IN THE HIGH COURT OF GUJARAT

AT AHMEDABAD

Civil Application (For Vacating Interim Relief) No. 2 Of 2019
R/Special Civil Application No. 20957 Of 2018

JUPITER SOLAR POWER LTD
THROUGH DIRECTOR ALOK S/O RAJ
KUMAR GARODIA

Vs

UNION OF INDIA (DEPARTMENT OF REVENUE)

Harsha Devani & Bhargav D Karia, JJ

Dated: May 07, 2019

Appellant Rep by: Mr Mihir Joshi, Senior Adv. With Mr S N Thakkar
Respondent Rep by: Mr Ankit Shah, Mr Py Divyeshvar, Mr SN Soparkar, Senior Adv. With Mr Bhadrish S Raju

Cus - By this application, the applicant (original respondent no.8) has prayed that the interim order dated 28.12.2018 passed by this Court in Special Civil Application No.20957 of 2018 be vacated - the opponent No.8 (original petitioner) had filed the captioned petition seeking a declaration that the Final Findings dated 16.7.2018 issued by the Directorate General of Trade Remedies and the Notification dated 30.7.2018 as also Instruction No.14/2018-Customs dated 13.9.2018 are ultra vires the Customs Tariff Act and the Safeguard Duty Rules as well as unconstitutional in terms of Articles, 14, 19(1)(g), 21, 265 and 300A of the Constitution of India and other ancillary reliefs - by the Final Findings dated 16.7.2018, the Director General had recommended imposition of safeguard duty on imports of Solar Cells [product under consideration (PUC)] for a period of two years - pursuant thereto, the GOI had issued a notification dated 30.7.2018 levying safeguard duty at the rates specified therein - being aggrieved, the petitioner presented the captioned petition wherein this court, by the order dated 28.12.2018, had granted ex parte ad-interim relief in favour of the petitioner

Held: The Director General has recorded a categorical finding that the two applicant units meet with the requirement of major share of Indian industry - however, prima facie, at this stage, without a detailed inquiry, it cannot be said that the applicants before the Director General do not meet with the requirements of domestic industry as contemplated under section 8B(6)(b) of the Customs Tariff Act - the Director General has found that domestic industry suffered serious injury during the POI and that there is threat of serious injury in future to the domestic industry - from the facts as emerging from the record, it is clear that the Director General has considered all relevant parameters in the final findings - as to whether such findings are justified having regard to the material on record, would be

required to be gone into at the stage of final hearing of the petition - insofar as the question of balance of convenience is concerned, if the petitioner continues to make imports by simply executing a bond, the operation of the final findings in effect and substance remain stayed and the domestic industry does not get any benefit under the impugned notification and final findings - when the Director General (Safeguard) has found that the domestic industry has suffered injury and also faces threat of serious injury, if the ad interim relief granted earlier is continued, the domestic industry would continue to suffer such injury and may collapse under the impact of the onslaught of imports - the importers are duly protected from the increase in the change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government or the Union Territories - besides, if the petitioner ultimately succeeds it would be entitled to the refund of the safeguard duty paid by it, whereas if the applicant (original respondent No.8) succeeds in the petition, it would not be possible to reverse the injury done to it if the ad interim relief granted earlier is continued - under the circumstances, the balance of convenience lies in favour of the domestic industry - the domestic industry would suffer irreparable injury if the ad interim relief granted earlier is permitted to continue - for the foregoing reasons, the application succeeds and is, accordingly, allowed - the ad interim relief granted vide order dated 28.12.2018 is hereby vacated : HIGH COURT [para 18, 22, 23, 24, 25, 26]

Request for Stay of the order: Considering the fact that the duration of the levy of safeguard duty is limited and the petitioner has already enjoyed interim relief for a period of more than four months, immense prejudice would be caused to the domestic industry if the interim relief is continued any further - Request is, therefore, declined: High Court [para 27]

Civil Application allowed

Case laws cited:

Bloom Dekor Limited v. Subhash Himatlal Desai - (1994) 6 SCC 322.....para 9.1, 12.....distinguished

JUDGEMENT

Per: Harsha Devani:

1. By this application, the applicant (original respondent No.8) has prayed that the interim order dated 28.12.2018 passed by this court in Special Civil Application No.20957 of u2018 be vacated.

2. On 28.12.2018, this court had passed the following order:

"1. The learned advocate for the petitioner has tendered a draft amendment. The amendment is allowed in terms of the draft. The same shall be carried out forthwith.

