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## Article

### Anti-dumping duty on imports of certain rubber chemicals - A Catch-22 situation for Designated Authority

By Neeraj Chhabra

Anti-dumping duty on the imports of certain rubber chemicals from China PR and Korea RP was originally recommended by the Designated Authority vide final findings dated 1<sup>st</sup> October 2008 and was implemented vide Customs Notification dated 12<sup>th</sup> December 2008. Sunset review investigation was initiated by Designated Authority on 30<sup>th</sup> April 2013 and the anti-dumping duties were extended vide Customs Notification No. 35/2014 dated 24<sup>th</sup> July 2014 pursuant to the recommendation of the Designated Authority in the sunset review vide Final Findings dated 29<sup>th</sup> April 2014.

Delhi High Court vide its Judgment dated 31<sup>st</sup> May 2018 in the case of *Forech India Ltd. v. Union of India*, 2018 (361) ELT 671 (Del.) set aside the Initiation Notification dated 30<sup>th</sup> April 2013, Final Findings dated 29<sup>th</sup> April 2014 and Customs Notification No. 35/2014 dated 24<sup>th</sup> July 2014. The High Court observed that there were two gaps in the continuation of anti-dumping duty pursuant to the sunset review. Both, Customs Notification No. 17/2013 extending the duty for one year pending the sunset review and Customs Notification No. 35/2014 extending the anti-dumping duty for another five years upon the conclusion of sunset review, were issued after the previous anti-dumping duty had already expired.<sup>1</sup> The Court also observed that the initiation of sunset review was illegal.

<sup>1</sup> Original anti-dumping duty on imports of certain rubber chemicals from China PR and Korea RP was valid only till 4<sup>th</sup> May 2013. The Central Government revived the anti-dumping duty for one year till 4<sup>th</sup> May 2014 vide Customs Notification No. 17/2013 dated 5<sup>th</sup> July 2013 i.e. after a gap of 60 days; pursuant to the

Appeal/SLP was filed against this decision before the Supreme Court of India by the domestic industry of rubber chemicals i.e. NOCIL Ltd. Supreme Court admitted the SLP by issuing notice but no interim relief or stay was granted by it vide its order dated 9<sup>th</sup> July 2018.

In the meanwhile, domestic industry filed an application before the Designated Authority requesting to initiate the second sunset review. There was no customs notification in force imposing anti-dumping duty on the subject product as the same had already been set aside by the Delhi High Court and therefore application for second sunset review for extension of duty was not correct. However, the Designated Authority examined the application of the domestic industry and eventually rejected the application of the domestic industry by stating that the information provided by the domestic industry in the application does not support the claim of the domestic industry that it is suffering injury or that there is likelihood of injury to the domestic industry. No sunset review investigation was initiated by the Designated Authority.

This decision of the Designated Authority was challenged before the Gujarat High Court by the Domestic Industry. Domestic Industry requested the High Court that the rejection of application of the Domestic Industry by the Authority was incorrect because the domestic

recommendation of the Designated Authority in the sunset review investigation, Central Government again revived anti-dumping duties for five years vide Customs Notification No. 35/2014 dated 24<sup>th</sup> July 2014 i.e. 80 days after expiry of the anti-dumping duty on 4<sup>th</sup> May 2014.

industry had provided all the relevant information and that the Designated Authority should initiate sunset review investigation to examine full facts and evidence regarding likelihood of dumping and injury. Gujarat High Court agreed with the request of the Domestic Industry and has issued its judgment on 3<sup>rd</sup> July 2019. The High Court vide its judgment in *NOCIL Ltd. v. Union of India & Others*, C/SCA/4461/2019, directed the Designated Authority to initiate sunset review and Ministry of Finance to extend the anti-dumping duty, pending the outcome of the sunset review.

