation (HCC) and the difference between $362.34 and landed price of imports on all exports from China. Regard being had to the preliminary findings, the Ministry of Finance had issued Notification No. 142 of 2002 on 26.12.2002 imposing preliminary anti-dumping duties. After hearing the interested parties and issuance of the disclosure statement, the DA issued its final findings in which it determined that the dumping margin for all exporters from Korea was 37.30%, except for HCC for which it determined a dumping margin of (-)4.2% (de minimis), and the dumping margin for all exporters from China was 84.05%, except for Chlor Shanghai for which it determined a dumping margin of 41.7%. The said order was passed on

04.08.2003 and a final Notification No. 142 of 2003 was issued by the Central Government on 23.09.2003.

2. Being aggrieved by the aforesaid Notification, the appellant in Civil Appeal No. 2242 of 2006 filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi (for short, "the tribunal") challenging the determination of the DA on anti-dumping duty. Two other companies, namely, M/s. National Aluminum Company Ltd. and M/s. Hindustan Lever Limited also preferred appeals challenging the imposition of anti-dumping duty on import of caustic soda.

3. Before the tribunal, it was contended by the complaint/appellant that the findings of the DA on the imports made from HCC recommending the anti dumping margin is de minimis (minus 4.2%) is not based on the correct appreciation of the facts and the normal value and the export price of sodium hydroxide (caustic soda) had not been correctly worked out in case of HCC as the data provided by the said Corporation was not correct. The said contention was elaborated on many a score which included

that the export price as defined in Section 9A of the Customs Tariff Act, 1995 (for short, "Act") had not been correctly determined; that the DA could not have worked out export price at ex-factory level as deduction allowed for arriving at the ex-factory price was without checking the records of HCC inasmuch as no appropriate response was given to the questionnaire; that the DA should have taken into consideration the price of each individual transaction for comparison of normal value and the export price. It was also urged that the methodology adopted by the DA for arriving at the cost of production was not disclosed although the authority was required to disclose all the

reasons for arriving at the conclusion.

4. The stand of the appellant was resisted by the contesting respondents. On behalf of the DA, reliance was placed on Cost Accounting Records (Caustic Soda) Rules, 1967 (for short, "1967 Rules") as amended from time to time and, on that basis it was put forth that ‘chlorine’ was determined as a by-product. It was also contended that the DA had applied the correct methodology and hence, no fault could be found with the determination. The assail to the

erroneous procedure being adopted by the DA was seriously resisted before the tribunal.

5. The tribunal considering the submissions raised by the parties came to hold that the main duty of the DA is to determine existence degree and effect of alleged dumping in relation to import of any article and to submit its finding provisionally or finally to the Central Government regarding normal value, export price and margin of dumping in relation to the article under investigation and the injury or threat of injury to an industry established in India or material retardation to the establishment of industry in India consequent upon imports of such articles from specified countries and to recommend levy of anti-dumping duty equal to the margin of dumping or less which if levied would remove the injury to the domestic industry and the date of commencement of such duty. The tribunal addressed the issue whether the allegation that in the case of HCC the normal value and export price had not been correctly determined as a consequence of which higher anti-dumping duty on HCC had been imposed and proceeded to hold thus:-

"19.1 In case of M/s Hanwha Chemical Corporation, caustic soda was exported from Korea to India. The order for export was obtained by M/s Tricon who had filed the tender with M/s

NALCO and whose tender was accepted. M/s Tricon for exporting caustic soda to M/s NALCO India placed order on M/s Hanwha Corporation to supply the goods to M/s NALCO and M/s Hanwha Corporation in turn obtained the goods from M/s Hanwha Chemical Corporation. We find that in this case the goods were exported from Korea to India irrespective of the fact that the tender was in the name of M/s Tricon, USA. Therefore, Designated Authority has to determine a definite CIF export price at which the goods were exported from Korea to India. When the CIF export price is available from Korea to India then it has to be taken as the export price. To reach the ex-factory export price, the deduction of ocean freight, ocean insurance, port charges, commission paid to the middleman namely M/s Hanwha Corporation and inland freight and inland insurance, etc. has to be deducted to reach the ex-factory price for export. This has been done, therefore, there is no relevance of taking into consideration the SGA expanses of M/s Hanwha Corporation. We also find that deduction of $5 per DMT was also not permitted by the Designated Authority for caustic soda produced by diaphram technology as there is no difference in caustic soda when manufactured by membrain technology or diaphram technology. It is immaterial whether M/s Hanwha Chemical Corporation and M/s Hanwha Corporation were running in loss, we have only to see whether the export price has been correctly determined or not. We find that the Designated Authority in his final finding has observed that the authority for the purpose of final finding considered the