2. Mr. S. N. Soparkar, Senior Advocate, learned counsel with Mr. Vipul Wadhwa, and Mr. Dhruv Toliya, learned advocates submitted that in this

case the application under rule 5 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 was made by in all five parties claiming to be domestic industries. It was submitted that out of the five, three were situated in the SEZ and, therefore, the Director General has accepted the contention that those three are not eligible to move such application and has restricted the application to two such domestic industries. The attention of the court was invited to paragraph 27(j)(iv) of the impugned order, to point out that the Director General has recorded that the scope of DI is restricted only to the producers I.e. M/s.Indosolar Limited and M/s. Jupiter Solar Power Limited. It was submitted that he has thereafter found that these two companies collectively account for 38% of the total domestic production in the DTA. Reference was made to the table below, to point out that the calculation is based on the basis that the total Indian production is 842 MW whereas total Indian production exceeds 2000 MW. It was submitted that, therefore, the calculation of 38% is incorrect. The attention of the court was invited to the definition of "domestic industry" as defined under clause(b) of sub-section (6) of section 8B of the Customs Tariff Act, 1975, to submit that the same inter-alia means the producers whose collective output of the like articles or a directly competitive article in India constitutes a major share of the total production of the said article in India. It was submitted that in the first place the collective production of the two parties at 38% is incorrect; however assuming for the sake of argument that the same is correct, even then, the same would not fall within the ambit of "domestic industry" as the same does not constitute the major share of the total production of the said article in India. It was submitted that, therefore, the application itself was not maintainable at the instance of such industries. It was submitted that the domestic sales of the applicants for the year 2017-18 is 314 MW and the total domestic sales is 785 MW whereas total domestic demand is 10618 MW. Therefore, imports to the extent of 9833 MW are required to be made. It was submitted that for the purpose of protecting about 3% of the domestic demand, the rest of the importers should not be subjected to safeguard duty.

3. Reference was also made to paragraph 49(iv) of the impugned order which shows the capacity utilisation, to point out that the capacity utilisation of the applicant is 85%. Therefore, they cannot claim to be injured on account of the imports.

4. Having regard to the submissions advanced by the learned counsel for the petitioner, Issue Notice returnable on 23rd January, 2019. By way of ad-interim relief, the sixth respondent is directed to assess the provisional safeguard duty payable by the petitioner relating to bills of entries referred to at Annexure-P-14 to the petition, and further import of solar cells and modules in accordance with section 18 of the Customs Act and release the goods without insisting upon payment of safeguard duty on executing a bond. Such bond shall be executed by an authorised officer of the company. It is made clear that in the event of upholding the

notification the petitioner shall be liable to pay the safeguard duty provisionally assessed by the authority.

Direct service is permitted qua the respondent No.6."

3. The opponent No.8 (original petitioner) has filed the captioned petition seeking a declaration that the Final Finding dated 16.7.2018 issued by the Directorate General of Trade Remedies and the Notification dated 30.7.2018 as also Instruction No.14/2018-Customs dated 13.9.2018 issued by the Union of India, Department of Revenue are ultra vires the Customs Tariff Act and the Safeguard Duty Rules as well as unconstitutional in terms of articles, 14, 19(1)(g), 21, 265 and 300A of the Constitution of India and other ancillary reliefs.

4. By the Final Findings dated 16.7.2018, the Director General has recommended that the increased imports of Solar Cells (Product under consideration for short "PUC") into India have caused serious injury and threaten to cause serious injury to the domestic producers of "PUC" into India and it will be in the public interest to impose safeguard duty on imports of 'PUC" into India in terms of rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (hereinafter referred to as "the rules") for a period of two years and has further recommended imposition of safeguard duty as reflected in the said final findings. Pursuant thereto, the Government of India has issued a notification dated 30.7.2018 levying safeguard duty at the rates specified therein. Being aggrieved, the petitioner presented the captioned petition wherein this court, by the order dated 28.12.2018 had granted ex parte ad-interim relief in favour of the petitioner.

