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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION(CIVIL) No. 8202/2017**

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Reserved on : 06th March, 2018
Pronounced on: 20th September, 2018

JINDAL POLY FILM LTD

..... Petitioner

Through Mr. Basava Prabhu Patil, Sr.Advocate
with Mr. Rajesh Sharma, Ms.Reena Khair, Ms.Rita
Jha and Ms. Shreya Dahiya, Advocates.

versus

DESIGNATED AUTHORITY & ANR.

..... Respondent

Through Mr. Balbir Singh, Sr.Advocate with
Mr.Darpan and Mr. K. Gurumurthy, Advocates.
Mr. Vinor Diwakar, Central Government Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

This order and judgment would decide the preliminary objection raised by the third respondent, M/s Fibertex Personal Care SDN BHD, not to exercise our discretion to entertain the present Writ Petition in view of the alternative statutory appellate remedy available to the petitioner under Section 9C of the Customs Tariff Act, 1975 ('CT Act' for short) before the Customs Excise and Service Tax Appellate Tribunal ('Appellate Tribunal' for short).

2. M/s. Jindal Poly Film Limited vide the present writ petition has challenged the legality and validity of the termination order No.14/23/2015-DGAD dated 2nd September, 2017 passed by the Designated Authority under Rule 14 of the Customs Tariff (Anti Dumping) Rules, 1995 [‘Rules’ for short].

3. On 17th March, 2016, the petitioner had filed an application for initiation of anti-dumping investigation on imports of *Non-Woven fabric* originating and exported from the China PR, Malaysia, Indonesia, Thailand and Saudi-Arabia on the ground that they were causing injury to the domestic industry. Thereupon, the Designated Authority had issued public notice on 15th June, 2016 in terms of Rule 5 of the Rules to determine existence, degree and effect of alleged dumping and to decide whether to recommend and specify the amount of anti-dumping duty that would be adequate to remove injury to the domestic industry. The period of investigation selected by the Designated Authority was 9 months from 1st July, 2015 to 31st March, 2016. Interested parties had consequently submitted information and evidences. On 2nd August, 2017, the Designated Authority had issued disclosure statement under Rule 16 containing essential facts under consideration that would form basis of the final findings. However, by the impugned order dated 2nd September, 2017, the Designated Authority had issued termination order holding that the product under consideration being exported to India from the subject countries (Malaysia, Indonesia, Thailand, Saudi Arabia and China PR) was not below its normal value, except in case of Toray Polytech (Nantong) Company Limited, China and Asahi Kasei Spunbound (Thailand) Company Limited. It was also concluded that there was only one producer from China PR for which dumping and injury margin was positive. With

regard to imports from Asahi Kasei Spunbound (Thailand) Company Limited the injury margin was negative. Price undercutting from all subject countries was negative and there was no causal link between the imports and material injury to the domestic industry.

4. The writ petitioner resists and questions the plea of alternative remedy, stating that the appellate remedy under Section 9C of the CT Act cannot be invoked against the termination order under Rule 14 of the Rules. An appeal under Section 9C of the CT Act, lies only against an “order of determination” which requires a positive final finding under Rule 17 by the Designated Authority recommending imposition of anti-dumping duty and acceptance by the Central Government by way of a notification under Rule 18 of the Rules imposing anti-dumping duty at the rate not exceeding the margin of dumping determined by the Designated Authority under Rule 17 of the Rules. When the Designated Authority terminates the proceeding, or gives negative final opinion under Rule 17, or the Central Government does not issue notification under Rule 18, there is no “order of determination” and hence no appeal lies under Section 9C of the CT Act.

5. To decide the preliminary objection, we must examine the scope and ambit of Section 9C of the CT Act. We begin by reproducing Sections 9A and 9C of the CT Act and Rules 3, 4, 14, 17, 18 and 23 of the Rules, i.e. the Customs Tarrif (Anti Dumping) Rules, 1995.

STATUTORY PROVISIONS

Section 9A and Section 9C of the CT Act, read as under:-

“9A (1) where any article is exported by an exporter or producer from any country or territory (hereafter in this section referred to as the

exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Explanation.- For the purpose of this section,-

- (a) “margin of dumping” in relation to an article, means the difference between its export price and its normal value;
- (b) “export price”, in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);
- (c) “normal value”, in relation to an article, means-
 - (i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or
 - (ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-
 - (a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

- (b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such, article into India and anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined,-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and subsection (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), shall not apply to articles imported by a hundred per cent export oriented undertaking unless,-

- (i) specifically made applicable in such notification or such imposition, as the case may be, or
- (ii) the article imported is either cleared as such into the domestic tariff area or used in the manufacture of any goods that are cleared into the domestic tariff area, and in such cases anti-dumping duty shall be levied on that portion of the article so cleared or so

used as was leviable when it was imported into India.

Explanation.-For the purposes of this section, the expressions “hundred per cent export-oriented undertaking”, “free trade zone” and “special economic zone” shall have the meanings assigned to them in Explanation 2 to subsection (f) of section 3 of Central Excise Act, 1944.

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that-

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the antidumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding anything contained in any other law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

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

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

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified and for the manner in which the export price and the normal value of and the margin refund of anti-dumping duty in certain cases of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided by such exporter or producer;

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, relating to, the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences

and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.”

