IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2831 OF 2018

Purple Products Private Limited,
A company incorporated under the Companies Act, 1956 and having its registered office at 502, 5th Floor, Powai Plaza (Commercial Bldg.,), Central Avenue Road, Opp. Nirvana Park, Hiranandani Garden, Powai, Mumbai - 400076 ... Petitioner

Versus

1. **Union of India through,**
   (a) The Joint Secretary, Department of Revenue, Ministry of Finance having its office at Ayakar Bhavan, Marine Lines, Mumbai - 400020

   (b) The Joint Secretary, Ministry of Law, Justice & Company Affairs having his office at Ayakar Bhavan, M. K. Road, Churchgate, Mumbai-400020
2. **Commissioner of Customs (NS-III)**
   having his office at Jawaharlal Nehru Customs House, Nhava Sheva, Dist- Raigad Maharashtra. PIN - 400707
3. **Joint Commissioner of Customs (NS-III), Gr.IV**
   having his office at Jawaharlal Nehru Customs House, Nhava Sheva, Dist- Raigad Maharashtra. PIN - 400707 ... Respondents

WITH

WRIT PETITION NO. 2491 OF 2018

Kothari Metals Limited,
a Company Incorporated under Companies Act, 1956 & having its registered office at Kothari Mansion Ground Floor, 20/1 Belvedre Road Kolkata - 700027, West Bengal … Petitioner

Versus

1. **Union of India through,**
   (a) The Joint Secretary, Department of Revenue, Ministry of Finance), having its office at Aayakar Bhavan, Marine Lines Mumbai - 400020.

   (b) The Joint Secretary, Ministry of Law, Justice & Company Affairs having his office at Ayakar Bhavan, Marine Lines Mumbai – 400020.

   Respondents
   …
2. **Director General of Revenue Intelligence**
   having his office at Directorate of Revenue Intelligence, 7th Floor, D Block, I.P. Bhawan, I.P. Estate, New Delhi.
3. **Deputy Director General of Revenue Intelligence**,
   having his office at Directorate of Revenue Intelligence, Mumbai Zonal Unit 13, Sir Vithaldas Thackersey Marg, Opp. Patkar Hall, New Marine Lines, Mumbai - 400 020.
4. **Senior Intelligence Officer**
   having his office at Directorate of Revenue Intelligence, Mumbai Zonal Unit 13, Sir Vithaldas

Thackersey Marg, Opp. Patkar Hall, New Marine Lines, Mumbai-400 020

5. **The Assistant Commissioner of Customs (Audit)**,
Office of the Commissioner of Customs, Audit Commissionerate, Chennai Customs House, 60, Rajaji Salai, Chennai-600001.

6. **The Additional Commissioner of Customs (Import)**
Office of the Commissioner of Customs (Import) ICD Tughlakabad, New Delhi.

7. **The Assistant Commissioner of Customs**,
Office of the Additional Commissioner of Customs, ICD Whitefield, Bengaluru-560066.

8. **The Principal Commissioner of Customs**,
Ahmedebad Customs House, Navrangpura, Ahmedebad 380009. … Respondents

WITH
INTERIM APPLICATION (L) NO. 6631 OF 2020
IN
WRIT PETITION NO. 2491 OF 2018

Kothari Metals Limited, Applicant (Original … Petitioner)

In the matter between :

Kothari Metals Limited, Original … Petitioner

Versus

Union of India and others ... Respondents

Mr Vikram Nankani, **Senior Advocate**, *with Mr Prithwiraj Choudhari & Mr Aansh Desai, i/b, Aansh Desai, for the Petitioner in WP/2491/2018.*

Mr Vikram Nankani, **Senior Advocate**, *with Mr Prithwiraj Choudhari i/b, Mr Prabhakar Shetty, for the Petitioner in WP/2831/2018.*

Mr Jitendra B Mishra, *with Ms Sangeeta Yadav, & Mr Rupesh Dubey, for the Respondent in all matters.*

CORAM : M.S. Sonak &
Jitendra Jain, JJ.
RESERVED ON : 09 JUNE 2025
PRONOUNCED ON : 13 JUNE 2025

JUDGMENT : *(Per M. S. Sonak, J.)*

1. Heard learned Counsel for the parties and with their consent, the matters are taken up for final disposal. Since there is no clarity on the Rule, we formally issue the Rule, and with the consent of and at the request of the learned Counsel for the parties, make it returnable immediately.

2. By judgment and order dated July 9, 2019, these Petitions, along with two others, were dismissed, relegating the Petitioners to respond to the impugned show cause notices and participate in the proceedings initiated.