5. Mr. Mihir Joshi, Senior Advocate, learned counsel for the applicant submitted that the opponent No.8 (original petitioner) was not an objector in the proceedings before the Director General and that it was the association which was the objector. It was submitted that against the final findings dated 16.7.2018 and the notification dated 30.7.2018, the association has not gone to the court but different members of the association have filed petitions before different courts. It was submitted that apprehending that the final finding and the notification would be challenged, the applicants had filed caveats and served the same on the principal company, wherever situated, but the petitions have been filed by the special purpose vehicles with a view to avoid the caveat. The attention of the court was invited to the averments made in paragraph 11 of the application wherein reference is made to the proceedings instituted by different parties before different High Courts and the reliefs granted by those courts. It was submitted that the conduct of the petitioner is required to be considered whereby multiple proceedings have been initiated by the beneficiary groups; an attempt has been made to avoid caveat by filing petitions through the special purpose vehicles and that the petitioner has resorted to judicial adventurism by filing various petitions in different courts. Moreover, despite the fact that it was the applicant and another

party (domestic industry), who had initiated the proceedings under section 8B of the Central Excise Tariff Act, neither of them have been joined as a parties in the petition which again reflects on the conduct of the petitioner.

5.1 Referring to the definition of "domestic industry" as defined under section 8B(6)(b) of the Customs Tariff Act, 1975, it was submitted that the same contemplates that the collective output of the like article or a directly competitive article in India should constitute a major share of the total production of the said article in India. It was submitted that the Director General has duly considered the said aspect and has found that the domestic industry constitutes a major share. In this regard reference was made to the final findings recorded by the Director General, to point out that the authority has recorded the scope of domestic industry in the investigation is restricted to only two producers, that is, M/s. Indosolar Limited (EOU) and M/s. Jupiter Solar Power Limited, the applicant herein and that, with the exclusion of three SEZ units, the domestic industry is now restricted to M/s. Indosolar Limited and M/s. Jupiter Solar Power Limited which collectively account for 38% of the total domestic production in the DTA. The support of ISMA rendered through the resolution of its managing committee and with no opposition qualifies the two applicant units meeting the requirements of major share of Indian industry. Referring to the chart below paragraph 27(j)(v) of the Final Findings, it was pointed out that the production of the domestic industry was as high as 93% in 2015-16 and that it is the entire period of investigation which is required to be taken into consideration and, therefore, the share of production of the domestic industry at 38% is incorrect. It was accordingly submitted that the contention raised on behalf of the petitioner at the time when ex parte ad interim relief came to be granted in its favour that the applicants before the Director General did not constitute domestic industry as contemplated under section 8B(6)(b) of the Customs Tariff Act is without any substance

5.2 The attention of the court was further invited to the findings recorded by the Director General as regards the unforeseen circumstances to point out that after considering the confluence of a number of developments; he had come to the conclusion that there were various unforeseen developments which had an impact on the domestic industry.

5.3 Reference was made to the various findings recorded by the Director General as regards the injury, market share of the domestic industry as well as of the domestic industry, profit and loss, inventory, price undercutting and the threat of serious injury etc. to submit that the case as established by the Director General and the factual findings cannot be said to be perverse and, therefore, the same do not merit a review. It was submitted that the scope of review in respect of the final findings recorded by the Director General is limited and that the authority has to take into account imports that have taken place which cause injury. It was submitted that the relevant facts have been taken into consideration by the authority and Article 226 of

the Constitution is not a substitute for an appeal which is consciously not provided.

5.4 The attention of the court was invited to the communication dated 27th August, 2018 of the Government of India, Ministry of Power addressed to the Central Electricity Regulatory Commission and more particularly to paragraph 3(a) thereof wherein it has been provided that any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed to pass through. It was submitted that, therefore, insofar as the original petitioner and other importers are concerned, they are duly protected as the corresponding changes in the cost would be allowed to be pass through, whereas the survival of the domestic industry is at stake. It was submitted that, therefore, the original petitioner does not have a prima facie case and that the interest of the petitioner can be safeguarded by ensuring return of the amount of safeguard duty in case it succeeds, whereas if the ad-interim relief as granted is permitted to continue, the domestic industry would suffer irreparable injury.

5.5 The attention of the court was invited to rule 16 of the rules to point out that the duty levied under rule 12 thereof shall be only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate positive adjustment. Reference was also made to rule 17 of the rules which provides for "Liberalization of duty" and says that if the duration of the duty levied under rule 12 exceeds one year, the duty shall be progressively liberalized at regular intervals during the period of its imposition. It was submitted that if the interim relief is permitted to continue, the period contemplated under rule 16 would soon be over and the provisions of rule 17 of the rules would come into play.

5.6 Next it was submitted apart from the fact that the conduct of the petitioner disentitles it to equitable relief, the petition was delayed by five months, inasmuch as the final findings are dated 16.7.2018, whereas the petition has been filed on 19.12.2018. It was submitted that in the present case, the factors of balance of convenience as well as irreparable injury and prima facie case all weigh in favour of the applicant and that the ad-interim relief granted by this court deserves to be vacated at the earliest.

