

Make Index Impex A Proprietorship ... vs Union Of India And 5 Ors on 10 August, 2023

Author: G. S. Kulkarni

Bench: G. S. Kulkarni

2023:BHC-OS:8310-DB

Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L.) NO. 33250 OF 2022

Make Index Impex
Vs.
Union of India & Ors.

Mr. Vikram Nankani, Senior Advocate with Dr. Sujay Kantawala, Mr. Swanand Ganoo, Ms. Tamanna Tavadia, Mr. Vikram Naik, Mr. Marmik Kamdar i/b. Khaitan & Co. for Petitioner.
Mr. Devang Vyas, ASG with Smt. Shehnaz V. Bharucha and Mr. Ashutos Mishra for Respondent nos. 1, 8 and 10.
Mr. J.B. Mishra a/w. Mr. Ram Ochani for Respondent Nos. 2 and 3.
Mr. Kevic Setalwad, Senior Advocate with Mr. Subhash Bhalwal i/b. Vyas & Bhalwal for Respondent no. 4.
Mr. Tushar Agrawal i/b. Mulani & Co. for Respondent No.6.
Mr. Aman Kacheria with Mr. Abdul Kader Lokhandwala i/b. Ms. Sukany Bhaumik for Respondent Nos. 7 & 9.

CORAM : G. S. KULKARNI &
JITENDRA JAIN, JJ.
DATE : AUGUST 10, 2023

P.C.:

1. This petition under Article 226 of the Constitution of India was filed by the petitioner being aggrieved by the actions of the Customs Department (respondent Nos.2 & 3) of a refusal to clear the goods in question namely the "Pigeon Peas" and "Soya bean" as imported by the petitioner. These consignments were not being cleared by the customs

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authorities on the ground that the goods are genetically modified and which if they exceed the permissible parameters cannot be permitted to be cleared and / or they would be required to be re-exported. It is on such premise, that the clearance of the goods being not accepted by the customs authorities, coupled with the fact that the goods were suffering demurrage / storage charges, causing a serious prejudice to the petitioner not only on the rights of the petitioner as a importer but also that on monetary losses being caused to the petitioner, the present petition came to be filed on 17 October, 2022, praying for the following reliefs:-

"a) That the provisions of Environment Protection Act, 1986 and the Manufacture, Use, Import, Export and Storage of Hazardous/Micro-Organism/Genetically Engineered Organisms or Cells Rules, 1989 issued thereunder are not applicable in relation to the impugned import of Soyabean;

b) That this Hon'ble Court be pleased to declare that the provisions of Food, Safety and Standard Act, 2006 and the Orders issued thereunder shall apply to import of Soyabean in the present case;

c) That in the event of conflict between Environment Protection Act, 1986 and the Food, Safety & Standard Act, 2006, the later shall prevail over the former;

d) This Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing and setting aside the illegal and arbitrary Seizure dated 4 th October 2022 | comprising of the Soyabean consignment totally weighing 17742 MT detailed in Bill of Entry Nos. Bills of Entry Nos. 2295860 dt. 03.09.2022; 2296035 dt. 04.09.2022, 2296076 dt. 04.09.2022, 2295993 dt. 04.09.2022, 2296070 dt. 04.09.2022;

e) In the alternative to prayer (d), that this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of

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Mandamus or any other appropriate writ or order or direction under 'Article 226 of the Constitution of India to setting aside the illegal and arbitrary Seizure dated 4" October 2022 comprising of the Soyabean consignment weighing 17742 MT detailed in Bill of Entry Nos. Bills of Entry Nos. 2295860 dt. 03.09.2022; 2296035 dt. 04.09.2022, 2296076 dt. 04.09.2022, 2295993 dt. 04.09.2022, 2296070 dt. 04.09.2022 and issue out of charge Certificate for home consumption;