adjustment as claimed by the customer on discount adjustment in terms of sale as per NALCO tender and adjustment of previous transaction sale to M/s Tricon. Thus addition of $4.57/MT was correctly done. Thus, Designated Authority has correctly determined the export price for caustic soda and it was normatted for other exporters from Korea. This normatted export price was taken and normal value was determined on the basis of published figures of domestic sale in Chlor Alkali Magazine. The domestic industry has raised various points with regard to M/s Hanwha Chemical Corporation like insufficient/dismal disclosure, incorrect cost of production data, lack of information of affiliation, illegal adjustment of US $5 PMT claimed citing NALCO tender and issue of contract and physical export. The Designated Authority had examined and verified at the plant site corporate office of M/s Hanwha's Chemical Corporation relevant cost record, financial records and production records for determining the cost components, domestic sale price, export price, pricing policy and transfer pricing to M/s Tricon. The English version of balance sheet was also prodded to domestic industry apart from other non-confidential information as and when asked for.

19.2 The Designated Authority has observed that the investigation is not NALCO's centric although NALCO consumes sizable quantity, but the consumption of NALCO just 6 to 7 per cent of

Indian demand, therefore, the investigation covers all other of imports whether by NALCO or others."

6. After so holding, the tribunal opined that in case of HCC cost had been correctly determined by the DA taking the chlorine as a co-product and separating its

manufacturing cost during the process of manufacture of caustic soda at the stage of separation of chlorine and caustic soda on the basis of the value of production and the same principle should have been adopted by the DA in case of domestic industry. The tribunal opined that the identical treatment was not given to the domestic manufacturers and HCC. After so holding, the tribunal proceeded to deal with the non-injurious price and opined thus :-

"22. While determining the non-injurious price for the like article for the domestic industry, the Designated Authority has used the actual verified cost of production of the subject goods to determine optimum cost of production for domestic industry taking into account the normatted base consumption norm of all the participating domestic industry and the actual price of raw material which are consumed for production of caustic soda during the period of investigation. We find that Cost Accounting Records (Caustic Soda) Rules 1967 as amended from 1999 provide for maintenance of proper books of accounts containing particulars in Schedule III and proforma "A" and "B" mentioned in the said schedule annexed to the rules relating to utilization of materials labour and other items of cost as far as these are applicable to caustic soda in any form. We find that during the POI, the cost of chlorine was varying and it has been treated as a bye-product by the Designated Authority. When cost of chlorine is substantial then it should not be taken as bye-product but it should be treated as a co-product as per para 12 of Annexure-III to Cost Accounting

Records (caustic soda) Rule 1967. In such a situation, DA should have apportioned the cost upto point of separation on reasonable and equitable basis. He should have taken caustic soda and chlorine as co-product and up to the stage of separation the common cost should have been allocated on the basis of volume of production. In case of M/s Hanwha Chemical Corporation the Designated Authority has done this. Therefore, two different methods cannot be adopted for costing of the same product for comparison with cost of M/s Hanwha Chemical Corporation. A uniform practice should have

been adopted for both."

7. The aforesaid view persuaded the tribunal to hold that the non-injurious price was not correctly determined by the DA and, accordingly, set aside the Notification No. 142 of 2003 dated 23.09.2003 and the final findings of the DA on non-injurious price and injury margin and remanded the matter to the DA for fresh determination of non-injurious price and injury margin by reasonable and equitable distributing the cost of production between the chlorine and caustic soda and issue findings afresh in accordance with law. The tribunal finally held thus:-

> "22.2 We are, therefore, of the view that the non-injurious price was not correctly determined by the Designated Authority. In case of M/s. Hanwah Chemical Corporation, the appellant had separated the cost of production between Caustic
>
> 11
>
> soda and Chlorine at the point of separation of the Chlorine and Caustic soda. The same principle should be applied for domestic industry for reasonable and equitable distribution of cost of production between chlorine and caustic soda. Since this has not been done and this has lead to incorrect fixation of non-injurious price, and consequently anti-dumping duty.
>
> 23. We, therefore, set aside the impugned notification No. 142/2003-Cus dated 23rd September, 2003 and the final findings of the DA on non-injurious price and injury margin. We remand the case to the designated Authority for a fresh determination of non-injurious price and injury margin by reasonably and equitably distributing the cost of production between chlorine and caustic soda and issue final finding afresh on that basis in accordance with law and in the light of this judgment."