6. Vehemently opposing the petition, Mr. S. N. Soparkar, Senior Advocate, learned counsel for the opponent No.8 (original petitioner) submitted that insofar as locus of the petitioner to file the present petition, as it was not an objector is concerned, the same is not relevant as the petitioner is also affected by the levy. It was submitted that in any case the petitioner was represented through its association and hence, this cannot be an issue.

6.1 Insofar as the contention that the petitioner has resorted to judicial adventurism is concerned, it was submitted that the petition has to be filed

by the member at the place where he operates. It was pointed out that the petitioner has imported goods at Mundra, and, therefore, it has a right to approach this court. It was submitted that in any case this petition was filed prior in point of time to most of the other petitions, inasmuch as while granting interim relief in those petitions, the concerned courts have referred to the interim order passed by this court in the present petition. The attention of the court was invited to various orders passed by different High Courts in different writ petitions challenging the final findings and the impugned notification. It was argued that the petitioner cannot be accused of being adventurous because different parties have approached the appropriate courts. It was submitted that if the applicants were aggrieved by the filing of cases before different courts, they could have approached the Supreme Court for consolidation of the cases, but they have not taken any such action.

6.2 Dealing with the contention with regard to avoidance of caveat, it was submitted that the caveat was not filed against the petitioner but against its parent company. It was submitted that when no caveat had been filed against the petitioner, there was no obligation upon it to serve a copy of the application on the applicant herein. As regards not joining the domestic industry as party in the petition, it was submitted that the petitioner has challenged the levy of tax and, therefore, it has joined the authority which has levied the tax and that it is not necessary to join the parties who had initiated the proceedings.

6.3 On the question of balance of convenience, it was submitted that while the power purchase agreement may provide for pass through, the petitioner has a right to pass on at the appropriate stage when it actually sells power, whereas safeguard duty has to be paid when it imports the goods. It was submitted that the petitioner would take time to set up the plant and the cost of safeguard duty would not be reimbursed overnight. It was submitted that the petitioner would be able to recoup the amount paid over a period of twenty to thirty years subject to GERC. It was submitted that the outflow of money today is a certainty but the recovery thereof is not certain. It was submitted that the mere fact that there is possibility of recoupment cannot be regarded as a factor while considering the question of balance of convenience. It was submitted that such argument was made before the Madras High Court but did not appeal to the said court.

6.4 On the merits of the final findings, it was submitted that two persons would not constitute a domestic industry. Reference was made to the definition of domestic industry as defined in clause (b) of sub-section (6) of section 8B of the Customs Tariff Act to submit that the domestic industry has to have a major share. According to the learned counsel, while according to the authority the applicants before it had 38% share, actually they have less than 10 to 12% share. It was submitted that the benefit of safeguard duty is to be given to a domestic industry and if the persons do not hold major share they would not fall within the ambit of the expression

domestic industry as contemplated under section 8B(6)(b) of the Customs Tariff Act, and hence, to say the applicant and other industry are constituting major domestic industries would not be correct.

6.5 The learned counsel next drew the attention of the court to the final findings recorded by the authority and more particularly, to the table below paragraph 31 (f) (a) and (b), to submit that the imports have gone up; however, there is also an increase in the domestic production. Referring to the charts below paragraph (iii) and (iv) of paragraph 49 of the final findings, it was submitted that the production of the domestic industry has gone up from 141 in 2014-15 to 318 (annualized) in 2017-18 and the capacity utilisation of the domestic industry has gone up from 48% in 2014-15 to 85% (annualized) in 2017-18. It was pointed out that total installed capacity of the domestic industry is 371 MW as against the total imports of 9833 MW, to submit that the domestic industry does not have a wherewithal to support the demand and that the imports are not increasing at the cost of domestic industry but they have increased because the domestic industry is not in a position to meet with the demand. It was argued that to protect the domestic industry which produces only 373 MW, those who import 10000 MW should not be called upon to pay safeguard duty, more so, when the domestic industry has increased its capacity.

6.6 Referring to the share of the domestic market as reflected in paragraph 49(i) of the final findings, it was submitted that the domestic demand in the year 2014-15 was 1419 which has gone up to 10618 MW in 2017-18; and that total domestic sales have also increased from 143 MW to 785 MW and the domestic sales of the domestic industry has also increased from 115 to 314 MW. It was submitted that the capacity utilisation of the domestic industry has gone up from 48% in 2014-15 to 85% in 2017-18 without any protection and that production has gone up three times from 115 to 314 though the percentage has gone down. It was contended that, therefore, it is evident that the domestic industry does not need any protection and that even if the capacity of the domestic industry had increased to 100%, at best they could have manufactured only 373 MW. It was further submitted that the production capacity of the domestic industry is far below the requirements of the country and that there is a policy of the Government not to impose safeguard duty where requirement is more than twice the domestic industry capacity and hence also safeguard duty could not have been imposed.

