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

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Date of decision: 27 September, 2022

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W.P.(C) 3884/2020, CM APPL. 13882/2020 (Interim Direction)

AROMATRIX FLORA PVT LTD

..... Petitioner

Through: Ms. Jyoti Taneja and Mr. Vidur
Kamra, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Asheesh Jain, CGSC with Mr.
Adarsh Kumar Gupta, Mr. Keshav
Mann and Mr. Gaurav Kumar, Advs.
for UOI.

Mr. Rakesh Chaudhary and Mr.
Vijay Jakhwal, Advs. for FSSAI.

Mr. Sarul Jain, Adv. for R-4.

Mr. Vijay Joshi, SC with Mr. Gujras
Singh Narula and Mr. Lalit Sharma,
Advs. for R-5.

Mr. Avinash Singh, Adv. for R-7.

Ms. Anjana Gosain, Ms. Shalini
Nair, Ms. Dipika Sharma and Ms.
Ritika Khanagwal, Advs. for R-8.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

YASHWANT VARMA, J. (ORAL)

1. This writ petition has been preferred seeking the following reliefs:

"a. Harmoniously, construe the Statutes and regulations governing the field of Import of Consumable items, and strike down the legislation and Policy which is Ultra vires the Constitutional Rights of the Petitioner;

b. Direct Respondent No. 3, to collect the samples and issue the test reports, within the free period provided by the Ministry of Civil Aviation, Union of India i.e. 48 hours of goods being stored at the Custodian warehouse;

OR

Direct, the Respondent No. 3, to take a sample for the purpose of grant of NOC from a Public warehouse as contemplated under Section 49 of the Customs Act, pending clearance of the goods;

OR

Direct, the Airport Economic Regulatory Authority of India to levy Demurrage Charges on importer of Consumable goods after grant of NOC from FSSAI;

c. Direct Respondent No. 5 to expeditiously decide the application of the Petitioner for storing its goods u/s 49 Customs Act, and in any case within 48 hours of receiving such application;”

2. The petitioner had approached this Court essentially aggrieved by the alleged delay caused by the **Food Safety and Standards Authority of India**¹ in the grant of a **No Objection Certificate**² for clearance of imported goods resulting in prohibitive demurrage charges coming to be levied. The petitioner had contended that in terms of the provisions made in Section 47(5) of the **Food Safety and Standards Act, 2006**³, FSSAI was obliged to duly inspect the imported food articles and accord clearance within a period of 5 days of taking the requisite samples. It was contended that FSSAI had on innumerable occasions caused delay in the grant of the NOC resulting in the petitioner being foisted with huge liabilities towards demurrage charges.

3. It must, at the outset, be noted that while the writ petition as

¹ FSSAI

² NOC

³ the Act

originally framed had sought appropriate directions for the levy of demurrage charges being imposed on an importer only after the grant of an NOC from FSSAI and in essence a waiver from that levy till such time as clearance is granted, learned counsel for the petitioner has in the course of her submissions, stated that the reliefs as claimed stand restricted to appropriate directions being framed for FSSAI expediting the process of inspection of imported articles and for permission being accorded to enable an importer to move the goods from a custodian warehouse to a public warehouse.

4. The questions which essentially survive and merit consideration in light of the aforesaid statement were duly noticed by the Court in its order of 22 August 2022 which reads thus: -

“1. The principal question which arises for determination is whether the stand of the Food Safety and Standard Authority in mandating that the imported articles be stored in the custodian warehouse at the airport would legally sustain. Learned counsel appearing for the petitioner would submit that, in terms of the Food Safety and Standard, (Food Import) Regulations, 2016, [“Regulations”] the nominal obligation which is placed upon an importer is to ensure that the imported articles are maintained in a preclearance warehouse to enable the FSSAI authority to undertake the requisite inspection as is contemplated in terms of the regulations aforesaid. Learned counsel would submit that the insistence of the Authority to require the importer to store the goods in the custodian warehouse results in huge demurrage charges being imposed on the importer. Reference is also made to the provisions contained in the Customs Act, 1962 and more particularly to the definition of a “public warehouse” which, according to learned counsel, would ensure sufficient compliance with the statutory provisions made in the Regulations. The attention of the Court is also drawn to Section 49 of the Customs Act, 1962, in terms of which the importer is granted the right to move imported goods meant for home consumption to a “public warehouse” subject to requisite permissions being obtained from the Customs authorities.