f) In the alternative to prayer (d), that this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India to assess the bills of entry Nos. 2295696 dated 03.09.22, 2295821 dated 03.09.22, 2295572 dated 03.09.22, 2295697 dated 03.09.22, 2295752 dated 03.09.22 pertaining to the Pigeon Peas cargo and issue out of charge certificate for home consumption;

g) Pending admission, hearing and final disposal of the Petition this Hon'ble Court be pleased to issue any order or direction to the Respondent Authorities to unload the cargo containing Soyabean consignment weighing 17742 MT detailed in Bills of Entry Nos. 2295860 dt. 03.09.2022; 2296035 dt. 04.09.2022, 2296076 dt. 04.09.2022, 2295993 dt. 04.09.2022, 2296070 dt. 04.09.2022 and permit the same to be warehoused in Custom Bonded Warehouse and subject to such terms and conditions as required in law and as the Hon'ble Court deems fit and proper;

h) that this Hon'ble Court be pleased, Pending admission, hearing and _ final disposal of the Petition, to issue any order or direction and permit the Petitioner to provisionally release .for home consumption the Soya bean consignment weighing 17742 MT as detailed in Bill of Entry Nos. 2295860 dt. 03.09.2022; 2296035 dt. 04.09.2022, 2296076 dt. 04.09.2022, 2295993 dt. 04.09.2022, 2296070 dt. 04.09.2022 and subject to such terms and conditions as required in law and as the Hon'ble Court deems fit and proper;

i) that this Hon'ble Court be pleased, to issue any order or direction to the Respondents and its officers to refrain from taking any coercive actions against the Petitioners;

j) that this Hon'ble Court be pleased, pending the hearing and final disposal of the Petition, issue any order or direction, restraining the Respondents' by themselves, their officers,

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subordinates, servants and agents from taking any steps or proceedings in pursuance of or in furtherance of the Seizure Memo dated 4" October 2022 and investigation initiated issued by Respondent No.2 such as but not limited to destruction, sale or auction of the impugned goods;

k) for ad-interim reliefs in terms of the prayers (g) -- (j) above;

l) for costs of this Petition;

m) for such further and other reliefs as the nature and circumstances of the case may require."

2. Perusal of the record would indicate that from time to time the proceedings were heard by different benches from October, 2022. A co-ordinate Bench of this Court (K. R. Shriram & A.S. Doctor, JJ.) in its order dated 20 October, 2022, accepted an ad-hoc arrangement arrived between the parties, which was without prejudice to the rights and contentions of the parties in regard to the warehousing of Pigeon Peas and Soya bean.

3. A substantive order recording the issues which fell for consideration in the present proceedings was passed by a co-ordinate bench of this Court on 20 January, 2023 (Nitin Jamdar & Abhay Ahuja, JJ.). In such order, the contention as urged on behalf of Customs Department, that as per the

Import Policy, all imported goods are subjected to domestic laws, acts, rules, orders, regulations, technical specifications, environmental and safety norms as applicable to domestically produced goods, came to be recorded. As also the further contention of the Customs Department that

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the imported soyabeans are genetically modified and the petitioner's contention that though the goods are genetically modified, they are within the permissible limits set out by the Food Safety and Standards Authority of India (Respondent Nos.7 and 9) was recorded. Also the contention of the Customs Department that the goods were not cleared by the Genetic Engineering Approval Committee (for short, GEAC") under the Environment Protection Act, 1986 which deals with genetically modified food and genetically modified organism, was noted by the Court. In the context in hand the Court also noted the relevant clause of the Import Policy (i.e. Clause 6) as relied upon by the Customs Department. The Court observed that considering the larger implications of the issue at hand and as no specific stand of the Genetic Engineering Approval Committee and the Ministry of Environment and Forests and Climate Change (MoEF&CC) on the subject matter was on record, it was appropriate that the Food Safety and Standards Authority of India, the Genetic Engineering Approval Committee and the MoEF&CC be impleaded as parties to the petition. Accordingly, the petitioner was

permitted to amend the petition to implead such additional respondents.