3. The Petitioners in Writ Petition No. 2491 of 2018 (Kothari Metals Ltd) and Writ Petition No. 2831 of 2018 (Purple Products Pvt Ltd) challenged the order dated 9 July 2019 vide Civil Appeal Nos. 9010 of 2019 and 3011 of 2019.

By a common order dated 25 November 2019, the Hon'ble Supreme Court set aside the order dated 9 July 2019 and restored the two Writ Petitions to their original numbers, to be decided on their own merits in accordance with the law, leaving all questions open.

4. By order dated 27 February 2020, this Court, after taking cognizance of the Hon'ble Supreme Court's order dated 25 November 2019 and the fact that the Petitioner in Writ Petition No. 3023 of 2018 (Sri Bhavani Metals Pvt Ltd) and Writ Petition No. 3474 of 2018 (Sizer Metals Pvt Ltd) had not challenged this Court's order dated 9 July 2019 dismissing the said two Petitions, held that only Writ Petition No. 2491 of 2018 instituted by Kothari Metals Ltd and Writ Petition No. 2831 of 2018 instituted by Purple Products Pvt Ltd remain for consideration. Mr Nankani and Mr Choudhary appeared for the Petitioners in the said two Petitions and were heard exhaustively. They also submitted a written synopsis of their arguments at the conclusion of their oral submissions.

5. In both these Petitions, the Petitioners essentially challenge the show cause-cum-demand notices issued under Section 28 of the Customs Act, 1962 (Customs Act), in the context of benefits under Customs Notification No. 46/11 dated 1 June 2011 concerning the import of "Tin Ingots" from Malaysia. The impugned show cause notices, inter alia, alleged that the Petitioners had secured benefits under Customs Exemption No. 46 of 2011 by misrepresenting that

the Regional Value Content (RVC) of the Tin Ingots was more than 35% when it was not.

6. The Petitioners' main contention in these Petitions is that a Free Trade Agreement dated August 30, 2009 (AIFTA) between the Republic of India and the Association of Southeast Asian Nations (ASEAN), governs the subject transaction. Accordingly, the Petitioners contend that the initiation of any adjudication proceedings under the Customs Act without observing the due process of law and as prescribed in the treaty, which would include the specific dispute resolution mechanism provided under Article 24, is wholly without jurisdiction and unsustainable.

7. After these Petitions were dismissed on 9 July 2019, the Petitioners, in the Appeals instituted by them before the Hon'ble Supreme Court had urged that the issue about the efficacy of Article 24 of Appendix 'D' to the treaty cannot be adjudicated by the authorities under the Customs Act and therefore, this Court was not justified in dismissing the Petitions by relegating the Petitioners to avail of the alternate remedies. The Hon'ble Supreme Court accepted this contention, and this Court's order dated 9 July 2019 was set aside, and these Petitions were restored to this Court's file.

8. The above is evident from the Hon'ble Supreme Court's order dated 25 November 2019 disposing of Civil Appeal Nos. 9010 of 2019 and 9011 of 2019, which is now transcribed below for the convenience of reference: -

O R D E R

1. Leave granted.

2. These appeals take exception to the judgment and order dated 09th July, 2019 passed by the High Court of Judicature at Bombay in Writ Petition Nos.2491 of 2018 and 2831 of 2018 respectively.

3. The appellant(s) by way of writ petition(s) challenged the show cause-cum-demand notices issued by the Officers of Customs under Section 28 of the Customs Act, 1962 concerning Mumbai, Delhi and other ports.

4. As regards appeal by Kothari Metals Limited, the notices pertain to more than one port. The show cause notice issued in respect of imports concerning Delhi port has since been dropped by the Department. However, the show cause notice(s) regarding Mumbai and other ports against the said appellant(s) still continue.

5. The appellant(s) had challenged the show cause notice(s) not only on merits but had raised foundational issue of the competence of the concerned authority to proceed in the matter in the context of Article 24 of the Appendix 'D' to the Treaty dated 30.08.2009 between the Republic of India and the Association of South East Asia Countries (ASEAN).

6. The High Court took notice of that plea in paragraph 6 of the impugned judgment and yet proceeded to dispose of the writ petition(s) on the ground that the appellant(s) could invoke efficacious alternative remedy.

7. Needless to observe that the issue raised by the appellant(s) regarding the efficacy of Article 24 of the Appendix ‘D’ to the Treaty cannot be adjudicated by the competent authority. That issue needs to be addressed by the High Court in the Writ Petition(s) filed by the concerned appellant(s).

8. In this view of the matter, we set aside the impugned judgment and order and relegate the parties before the High Court by restoring the concerned writ petition(s) to their original number(s), to be decided on their own merits in accordance with law. All questions are left open.