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“9C. (1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (hereafter referred to as the Appellate Tribunal).

[(1A) An appeal under sub-section (1) shall be accompanied by a fee of fifteen thousand rupees.

(1B) Every application made before the appellate Tribunal,-

(a) in an appeal under sub-section (1), for grant of stay or for rectification of mistake or for any other purpose; or
(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees]

(2) Every appeal under this section shall be filed within ninety days of the date of order under appeal:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

(4) The provisions of sub-section (1), (2), (5) and (6) of section 129C of the Customs Act, 1962 shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962.

(5) Every appeal under sub-section (1) shall be heard by a Special Bench constituted by the President of the Appellate Tribunal for hearing such appeals and such Bench shall consist of the President and not less than two members and shall include one judicial member and one technical member.”

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Rules 3, 4, 14, 17, 18 and 23 of the Rules, i.e. the Customs Tariff (Anti Dumping) Rules, 1995, read as under:

“3. Appointment of designated authority.- (1) The Central Government may, by notification in the Officer Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority for purposes of these rules.

(2) The Central Government may provide to the Designated Authority the services of such other person and such other facilities as it deems fit.

4. Duties of the designated authority.- It shall be the duty of the Designated Authority, in accordance with these rules,-

(a) to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article;

(b) to identify the article liable for anti-dumping duty;

(c) to submit its findings, provisional or otherwise to the Central Government as to-

(i) normal value, export price and the margin of dumping in relation to the article under investigation; and

(ii) the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such article from the specified countries;

- (d) to recommend to the Central Government-
- (i) the amount of anti-dumping duty equal to the margin of dumping or less which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and
- (ii) the date of commencement of such duty;
- (e) to review the need for continuance of anti-dumping duty.

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14. Termination of investigation.- The designated authority shall, by issue of a public notice, terminate an investigation immediately if-

- (a) it receives a request in writing for doing so from or on behalf of the domestic industry affected, at whose instance the investigation was initiated;
- (b) it is satisfied in the course of an investigation, that there is not sufficient evidence of dumping or, where applicable, injury to justify the continuation of the investigation;
- (c) it determines that the margin of dumping is less than two per cent of the export price;
- (d) it determines that the volume of the dumped imports, actual or potential, from a particular country accounts for less than three per cent of the imports of the like product, unless, the countries which individually account for less than three per cent of the imports of the like product, collectively account for more than seven per cent of the import of the like product; or
- (e) it determines that the injury where applicable, is negligible.

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17. Final findings.- (1) The Designated Authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding-

(a) as to,-

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, cause or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reason therefor and date of commencement of such retrospective levy:

Provided that the Central Government may, [in its direction in special circumstances] extend further the aforesaid period of one year by six months:

Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,

[(b) recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry [after considering the principles laid down in the Annexure III to these rules.]]

(2) The final finding, if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information regarding-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(3) The designated authority shall determine an individual margin of dumping for each known exporter or product concerned of the article under investigation:

Provided that in cases where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, and any selection, of exporters, producers, or types of articles, made under this proviso shall preferably be made in consultation with and with the consent of the exporters, producers or importers concerned:

Provided further that the designated authority shall determine an individual margin of dumping for any exporter or producer, though not selected initially, who submit necessary information in time, except where the number of exporters or producers are so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.

(4) The designated authority shall issue a public notice recording its final findings.

18. Levy of duty.- (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17:

(2) In cases where the designated authority has selected percentage of the volume of the exports from a particular country, as referred to

sub-rule (3) of the rule 17, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed-

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined:

Provided that the Central Government shall disregard for the purpose of this sub-rule any zero margin, margins which are less than 2 per cent expressed as the percentage of export price and margins established in the circumstances detailed in sub-rule (8) of rule 6. The Central Government shall apply individual duties to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation as referred to in the second proviso to sub-rule (3) of rule 17.

(3) Notwithstanding anything contained in sub-rule (1), where a domestic industry has been interpreted according to the proviso to sub-clause (b) of rule, 2, a duty shall be levied only after the exporters have been given opportunity to cease exporting at dumped prices to the area concerned or otherwise give an undertaking pursuant to rule 15 and such undertaking has not been promptly given and in such cases duty shall not be levied only on the articles of specific producers which supply the area in question.

(4) If the final finding of the designated authority is negative that is contrary to the evidence on whose basis the investigation was initiated, the Central Government shall, within forty-five days of the publication of final findings by the designated authority under rule 17, withdraw the provisional duty imposed, if any.

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23. Review.- (1) Any anti-dumping duty imposed under the provision of section 9A of the Act, shall remain in force, so long as and to the extent necessary, to counteract dumping which is causing injury.

(1A) The designated authority shall review the need for the continued imposition of any anti-dumping duty, where warranted, on its own initiative or upon request by any interested party who submits positive information substantiating the need for such review, and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty and upon such review, the designated authority shall recommend to the Central Government for its withdrawal, where it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur, if the said anti-dumping duty is removed or varied and is therefore no longer warranted.

(1B) 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.]

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

(3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 18, 19 and 20 shall be *mutatis mutandis* applicable in the case of review.”