2. In view of the aforesaid contentions as addressed, let learned counsel

appearing for FSSAI address submission on the next occasion.

3. List again on 27.09.2022.”

5. Learned counsel for the petitioner has essentially argued that in terms of the provisions made in the **Customs Act, 1962**⁴ the procedure for clearance of imported goods which stand enshrined in Chapter VII of the 1962 Act place an embargo on all imported goods unloaded in a customs area from being released for home consumption. The aforesaid restrictions stand placed in Section 45 which mandates that they would remain in the custody of such persons as may be approved by the Principal Commissioner or Commissioner of Customs. The clearance of goods for home consumption is thereafter dealt with in Section 47 of the Act.

6. Section 48 of the 1962 Act then deals with contingencies where goods are not cleared for home consumption within 30 days from the date of unloading. That provision reads as follows: -

“48. Procedure in case of goods not cleared, warehoused, or transhipped within thirty days after unloading.—If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof:

Provided that —

(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation.— In this section, —arms|| and —ammunition|| have the

⁴ 1962 Act

meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959).”

7. Section 49 lays down the procedure for storage of imported goods in a warehouse pending clearance by competent authorities. That provision reads as under: -

“49. Storage of imported goods in warehouse pending clearance or removal. —Where,—

(a) in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;

(b) in the case of any imported dutiable goods, entered for warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time, the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days:

Provided that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section:

Provided further that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time”

8. The grievance of the petitioner essentially was that while FSSAI proceeds to inspect and examine the imported articles, importers are forced to store the same in the custodian warehouse at the airport which results in huge liabilities towards demurrage being levied. It was in the aforesaid light that learned counsel for the petitioner submitted that importers must be recognized to have the right as well as the choice to move the goods to a public warehouse pending clearance by FSSAI.

9. It becomes relevant to note that the articles which were imported in

the present case were hops, an ingredient which is used for providing a bitter flavor to beer. The article was thus liable to be duly inspected and cleared by FSSAI before it could be released for home consumption. As was already noticed by the Court the inspection and analysis of imported articles of food is governed by Section 47(5) of the Act which reads as under: -

“47. (5) In case of imported articles of food, the authorised officer of the Food Authority shall take its sample and send to the Food Analyst of notified laboratory for analysis who shall send the report within a period of five days to the authorised officer.”

10. The manner in which imported food articles are to be inspected and NOC's granted is then governed by the provisions contained in the **Food Safety and Standards (Import) Regulations, 2017**⁵. For the purposes of the present writ petition, it would be apposite to notice the provisions made in Regulation 5 which reads as under: -

“5. (1) Upon arrival of the food consignments at the port, the importer or Custom House Agent shall file an Integrated Declaration Form as specified by the Customs and shall pay non-refundable basic food import clearance fee as specified by Food Authority from time to time.

(2) The Form forwarded from Customs to the Food Import Clearance System of Food Safety and Standards Authority of India shall be processed in the following manner, namely:—

- (a) the Authorised Officer shall scrutinise the Form and may seek clarification if required;
- (b) after satisfactory scrutiny, the Authorized Officer shall intimate the details of date and time of inspection to the Food Importer to facilitate the presence of the Imported or his Custom House Agent or authorized representative at the time and place of inspection;

⁵ Import Regulations

(3) The Food Importer or his authorised representative shall remain present at the customs area at the appointed time to participate and facilitate visual inspection, assist in drawing of samples, if required, assist in the import clearance proceedings as instructed by the Authorised Officer or his representative and witness proceeding, sealing of samples by the Authorised Officer or his representative and affix his counter signatures on the sealed samples.

(4) If the Food Importer or his Custom House Agent is not present to facilitate inspection and sampling at the mutually agreed date and time, the Authorised Officer may grant one opportunity to reschedule the appointment for inspection and sampling on request of Food Importer or his Custom House Agent.