8. We have heard Mr. Basava Prabhu Patil, learned senior counsel for the appellant in Civil Appeal No. 2242 of 2006, Mr. Yashank Adhyaru, learned senior counsel for the appellant-Designated Authority in Civil Appeal No. 3481 of 2006, and Mr. S.K. Bagaria, learned senior counsel for respondent no. 7.

9. Mr. Basava Prabhu Patil, learned senior counsel,

assailing the judgment and order passed by the tribunal has urged that the tribunal was not justified in comparing the

12

normal value of a foreign exporter with the NIP of Indian producers and further there was no warrant to direct the DA to determine cost of production for foreign exporters and of Indian producers following the same methodology when the foreign exporters and Indian producers adopt and apply different accounting practices as permissible in their respective countries; that the tribunal has applied the principle laid down in HCC case though in the said case, the normal value and the value of export price was the same and there was really no dumping; that the tribunal has grossly erred by treating chlorine as a co-product or a joint-product along with caustic soda without taking note of the accounts of the company which has been maintained on the basis of the generally accepted accounting principles; that the tribunal has really not kept itself alive to the language employed in Para 12 of Schedule III to the 1967 Rules which lays down the concept of "Equal Economic Importance" for the joint products. The learned counsel further urged that the tribunal has been carried away by the data of international prices presented by the importers which show that the chlorine prices in the international

13

market were substantial whereas the thrust of the matter to be decided for treating chlorine as a joint product under paragraph 12 of the Schedule III to the 1967 Rules as the chlorine was equal economic importance to the concerned Indian company. The submission of Mr. Patil is that the DA has committed a grave error by by-passing the generally accepted accounting principles in India as well as specific provisions of law that the recognized accounts have to be maintained for a particular product and that has led to the eventual determination. Learned counsel would criticise that the order of the tribunal is not clear and it is solely

based on earlier determination in M/s. Hanwha Chemical Corporation’s case.

10. In Civil Appeal No. 3481 of 2006 preferred by the DA, apart from raising the similar grounds, it has also been urged that the DA on appropriate consideration and also considering the ambit and sweep of the 1967 Rules has determined chlorine as a by-product and there was no justifiable reason on the part of the tribunal to dislodge the same. Mr. Yashank Adhyaru, learned senior counsel appearing for the DA would seriously urge that it was not a

fit case on the part of the tribunal to remit the matter to the DA to determine the NIP as it was not necessary to do so, for undoubtedly it was a by-product but not a co-product.

11. Mr. Bagaria, learned senior counsel appearing for the respondent no. 7, per contra, would contend that voluminous documents were filed by the said respondent as the appellant before the tribunal, and accordingly the tribunal had applied the principle in M/s. Hanwha Chemical Corporation’s case and taken note of the market price of Chlorine at the relevant time and, therefore, the judgment and order passed by the tribunal are absolutely impeccable and do not warrant any kind of interference by this Court in appeal. It is further propounded by him that the determination of "Equal Economic Importance", as envisaged in paragraph 12 of Schedule III to the 1967 Rules having not been defined, cannot be restricted or confined to the sale price as reflected in the books of accounts of a domestic company but there has to be other permissible enquiry, regard being had to the commercial use. To bolster the said submission, he has read out few passages from the monograph issued by the Institute of Costing Work

Accounts of India.

12. To appreciate the aforesaid submissions in proper perspective, we have carefully scrutinized the judgment rendered by the tribunal. On a perusal of the same, we find that after narrating the facts and noting the submissions, the tribunal has observed that the DA has not taken into account many an aspect while determining the NIP, for it has taken into consideration certain obsolete concepts. The tribunal has observed that for arriving at dumping in relation to an article, the DA is required to make a fair comparison between the export price and the normal value. It has also stated that the comparison is required to be made at the same level of trade at ex-factory level and in respect of sales made at as nearly possible the same time. In this context, it has placed reliance on the decision rendered in M/s. Hanwha Chemical Corporation's case where the DA had compared the ex-factory export price and normal value and determined the margin of dumping. The tribunal has opined that the margin of dumping in M/s. Hanwha Chemical Corporation is different from the margin

of dumping from other non-cooperative exporters from Korea. After so observing, the tribunal has held that in case of M/s. Hanwha Chemical Corporation cost has been correctly determined by the DA taking the chlorine as co-product and separating its manufacturing cost during the process of manufacture of caustic soda at the stage of separation of chlorine and caustic soda on the basis of the volume of production. The same principle should have been adopted by the DA in case of domestic industry and therefore, identical treatment was not given to domestic manufacturers and HCC.