Interpretation of the Statutory provisions

6. Section 9C of the CT Act postulates an appeal against the “order of determination” or review thereof, regarding existence, degree and effects of any subsidy or dumping in relation to import of any article before the Appellate Tribunal. It is apparent that the scope and ambit of appeal under

Section 9C of the CT Act is wide and broad, for an appeal would lie from any "order of determination" or review thereof, regarding matters relating to the existence, degree and effect of any subsidy or dumping in relation to import of any article. Section 9C *ex facie* does not restrict the right to appeal to specific category of orders, except that the order should determine the existence, degree and effect of subsidy or dumping in relation to imports in India. The word "determination" qualifies the word "order" and in this manner, restricts the right to appeal to those orders, which are determinative and final. The two words read together express the legislative intent, i.e. the order to be appealable must determine the existence, degree and effect of subsidy or dumping in relation to any article imported into India. No appeal lies against in-determinative orders i.e. an order which is not conclusive and final in relation to the existence, degree, and effect of subsidy or dumping in relation to any article imported into India.

7. Sub-section 1 to Section 9A of the CT Act states that the Central Government by a notification in the official gazette can impose anti-dumping duty not exceeding the margin of dumping in relation to such article. Therefore, imposition of anti-dumping duty requires a gazette notification. Till a gazette notification is issued, anti-dumping duty cannot be imposed and collected even if the Central government intends and wants to impose anti-dumping duty. We need not refer to the Explanation for the purpose of present adjudication. Similarly, reference to Sub-Section 1(a) is not required as it would come into operation in cases of circumvention of anti-dumping duty imposed under Sub-Section 1. Sub-section 2, however, is relevant and states that the Central Government can, pending the "determination" under Section 9A, i.e. in the interlude till "determination" of the existence, degree,

and effect of subsidy/dumping in relation to any article imported into India, impose anti-dumping duty on importation of an article into India, on provisional estimate of such value and margin. The provision prescribes the conditions that should be satisfied, the formula for imposition of provisional or interim anti-dumping duty pending investigation. Sub-Section 5 states that anti-dumping duty imposed under Section 9A, unless otherwise revoked earlier, shall cease to be effective on the expiry of five years from the date of imposition. Two provisos empower the Central Government to review imposition of duty upon such cessation and confers power to extend anti-dumping duty for a period not exceeding one year.

8. Sub-section 6 to Section 9A of the CT Act states that the margin of dumping referred to in Sub-sections 1 and 2 shall be ascertained and determined by the Central Government after such enquiry as may be considered necessary, for which purpose the Central Government is also authorized to make rules by way of notification in the official gazette. Without prejudice to the generality, the rules may provide for identification of the articles liable for any anti-dumping duty; the manner to determine the export price, the normal value, the margin refund of anti-dumping duty in certain cases of dumping in relation to such articles, and assessment and collection of such anti-dumping duty. It states that the margin of dumping in relation to an article, shall be determined on the basis of records concerning the normal value and the export price maintained and information provided by the exporter or the producer.

9. Sub-section 7 requires that every notification under Section 9A(1) is to be laid before each House of the Parliament as soon as possible.

10. Sub-section 8 provides that provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refund, interest etc. shall apply to the duty chargeable under the section.

11. Though we have not quoted Section 9AA, this section relates to refund of anti-dumping duty in certain cases. Section 9B relates to non-levy under Section 9 and 9A in certain circumstances.

12. We would now examine and interpret the Rules. Rule 3 entitles the Central Government to notify an officer not below the rank of Joint Secretary or such other person as the Government thinks fit as the Designated Authority for the purpose of the Rules. Designated Authority is to be provided with services of such other persons and such other facilities as the Central Government deems fit. Rule 4 consists of five separate sub-rules or clauses. Clause (a) deals with powers of the Designated Authority and right to conduct investigation and clause (b) relates to identification of article. Clause (c) deals with duty of the Designated Authority to submit its findings, provisional or otherwise to the Central Government and Clause (d) authorizes the Designated Authority to make recommendations to the Central Government on the quantum of anti-dumping duty, which if levied would remove the injury. Clause (e) relates to review of the continuation of anti-dumping duty.

13. Clause (a) in Rule 4 is significant. The clause defining the duties of the Designated Authority, uses the same and identical expressions as used in Section 9C of the CT Act i.e. existence, degree and effect of any alleged dumping in relation to import of any article. Designated Authority has the power to carry out investigation to identify the article liable for anti-dumping

duty and submit its finding, provisional or otherwise to the Central Government, as to the normal value, the export price and the margin of dumping in relation to the article under investigation, i.e. different aspects referred to in Section 9A of the CT Act. Designated Authority has the power to examine the injury or threat to injury to industries established in India or material retardation to the establishment of such industry in India consequent upon import of such articles from specified countries. Clause (d) to Rule 4 states that the Designated Authority is to then make recommendation to the Central Government on the amount of anti-dumping duty equal to the margin of the dumping or less which if levied would remove the injury to the domestic industry. Recommendation should take into consideration the principles laid down in Annexure 3 to the Rules and indicate the date of commencement of such duty. Clause (e) deals with duty to review the need for continuance of anti-dumping duty.