9. The appeal(s) and pending application(s) are accordingly disposed of. No costs.

PETITIONERS CONTENTIONS

9. Given the above order made by the Hon'ble Supreme Court, quite correctly, Mr Nankani, the learned counsel for the Petitioners, stressed on the efficacy and the invocability of Article 24 of AIFTA, which, according to him, provided a special dispute resolution mechanism. He contended that without resort to such a special dispute resolution mechanism, the customs authorities lacked jurisdiction to exercise any powers under the Customs Act qua the transactions of import of Tin Ingots, which were the subject matter of these Petitions. He contended that the assumption of jurisdiction by the customs authorities was improper and therefore, the impugned show cause notices and the adjudication proceedings in pursuance thereof were wholly without jurisdiction, null and void.

10. Mr Nankani elaborated that in terms of Article 24 of AIFTA in case of a dispute concerning origin determination, classification of products, or other related matters, the governmental authorities involved in the importing and exporting parties shall consult each other to resolve the dispute, and the result shall be communicated to the other parties. However, if no mutually satisfactory solution to the dispute is reached through the consultations, the party concerned may invoke the dispute settlement procedures under the ASEAN-India DSM Agreement. He submitted that in this case, a dispute as contemplated by Article 24 had arisen

between the Republic of India and Malaysia, the contracting parties to the treaty. Efforts to resolve such disputes mutually were attempted but had failed. Therefore, the only option permissible to the Indian authorities was to seek a resolution of the dispute under the ASEAN-India DSM Agreement, a specialized dispute resolution mechanism agreed upon between the contracting parties. Without resorting to such a mechanism, the customs authorities lacked jurisdiction to issue the impugned show cause notices or to allege that there was some issue with the Certificate of Origin ("COO") concerning the imported Tin Ingots for the Regional Value Content of the imported Tin Ingots.

11. Mr Nankani submitted that since there was no contrary provision in the Customs Act or Rules, the provisions of the treaty, including Article 24 must prevail and had to be adhered to. He submitted that in such a situation, it was for the Republic of India to file a complaint before the Arbitral Panel constituted in terms of the ASEAN-India DSM Agreement, and only on adjudication of the said complaint and filing of final report by the said arbitral panel, could the dispute be resolved. He submitted that only if the final report of the arbitral panel favoured the Republic of India, could the COOs issued by the competent issuing authorities be regarded as affected, cancelled or nullified, but not otherwise. He submitted that since this specialised dispute redressal mechanism had never been resorted to, the invocation of the provisions of the Customs Act by the customs authorities for

the resolution of such a dispute was entirely without jurisdiction and unconstitutional.

12. Mr Nankani submitted that Article 9 of the treaty does not permit any unilateral modification, nullification or impairment of the concessions. He submitted that if the customs authorities are allowed to proceed, it would virtually amount to nullifying the benefits under the treaty, except through the procedure prescribed under the treaty. Such an attempt is wholly without jurisdiction and even unconstitutional.

13. Mr Nankani submitted that all efforts should be made to enforce and honour the treaty provisions and the obligations solemnly undertaken thereunder. He submitted that only the parliament is competent under our constitutional scheme to enact any law to dilute or otherwise rescind the provisions of international treaties. He submitted that the provisions of international treaties can never be diluted by any delegated legislation, such as rules etc.

14. Mr Nankani submitted that the reasoning of the Gujarat High Court in the case of ***Trafigura India Private Limited V/s. Union of India***[1] is quite fallacious since it has missed this crucial distinction about only the subordinate rules omitting reference to Article 24 and not some Parliamentary legislation. He submitted that the non-incorporation of Article 24 in the subordinate legislation like the Customs Tariff (DOGPTA)

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[1] R/Special Civil Application No.14028/2020 & Ors.

between ASEAN and Republic of India, Rules 2009, in no manner, dilutes or renders inapplicable the provisions of Article 24 of the AIFTA.

15. Mr Nankani submitted that Parliament amended the Customs Act, effective from 27 March 2020, by adding Chapter VAA, which includes Section 28DA. He pointed out that this was a special provision relating to disputes concerning the Country-of-Origin Criteria/Certificate. He submitted that after the introduction of this Chapter, the customs authorities might have jurisdiction to adjudicate disputes regarding Country of Origin, etc. However, these provisions have not been given any retrospective effect, and furthermore, they indicate that prior to the introduction of this Chapter, the customs authorities lacked jurisdiction to adjudicate such disputes. He submitted that even this aspect was never considered by the Gujarat High Court in the *Trafigura* (supra).

16. For all these reasons, Mr Nankani submitted that we should place no reliance on the decision of the Gujarat High court in the case of *Trafigura* (supra). He pointed out that in any event, the said decision was already challenged before the Supreme Court and a notice has been issued in the special leave petition already instituted.