### **Sunset review of anti-dumping duty – Legal provisions**

Anti-dumping duties in force can be extended only if Customs Notification levying anti-dumping is in existence. Section 9A(5) provides as under:

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

First proviso of Section 9A(5) of the Customs Tariff Act provides for the extension of anti-dumping duty for a further period of five years if there is likelihood of continuation or recurrence of dumping and injury. It provides:

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

Rule 23(1B) of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of injury) Rules, 1995 as amended from time to time (hereinafter also referred to as

“Anti-dumping Rules, 1995”) provide the maximum duration of anti-dumping duty once imposed and also possibility of sunset review to examine need for continuation of anti-dumping duty for a further period. Rule 23(1B) of the Anti-dumping Rules, 1995 provides as under:

*“Notwithstanding anything contained in sub-rule (1) or (1A), any definitive anti-dumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry, within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry”*

Thus, it is clear from Section 9A(5) of the Customs Tariff Act r/w Rule 23(1B) of the Anti-dumping Rules, 1995, that sunset review can be initiated only when the anti-dumping duty is in force on the import of the subject goods. If no anti-dumping duty is in force on the import of subject goods, the domestic industry is required to request for initiation of fresh anti-dumping investigation in accordance with Section 9A(1) of the Customs Tariff Act r/w Rule 5 of the Anti-dumping Rules, 1995.

### **Conclusion**

The judgment of Gujarat High Court has created a very unusual situation for the Designated Authority and Ministry of Finance. Gujarat High Court has directed the Designated Authority to initiate the sunset review and Ministry of Finance to extend the Customs Notification No. 35/2014 for a further period (one year or less) pending such sunset review. If these

directions are implemented, it will be contrary to the decision of the Delhi High Court in *Forech India Ltd. & Ors.* Needless to say, the issue is required to be appropriately resolved by the Supreme Court.

**[The author is a Senior Associate in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]**



## Trade Remedy News

### Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol (2-EH)	Saudi Arabia and Singapore	F.No.14/22/2016-DGAD	09-07-2019	Anti-dumping investigation initiated
2-Propylheptyl Alcohol (2-PH)	European Union	F.No.14/22/2016-DGAD	09-07-2019	Anti-dumping investigation initiated
Chlorinated Poly Vinyl Chloride Resin- whether or not further processed into compound	China PR, Korea RP	F.No.6/3/2019-DGTR	12-07-2019	Preliminary Findings issued recommending provisional duties
Coated/Plated Tin Mill Flat Rolled Steel Products	European Union, Japan, USA, Korea RP	F.No.6/9/2019-DGTR	28-06-2019	Anti-dumping investigation initiated
Dimethylacetamide	China PR and Turkey	F. No.7/11/2019-DGTR	17-7-2019	Initiation of Mid-Term Review limited to the product scope
Ductile Iron Pipes	China PR	25/2019-Cus. (ADD)	23-06-2019	Extension of duty upto 09-10-2019 upon directions of the Hon'ble High Court of Gujarat in the matter of SCA No. 6896/2019 vide its final order dated the 20-06-2019 for completion of investigation afresh by the DGTR

Product	Country	Notification No.	Date of Notification	Remarks
Electrical Insulators	China PR	F.No. 7/44/2018-DGTR	17-7-2019	Final findings issued recommending imposition of definitive anti-dumping duty
Flat Rolled Products of Stainless Steel	China PR, Korea RP, European Union, Japan, Taiwan, Indonesia, USA, Thailand, South Africa, UAE, Hong Kong, Singapore, Mexico, Vietnam, Malaysia	F.No.6/12/2019 -DGTR	03-07-2019	Anti-dumping investigation initiated
Homopolymer of vinyl chloride monomer (suspension grade)	China PR and USA	F. No. 7/34/2018-DGTR	18-7-2019	Imposition of definitive anti-dumping recommended in sunset review
Isononanol (INA)	European Union and Singapore	F.No.14/22/2016-DGAD	09-07-2019	Anti-dumping investigation initiated
Melamine	China PR	F.No.7/11/2017 -DGAD	19-06-2019	Final Findings pursuant to New Shipper Review Investigation recommends individual anti-dumping duty margin for New Shipper
New / Unused pneumatic radial tyres with or without tubes and / or flap of rubber (including tubeless tyres), having nominal rim dia code above 16" and used in buses and lorries/trucks	China PR	1 / 2019-Cus. (CVD)	24-06-2019	Imposition of Countervailing duty notified