6.7 It was submitted that considering the increase in production, capacity and sales, it is evident that the domestic industry has not suffered any loss. It was argued that the authority says that the domestic industry has not grown at the rate at which imports have grown, overlooking the fact that the domestic industry has not grown because it does not have the capacity to grow. It was submitted that the safeguard duty is imposed to ensure that a person who can manufacture is given support so that he does not suffer, whereas in the present case there is nothing to show that the domestic

industry is suffering so as to impose safeguard duty. It was further submitted that the levy of safeguard duty is also opposed to public interest, inasmuch as, two persons would be benefitted at the cost of a large number of people.

6.8 Insofar as the unforeseen circumstances are concerned, it was submitted that it cannot be said that there were any such unforeseen circumstances so as to cause injury to the domestic industry. It was submitted that by levying safeguard duty, the prices will have to go up for the survival of the domestic industry, and as a result, the importers have to pay higher price though imports are in large numbers.

6.9 It was submitted that the petitioner has made out a prima facie case, balance of convenience also lies in its favour and irreparable injury would be caused to them in the interim relief granted earlier is not continued and hence, the ad interim relief granted earlier be confirmed. Alternatively, it was submitted that interim relief in terms of the order passed by the Madras High Court whereby it has permitted the petitioners before it to clear the goods by furnishing bank guarantee for 50% of the amount of safeguard duty and to furnish a bond for the remaining amount, be granted.

7. Mr. Ankit Shah, learned senior standing counsel for the opponent Union of India, submitted that when the demand for the product under consideration is increasing, it is the domestic industry which should get the benefit of such increased demand and is required to be promoted. It was submitted that imposition of safeguard duty is not only for the existing industries and that the benefit of meeting targets which should go to the local market goes to the foreign suppliers. It was submitted that therefore, in the interest of justice, the interim relief granted earlier deserves to be vacated.

8. Mr. P. Y. Divyeshwar, learned senior standing counsel for the opponent No.6 - Principal Commissioner of Customs, invited the attention of the court to the provisions of rule 12 of the rules, which permit the Central Government to impose by a notification in the Official Gazette, upon importation into India of the product covered under the final findings, a safeguard duty not exceeding the amount which is found adequate to prevent or remedy serious injury and to facilitate positive adjustment. It was submitted that the Director General (Safeguard) has duly considered all the aspects which are necessary while considering the application under section 8B of the Customs Tariff Act and, therefore, the interim relief granted by this court deserves to be vacated.

9. In rejoinder, Mr. Mihir Joshi, learned counsel for the applicant reiterated the submissions with regard to judicial adventurism, to submit that the petitioner had gone before the authority as an association but thereafter the members of the association have fragmented into different parties to invoke the jurisdiction of different courts. It was submitted that it was the principal company which was the objector, however, it has selected

the special purpose vehicles to institute proceedings in different courts with the idea to have multiple litigation through special purpose vehicles.

9.1 Reliance was placed upon the decision of the Supreme Court in the case of *Bloom Dekor. Limited v. Subhash Himatlal Desai, (1994) 6 SCC 322*, wherein the court has held thus:-

"27. From the above narration it is clear that the respondents have been clearly indulging in judicial adventurism. A string of suits comes to be filed one after the other. Late orders are obtained that too on applications filed without notice to the appellant. Unfortunately, the courts below wittingly or otherwise have aided this judicial adventurism without even determining whether they had Jurisdiction. Take for instance the suit in Morvi court. How does the said court get jurisdiction? What is the cause of action?"

9.2 It was submitted that not joining the applicant as party in the petition is serious. It was submitted that these duties have been imposed on the application of aggrieved parties, where someone is suffering a legal injury or likely to suffer legal injury and hence, the persons at whose instance the proceedings came to be initiated, who would be the main affected parties if any relief were to be granted to the petitioner, ought to have been impleaded as respondents. It was submitted that determination of injury is quasi judicial and cannot be equated with imposition of tax payable.