17. Mr Nankani finally submitted that as long as the COOs were not rescinded or withdrawn by the Malaysian counterparts, the Petitioners were entitled to the benefits

under the Customs Notification No. 46 of 2011 dated 01 June 2011. Such benefits could not be denied or recovered based on some unilateral investigations, either by the Indian counterparts or the customs authorities of India.

18. Mr Nankani relied upon ***Commissioner of Customs, Bangalore V/s. G. M. Exports And Ors.,***[2] ***Gramophone Company of India Ltd. V/s. Birendra Bahadur Pandey,***[3] ***East India Commercial Co. Ltd., Calcutta V/s Collector of Customs, Calcutta***[4]***,*** *and* ***Bombay Chemicals Pvt. Ltd. V/s. Union of India And 14 Ors.***[5]***, 1982 (10) ULT 171 (BOI)*** in support of his submission.

19. Based on the above submissions and contentions that we have now exhaustively referred to, learned Counsel for the Petitioner submitted that the impugned show cause notices be quashed, and the Rule made absolute in both these Petitions.

RESPONDENT'S CONTENTIONS

20. Mr Mishra, the learned counsel for the Respondents, submitted that the provisions of an international treaty, unless incorporated into or transformed into Municipal laws or the State laws, cannot be directly enforced in the Court. He submitted that, therefore, to give effect to some of the provisions of AIFTA, the Customs Tariff (DOGPTA) Rules 2009 were enacted. However, he pointed out that there was no

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2 (2016) 1 SCC 91
3 (1984) 2 SCC 534
4 1983(13) E.L.T. 1342 (S.C.)
5 1982 (10) E.L.T. 171(Bom.)

reference to Article 24 in the document. He therefore submitted that the Petitioners' attempt to seek enforcement of Article 24 through these Petitions was entirely misconceived.

21. Mr Mishra submitted that the impugned notices have been issued under the provisions of the Customs Act because there was substantial material on record suggesting suppression and fraud, particularly regarding the RVC of the imported Tin Ingots. He submitted that there are ample provisions under the Customs Act empowering the Customs Authorities to issue such show cause notices. Based on treaty provisions not incorporated into municipal laws, customs authorities cannot be deprived of their powers to adjudicate on issues such as potential misrepresentation, suppression, or fraud. He submitted that the impugned show cause notices are therefore legal and valid, and the petitioners' attempts to stall adjudication should not be encouraged.

22. Mr Mishra submitted that neither the provisions of Article 24 of the treaty nor the provisions of Chapter VAA render the impugned show cause notices without jurisdiction, or otherwise legally infirm. He submitted that the Petitioners can always urge during the adjudication proceedings how none of the prima facie issues flagged in the impugned show cause notices apply and there was no misrepresentation, etc. However, he submitted that by relying on the treaty provisions, there was no case to interdict the proceedings or stall the adjudication.

23. Mr Mishra pointed out that there were 10 to 12 cases involving the import of Tin Ingots from Malaysia. In all such matters, upon adjudication, it was found that there was suppression, collusion, and fraud, particularly in the context of Regional Value Content. He pointed out that the local traders had filed complaints based upon which investigations were carried out, and such investigations revealed that the RVC of Tin Ingots was not more than 35%. Still, the benefits under the Customs Exemption Notification No.46 of 2011 were obtained. He submitted that to the best of his knowledge, in none of these matters, the orders made by the adjudicating authorities were interfered with by the Courts of law. He, therefore, submitted that the Petitioners may not be allowed to interdict the adjudication proceedings by questioning the impugned show cause notices on untenable grounds.

24. Mr Mishra submitted that the issues and the contentions now raised on behalf of the Petitioners have been squarely answered against the Petitioners by the Gujarat High Court in *Trafigura* (supra). Therefore, these Petitions may be dismissed. He relied on *Trafigura* (supra) and the various Supreme Court and High Court decisions referred to therein in support of his contentions.

25. For all the above reasons, Mr Mishra submitted that these Petitions may be dismissed.

EVALUATION OF THE RIVAL CONTENTIONS

26. The rival contentions now fall for our determination.

27. The Petitioners are primarily engaged in the business of importing and trading in various products, including Tin Ingots.

28. The Government of India signed an agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the Association of Southeast Asian Nations in 2009 [AIFTA]. Malaysia is a member of the Association of Southeast Asian Nations (ASEAN). According to AIFTA, India agreed to provide preferential tariff treatment for imports of specified goods, including tin ingots, from ASEAN countries, subject to certain conditions being met. One of the critical conditions was the fulfilment of the Regional Value Content (RVC). The RVC, along with the formula and methodology for calculating it, were prescribed in the provisions of AIFTA.