Product	Country	Notification No.	Date of Notification	Remarks
Nylon Multi Filament Yarn	China PR, Korea RP, Taiwan, Thailand	F.No.6/11/2019 -DGTR	28-06-2019	Anti-dumping investigation initiated
Paracetamol	China PR	27/2019-Cus. (ADD)	12-07-2019	Extension of duty upto 27-10-2019, upon directions of the High Court of Gujarat in the matter of SCA No. 5278/2019 vide its Order dated the 3rd July, 2019 for completion of investigation afresh by the DGTR
Polystyrene of all types except expandable polystyrene	Iran, Malaysia, Singapore, Chinese Taipei, UAE, USA	F.No.6/10/2019 -DGTR	10-07-2019	Anti-dumping investigation initiated
Purified Terephthalic Acid	Korea RP, Thailand	28/2019-Cus. (ADD)	24-07-2019	Definitive anti-dumping imposed after sunset review
Sheet glass	China PR	F.No. 7/10/2019-DGTR	17-7-2019	Initiation of sunset review

### *Trade remedy measures against India*

Product	Country	Notification No.	Date of Notification	Remarks
Ductile pipes (tubes and pipes of ductile cast iron)	European Union	2019/C 209/07 [Case AS618a] and [Case AD616a]	20-06-2019	Re-opening of investigations following General Court judgments relating to Regulations imposing definitive countervailing duty and definitive anti-dumping duty
Polyester Textured Yarn	United States of America	84 FR 31301 [A-533-885]	01-07-2019	Preliminary Affirmative Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures
Welded Carbon Steel Standard Pipes and Tubes	United States of America	84 FR 33916 [A-533-502]	16-07-2019	Preliminary Results of Antidumping Duty Administrative Review; 2017-2018



## WTO News

### Sugar catching up with steel at WTO

Sugar seems to be getting all the attention, which was earlier given to steel, at WTO. This month while Australia, Brazil and Guatemala presented their first requests for the establishment of panels to determine whether India's measures supporting the domestic sugar and sugarcane sector are compatible with WTO rules, Costa Rica has launched safeguard investigation on imports of white sugar.

Australia, Brazil and Guatemala have challenged India's domestic support that includes a system of administered prices for sugarcane, a minimum selling price for sugar and the setting of prices for sugar such as stockholding requirements and subsidies to maintain buffer stocks as well as additional measures that provide financial assistance to sugarcane producers, both at the federal and state levels. It is also alleged that India provides subsidies contingent on export through 'Minimum Indicative Export Quotas' (MIEQ) or other sugar export incentives.

As per reports, India has on 22-7-2019 responded, stating that its measures are aimed at preventing exploitation of over 35 million vulnerable low-income, resource-poor farmers and that the measures do not violate India's WTO obligations and do not have any trade-distorting effect on the global sugar trade, nor do they adversely affect the commercial interests of Australia, Brazil and Guatemala.

Meanwhile, Costa Rica, on 9 July 2019, notified the WTO's Committee on Safeguards that it has initiated a safeguard investigation on white sugar. The Notification was published in Costa Rica's official gazette on 20 June 2019, along with the intimation that the initiation of the investigation is

10 calendar days after publication in the Official Gazette, i.e., on 30 June, 2019.

### Indian additional duties on US goods – USA initiates dispute

The WTO has on 4th of July circulated the request for consultations by the United States with India concerning additional duties applied by India on certain imports of US goods. In the consultation request, the US has stated that the measures imposing additional duties appear to be inconsistent with:

- Article I:1 of the GATT 1994, because India fails to extend to US products an advantage granted by India with respect to customs duties on imports of products originating in the territory of other Members, and
- Article II:1(a) and (b) of the GATT 1994, because India accords less favourable treatment to products originating in the United States than that provided for in India's schedule of concessions.

### US measures for renewable energy sector violate WTO provisions: Panel report

The WTO has on 27th of June, circulated the panel report in the case brought by India in "*United States — Certain Measures Relating to the Renewable Energy Sector*" (DS510). The Panel found that all the measures at issue are inconsistent with Article III:4 of the GATT 1994 because they provide an advantage for the use of domestic products, which amounts to less favourable treatment for like imported products. The Panel exercised judicial economy on India's claims under Articles 2.1 and 2.2 of the TRIMS Agreement and Articles 3.1(b) and 3.2 of the SCM Agreement.