As this order has some relevance, we extract the order hereinbelow:-

"1. Heard the learned Counsel for the parties.

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2. The Petitioner is aggrieved by the stand taken by the Respondent Customs Department of not clearing the consignment of soyabeans imported by the Petitioner from Mozambique.

3. According to the Customs Department as per the Import policy, all imported goods are subjected to domestic laws, acts, rules, orders, regulations, technical specifications, environmental and safety norms as applicable to domestically produced goods.

4. The Respondent Customs Department states that the imported soyabeans are genetically modified. According to the Petitioner, though the goods are genetically modified, they are within the permissible limits set out by the Food Safety and Standards Authority of India. The Customs Department contends that the goods have not been cleared by the Genetic Engineering Approval Committee under the Environment Protection Act, 1986 which deals with genetically modified food and genetically modified organism. The clause in the Import policy relied upon by the Customs Department read thus :

"6. Genetically Modified Food, Feed, Genetically Modified Organism (GMOs) and Living Modified Organisms (LMOs) Import of Genetically Modified Food, Feed, Genetically Modified Organism (GMOs) and Living Modified Organisms (LMOs) will be subject to the following conditions :

- (a) The import of GMOs / LMOs for the purpose of
 - (i) R & D;
 - (ii) Food;
 - (iii) Feed;
 - (iv) Processing in Bulk and
 - (v) For Environment release

will be governed by the provisions of the Environment Protection Act, 1986 and Rules framed thereunder

(Environment Protection Act, 1986 and Rules framed thereunder can be accessed from the website of the Ministry of Environment & Forests : <http://envfor.nic.in>).

(b) The import of any Food, Feed, raw or processed or any ingredient of food, food additives or any food product that contains GM material and is being used either for Industrial productions, Environmental release, or field application will be allowed only with the approval of the Genetic Engineering Approval Committee

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(GEAC), set up by the Ministry of Environment & Forests (the details of GEAC can be accessed from the website link of the Ministry:http://www.envfor.nic.in/divisions/csurv/geac/geac_home.html).

(c) Institutes / Companies who wish to import Genetically Modified material for R & D purposes will submit their proposal to the Review Committee for Genetic Modification (RCGM) under the Department of Bio-Technology. In case the Companies / Institutes use these Genetically Modified material for commercial purposes, approval of GEAC is also required.

(d) At the time of import all consignments containing products which have been subjected to Genetic Modification will carry a declaration stating that the product is Genetically Modified. In case a consignment does not carry such as declaration and is later found to contain Genetically Modified material, the importer is liable to penal action under the Foreign Trade (Development and Regulation) Act, 1992 (as amended from time to time).

The Genetic Engineering Approval Committee (GEAC) has accorded 'one time approval' for import of GM Soyabean oil (crude de-gummed / refined form) derived from Round-up, Ready Soybean for the purpose of consumption after refining. Therefore, above conditions will not apply to the import of said Soyabean Oil till further orders.

[Reference - Notification No.69 (RE-2007) / 2004-

2009 dated 27.12.2007]

5. The Petitioner contends that the Petitioner has the necessary certification under the Plant Quarantine (Regulation of Imports into India) Order 2003. The Petitioner also relies upon the order issued by the Food Safety and Standards Authority of India dated 21 August 2020 and the Annexure 1 thereto which refers to soyabean as a permissible import.

6. According to the Petitioner, as per the norms specified by the Food Safety and Standards Authority of India the Petitioner has also obtained the necessary certification from the exporting country, Mozambique, that the consignment is not genetically modified. The Petitioner also contends that the Petitioner cannot be driven to take necessary No Objection from the authority under the Environment

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Protection Act and it is the Customs Department who should abide by the clearances given under the Food Safety and Standards Authority of India and the Plant Quarantine (Regulation of Imports into India) Order 2003.

7. The Petitioner has sought to contend that the Food Standards Act, 2006 being a later legislation would prevail over the Environment Protection Act, 1986.