9.3 It was submitted that according to the petitioners, the domestic industry is not in a position to make up the deficit, and therefore, a vast majority of persons should not suffer for protecting a few persons. It was submitted that such submission on the part of the petitioners does away with the very concept of safeguard duty and is without any substance. It was submitted that safeguard duty is imposed to save the domestic industry from injury and that if the argument of the petitioner was to be accepted no new or fledgling industry can grow. According to the learned counsel, undoubtedly, there is an element of public interest which has to be considered, which in fact the authority has taken pains to consider at great length. It was submitted that imposition of safeguard duty is only handholding till the domestic industry corrects itself and that today there is an onslaught of imports and by imposing safeguard duty, breathing time is given to the domestic industry. It was submitted that there is a glut of imports at far lower prices and that while there is a demand, inventory is increasing as the domestic industry is not able to match the price at which the goods are imported and is unable to get fair selling price and is suffering losses. It was submitted that it is the balance of public interest for which prima facie the authority has considered relevant factors.

9.4 Insofar as the applicant not falling within the ambit of domestic industry as contemplated under section 8B(6) (b) of the Customs Tariff Act is concerned, the attention of the court was invited to the findings recorded by the Director General in this regard. It was submitted that the applicants have the support of ISMA which renders them major sharers. It was

submitted that the investigation period is 2014-15 to 2017-18 and in 2015-16, the share of the domestic industry was as high as 93% and hence, there is no reason to restrict the share of domestic industry to 38% and that in any case since the applicants before the authority have the support of ISMA the domestic industry is even otherwise a major sharer.

9.5 It was submitted that the interim relief granted by the Madras High Court whereby it has directed the petitioner therein to furnish bank guarantee for 50% of the safeguard duty would not help the domestic industry in any manner and that the stay granted by this court is required to be vacated in the interest of justice.

10. Vide order dated 28.12.2018, this court after considering the submissions advanced by the learned counsel for the petitioner had granted ex parte ad-interim relief as reproduced in paragraph 2 here-in-above, whereby the respondent authorities were directed to provisionally assess the bills of entry and release the goods without insisting upon payment of safeguard duty on execution of a bond by an authorised officer of the company; and had clarified that in the event of upholding the notification the petitioner shall be liable to pay the safeguard duty provisionally assessed by the authority.

11. At the time of presenting the petition, the applicant had not been impleaded as a party and since the petition had been filed by an entity other than the entity against which the applicant had filed caveat, the applicant could not be heard at the time of granting the ad-interim relief. However, subsequently, the applicant moved an application for being joined as a party and by an order dated 22.2.2019, the applicant was permitted to be joined as respondent No.8 in the writ petition. Thereafter, the applicant has moved this application for vacating the ex parte ad-interim relief granted in favour of the petitioner. Since the proceedings for imposition of safeguard duty were initiated by the applicant and another party and it is they who are directly affected by any relief that may be granted in the petition, in all fairness the petitioner ought to have impleaded them as respondents in the petition. The contention that as the petitioner has challenged the levy of tax, it has joined the authority which levied the tax and that it is not necessary to join the persons at whose instance the proceedings came to be initiated, does not merit acceptance, for the reason that levy of safeguard duty cannot be equated with other levies which are levied for the purpose of fetching revenue, as it a levy which is imposed to protect the domestic industry from injury, and it is the domestic industry which is the main affected party if such levy is set aside. Be that as it may, it is not necessary to dwell further on this aspect.

12. Insofar as the allegation of judicial adventurism is concerned, since the petitioner is importing goods from a port situated in Gujarat, no fault can be found in the conduct of the petitioner in invoking the writ jurisdiction of this court. In the opinion of this court, the decision of the Supreme Court in Bloom Dekor Limited (supra) on which reliance has been placed on behalf

of the applicant would have no applicability to the facts of the present case inasmuch as in that case multiple suits came to be instituted by the respondents therein at far away places where no cause of action arose, and in those circumstances the court held that the respondents had indulged in judicial adventurism.

13. On behalf of the opponent No.8- original petitioner, the final findings have been assailed mainly on the ground that the two applicants at whose instance the proceedings for imposition of safeguard duty came to be initiated did not constitute "domestic industry" as contemplated under section 88(6)(b) of the Customs Tariff Act, 1975. It has further been contended with reference to the final findings recorded by the Director General, that the total Indian production has increased from 170MW in 2014-15 to 842 in 2017-18, domestic sales of the applicants has increased from 115MW to 314 MW; the capacity utilisation of the domestic industry has increased from 48% in 2014-15 to 85% in 2017-18, which indicates growth of the domestic industry without any protection. It has further been submitted that the total imports are 9833 MW and the production of the domestic industry is 318 MW and that the domestic industry does not have the capacity to meet with the demand, inasmuch as its production capacity is only 3.2% of the demand and, therefore, the importers who import 9833 MW should not be made to suffer by imposing safeguard duty for the sake of the two applicants. In effect and substance, the contention of the petitioner is that the domestic industry has not suffered from any injury on account of imports being made.