29. To implement the AIFTA provisions and related matters, the Indian Government undertook several measures, including the issuance of Customs Exemption Notification No. 46 of 2011, dated 1 June 2011, to provide preferential customs tariffs as well as the Customs Tariff (DOGPTA) between ASEAN and the Republic of India, Rules 2009. This was based on the premise that the provisions of a treaty like AIFTA, unless transformed into or incorporated into municipal laws, cannot be enforced by the beneficiaries in the municipal or

State Courts. Only after such transformation or incorporation, and to the extent of it, could a beneficiary seek enforcement; otherwise, they could not.

30. The Petitioners in these Petitions had imported Tin Ingots manufactured by Malaysian Smelting Corporation (MSC) under its brand name, from various traders located in Singapore or Europe. The Petitioners have pleaded that these imported Ingots were accompanied by a valid Certificate of Origin (COO) issued by the Ministry of International Trade and Industry, Malaysia (MITI). Based on such certification, the Petitioners have claimed and availed themselves of the benefits under Customs Exemption Notification No. 46 of 2011, dated June 1, 2011, from time to time.

31. Several domestic industries filed complaints or made representations regarding the import of Tin Ingots from Malaysia, alleging that they had been wrongly availing themselves of the benefits under Exemption Notification No. 46 of 2011. The complaints alleged fraud, inter alia, by misrepresenting the RVC as being above 35%, when in fact it was significantly below 35%. The complaints and representations pointed out that this was in breach of the rules and conditions outlined in the Exemption Notification.

32. This issue was therefore taken up for investigation by the Director of Revenue Intelligence (DRI) of the Mumbai Zonal Unit. The DRI initiated the process of "Retroactive Check" and noted that there was no cooperation from the

Malaysian authorities. Finally, a team from DRI visited Malaysia to examine the status of RVC and ascertain the originating criteria for the Tin Ingots. The investigation revealed prima facie substance in the complaints that the RVC was inflated, when in fact, it was less than 35%. A detailed affidavit is filed by the Respondents in this regard. However, at this stage, it is not for this Court to go into such issues. If the initiation of proceedings based on the prima facie material is found to be without jurisdiction, then, of course, further proceedings or adjudication may not be competent. However, if there is no jurisdictional infirmity in the initiation, then all such issues can be addressed by the customs adjudicating authorities after providing a full opportunity to the Petitioners.

33. Accordingly, the Customs Authorities issued the impugned show cause notices under Section 28 of the Customs Act, requiring the Petitioners to show cause why the benefits obtained by them through misrepresentation or suppression of correct facts should not be recovered and a penalty should not be imposed upon them.

34. The Petitioners, at this stage, instead of participating in the adjudication proceedings under the impugned show cause notices, instituted these Petitions questioning the jurisdiction of the Customs Authorities primarily on the ground that the Respondents needed to resort to the Special Dispute Resolution Mechanism provided under Article 24 of the

AIFTA. The Petitioners urged that the Customs Authorities lacked jurisdiction to proceed under the Customs Act without the treaty parties or countries first taking recourse to Article 24, which provides a Specialised Dispute Resolution Mechanism. The Petitioners contend that the very issuance of the show cause notices was therefore without jurisdiction. In effect, thus, the Petitioners seek enforcement of Article 24 of AIFTA before a municipal or national Court and contend that without recourse to the Specialized Disputes Resolutions Mechanism under Article 24, the Customs Authorities must not be allowed to proceed with the adjudication.

35. In the context of applying treaties into National Legal Systems, two aspects generally arise: (i) the applicability of the international treaty in domestic law; and (ii) the enforceability of the treaty in municipal law and before municipal courts. In **Union of India Vs. Agricas LLP**[6]**,** the Hon'ble Supreme Court explained the distinction between 'direct application' of treaties in domestic law, and national legal systems that mandate and require 'act of transformation' for an international treaty to apply and be a part of domestic law. 'Direct application' means and mandates that the treaty norms, either wholly or to some extent, are directly treated as norms of domestic law and enjoy the statutory law status by default in the domestic legal system. The term 'direct application' will also cover situations in which government or different levels of government utilise treaty norms as part of

[6] 2020 (373) E.L.T. 752 (S.C.)

domestic jurisprudence and is not limited to situations in which private parties can sue based on the treaty norms.

36. As explained below, there is a distinction between direct application and 'invocability'. 'Act of transformation' principle means and implies that an international treaty is not directly applicable in the domestic law system and requires provision in the domestic rules before it is applied. 'Transformation' is a word of wide amplitude and does not refer to mere implementation as it includes the right of the country to adopt, amend or modify the treaty language into domestic jurisprudence. The 'act of transformation' is different from 'direct application' as in the former, the treaty is not received and treated as part of domestic jurisprudence until it is published and made part of the domestic jurisdiction in the same manner as other law.