8. Considering the larger implications of the issue at hand and that no specific stand of the Genetic Engineering Approval Committee and the Ministry of Environment and Forests and Climate Change (MoEF&CC) in respect of the subject matter is on record, it would be appropriate that the Food Safety and Standards Authority of India, the Genetic Engineering Approval Committee and the MoEF&CC are impleaded in this Petition. Accordingly, we grant leave to the Petitioner to add the Food Safety and Standards Authority of India, the Genetic Engineering Approval Committee, Ministry of Health & Family Welfare and MoEF&CC as party respondents. Amendment to be carried out within a period of two days. Re-verification is dispensed with.

9. If the Petitioner will give notice to the added Respondents and file the affidavit of service, stand over to 31 January 2023."

4. Subsequent to the above orders, the proceedings had continued to appear before the Court. We do not refer to all the orders, as they may not be so relevant, suffice it to observe that by an order dated 19 April, 2023, the Court recorded its observations on the affidavits which were placed on record on behalf of the Ministry of Environment, Forest and Climate (MOFF & CC), which stated that the Ministry of Environment had no role in regulating the import of genetically modified food, including food crops for direct use as food for consumption.

Also considering the contention as urged on behalf of respondent nos.1, 8 and 10 / the Genetic

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Engineering Appraisal Committee, the Court passed the following order:-

1. Heard the learned Counsel for the parties.
2. In this Petition, after we had directed, the Petitioner had joined the Ministry of Environment, Forest and Climate Change and the Genetic Engineering Appraisal Committee as party Respondent even though their presence was necessary, and they ought to have been joined when the Petition was filed.
3. During the hearing, we were shown an affidavit sworn by Mr. Surender Gugloth, Scientist, 'E' working in the Integrated Regional Office of the Ministry of Environment, Forest and Climate (MOEF & CC) at Nagpur dated 9 March 2023. This affidavit is filed through the Advocate, who has filed a note of appearance for Respondent Nos.1, 8 and 10, that is, the Union of India, Ministry of Environment and the Genetic Engineering Appraisal Committee. In this affidavit, in paragraph 13, the Deponent has stated that the Ministry of Environment has no role in regulating the import of genetically modified food, including food crops for direct use of food for consumption. The issue at hand is regarding the import of soyabean. This affidavit though stated to be filed on behalf of Respondent No. 8 - the Committee does not refer to the role of the Genetic Engineering Appraisal Committee, which, according to the Department of Customs, is more relevant; instead, a sweeping generalized stand is taken. Therefore, when the Petition came up on board yesterday, the Deponent of the affidavit was directed to remain present to explain.

4. The Deponent is present. The learned Counsel for Respondent Nos.1, 8 and 10 submits that this specific paragraph is incorrect and states an additional affidavit would be filed. To a query to the Deponent as to whether he has filed this affidavit on instructions of Respondent No.8 - the Committee, he has answered in negative. The learned Counsel for Respondent Nos.1,8 to 10 sought to contend that since the Committee is under the Ministry of Environment, an affidavit and appearance are filed. Though the Genetic Engineering Appraisal Committee may fall under the general superintendence of the Ministry of Environment, it is a distinct entity which a specified specialized role. It is unclear whether the Advocate has the authority to represent Respondent No.8. We place our strong dis-approval on record for this state of affairs in an important issue such as this. How its litigation is handled should be a matter of concern for the Government.

5. We direct that affidavit be filed by the Genetic Engineering Appraisal Committee specifically regarding the commodities at hand and their role in regulating import. Though the Petitioner has shown urgency in the matter and we understand the anxiety, considering the importance of the issue, we are not inclined to proceed without a specific stand of the Committee, which ought to have been placed on record.

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6. We direct the Registry to forthwith send a copy of this order to the Secretary of the Ministry of Environment, Forest and Climate Change and to the Incharge of Genetic Engineering Appraisal Committee to draw their attention to this state of affairs regarding the filing of this affidavit without instructions and the appearance. The Registry shall also send a copy of this order by way of an e-mail. The Registry shall also furnish a copy of this order to the Office of the learned Additional Solicitor General to enable him to look into the filing of the appearance and the affidavit so that there is no confusion on the next date of the hearing.