(4) (a) In absence of Food Importer or his Custom House Agent during mutually agreed date and time, The Authorized Officer may refuse to grant further appointment and may carry out inspection and sampling of food consignment:

Provided that on request of Food Importer or his Custom House Agent, any further opportunity in this behalf may be granted by the official authorized by CEO, after levy of suitable fee on the Food Importer as may be specified by the Authority from time to time.

(5) The report of the visual inspection shall be submitted in **FORM – 1**.

(6) The custom shall not clear any article of food unless it has a valid shelf life of not less than sixty per cent or three months before expiry whichever is less at the time of import”

11. Regulation 8 then makes detailed provisions with respect to the storage of imported goods. That provision reads thus: -

“8. Storage facilities for Imported Foods – (1) No consignment of food articles shall be stored in a manner that one type of articles of food come in contact with other type of articles of food.

(2) The imported articles of food shall be stored in accordance with the specified storage conditions in the custom warehouse before clearance, failing which, the concerned Authorised Officer may refuse to grant no objection certificate for import clearance of the food consignment.

(3) The port authorities and custodian of freight stations shall ensure adequate and conducive storage infrastructure; meeting the safe storage of various types of imported food consignments in the customs area till the imported articles of food is cleared by the custom authority.

- (4) In case of imported article of food which requires special storage condition, the Authorised Officer shall verify the true storage conditions required for the consignment
- (5) The Authorised Officer shall confirm from the cargo operator or Custodian of freight stations regarding the availability of desired special storage facilities at the custom bonded area at the port or airport.
- (6) In case of non – availability of storage facility, the Authorised Officer shall confirm from the department of custom their no objection to treat importers warehouse as custom bonded area.
- (7) For the purpose of sub-regulation (6), the Authorised Officer shall take an undertaking from the importer in FORM - 12, and issue provisional no objection certificate to the importer to move the food consignment to a well-equipped storage facility.
- (8) In case of non-compliance of any of the provisions of regulation, the importer shall not be eligible to avail any facility in future and also liable for other appropriate actions as per the prevailing law.
- (9) The Authorised Officer may issue a no objection certificate to the importer if he is satisfied on the basis of the analysis report conforming to standards.
- (10) The importer or customs shall ensure sale only after clearance based on no objection certificate.”

12. The sampling and testing of imported articles of food is governed by Regulation 9 which is extracted hereinbelow: -

“9 Sampling of Imported Food in respect of imported article of food.- (1) The Authorised Officer or his representative shall ensure compliance with the Food Safety and Standards (Labelling and Packaging) Regulations, 2011 and with a valid balance shelf life in respect of imported article of food in the following manner, namely:—

- (a) shall draw two parts of food sample of each description or measures (except for aseptic sealed packages);
 - (b) forward to the food analyst such quantity of sample as specified under the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011;
 - (c) seal the samples;
- (2)(a) If the imported articles of food is packed in a sealed bulk container by the manufacturer in order to maintain aseptic or hygroscopic

condition, which is required to retain the character of the article of food, the manufacturer shall provide two representative sealed samples from the same batch along with a declaration by the manufacturer stating that the articles of food in the sealed container match with the representative samples placed in the sample containers.

(b) Where the representative sealed sample referred to in clause (a) with a manufacturer undertaking is not provided by the Food Importer, the Authorised Officer is empowered to break open the seal and collect a sample for lab analysis.

(c) The Authorised Officer may collect a representative sample from the sealed container, for lab analysis, wherever the provided sealed representative samples appear to be doubtful.

(3) In respect of imported articles of food having shelf-life less than seven days, the applicant shall declare the same in FORM - 13 allowing the Authorised Officer to draw sample and issue provisional no objection certificate to the customs, without waiting for the analysis report from laboratory and on receipt of the report analysis from the laboratory, the Authorised Officer shall communicate to the customs along with no objection certificate if products conform to the standard.

(3a) In case of imported pre-packaged retail food article, the Authorized Officer after successful completion of visual inspection and sampling, may issue a provisional no objection certificate to move the food consignment to a well equipped storage facility.

(3b) For the purpose of sub-regulation (3a), the Authorized Officer shall take a declaration from importer in Form '13 A' and importer shall sell such pre-packaged food article only after the issuance of no objection certificate by the Authorized Officer.