37. The Hon'ble Supreme Court referred to the position in several Commonwealth Countries, including the United Kingdom, Canada and Australia, which are generally considered to be prime examples of a "dualist system". The dualist position is that international municipal law operates separately, and before any rule or principle of international law can have effect within a domestic jurisdiction, it must be expressly or transformed explicitly into municipal law by use of appropriate constitutional machinery.

38. Dualism stresses that international law and municipal law exist separately and cannot have effect on or overrule the

other. Consequently, the municipal laws and international laws can operate simultaneously as they regulate different subject matters. International law applies between sovereign States, while municipal law regulates legal relationships within a state, includ*ing those* between citizens, subjects, and the State.

39. In **Maclaine Watson & Co. Ltd. Vs. Department of Trade and Industry & Anr.**[7], the House of Lords has held that as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. Therefore, except to the extent that treaty becomes incorporated into the laws by a statute, the Courts in United Kingdom have no power to enforce treaty rights and obligations at the behest of foreign government or even a citizen of the United Kingdom. It was also held that the decision as to whether the terms of the treaty have been complied with are matters exclusively for the Crown as the court must speak with the same voice as the executive (See **Lonrho Exports V. ECGD [1998] 3 W.L.R.394**).

[7] (1989) 3 AII ER 523

40. In *Agricas LLP* (supra) the Hon'ble Supreme Court also referred to and explained the principle of invocation or invocability. The Court explained that, in simple terms invocability refers to justiciability, admissibility of a claim before the national Courts. It is not connected with the defence or merits of the defence. In cases where an 'act of transformation' is required, treaties may be partially or entirely incorporated into domestic law. Where the treaty or portion thereof becomes a part of the domestic law by 'act of transformation', it is obvious that only the part incorporated or transformed into domestic law is invocable and justiciable and not the parts that are not codified into domestic law.

41. However, invocability can embrace several ideas which are intertwined and are of specific concern in cases of constitutions allowing direct application. Here, 'invocability' is a generic term which means to embrace a small inventory of means of judicial control over the use in a particular lawsuit of the direct applicability of the treaty. As in the case of 'act of transformation', even in direct application cases, some jurisdictions accept the principle of partial direct application, and therefore, the treaty is directly applicable for some purposes but not others.

42. In *Agricas LL*P (supra) the Hon'ble Supreme Court after adverting to various theories and the legal position in foreign jurisdictions, explained the legal position in India in paragraphs 34 to 46. The decisions in Gramophone Company

of India Ltd. (supra); *G. M. Exports* (supra) and **Entertainment Network (India) Limited and Anr. Vs. Super Cassette Industries Ltd and Ors.**[8] on which Mr Nankani laid considerable emphasis were also considered by the Hon'ble Supreme Court in paragraphs 38 to 45. By reference to these and other decisions on the subject, the Hon'ble Supreme Court noticed the distinction between (i) formation of a treaty; and (ii) performance of the treaty obligations.

43. The Court explained that the first is an executive act and the second a legal act if domestic law is required. Unless the Parliament assents to the treaty and accords its approval to the first executive act, the performance has no force of law though the treaties created by the executive action bind the contracting States and, therefore, means must be found for their implementation within the law. Consequently, whenever a treaty requires municipal execution, statutes must be passed. The Court referred to **Oppenheim's International Law, 8th Edition,** in which it was observed that binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the Legislature. The binding force of a treaty concerns, in principle, the contracting States only, and not their subjects.

44. The Hon'ble Supreme Court also referred to the Constitution Bench decision in **Maganbhai Ishwarbhai Patel Etc. Vs. Union of India and anr.**[9], in which it was held that

[8] (2008) 13 SCC 30)

[9] 1970 (3) SCC 400

obligations arising under agreements or treaties are not, by their own force, binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others, or modifies the laws of the State.

45. The Hon'ble Supreme Court also referred to its decision in *Gramophone Company of India Ltd.* (supra) in which it was held that Comity of Nations or no, Municipal Law must prevail in the case of a conflict with an international treaty. National Courts cannot say yes if the Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts, being organs of the National State and not organs of international law, must perforce apply national law if it conflicts with international law.

46. The Hon'ble Supreme Court held that the above-quoted decisions are on the legal effect of international treaties in domestic law in India. The ratio of these decisions primarily relates to and is confined to the requirement and mandate of the need for *'act of transformation' to be a part and parcel of domestic law, which confers a right to invocability.* Most crucially, the Hon'ble Supreme Court noted in paragraph 40 that *"the ratio of the above decisions has to be distinguished from decisions interpreting domestic law after the 'act of transformation' consequent to which the portions of GATT-*

1994 stand enacted thereby conferring right of invocability to parties. The decisions referred to in paragraphs 41 to 44 and relied upon by the importers fall in the second category."