14. Section 8B of the Customs Tariff Act provides that if the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry, then, it may, by notification in the Official Gazette, impose a safeguard duty on that article. Rule 8 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 provides for determination of serious injury or threat of serious injury and postulates that the Director General shall determine serious injury or threat of serious injury to the domestic industry taking into account inter alia the principles laid down in the annexure to the rules. The annexure to the rules reads thus:-

"ANNEXURE

(See Rule 8)

(1) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Director General shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the article concerned in absolute and relative terms, the share of the domestic market

taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(2) The determination referred to in paragraph (1) shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the article concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports. In such a cases, the Director General may refer the complaint to the authority for anti-dumping or countervailing duty investigations, as appropriate."

15. For the purpose of confirmation or vacation of interim relief granted by this court, it would be necessary to examine whether prima facie the investigation was in accordance with the rules and whether all relevant factors have been taken into consideration. At this stage, the court would not enter into any detailed inquiry as regards the merits of the final findings recorded by the Director General (Safeguard).

16. It has been contended on behalf of the petitioner that the applicants who made applications for initiation of inquiry under rule 5 of the rules, do not fall within the ambit of domestic industry as contemplated under section 8B(6)(b) of the Customs Tariff Act, inasmuch as, their collective output of the like article or a directly competitive article in India does not constitute a major share of the total production of the said article in India.

17. In this regard, it may be germane to refer to the final findings recorded by the Director General, wherein he has recorded thus:-

"(iv) Therefore, on the basis of the above, I hold that the provision of Sales to DTA by a SEZ unit as an exception with features varying in different cases, does not justify a SEZ unit to be considered as a domestic producer in the context of trade remedial measures keeping in view the context of the larger framework of SEZ Act, 2005. Therefore, the scope of the DI in this investigation is restricted only to the producers i.e. M/s. Indosolar Limited (EOU) and M/s. Jupiter Solar Power Limited, which includes the EOU unit also, since they are physically located in DTA governed by Foreign Trade Policies though with export orientation.

(v) With the exclusion of 3 SEZ units, the DI is now restricted to M/s. Indosolar Limited and M/s. Jupiter Solar Power Limited which collectively account for 38% of the total domestic production in the DTA. The support of ISMA rendered through the resolution of its managing committee and with no opposition qualifies the 2 applicant units meeting the requirements of major share of Indian Industry."

18. Thus, the Director General after considering the material on record has recorded a categorical finding that the two applicant units meet with the requirement of major share of Indian industry. At this stage of considering the question of confirmation or vacation of the interim relief, the issue need not be gone into in detail. However, having regard to the above findings

recorded by the Director General, prima facie, at this stage, without a detailed inquiry, it cannot be said that the applicants before the Director General do not meet with the requirements of domestic industry as contemplated under section 8B(6)(b) of the Customs Tariff Act.

19. As regards the other contentions raised by the learned counsel for the respective parties, reference may be made to the final findings recorded by the Director General. While it is true that from the record, it emerges that the capacity utilisation has increased from 48% in 2014-15 to 85% in 2017-18, and the domestic sales have also increased from 115 MW in 2014-15 to 314 in 2017-18 and the production of the domestic industry has increased from 141 MW in 2014-15 to 318 in 2017-18 (annualized), it is equally true that the volume of the imports has grown from 1275 MW in 2014-15 to 9833 in 2017-18 (annualized) that is an increase of 671% in comparison to the production of the domestic industry which has increased by 126% during the same period. Moreover, though the total sales of the domestic industry have increased, the percentage of sales has decreased from 8% to 3%. Though the capacity utilisation has increased, the Director General has recorded that when compared with the growth in demand which increased to 10618 MW in 2017-18, the domestic industry's total capacity should have got utilised. The capacity remaining below 100% even in such enhanced demand indicates a clear preference for the imported product under consideration.