## US compliance with countervailing duties ruling - Appellate Body issues report

The Appellate Body has on 16-7-2019 issued its report in the case *'United States — Countervailing Duty Measures on Certain Products from China — Recourse to Article 21.5 of the DSU'* (DS437). The Appellate Body made the following findings:

**Public bodies — Article 1.1(a)(1) of the SCM Agreement** - The Appellate Body upheld the Panel's finding that Article 1.1(a)(1) does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue. The Appellate Body also upheld the Panel's finding that the USDOC's public body determinations at issue were not based on an improper legal standard.

**Benefit — Articles 1.1(b) and 14(d) of the SCM Agreement** - The Appellate Body upheld the Panel's finding that Article 14(d) does not limit the possibility of resorting to out-of-country prices to the situation in which the government effectively determines the price at which the good is sold. The AB also found that the United States had not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding that the USDOC had failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price, as well as that the USDOC failed to consider price data on the record.

**Specificity — Article 2.1(c) of the SCM Agreement** - With respect to the Panel's interpretation and application of Article 2.1(c), the Appellate Body agreed with the Panel that the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c). Accordingly, the Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in 11 of the Section 129 proceedings at issue in this dispute.

For each of the issues as mentioned above, the Appellate Body report contains a separate, dissenting opinion by one member of the Division.

## Russia initiates WTO dispute against US dumping duties on steel

The WTO has on 9th of July circulated the request for dispute consultations by the Russian Federation with the United States concerning the continued application of US anti-dumping duties on imports of hot-rolled carbon-quality steel from Russia. According to the Russian Federation, the measures appear to be inconsistent with various provision of the Anti-dumping Agreement and the GATT 1994.

## Panels to review US duties on Spanish olives, Indonesian compliance with chicken ruling

On 24 June, the Dispute Settlement Body (DSB) agreed to a request from the European Union for a dispute panel to review anti-dumping and countervailing duties imposed by the United States on imported olives from Spain. Members also agreed to Brazil's request for a panel to examine whether Indonesia has complied with an

earlier WTO ruling regarding measures impeding the import of chicken meat and chicken products.

Interestingly, WTO's 21st Monitoring Report on G20 trade measures issued on the same day (24th of June) shows that the trade coverage of

new import-restrictive measures introduced during the period (October 2018 to May 2019) was more than 3.5 times the average since May 2012.



## India Customs & Trade Policy Update

### Countervailing duty to be imposed in cases of circumvention of said duty:

Section 9 of the Customs Tariff Act, 1975 is being amended by the Finance (No.2) Bill, 2019 to provide for imposition of countervailing duty in cases of circumvention of said duty. According to the new sub-section (1A), circumvention occurs in cases of altering the description or name or composition of the article on which such duty has been imposed or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner. It may be noted that similar provision is already available since 2012 in respect of anti-dumping duty.

### Indian trade remedy measures – Changes proposed in safeguard, anti-dumping and countervailing duty measures:

Directorate General of Trade Remedies in India has sought comments from all stakeholders regarding certain changes proposed in the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, Countervailing Duty Rules and the Anti-dumping Rules. Some of the changes proposed are,

- Rules pertaining to Safeguard duty are proposed to be renamed as Customs Tariff (Identification and Assessment of Safeguard Measure) Rules, 1997, with a new definition

of 'Safeguard measure' to mean a safeguard duty or a duty in the nature of Tariff Rate Quota (TRQ) imposed under sub-section (1) of section 8B of the Customs Tariff Act.

- Reference to 'irreparable damage to the domestic industry' in the meaning of 'Critical circumstances' is also proposed to be amended to 'damage to the domestic industry which would be difficult to repair'.
- Meaning of domestic industry in the Countervailing duty Rules is proposed to be amended to bring the subsidy law at par with the dumping law and align the definition with the WTO Agreement.
- Explanation is proposed to be inserted in the definition of domestic industry to provide for provision when producers shall be deemed to be related to exporters or importers. Similar provision has also been proposed to be inserted in the Anti-dumping duty Rules.
- 'Like article' and 'Period of Investigation' are proposed to be defined in the Countervailing duty Rules.
- Rules for Circumvention of Countervailing duty have also been proposed to be inserted.
- Definition of 'Period of Investigation' is proposed to be inserted in the Anti-dumping Rules which says that the Period of Investigation proposed in the application

should normally be as latest as possible and in any case not more than six months old as on date of initiation.

It may be noted that some 49 amendments in the Safeguard duty Rules, 14 amendments in the Countervailing duty Rules and some 7 amendments in the Anti-dumping duty Rules have been proposed.