7. Stand over to 26 April 2023 at 2.30 p.m.

5. On the subsequent hearing of the proceedings, on 26 April, 2023 in its order passed by a co-ordinate bench of this Court, it was observed that there is a divergence of views between three statutory bodies namely,

Customs Department, Food Safety and Standards Authority of India and Genetic Engineering Appraisal Committee, which were functions under Ministry of Environment, Forest and Climate Change.

The Court also recorded the contention as urged by the learned ASG that he had taken a joint meeting of the statutory authorities to reconcile their stand. The learned ASG had stated that import of genetically modified Soyabeans can be segregated into two categories, one below 1% and other above 1%.

The learned ASG further stated that it will have to be determined by a Laboratory which has the "method and food matrix wise testing" of genetically modified soyabeans under National Accreditation Board for Testing and Calibration Laboratory ("NABL"). The learned

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ASG also referred to the report received from the accredited laboratory - Geo Chem Laboratory which recorded the extent of Genetic Modification ("GM") in the sample was below 1% and that such laboratory does not have a facility of food matrix wise testing. The statement of the learned ASG that it would be appropriate that sample of the consignment is tested from a different Laboratory and on receipt of a report from such laboratory, if it is found that the item as tested is below 1%, then the option of provisional release can be considered also came to be recorded. The contention on behalf of the petitioner that Geo Chem Laboratory is an accredited laboratory, hence there was no reason why the report on

record needs to be discarded was also noted by the Court. The Court, accepted the suggestion made by the learned ASG, that the sample which is already drawn pursuant to panchanama dated 17 September, 2022

would be sent to another Laboratory.

Thus awaiting the second

laboratory's report, the petition was adjourned. The Court accordingly passed the following order:-

"1. Heard learned counsel for the parties.

2. This order is in continuation of orders which we have passed from time to time. As we have recorded in the earlier orders dated 20 January 2023 and 19 April 2023, there is a divergence of views between the three statutory bodies which are Respondents before us. These the Customs Department, Food Safety and Standards Authority of India and Genetic Engineering Appraisal Committee which are performing functions under Ministry of Environment, Forest and

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Climate Change. In view of this divergence, we had requested learned Additional Solicitor General to assist the court.

3. The learned ASG states that he has taken joint meeting of the statutory authorities to reconcile their stand. The learned ASG states that import of genetically modified Soyabeans can be segregated into two categories : one is below 1% and other is above 1%. He states that it will have to be determined from a Laboratory which has the method and food matrix wise testing of genetically modified soyabeans under National Accreditation Board for Testing and Calibration Laboratory ("NABL"). The learned ASG submits that the report which is on record given by the accredited laboratory-Geo Chem Laboratory, though states that the extent of Genetic Modification (GM) in the sample is below 1%, this Laboratory does not have above mentioned facility and therefore, it is appropriate that sample of the consignment is tested from a different Laboratory and the learned ASG states if it is found below 1%, then the option of provisional release can be considered.

4. Learned Senior Advocate for the Petitioner has sought to contend that Geo Chem Laboratory is an accredited Laboratory and there is no reason why the report on record needs to be discarded.

5. Without going into the question of competence of Laboratory considering the importance of the issue raised before us and the fact that what is involved is genetically modified substance having larger implications, we accept the suggestions of learned ASG, as it would be a further precaution in this regard.

6. The learned ASG states that the sample which is already drawn pursuant to panchanama of 17 September 2022 would be sent to the Laboratory. We direct the concerned Laboratory to give a report to the Customs Department as early as possible.

7. Hearing of this petition is deferred to 7 June 2023. To be listed under the caption "For Directions".

8. The Central Government will also consider coming up with a co-ordinating mechanism so that conflicts, such as the one which have arisen before us can be avoided.