14. We have not quoted Rules 5, 6, 10, and 11 to avoid prolixity. These Rules relates to initiation of investigation, principles governing investigation, determination of the normal value, the export price and the margin of dumping and determination of injury.

15. Rule 14 relates to termination of investigation for which the Designated Authority has to issue public notice; if the Designated Authority receives a request in writing for doing so on behalf of the domestic industry; if it is satisfied in the course of investigation that there does not exist sufficient evidence of dumping etc.; where it determines that the margin of dumping is less than 2% of the export price; where it determines that volume of dumped exports is less than three per cent of the imports of the like product or unless the countries that individually account for less than three

per cent of the imports of the like product, collectively account for more than seven per cent of the import of the like product or lastly where the injury is negligible. Rule 15 though not quoted deals with suspension and termination of investigation on price undertaking.

16. Rule 17 states that the Designated Authority shall record its final finding within one year from the date of initiation of the investigation, which period can be further extended by the Central Government under special circumstances by a further period of six months to determine whether or not the article under investigation is being dumped in India. Final finding by the Designated Authority should determine as to whether or not the article is being dumped into India and submit to the Central Government the export price, the normal value and the margin of dumping of the said article, casual link, if applicable, between the dumped imports and injury and recommend the amount of duty, if levied, would remove the injury to the domestic industry on the basis of principles in Annexure III. Sub-rule 2 to Rule 17 states that where the final finding of the Designated Authority on anti-dumping duty is in affirmative, the said finding shall contain all information on the matter of facts and law and reasons that led to the conclusion. Final finding is required to contain information mentioned in Clauses (i) to (v) which includes consideration relevant to the injury determined and the main reasons leading to the determination. Designated Authority as per Sub-rule 3 is to determine individual margin of dumping for each case, the exporter or producer concerned of the article under investigation. Sub-rule 4 states that the Designated Authority shall issue public notice regarding its finding. In terms of Rule 17 the report of the Designated Authority has to be exhaustive and comprehensive covering all aspects relating to and relevant for

determining whether the Designated Authority recommends levy anti-dumping duty or gives a negative finding.

17. Rule 18 is significant and is of considerable importance for the decision of the issue in question. Sub-rule (1) states that Central Government may within three months of publication of the finding by the Designated Authority under Rule 17 impose by way of notification in the official gazette, anti-dumping duty which shall not exceed the margin of dumping determined under Rule 17. In other words, Central Government is entitled to impose anti-dumping duty less than the margin of dumping recommended by the Designated Authority under Rule 17. The notification issued by the Central Government under Rule 18, cannot exceed the margin of dumping determined by the Designated Authority. In other words, where the Designated Authority in its final findings recommends imposition of anti-dumping duty, the Central Government has the power and authority to impose or not impose anti-dumping duty, and where it decides to impose anti-dumping duty, the determination of the margin of dumping can be lower (even nil), but cannot exceed the margin determined by the Designated Authority under Rule 17. We need not for our purposes refer to sub-rules (2) and (3) to Rule 18. Sub-rule (4) states that when the final finding of the Designated Authority is negative i.e. it does not propose or recommend imposition of anti-dumping duty, the Central Government shall within 45 days of the publication of the final finding of the Designated Authority withdraw provisional duty imposed, if any. In case of negative opinion the recommendation of the Designated Authority is final and conclusive. It is determinative opinion or order.

18. The Designated Authority under Rule 23 has been vested with the power of review to anti-dumping duty imposed under Section 9A when in force, to the extent necessary to counteract dumping which is causing injury. Power of review can be exercised by the Designated Authority on its own initiation or on the request of any interested party which submits positive information substantiating need for such review. Provisions of several Rules including Rules 17, 18 etc. then apply *mutatis mutandis*.

Contentions

19. The petitioner has submitted that the expression “order of determination” as defined in Section 9C must be interpreted in the light of Section 9A of the CT Act and is therefore a term of art. Section 9A of the CT Act refers to determination made by the Central Government and does not speak of recommendation of the Designated Authority. Reliance is placed on ***Saurashtra Chemicals Limited Vs. Union of India & Ors.***, 2000 (118) E.L.T. 305 (S.C), wherein the Supreme Court has refused to entertain the Special Leave Petition, under Article 136 of the Constitution of India, observing that the order of the Designated Authority was purely recommendatory and an appeal lies against the determination which is to be made by the Central Government. Reliance is placed upon the judgment of the Appellate Tribunal in ***M/s. Panasonic Energy India Co. Ltd. & Ors. Vs. Union of India*** (Anti- Dumping Appeals No. 50452-50455 of 2017) that if there is negative finding under Rule 17 by the Designated Authority, the Appellate Tribunal does not have jurisdiction to entertain the appeal under Section 9C of the CT Act. In such scenario aggrieved party would have to file a writ petition and the appeal under Section 9C would not be

maintainable. It is submitted that there is a rationale behind not providing statutory appeal against the negative finding as the Designated Authority is an expert in the field. Alternative remedy needs to be efficacious and where Designated Authority has violated the principles of natural justice and acted in complete defiance of anti-dumping rules, a writ petition should be entertained. It is alleged and asserted that there was violation of the Rules and the final finding of the Designated Authority is at variance with the procedure prescribed under the Statute. Reliance is placed upon ***U.P. State Spinning Co. Ltd. Vs. R.S. Pandey***, (2005) 8 SCC 264.