13. Thereafter, the tribunal has adverted to the issue of NIP and in that context has opined that DA should have apportioned the cost up to point of separation on reasonable and equitable basis and he should have taken caustic soda

and chlorine as co-product up to the stage of separation the common cost should have been allocated on the basis of volume of production. Thereafter, it has been observed that in case of HCC, the DA has done that and hence, two different methods cannot be adopted for costing of the same product for comparison with cost of HCC.

17

14. To appreciate the factual score in proper perspective, we may profitably refer to Section 9A of the Act which reads as follows:-

> "Section 9A. Anti-dumping duty on dumped articles
> (1) Where any article is exported by an exporter or producer from any country or territory (hereafter 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.
> Explanation.-For the purposes of this section,-
> (a) "margin of dumping" in relation to an article, means the difference between its export price and its normal value;
> (b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);
> (c) "normal value", in relation to an article, means-

18

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or
(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-
(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under

sub-section (6); or
(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub- section(6):
Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.
(1A). Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, either by altering the description or name or composition of the article subject to such anti- dumping duty or by import of such article in an unassembled or dissembled form or by changing

the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be.
(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti- dumping duty exceeds the margin as so determined,-
(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and
(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.
(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent export-oriented undertaking or a unit in a free trade zone or in a special economic zone.
Explanation. - For the purposes of this section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in Explanations 2 to sub-section (f) of section 3 of Central Excise Act, 1944.

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that -
(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping

and that such dumping would cause injury; and
(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti- dumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding anything contained in any other law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.
(4) The anti-dumping 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.
(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 anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.
(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified and for the manner in which the export price and the normal value of and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.
(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub- section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:
Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.;
(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid

before each House of Parliament.
(8) 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,

22

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."

15. As we find the said Section is quite a comprehensive provision and deals with various facts covering "margin of dumping", "export price", "normal value", etc. It clearly stipulates that it is an additional duty. The said duty is to be imposed on various criteria. In this regard, we may usefully reproduce Rule 5 of the Anti-Dumping Rules. It reads as follows:-

"Rule 5. Initiation of investigation. - (1) Except as provided in sub-rule (4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry.
(2) An application under sub-rule (1) shall be in the form as may be specified by the designated authority and the application shall be supported by evidence of -
(a) dumping
(b) injury, where applicable, and
(c) where applicable, a causal link between such dumped imports and alleged injury.
(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless -

23

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry :
Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like article by the domestic industry, and
(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -
(i) dumping,
(ii) injury, where applicable; and
(iii) where applicable, a causal link between such dumped imports and the alleged injury, to justify the initiation of an investigation.
Explanation. - For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per

cent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition, as the case may be, to the application.
(4) Notwithstanding anything contained in sub-rule (1) the designated authority may initiate an investigation suo motu if it is satisfied from the information received from the Collector of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation."

16. Rule 11 deals with determination of injury. Rule 17 provides for final findings. To understand the import of the Section and the Anti-Dumping Rules, we may reproduce a passage from the S&S Enterprise v. Designated Authority and others1:-

"In our opinion, the interpretation of Rule 14(d) by Respondent No.1 and the Tribunal is incorrect and contrary to its language. The imposition of dumping duty is under Section 9A of the Customs Tariff Act, 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. 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. The levy of dumping duty is a method recognized by GATT which seeks to remedy the injury and at the same time balances 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

1 (2005) 3 SCC 337

domestic industry."

17. In Reliance Industries Ltd. v. Designated Authority and others2 this Court has observed thus:-

"The result was that an industrial base was created in India after independence and this has definitely resulted in some progress. The purpose

of Section 9-A can, therefore, easily be seen. The purpose was that our industries which had been built up after independence with great difficulties must 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. This is done by selling goods at a very low price for some time so that the domestic industries cannot compete and are thereby destroyed, and after such destruction has taken place, prices are again raised.

The purpose of Section 9-A is, therefore, to maintain a level playing field and prevent dumping, while allowing for healthy competition. The purpose is not protectionism in the classical sense (as proposed by the German economist Friedrich List in his famous book 'National System of Political Economy' published in 1841) but to prevent unfair trade practices. The 1995 Amendment to Section 9A was apparently made in pursuance to Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) which permitted anti-dumping measures as an instrument of fair competition.

The concept of anti-dumping is founded on the basis that a foreign manufacturer sells below the normal value in order to destabilise domestic manufacturers. Dumping, in the short term, may give some transitory benefits to the local cus-

2 (2006) 10 SCC 368

tomers on account of lower priced goods, but in the long run destroys the local industries and may have a drastic effect on prices in the long run."

18. Recently in Commissioner of Customs, Bangalore v. M/s G.M. Exports & others3, while dealing with the concept of 'injury', a two-Judge Bench has observed:-

"It will thus be seen that the determination of material injury to domestic industry depends on a series of complex economic factors which are to be segregated from other factors which may also cause injury to the said industry."