**Penalty for obtaining and utilizing FTP instruments by fraud:** Finance (No.2) Bill, 2019 introduced in the Indian Parliament on 5th of July has proposed to insert new Section 114AB in the Customs Act, 1962 to provide for penalty for obtaining instrument (scrip, authorization, licence, or certificate, etc.) by fraud, collusion, willful misstatement or suppression of facts, and where such instrument has been utilized for discharge of duty. Meaning of the expression 'instrument' has to be taken from Section 28AAA of the Customs Act. Maximum penalty imposable as per the new provision would be the face value of the instrument. Further, Section 135 of the Customs Act is also being amended to provide for imprisonment and/or fine in case a person obtains an 'instrument' by fraud, collusion, willful misstatement or suppression of facts and such instrument is utilized. It may also be noted that Section 104 relating to 'Power to arrest' is also being amended to provide for such offence of obtaining the instrument by fraud, etc., and then utilizing it for payment of duty, as a cognizable and non-bailable offence if the duty involved exceeds Rs. 50 lakhs.

**Procedure relaxed for Transport and Marketing Assistance for specified agriculture products:** Requirement of Export Promotion copy of shipping bill and

landing certificate for availing the benefit of Transport and Marketing Assistance (TMA) for specified agriculture products has been dispensed with, from the date of effect of Public Notice 82/2015-20 dated 20-3-2019. Additionally, exports from/of SEZ/EOU/FTWZ have also been made eligible for the benefit of TMA. DGFT Public Notice No. 12/2015-20, dated 25-6-2019 for this purpose amends Chapter 7(A) of Handbook of Procedures Vol. 1 and the Aayaat Niryaat Forms.

**Customs duty on reimport of jewellery exported under bond for exhibition:** CBIC has clarified that Additional Customs duty is not payable in cases of re-import of jewellery earlier exported under bond/LUT for exhibition abroad or on consignment basis. Circular No. 17/2019-Cus., dated 19-6-2019 observes that as there was no sale involved, there was no liability to pay Central Excise duty as the same arises, as per Articles of Jewellery (Collection of Duty) Rules, 2016, only at the time of first sale. The Circular however states that if the jewellery was exported under rebate, repayment of rebate is required at time of re-import.

**Provisional attachment of bank account:** Budget 2019 has proposed amendment in Section 110 of the Customs Act, 1962 to empower the Customs proper officer to provisionally attach any bank account, during any proceeding under the Customs Act. As per the new proposed sub-section (5) of Section 110, the purpose should be for protecting interest of revenue or for preventing smuggling. Further, Section 110A is also being amended for provisional release of such provisionally attached bank account on submission of bond with required security and conditions.



## Ratio Decidendi

### **Safeguard duty on solar cells – High Court vacates interim relief against levy:**

Gujarat High Court has vacated the ad-interim relief granted to petitioner (importers) against imposition of safeguard duty on solar cells imported into India. The High Court observed that final findings of DGTR showed that domestic industry has suffered injury, and if ad-interim relief is continued, domestic industry may collapse. It noted that the petitioner had already availed four months of interim relief out of the limited duration of levy of such duty. It also noted that volume of imports grew 671% while domestic industry grew only by 126%. [*Jupiter Solar Power v. UoI* - 2019-VIL-297-GUJ-CU]

### **Goods cleared for home consumption do not retain identity of imported goods:**

Gujarat High Court has held that imported mis-declared goods, which were subsequently cleared for home consumption after payment of duty and furnishing of bond and guarantee, no longer retain identity of imported goods and can be exported. The High Court in this regard noted that there is no question of re-export. It observed that unless there is a statutory bar or statutory requirement for export are not satisfied, authorities cannot deny permission to export. According to the department, it had denied exports to deter the importer from committing same irregularities again. [*Naitik Enterprise v. UoI* - 2019-VIL-287-GUJ-CU]

### **Submission of EO Discharge Certificate is only a procedural condition:**

CESTAT Bangalore has held that submission of Export Obligation Discharge Certificate (EODC) is only a procedural condition. It held that in the absence of one, if the assessee can prove the factum of export and foreign exchange realization by way of other corroborative evidences, then benefit of Notification No. 43/2002-Cus. was not deniable. The Tribunal hence waived the demand of interest and penalty observing that the importer had already closed down business and had paid entire duty despite fulfilling export obligation. [*Hungi Granites v. Commissioner* – 2019 (366) ELT 736 (Tri. – Bang.)]