(4) In case of non – conformance of the sample, the Authorised Officer shall immediately inform the Importer or Custom Broker, to initiate recall of that consignment and submit a compliance report as specified in the Food Safety and Standards (Food Recall Procedure) Regulations, 2017.

(5) The Food Authority shall alert all import points to maintain vigil on imports of products manufactured by the same company or similar products imported by the same importer or Custom Brokers.

(6) The sealed sample of imported articles of food shall bear the following information on the Label, namely:-

- a. code number of the sample;
- b. date and place of collection;
- c. quantity of sample;

- d. name of articles of food and category as per the Food Safety and Standards (Food Product Standards and Food Additives) Regulations-2011.
- e. name and quantity of preservative added while drawing the sample, if any;
- f. name and signature of the Food Importer or his Custom House Agent and;
- g. name and signature of the sender with official seal.

(7) The Authorised Officer shall forward one part of the sealed and labelled articles of food to the Food Analyst who shall analyse or cause to be analysed by a notified laboratory under regulation 2.1 of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011.

(8) The remaining parts of the food sample after forwarding one part of the sealed and labeled articles of food referred to in sub – regulation 7, shall be stored in appropriate conditions by the Authorised Officer or his authorised representative.

(9) On the sample being found to be safe, the remaining sample shall be returned to the food importer.

(10) If the sample found to be unsafe, on request received from Food Importer, the second sample may be forwarded to the Referral Laboratory for analysis.

(11) The rejected export consignments by foreign countries that have been returned to India as the country of origin shall be subject to these regulations except that the packaging and labelling requirements shall be in accordance with the country of export and the importer shall submit rejection documents of the country of export.

(12) The Food Analyst shall analyse or cause to be analysed by a notified laboratory an article of food forwarded by the Authorised Officer as per the parameters specified in the Act and the regulations made thereunder and shall forward his report within five days to the Authorised Officer whether the product is conforming or non-conforming.

Provided that proprietary foods, shall be tested for as per general safety requirements for contaminants, toxins, residues and microorganism, laid down by the Food Safety and Standards Regulation, 2011, wherever applicable, depending on the nature of product.

The Certificate of analysis, submitted by the importer, shall be sent with the sample. The COA should be referred while undertaking the requisite tests for quality parameters.

(13) If the sample cannot be tested by the laboratory within the specified time it shall state the reasons for the same in writing to the Authorised

Officer. The food analyst shall forward the report of analysis to the Authorized Officer duly signed by him.”

13. As would be evident from the provisions introduced in terms of Regulation 8, imported articles of food are liable to be stored in accordance with specified storage conditions in a customs warehouse. In terms of Regulation 9, the imported article of food is to be duly inspected and tested by the authorized officer and who, for the aforesaid purposes, may also collect representative samples. The representative samples are then forwarded by the authorized officer to the Food Analyst. Regulation 9(12) stipulates that upon due analysis of the imported food article the Food Analyst shall forward his report within 5 days to the authorized officer apprising him whether the product is conforming or non-conforming. It is only thereafter that it would be permissible for an importer to seek the release of the imported food articles for home consumption. It would be pertinent to note that Regulation 8(2) contemplates the imported articles of food being stored in a customs warehouse pending analysis and clearance by the competent authorities of the FSSAI.

14. Pursuant to the directions issued on this writ petition, the Ministry of Civil Aviation, the first respondent, which was represented by Ms. Gosain, has contended that demurrage is a charge which is liable to be paid by a shipper, consigner, carrier or agent to an Airport Operator or a Cargo Terminal Operator which utilizes the storage facility at cargo terminals. It is pointed out that the free period which is 48 hours from the touchdown of the aircraft after which demurrage charges can be imposed is a regulatory measure adopted by the said respondent to address issues of piling up of

cargo and congestion in the warehouses at airports. Ms. Gosain also submitted that since the goods while stored in the warehouse are held in the custody of the custodian, which would be the Airport or the Cargo Terminal Operator, it is bound to ensure the safety and security of the stored articles. The levy of demurrage charges is thus sought to be justified on the aforesaid counts. However, it was stated that the first respondent would have no principled objection to the storage of the imported articles in a public warehouse pending clearance for home consumption.