20. The contention of the third respondent on the other hand is that Section 9A (6), 9B(1) (b) (ii) and Section 9B (2) read with rules 4, 10, 11, 14 and 17, leave no room for doubt that the factual finding regarding existence, degree and effect of dumping made by the Designated Authority is for and on behalf of the Central Government. In case of negative finding, the said findings are binding on the Central Government, and therefore, no further determination is required. Negative finding is an order of determination. Rule 17 which provides for issuance of final finding by the Designated Authority does not refer to determination by the Designated Authority for the reason that negative findings of the Designated Authority is the order of the Central Government itself. It is the quasi judicial order which is challenged by way of appeal under Section 9 C of the CT Act, whereas validity of a legislation can be challenged by a judicial review by filing a writ petition under Article 32 or 226 of the Constitution of India. Issuance of Customs notification under Section 9A (i) is a legislative act, whereas the determination made by the Designated Authority is a quasi judicial act. Therefore, when the Appellate Tribunal examines and adjudicates merits of the “order of

determination” under Section 9C as an appellate authority, it examines the quasi judicial order and not the legislative enactment. In case of positive determination by the Designated Authority, the final finding given by the Designated Authority is not conclusive as the Central Government is empowered and can reduce and even decline and refuse to impose anti-dumping duty. Therefore, in *Saurashtra Chemicals Limited (Supra)*, the Supreme Court had held that the order of the Designated Authority was recommendatory in nature and determination is to be made by the Central Government. Cause of action to challenge the final finding would only arise once there is determination by the Central Government, and till the determination, there is no live issue to be adjudicated. Therefore, reliance placed upon *Saurashtra Chemicals Limited (Supra)* is fallible and not germane. Reliance is placed on the judgment of the Delhi High Court in *Jindal Stainless Ltd. Vs. Union of India*, 2005 (85) DRJ 368, which expounds and explains the ratio and the effect of the decision of the Supreme Court in *Saurashtra Chemicals Limited (Supra)*. It is submitted that the decision of the Appellate Tribunal in the case of *M/s.Panasonic Energy India (Supra)* is bad in law, based upon incorrect understanding of the ratio in *Saurashtra Chemicals Limited (Supra)*. Reliance is placed on the judgment of the Gujarat High Court in *Alembic Ltd. Vs. Union of India* [Special Civil Application No.12142/2011 decided on 29th December, 2011].

Findings and reasoning.

21. We would first re-produce the short order passed by the Supreme Court in the case of *Saurashtra Chemicals Limited (Supra)*, which is as under:

“We see no reason whatsoever to entertain these special leave petitioners. It is perfectly clear now that we have seen the provisions of the Act that the order of the Designated Authority is purely recommendatory. The appeal that lies is against the determination and that determination has to be made by the Central Government. For this reason, we decline to exercise jurisdiction under Article 136 of the Constitution of India and dismiss the special leave petitions.”

22. We agree with the counsel for the third respondent that the aforesaid order proceeds and gives an answer to the specific situation in the said case, as the Designated Authority had in affirmative recommended imposition of anti-dumping duty, which question had not attained finality and was pending consideration before the Central Government. The Central Government had not determined and decided whether or not to impose anti-dumping duty, and hence, the order passed by the Designated Authority remained a mere recommendation and had not fructified into final determination. The situation would not be apposite, albeit entirely different when the Designated Authority holds and gives a final finding in negative i.e. no anti-dumping duty is required to be imposed. In this eventuality, the order of the Designated Authority is final and no further examination is mandated and required. Negative finding in other words is binding on the Central Government and cannot be interfered with. Negative final finding order or termination order is determinative, and not a mere recommendation as in the case of positive finding proposing imposition of anti-dumping duty.

23. The Supreme Court in *Tata Chemicals Ltd. Vs. UOI & Ors.*, (2007) 15 SCC 596 had examined decision in *Saurashtra Chemicals Limited (Supra)* and observed that the Central Government had issued customs notification dated 27th October, 1998 whereby anti-dumping duty had been imposed. This aspect has not been brought to the notice of the Supreme Court when the

order dated 11th May, 2000 was passed vide decision in the case of ***Saurashtra Chemicals Limited (Supra)***. It was observed that the Appellate Tribunal had not referred to the customs notification dated 27th October, 1998 and therefore, probably the Supreme Court was made to believe that an appeal had been preferred against the final finding of the Designated Authority and not against the notification.

24. In the case of ***Jindal Stainless Ltd. (Supra)***, a Single Judge of Delhi High Court had distinguished the ratio in ***Saurashtra Chemicals Limited (Supra)*** by observing that where recommendation had been made by the Designated Authority for levy of anti-dumping duty, its imposition is left to the discretion of the Central Government as per Rule 18 of the Rules. Accordingly, an order in the form of notification/ final finding in the nature of mid-term review of anti-dumping duty can be challenged in appeal under Section 9C before the Appellate Tribunal. This case also observes that the decision in the case of ***Saurashtra Chemicals Limited (Supra)***, was distinct and in the specific facts of the said case for the recommendation of the Designated Authority on imposition of the anti-dumping duty was still inchoate and had not attained finality. The Central Government may or may not have accepted the recommendation and therefore, there was no determination.