### **Part of machine – Conditions for classification as ‘part’:**

Court of Justice of the European Union has reiterated that in order to classify an article as ‘parts’, it is not sufficient to show that without that article the machine or apparatus is not able to carry out its intended functions. It must also be established that the mechanical or electrical functioning of the machine or apparatus in question is dependent on that article. Consequently, it must be examined if part qualifies as part of general use. CJEU held that welded steel part at issue is classifiable as Tube or Pipe fitting of general use within Note 2 to Section XV of CN, and not as part of radiator. It observed that internal diameter of collar was of conventional diameter. [*Korado v. Genralni Reditelstvi Cel* – Judgement dated 15-5-2019 in Case C-306/18, Court of Justice of the European Union]

**NEW DELHI**

5 Link Road, Jangpura Extension,  
Opp. Jangpura Metro Station,  
New Delhi 110014  
Phone : +91-11-4129 9811  
-----

B-6/10, Safdarjung Enclave  
New Delhi -110 029  
Phone : +91-11-4129 9900  
E-mail : [lsdel@lakshmisri.com](mailto:lsdel@lakshmisri.com)

**MUMBAI**

2nd floor, B&C Wing,  
Cnergy IT Park, Appa Saheb Marathe Marg,  
(Near Century Bazar)Prabhadevi,  
Mumbai - 400025  
Phone : +91-22-24392500  
E-mail : [lsbom@lakshmisri.com](mailto:lsbom@lakshmisri.com)

**CHENNAI**

2, Wallace Garden, 2nd Street  
Chennai - 600 006  
Phone : +91-44-2833 4700  
E-mail : [lsmds@lakshmisri.com](mailto:lsmds@lakshmisri.com)

**BENGALURU**

4th floor, World Trade Center  
Brigade Gateway Campus  
26/1, Dr. Rajkumar Road,  
Malleswaram West, Bangalore-560 055.  
Ph: +91(80) 49331800  
Fax:+91(80) 49331899  
E-mail : [lsblr@lakshmisri.com](mailto:lsblr@lakshmisri.com)

**HYDERABAD**

'Hastigiri', 5-9-163, Chapel Road  
Opp. Methodist Church,  
Nampally  
Hyderabad - 500 001  
Phone : +91-40-2323 4924  
E-mail : [lshyd@lakshmisri.com](mailto:lshyd@lakshmisri.com)

**AHMEDABAD**

B-334, SAKAR-VII,  
Nehru Bridge Corner, Ashram Road,  
Ahmedabad - 380 009  
Phone : +91-79-4001 4500  
E-mail : [lsahd@lakshmisri.com](mailto:lsahd@lakshmisri.com)

**PUNE**

607-609, Nucleus, 1 Church Road,  
Camp, Pune-411 001.  
Phone : +91-20-6680 1900  
E-mail : [ls pune@lakshmisri.com](mailto:ls pune@lakshmisri.com)

**KOLKATA**

2nd Floor, Kanak Building  
41, Chowringhee Road,  
Kolkatta-700071  
Phone : +91-33-4005 5570  
E-mail : [lskolkata@lakshmisri.com](mailto:lskolkata@lakshmisri.com)

**CHANDIGARH**

1st Floor, SCO No. 59,  
Sector 26,  
Chandigarh -160026  
Phone : +91-172-4921700  
E-mail : [lschd@lakshmisri.com](mailto:lschd@lakshmisri.com)

**GURGAON**

OS2 & OS3, 5th floor,  
Corporate Office Tower,  
Ambience Island,  
Sector 25-A,  
Gurgaon-122001  
phone: +91-0124 - 477 1300  
Email: [lsurgaon@lakshmisri.com](mailto:lsurgaon@lakshmisri.com)

**ALLAHABAD**

3/1A/3, (opposite Auto Sales),  
Colvin Road, (Lohia Marg),  
Allahabad-211001 (U.R)  
phone . +91-0532 - 2421037, 2420359  
Email:[lsallahabad@lakshmisri.com](mailto:lsallahabad@lakshmisri.com)

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