47. In paras 41 to 44, the Hon'ble Supreme Court has then considered the decision in **Associated Cement Companies Ltd. Vs. Commissioner of Customs**[10]**; State of Punjab and Another Vs. Devans Modern Breweries Ltd and Another**[11] **S&S Enterprise Vs. Designated Authority and Others**[12] **and *G. M. Exports* (Supra).**

48. Thus, *G.M. Exports* (supra), upon which Mr Nankani laid considerable emphasis, was a case belonging to the second category concerning the construction of a statute made in response to an international treaty obligation and to give effect to the obligations in international law. In this context, the Court held that the statutory language should be construed in the same sense as that of the treaty if the words of the statute are reasonably capable of bearing that meaning. However, this decision does not establish authority to suggest that a treaty provision can be directly enforced before a Municipal Court in India, even though it may not have been transformed into municipal law or incorporated into any statutory provisions to give effect to the treaty obligations.

49. Even *Entertainment Network (India) Limited* (supra) concerned interpretation of domestic/municipal laws and held

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[10] (2001) 4 SCC 593

[11] (2004) 11 SCC 26

[12] (2005) 3 SCC 337

that international conventions can be relied as a means of interpretations, justification or fortification of stance taken or to fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law, to reflect international changes, to provide relief contained in a covenant but not in a national law and to fill gaps in the law. Again, this was in the context of the interpretation of a municipal law and the impact of international treaties on such interpretation.

50. The Petitioners' contention about the enforceability of Article 24 of AIFTA, even though the Petitioners were unable to show any statute or even rules by which this treaty provision had been transformed into municipal law, is untenable. If accepted, this contention would run counter to several decisions of the Hon'ble Supreme Court on the subject and the principles of interplay between domestic law and international law as explained by eminent authors and the Hon'ble Supreme Court from time to time.

51. Incidentally, the Government of India did enact the Customs Tariff (DOGPTA) between ASEAN and Republic of India Rules 2009 to give effect to the provisions of AIFTA. However, these rules provide no statutory recognition to Article 24, which, according to the Petitioner, contains a specialised dispute resolution mechanism intended to displace the municipal or domestic laws already in force. Therefore, the provisions of Article 24 of AIFTA cannot be said to have formed a

part of the domestic or municipal laws or transformed into domestic or municipal laws to seek their enforcement before a domestic or municipal Court.

52. A Division Bench in the Gujarat High Court in *Trafigura* (supra) has summarised the legal position precisely in the context of the invocability of Article 24 of AIFTA by detailed reference to the DOGPTA Rules of 2009. This decision affords answers to most of the issues raised by the petitioners. Even the factual base in the two matters does not differ significantly. In the Gujarat case, the challenge was to the orders holding that there was fraud, suppression and misrepresentation in availing the benefits of the Customs exemption notification in respect of tin ingots imported from Malaysia. Since there was ample material and the show cause notices suffered from no infirmities, the orders were upheld. In the cases at hand, the challenge is to the show cause notices making the same or similar allegations. The allegations in the show-cause notices have yet to be adjudicated. The primary challenge before both courts was that the Customs authorities were denuded of their statutory powers in such cases due to the specialised dispute resolution mechanism outlined in Article 24 of the AIFTA.

53. Mr Nankani, however, submitted that the provisions of international treaties cannot be displaced by "mere rules" and that parliamentary legislation is a must for such displacement. He submitted that since the parliament has made no law deviate from the specialised dispute redressal mechanism provided in Article 24 of AIFTA, this procedure must be honoured and the customs authorities, are denuded of their powers under the Customs Act, until and unless the Republic of India follows the provisions of

Article 24 of AIFTA. He submitted that the Gujarat judgment has not considered this aspect.

54. The above contention begs the question. The Petitioners were unable to identify any parliamentary statute that endorsed or transformed the provisions of Article 24 of AIFTA into municipal or domestic law. If such a statute were to exist, its effect could not be undermined merely by rules. However, no national statute incorporates or transforms the provisions of Article 24. The petitioners cannot therefore, seek the enforcement of Article 24 of AIFTA before the domestic or municipal Courts, as they now seek to do. The petitioners, in fact, seek to suspend the provisions of the national law i.e. the Customs Act and denude the customs authorities of their statutory powers. This is impermissible.