19. It is pertinent to note that except M/s. Hanwha Chemical Corporation, the other exporters did not cooperate. However, it was the obligation of the complainant to establish that there was an injury to the domestic industry. For the said purpose, the endeavour was made to establish before the DA that it was a by-product and it succeeded in the said attempt. The tribunal, on being approached by the 7th respondent, has set aside the order

and the notification. As is noticeable, the reversal has taken place on two counts, namely, the principle determined in M/s. Hanwha Chemical Corporation's case, and further by taking notice of the fact that the cost of Chlorine was

substantial during the said period and, therefore, it deserved to be treated as a co-product as per the 1967 Rules. The approach of the tribunal, as we see, is fallacious. It has observed that M/s. Hanwha Chemical Corporation's case is absolutely different. In such a situation, it should not have mechanically adopted the said principle. That apart, as submitted by Mr. Patil, it has followed a general principle of the rise in price but has not dwelt upon the issue with regard to the concept, i.e., "Equal Economic Importance". The Equal Economic Importance, as is canvassed, is the price almost similar to the main product, i.e. caustic soda. Mr. Patil, learned senior counsel, would contend that it would depend upon the realization of amount from sales. It is submitted by him that the appellant had received 82% from sales of caustic soda and 18% from the sale of Chlorine subject to certain variations.

20. Mr. Bagaria, learned senior counsel, has put forth that the amount reflected in the accounts may be correct for the purpose of accounting as provided under the Companies Act, 1956 and other purposes but the words "Equal Economic Importance" being not defined in Paragraph 12 to

Schedule III of the 1967 Rules, it has to be determined on the facts of each case. Learned counsel would contend that the use of chlorine and its commercial use should have gone into by the tribunal. Elaborating the same, it is contended that the Chlorine can be used for some other production.

21. In our considered opinion, the tribunal should have dwelled upon the said facet before it recorded the finding whether it is a co-product or a by-product. It is because the

"Equal Economic Importance" has to be considered on a rational and pragmatic basis. It is the duty of the tribunal to see whether the DA had considered the said aspects or proceeded on hypothetical basis. The tribunal has the jurisdiction to appreciate the evidence in entirety and arrive at a conclusion and that having not been done and the entire judgment having been based on the application of M/s. Hanwha Chemical Corporation's case and the price rise in the price of Chlorine, we are constrained to dislodge the judgment and order of the tribunal.

22. Resultantly, the appeals are allowed and the judgment and order passed by the tribunal are set aside and the

tribunal is directed to decide the matter afresh keeping in view the observations made hereinabove. The tribunal shall take into account the generally acceptable accounting principle and keep in view the statutory concept and commercial use, "Equal Economic Importance" and determine the controversy. It will be permissible to look at any other material to determine the same. The tribunal shall decide the matter within a span of six months hence. There shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(Shiva Kirti Singh)

New Delhi;
January 07, 2016.

ITEM NO.101 COURT NO.4 SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2242/2006

M/S. ALKALI MANUFACTURERS ASSN. OF INDIA Appellant(s)

VERSUS

DESIGNATED AUTHORITY,D.A.D.A.S. & ORS. Respondent(s)

WITH

C.A. No. 3481/2006
(With Office Report)

SLP(C) No. 14323/2006
(With Interim Relief and Office Report)

Date : 07/01/2016 This appeal was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE SHIVA KIRTI SINGH

For Appellant(s) M/s. Lawyer S Knit & Co,Adv.

Mr. B. Krishna Prasad,Adv.
Mr. Praveen Kumar,Adv.

For Respondent(s) Mr. B. Krishna Prasad,Adv.
Mr. Praveen Kumar,Adv.
Mr. Vishwajit Singh,Adv.
M/s Suresh A. Shroff & Co.,Adv.

UPON hearing the counsel the Court made the following

O R D E R

CA Nos. 2242 & 3481 of 2006

The appeals are allowed and the judgment and order passed by the tribunal are set aside in terms of the signed reportable judgment. There shall be no order as to costs.

SLP (C) No.14323 of 2006

Having heard Mr. Bagaria, learned senior counsel for the petitioner, we think, regard being had to the facts and

31

circumstances of the case, there is no justification to interfere with the case. However, our non-interference will not be taken note of by the tribunal while adjudicating the matter that we have remanded today forming subject matter of Civil Appeal Nos. 2242 of 2006 and 3481 of 2006.

The special leave petition is disposed of accordingly.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master

(Signed reportable judgment is placed on the file)