20. The Director General has further found that the profitability per watt was severely impacted during April 2017 - September 2017 period as compared to the previous year and even the base year of injury period. He has also found that the inventory carried by the domestic industry increased by more than two times during the period of investigation and that there was a significant price undercutting by the imported goods throughout the POI and that it was evident that the high level of price undercutting prevented the domestic industry from increasing their prices as a result of which they suffered losses. The Director General has further found that the continued price undercutting has finally led to a situation where the domestic industry is not able to raise prices above the landed value and that the threat of serious injury is established. In paragraph 52 of the final findings, the Director General has recorded the factors relevant in regard to determining the cause and effect relationship of increased imports and the serious injury during the POI and the threat of serious injury in the future to domestic industry, wherein it has been inter alia recorded that the imports have increased significantly in absolute terms; the market share of imports has increased and consequently the market share of domestic industry had declined: the imports are available at prices lower than the selling price of the domestic industry and are also decreasing over the time, the consumers are switching over to the imported PUC with the effect that the domestic industry are unable to not only sustain their prices but also have to face rising inventories (of the PUC); another impact of the increased imports at low prices is that the domestic

industry are unable to increase their production and sales as compared to the rate of increase in demand/consumption of the PUC in India; though the Indian industry including the domestic industry established capacities to contribute towards meeting the growing demand for the PUC, the substantially increased imports at consistently reducing landed prices have led to idle production capacities, falling sales realization etc; and the domestic industry is incurring significant losses. Thus, the contention of the learned counsel for the petitioner that the condition of the domestic industry has improved without protection, prima facie does not appear to be correct.

21. Insofar as the unforeseen circumstances are concerned, the Director General has recorded that India could not have expected that both EU and the United States would simultaneously levy trade remedy measures against China and certain other countries which would also coincide with the increase in demand due to commitments undertaken under COP21 (Paris Agreement). The Director General has further recorded that the surge in imports at consistently falling landed price changed the competitive relationship between imports and domestic production, to the disadvantage of the latter. This has hampered the domestic industry's ability to compete and make and sell the PUC and that it is but evident that this change in the competitive relationship was entirely unforeseen.

22. Thus, the Director General (Safeguard) has examined all the relevant parameters and has given his findings thereon. The Director General has found that domestic industry suffered serious injury during the POI and that there is threat of serious injury in future to the domestic industry.

23. In paragraph 63 of the final findings, the Director General has evaluated the impact of safeguard measure comprehensively on various stakeholders like (i) the domestic producers of solar cells, (ii) the domestic manufacturers of solar modules who do not manufacture cells themselves and rely upon domestic and imported cells, and (iii) the power developers and (iv) the consumer of electricity who may bear the brunt of safeguard measures in form of increased electricity tariff. Thus, from the facts as emerging from the record it is clear that the Director General has considered all relevant parameters in the final findings. As to whether such findings are justified having regard to the material on record, would be required to be gone into at the stage of final hearing of the petition.

24. Insofar as the question of balance of convenience is concerned, if the petitioner continues to make imports by simply executing a bond, the operation of the final findings in effect and substance remain stayed and the domestic industry does not get any benefit under the impugned notification and final findings. In the opinion of this court, when the Director General (Safeguard) has found that the domestic industry has suffered injury and also faces threat of serious injury, if the ad interim relief granted earlier is continued, the domestic industry would continue to suffer such injury and may collapse under the impact of the onslaught of

imports. On the other hand, insofar as the importers are concerned, the Government of India in the Ministry of Power by a communication dated 27.8.2018 addressed to the Chairperson of the Central Electricity Regulatory Commission has directed thus:-

"(a) Any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed to pass through."

25. Therefore, the importers are duly protected from the increase in the change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government or the Union Territories. Besides, if the petitioner ultimately succeeds it would be entitled to the refund of the safeguard duty paid by it, whereas if the applicant (original respondent No.8) succeeds in the petition, it would not be possible to reverse the injury done to it if the ad interim relief granted earlier is continued. Under the circumstances, the balance of convenience lies in favour of the domestic industry. Having regard to the findings recorded by the Director General in the final findings, the court is further of the view that the domestic industry would suffer irreparable injury if the ad interim relief granted earlier is permitted to continue.

26. For the foregoing reasons, the application succeeds and is, accordingly, allowed. The ad interim relief granted vide order dated 28.12.2018 is hereby vacated.

27. At this stage, the learned advocate for the opponent No.8 (original petitioner) has requested that this order be stayed for a period of four weeks so as to enable the petitioner to approach the higher forum. Considering the fact that the duration of the levy of safeguard duty is limited and the petitioner has already enjoyed interim relief for a period of more than four months, immense prejudice would be caused to the domestic industry if the interim relief is continued any further. The request is, therefore, declined.