55. Furthermore, the above contention was neither supported by reference to a principle nor precedent. The circumstance that the provisions of AIFTA were sought to be given effect to the 2009 Rules and the customs exemption notification is relevant. These Rules or Notifications are conspicuous by their non-reference to Article 24 of AIFTA. Thus, the absence of any statute transforming Article 24 into domestic or municipal law coupled with the omission to even refer to Article 24 in the 2009 Rules made to implement the AIFTA makes it clear that the provisions of Article 24 of AIFTA cannot be sought to be enforced before this Court by the Petitioners and based upon the same, the action of the customs authorities cannot be questioned as being without jurisdiction. Based on a treaty provision that is not transformed or incorporated into the national law or statute, the provisions of the existing

Customs Act cannot be undermined, or the powers and jurisdiction of the customs authorities questioned.

56. Section 28 of the Customs Act confers ample powers upon the Customs authorities to investigate into and adjudicate upon violations due to misrepresentation, suppression or fraud. Based on the material collected by the Customs authorities, a show cause notice has been issued to the Petitioners giving them full opportunity to explain how there was misrepresentation, suppression or fraud on the issue of RCV. There is no legal or jurisdictional infirmity in the issue of such show cause notices. The provisions of Article 24 of AIFTA do not deprive the customs authorities of their powers or jurisdiction to issue such show cause notices. The Petitioners virtually insist that the treaty provisions prevail over national laws, even though the treaty provisions on which they rely have not been incorporated into any national law. This is clearly impermissible, and the challenge on the lack of jurisdiction to issue the show cause notices cannot be sustained.

57. Incidentally, we must note the observations made by the Gujarat High Court in *Trafigura* (supra), which express doubts about whether the provisions of Article 24 of the AIFTA would apply at all, given that there was no dispute about the origin of the goods being from Malaysia. The Court noted that the misrepresentation and fraud were not about the origin of the goods, but rather the core aspect related to the misrepresentation and fraud concerning the RCV content. In any event, the decision proceeds to reason that even

otherwise, the Article could not be invoked to scuttle the operation of the national laws.

58. The argument based on the introduction of Chapter VAA in the Customs Act, effective from 27 March 2020, cannot be accepted. Based on the provisions of Section 28DA, we cannot infer that the pre-amended provisions of the Customs Act, 1962, prevented the Customs Authorities from exercising powers under Section 28 of the Customs Act and investigating cases of misrepresentation, suppression, or fraud. Certain additional powers have now been conferred upon the Customs authorities. But an inference that the earlier powers were insufficient to deal with cases of fraud, suppression or misrepresentation is untenable. This was not even a contention raised initially in the petitions, but is now put forth in an attempt to persuade us not to follow the reasoning of the Gujarat Judgment.

59. Section 28 of the Customs Act is quite exhaustive, it provides that where any duty has not been levied or paid etc. on account of collusion, willful mis-statement, suppression of facts by importer or exporter etc., the competent officer may act within five years from the relevant date and serve a notice on the person chargeable with duty or interest, which has not been paid, the Gujarat High Court has interpreted the provisions of Section 28 and concluded that suppression of facts implicatory can be a ground for invocation of the said provision.

60. The arguments about COO being conclusive, etc., have never been elaborated in the pleadings. If Mr Mishra's submission is correct, then, in several matters concerning imports of Tin Ingots from Malaysia, a detailed investigation revealed the extent of misrepresentation, suppression and fraud. In *Trafigura* (supra), the Gujarat High Court was dealing with a final order made by the Customs Authorities. Based on the materials on record, the Gujarat High Court found no reason to interfere with the factual findings recorded by the authorities and declined to interfere.

61. In the present case, the Customs Authorities are yet to adjudicate the matter, and therefore, it is not for this Court to make any observations that would even remotely prejudice the interest of the Petitioners or the Respondents. However, attempts to stall or prevent the adjudication proceedings, as outlined in the impugned show cause notices, cannot be encouraged when exercising our extraordinary and equitable jurisdiction under Article 226 of the Constitution.

62. The primary argument that the impugned show cause notices are ultra vires for failing to comply with the provisions of Article 24 of AIFTA lacks merit. The Gujarat High Court has addressed this issue in detail and rejected the identical contention regarding the importation of tin ingots from Malaysia. Mr Nankani's assertion that the Gujarat High Court failed to consider certain matters is untenable. In any event, even when considering those matters, we see no reason to

adopt a view different from that taken by the Gujarat High Court.

63. For all these reasons, we see no merit in these Petitions, or the contentions raised in support of these Petitions. Accordingly, we discharge the Rule and dismiss these Petitions. Interim Orders, if any, are vacated.

64. Interim Application (L) No.6631 of 2020 is disposed of.

(Jitendra Jain, J) (M.S. Sonak, J)