15. The aforesaid stand which has been taken on behalf of the Ministry of Civil Aviation is also reiterated by the **Airports Authority of India, Cargo Logistics and Allied Services**⁶. AAICLAS has also referred to the provisions made in the Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 in terms of which fixed charges are leviable for processing and storage of cargo in warehouses established by it.

16. Appearing for the Customs authorities, learned counsel for the said respondent has submitted that the grievance which is raised by the petitioner is clearly misplaced since in the present case no permission as such was sought by the petitioner for moving the articles from the custodian warehouse to a public warehouse. However, and it was so clarified by the said respondent that in case an importer were to make an application seeking permissions as contemplated under Section 49 of the 1962 Act, the same would be considered in accordance with law. In any case, the said

⁶ AAICLAS

respondent would contend that movement of the imported articles from a custodian warehouse to a public warehouse is not prohibited in law. Learned counsel appearing for the Customs additionally submitted that the directions which are sought and in terms of which the petitioner prays for the customs authorities to attend to applications which may be made under Section 49 of the 1962 Act within 48 hours of the receipt of such applications is untenable since no such prescription stands placed under the Act. It was further submitted by learned counsel that any application, which an importer may choose to make in terms of Section 49, would in any case be duly attended to and disposed of with expedition.

17. From the aforesaid recordal of submissions of parties it is manifest that none of them question the permissibility of the movement of imported articles from a custodian warehouse to a public warehouse. It was also conceded before the Court that no provision, statutory or otherwise, prohibits such a choice being exercised by an importer. In view of the above and bearing in mind the provisions which are made in Section 49 of the 1962 Act the Court records that pending clearance of imported articles by the competent statutory authorities it would in principle be permissible for an importer to apply to the competent authority of Customs to be granted the permission to move such articles from a custodian warehouse to a public warehouse. This would thus enable the importer to move the goods out of the airport or the cargo terminal and to store the same in a public warehouse. The movement of those goods would however necessarily have to be regulated by the Customs authorities since the goods while transiting from the custodian warehouse to the public warehouse are still to be cleared

for the purposes of home consumption.

18. Insofar as the role of FSSAI is concerned it would be pertinent to note that imported articles of food are statutorily subject to inspection and analysis under the provisions of the Act read with the Import Regulations which have been noticed above. An importer of food articles thus cannot contend that the goods be cleared for home consumption even before they have been duly inspected by the authorities of FSSAI and a conforming report having been drawn and submitted before the authorized officer. It would be pertinent to recollect that Section 47(5) of the Act only makes provisions for the authorized officer of FSSAI to take samples of the imported articles and forward the same to the Food Analyst. The report of the Food Analyst is supposed to reach the authorized officer within a period of 5 days. Similar provisions are made in Regulation 9(12) of the Import Regulations. Bearing in mind the provisions which are made in the Act as well as the Import Regulations all that may be observed is that the authorities of FSSAI would be liable to be recognized as being placed under the obligation of ensuring that all imported articles of food are inspected with due expedition and promptitude. However, it would not be prudent to prescribe or stipulate a particular timeframe within which that exercise of inspection, taking of samples and clearance is ultimately completed. This since it would be impossible for the Court to predict the vagaries of a particular situation as well as the volume of imported articles of food that may be pending for inspection at any particular point of time by FSSAI.

19. However, the apprehension which has been expressed in the writ

petition stands duly taken care of and laid to rest in light of the unanimous position as struck by and on behalf of respondents 1, 4, 5, 6 and 8 who had stated that the transportation of imported articles from the custodian warehouse to a public warehouse is not prohibited under the provisions of the 1962 Act. This would enable the authorities of FSSAI to inspect imported articles of food and draw samples for analysis thereof irrespective of whether the imported articles of food are stored in a custodian warehouse or a public warehouse. All that would need to be observed is that FSSAI would not refuse inspection merely on the ground that the goods are stored in a public warehouse.

20. The writ petition along with the pending application shall consequently stand disposed of in the above terms.

SEPTEMBER 27, 2022

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YASHWANT VARMA, J.

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