25. We may notice that in ***Jindal Stainless Ltd. (Supra)***, the Single Judge had referred to the decision of the Calcutta High Court in ***Shew Kumar Agarwal Vs. Union of India***, 2002 (141) ELT 312 (Cal) holding that the appellate remedy is available against the "order of determination" as well as review, and both are disjunctive to each other. Pertinently, an appeal could be filed against the order of review passed by the Designated Authority,

regarding existence, degree and effect of anti-dumping duty. Judgment in the case of *Jindal Stainless Ltd. (Supra)*, also elucidates and expounds the difference between the power of judicial review in a writ petition and the appellate power and remedy, which is wider and more comprehensive and therefore is more liberal and efficacious.

26. Now we will deal with the nature and the identity of the 'Designated Authority'. For that purpose, we will refer to sub-section (8) to Section 3 of the General Clauses Act, 1897 which defines the expression "Central Government". "Central Government" shall in relation to anything done or to be done after commencement of the Constitution means the President. Executive action of the Government of India is transacted in accordance with the Rule of Business which allocate amongst the Ministers the business of the Government, with all the executive actions, orders and instruments made and executed in the name of the President. The executive power of the Union of India under Article 73 of the Constitution extends to all matters in respect of which the Union Parliament can make laws.

27. The CT Act uses the expression "Central Government" and does not use the expression "Designated Authority". The term "Designated Authority" is not defined in the CT Act and not referred to in the Sections to CT Act. The expression "Designated Authority" is to be found and defined in the Rules. As noticed above, the Designated Authority is a person not below the rank of the Joint Secretary to the Government of India or such other person as Government thinks fit and designated as a "Designated Authority" by notification in the Official Gazette. No doubt, the Rules do postulate and use the expression "Central Government" in contrast and to differentiate Central Government from the Designated Authority, albeit it is

clear to us that the Designated Authority is nothing but part and parcel of the Central Government. The term “Designated Authority” has been used in the Rules for clarity in view of the two tier procedure in the form of objective and reasoned recommendation to be followed by further examination and issue of Notification in the Gazette, an act of delegated legislation, which is necessary to impose and levy any tax including anti-dumping duty. Designated Authority has been empowered to investigate as to the existence, degree and effect of any alleged dumping in relation to import of articles and recommend to the Central Government when required the quantum of anti-dumping duty equal to the margin of the dumping or less, specific date of the commencement and to review continuance of anti-dumping duty. The Designated Authority so appointed acts for and on behalf of the Central Government. It has been bestowed with the powers vested and conferred on the Central Government under the CT Act. The Designated Authority, when it performs the functions under the CT Act, it is acting for and on behalf of the Central Government and not as an independent and a distinct third party. Designated Authority is no different from the Central Government.

28. If the aforesaid position is clear, then it is not difficult to appreciate and interpret the provisions for appeal under Section 9C, which refers to the “order of determination” as to existence, degree and effect of any alleged dumping in relation to import of an article, which are exactly the areas of investigation and form the essence of the duties performed and the order passed by the Designated Authority. The role of the Designated Authority can, therefore, clearly be connected with the power and role of the Central Government under the main enactment i.e. CT Act read with the mandate of the Rules. In case of negative opinion or termination of proceedings, the

order passed is the ‘order of determination’, as it is the final order passed by the Central Government and no further “determination” is required and necessary, except consequential order of withdrawal of provisional duty if imposed within 45 days of the final findings by the Designated Authority in terms of sub-rule (4) to Rule 18 of the Rules.

29. It is in this context, we would observe that while interpreting a provision conferring right to appeal, we have to read the said provision to effectuate the legislative purpose in a reasonable, practical and liberal manner as was held by the Supreme Court in **CIT Vs. Ashoka Engineering Company**, (1992) 194 ITR 645. Similarly, in **Gopi Lal Vs. CIT**, (1967) 65 ITR 477, the Punjab and Haryana High Court has held that statute pertaining to right to appeal should be given a liberal construction since it is remedial and the right to appeal should not be restricted or denied unless such a construction is unavoidable. Thus, the right to appeal conferred should not be forfeited or abandoned unless the statute so states and can be inferred on reasonable and practical interpretation.

30. Before us reference was made to the Supreme Court in **Union of India and Anr. Vs. Kumho Petro Chemicals Company Ltd. & Anr.**, (2017) 8 SCC 307, where it was held that the exercise undertaken by the Central Government under sunset review was somewhat different from the initial exercise to determine whether anti-dumping was to be levied or not. In case of sunset review the focus would be on the issue whether withdrawal of the anti-dumping duty would lead to continuation or recurrence of dumping as well as injury to the domestic industry. In this context reference was made to **Reliance Industries Limited Vs. Designated Authority & Ors**, (2006) 10 SCC 368, wherein it has been held that the proceedings before the Designated

Authority were quasi judicial and therefore must be in accordance with the principles of natural justice. Hence, reasons must be disclosed by the Designated Authority for its decision. It was also observed that the notification of the Central Government under Section 9A would not be a purely legislative act, but a quasi judicial in nature. In the case of ***Alembic Ltd. (Supra)*** the Gujarat High Court had noticed ***Haridas Exports Vs. All India Float Glass Manufacturers' Association***, (2002) 6 SCC 600, which decision had held that the levy or non-levy of anti-dumping duty or other duty cannot be made subject matter of judicial review before the Monopolies and Restrictive Trade Practices Commission. In this context, the Supreme Court had observed that levy or non-levy of anti-dumping is a legislative act. In ***Alembic Ltd. (Supra)***, the Gujarat High Court has observed that levy or non-levy of anti-dumping duty or any other duty under the CT Act, i.e. Customs Tariff Act, as explained in ***Haridas Exports*** (supra) was in the context of Monopolies and Restrictive Trade Practices Commission, whose jurisdiction has been invoked. ***Haridas Exports*** (supra) had held that Monopolies and Restrictive Trade Practices Act and the CT Act substantially operate in different fields and distinct spheres and there was no conflict between the two. We however, do not perceive and accept any conflict between the opinion expressed in ***Reliance Industries Limited*** (supra) and ***Haridas Exports*** (supra) as they both refer to two different facets of the legislation in question, which requires both quasi judicial adjudication and on positive finding for imposition of anti dumping duty a delegated legislative enactment in the form of issue of notification.

31. On difference between legislative act and quasi-judicial act, reference can be made to the judgment of the Supreme Court in ***Mangalam Organics***

Limited Vs. Union of India, (2017) 7 SCC 221, which draws clear distinction between administrative orders and quasi judicial orders and also quasi judicial orders and acts of subordinate legislation. The scope of judicial review in the case of subordinate legislation and administrative orders is different. Most importantly, legislative powers cannot be sub-delegated unless specifically permitted but administrative powers can be sub-delegated. The scheme of the Rules as understood postulates a quasi judicial determination by the Designated Authority, which gives and submits its final finding report. The said report is binding and becomes final for the Central Government in case of negative determination not to impose anti-dumping duty. In that sense, this is the final opinion i.e. “order of determination” of the Central Government. The position is different in case the Designated Authority proposes and recommends imposition of duty, in which event there is further examination and then final determination. While doing so, the Central Government can reduce the rate of anti-dumping duty as recommended by the Designated Authority or even not impose anti-dumping duty. We would observe and hold, that the statutory provisions i.e. Section 9A of the CT Act and the Rules, require a quasi judicial determination at the first stage, which subsequently when implemented requires passing of a subordinate legislation, vide a notification for anti dumping duty to be imposed.

32. Reference, in this regard, can be made to judgment of the Supreme Court in **Global Energy Ltd. Vs. Central Electricity Regulatory Commission**, (2009) 15 SCC 570, wherein it has been observed:-

"71. The law sometimes can be written in such a subjective manner that it affects the efficiency and transparent function of the

Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on the one hand and responsiveness and accountability on the other. These are the fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes."

(emphasis supplied)

The procedure prescribed by Section 9A of the CT Act and the Rules, conform to the fundamental tenets of transparency, openness and also responsiveness and accountability.

33. We would also like to refer to the decision of the Supreme Court in ***National Securities Depository Limited Vs. Securities and Exchange Board of India***, (2017) 5 SCC 517. The decision had interpreted and examined the scope and ambit of appeal to the Securities Appellate Tribunal under Section 15-T of the Securities and Exchange Board of India Act, 1992. It was noticed that Securities and Exchange Control Board of India exercises powers when it makes rules and regulations, which are placed before the Parliament. It also exercises and passes administrative orders such as regulations. The exercise of legislative powers and administrative powers were outside the scope of appellate jurisdiction. However, exercise of quasi judicial powers and orders were amiable and could be made subject matter of appeal under Section 15-T. This judgment elucidates difference between administrative orders and quasi judicial orders, inter alia, holding that quasi

judicial orders are such when the authority acts as a legal authority and determines questions affecting rights of subjects and has duty to act judicially. These powers are normally traceable and empower to the said authority under the statute and could prejudicially affect the subject. In a given case, the adjudication need not be between two contending parties but between the authority and the subject. Negative final order or termination order, would satisfy aforesaid test and are quasi judicial adjudication orders.

34. In *Cellular Operators Assn. of India & Others Vs. TRAI & Others*, (2016) 7 SCC 703, it has been held by the Supreme Court that subject to certain well-defined exceptions, it would be healthy for functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out therein. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, we need not go examine this aspect any further, albeit the ratio supports our view as the Designated Authority determines the lis between two competing parties, ones who supports the levy of duty and the other who opposes the same. [See *Automotive Tyre Manufacturers Association Vs. Designated Authorities & Ors.*, (2011) 2 SCC 258].

35. There is, therefore, merit in the contention of the third respondent that Section 9C of the CT Act in the present case has to be interpreted in a manner so as not to frustrate its purpose i.e. to provide appellate remedy both in cases of "order of determination" and review. Accordingly, it will be contrary and would be against the legislative intent to hold and interpret that there is no right to appeal under Section 9C of the CT Act, when the Designated Authority does not propose imposition of anti-dumping duty. As the Central Government is bound by the final finding of the Designated Authority, the

final finding of the Designated Authority becomes the final finding and "order of determination" passed by the Central Government for the purpose of Section 9C of the CT Act. We would interpret the statute i.e. Section 9C in a manner that it would effectuate and not frustrate the purpose of the legislation that a party should have a right of appeal against the quasi judicial determination in relation to orders determining existence, degree and effect of any subsidy or dumping of articles imported into India.

36. Section 9C does not state and provide that an appeal is maintainable against customs notification. However, it refers to and states that an appeal would lie against the "order of determination" regarding existence, degree and effect of dumping. The words "existence, degree and effect of dumping" are significant. The final finding of the Designated Authority in the said aspect can be in positive i.e. when it recommends imposition of anti-dumping duty or may be in negative when it finds and holds that no anti-dumping should be imposed. Upon negative finding by the Designated Authority no further action is contemplated and required by the Central Government. Contention of the petitioner that the "order of determination" would mean notification imposing anti dumping tax and not a negative final finding of the Designated Authority under Rule 17, which is not recommendatory but the final determination, is erroneous and bad in law. In case of negative determination the finding of the Designated Authority is binding, it gives no discretion to the Central Government. Thereupon, the determination becomes the determinative order in the sense that no anti-dumping duty can be imposed.

37. Negative finding of the Designated Authority does not require a notification, a legislative act, ergo the said final finding gets stamped and approved by the Statute itself as binding decision of the Central Government.

38. Therefore, in this context of the statutory provisions we would reject the argument of the petitioner that Section 9C postulates an appeal only against "order of determination" in the form of notification imposing anti dumping duty and not against the negative final finding of the Designated Authority. To say that in case of negative findings the Designated Authority in its order of determination goes into the question of existence, degree and effect of dumping, yet no appeal would lie, would be incongruous and clearly contradictory.

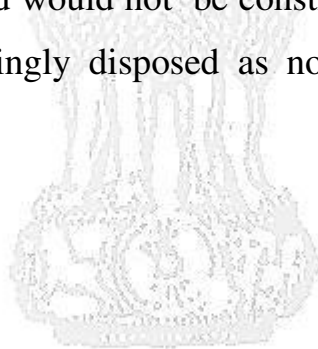
39. No doubt right to appeal is creature of the Statute as held in *Baradakanta Mishra Vs. Mr. Justice Gatikrushna Misra, Chief Justice of Orissa High Court*, (1975) 3 SCC 535 and in *D.N. Taneja Vs. Bhajan Lal*, 1988 (3) SCC 26, but in the present case the right to appeal is certainly conferred. We are determining scope and ambit of the right to appeal under Section 9C of the CT Act.

40. The aforesaid reasoning would also take care and negate the argument that the "order of determination" referred to in Section 9C must be interpreted as the determination made by the Central Government on the question of imposition of duty and not the determination or decision of the Designated Authority which has given a negative opinion on imposition of duty. The Designated Authority when it acts and performs functions of the Central Government, is no different and distinct from the Central Government.

41. In the end, we must deal with the alternative submissions of the writ petitioner that the impugned order suffers from jurisdictional errors and,

therefore, the writ Court should exercise discretion and entertain the present petition and the petitioner should not be relegated to take recourse to alternative appellate remedy, even if available. The said submission has to be rejected for the reasons set out and elucidated in ***Jindal Stainless Limited*** (supra) and decision authored by one of us (Sanjiv Khanna, J.) in Writ Petition (C) No. 8717/2017, ***Outokumpu Oyj Vs. Union of India and Others***, in which the expression “wholly without jurisdiction” as used in ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others***, (1998) 8 SCC 1 was examined and elucidated. The concept of jurisdiction or rather lack of it and its contours has been examined by the Supreme Court in ***Indian Farmers Fertilizer Cooperative Limited Vs. Bhadra Products***, (2018) 2 SCC 534. The petitioner in the present case submits that there is violation of the procedural provisions and the mandate of the Rules has not been followed by the Designated Authority. No doubt, the aforesaid issues can be made subject-matter of judicial review, *albeit* we are not examining the power of judicial review or check exercised by Writ Court, but whether the order under challenge is an order being "wholly without jurisdiction". This difference must be kept in mind, for otherwise the restraint exercised on the principle of alternative efficacious remedy would become illusory and delusive. The question is whether the statutory appellate remedy is efficacious and more appropriate remedy. Yes it is, for the appellate power is wider, effective and conferred by the statute. The core issue raised by the petitioner is and relates to whether or not there has been violation of the provisions, an issue that can be best adjudicated in the appellate forum, which has extensive and vast powers to examine the impugned decision both on facts and law.

42. In view of the aforesaid discussion we find merit in the preliminary objection raised by the third respondent and hold that the plaintiff has equitable efficacious alternate remedy to challenge the impugned order under Section 9C of the CT Act before the Appellate Tribunal. In the given facts we decline and would not entertain the present writ petition and give liberty to the petitioner to file an appeal under Section 9C of the CT Act. If required and necessary the petitioner may file an application under Section 14 of the Limitation Act, 1963 before the Appellate Tribunal for exclusion of time spent in the High Court. We hope and trust that the Appellate Tribunal will give due consideration as the present writ petition has been pending in the High Court for a while. Observations made in the order are for adjudicating the preliminary objection and would not be construed as a finding on merits. The writ petition is accordingly disposed as not entertained, without any order as to costs.



(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

SEPTEMBER 20th, 2018
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