9. The learned counsel for the Petitioner states that the Port Trust is not releasing the consignment of Pigeon Peas and representations have been made in that regard. The Port Trust Authority shall respond to this communication within period of one week by way of written order and after the order is received, we permit the Petitioner to amend the petition to incorporate, challenge the

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same, if the Petitioner is so indulged.

10. The learned Senior Advocate for the Petitioner states that if the order passed by the Port Trust is adverse, liberty may be granted to move to the vacation court. It is for the Petitioner to take the steps and it is for the vacation court to consider the same if it is satisfied of the urgency."

6. Thereafter the proceedings had remained pending for report of such laboratory to be placed on record. When the proceedings were listed before this Court on 19 June, 2023 considering the larger implications and also the peculiar situation which would arise in non-clearance of the

imports, on such issues the Court passed a detailed order including reflecting on such issues. The Court opined, that such issues are likely to adversely affect the trade itself. The Court also observed that similar issues on non-clearance of the goods had often reached the Courts, thereby observing that there cannot be any uncertainty on the issues, which would adversely affect the trade and the business, whichever may be the category of goods, requiring a laboratory clearance, for which a robust mechanism was the necessary. An assurance of the learned ASG, that these issues would be looked into by the Government, also came to be recorded. The Court also recorded the stand of the parties that there was no hurdle for clearance of pigeon peas, which could be cleared by the Petitioner, without the same being entangled in the proceedings qua soyabean. The said order

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dated 19 June, 2023 is required to be noted which reads thus:-

"1. We could not be waiting any longer for the laboratory report, which is intended to be placed on record, as observed by the Court in its previous orders. The examination process of the samples by the laboratory needs to be expedited. The concerned head of the laboratory, who is looking into such issues, shall inform the Competent Officer in writing as to how long the process would take as per the estimation of the laboratory and the reasons thereof. We would require a Competent Officer of the Respondent to place on record an affidavit explaining as to the stage of the processing at the laboratory and the further time required.

2. Little away from the issue in hand, we are, in fact, quite perturbed to see that the trade itself is adversely affected on such issues of goods arriving at the port and not getting cleared and which are incurring demurrage. Further when the goods are of a

perishable nature and edible, different problems would arise. The goods like in the present case being a soyabean consignment certainly is adversely affected which is likely to frustrate the import. Mr. Nankani, Senior Counsel for the Petitioner, on instructions, states that large part of the cargo is likely to have become non-consumable and would be required to be destroyed. If what Mr. Nankani states is correct, this is a sorry state of affairs and certainly not conducive to an effective trade. In such circumstances, in the present case the anxiety of the Court as seen from the earlier orders, was to the effect that the laboratory reports be made available expeditiously.

3. We may also observe that similar issues have repeatedly reached the Courts. In these circumstances, we are of the opinion that there ought not to be any uncertainty on such issues, which would adversely affect the trade and the business interest of the importers, whichever may be the category of goods, requiring a laboratory clearance. Also the policy of the Government is to have effective trade practices. We would, therefore, intend that the Government of India considers forming a centralized agency/laboratory by appointing appropriate research persons in different scientific fields or designate specific laboratories for the different items reaching the ports requiring such tests. Such provision / facility would assist the trade, whereby expeditious laboratory reports can be facilitated, enabling clearance of the goods being imported into the country. Any uncertainty of business on such issues can be avoided and, in fact, effectively handled by such experts agencies.

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4. The consignment of the petitioner has got stuck on issues concerning the laboratory clearance. If this was the fate of the goods to be imported, the Petitioner would have certainly had a second thought to import such cargo. It would be not out of place to observe that a bonafide businessman is not interested in litigation, and more particularly, on such issues.

5. We, therefore, request the learned ASG who has fairly stated that these issues would be looked into at the highest level, in the appropriate department. We, accordingly, adjourn the proceedings for two weeks to enable the learned ASG to obtain appropriate instructions from the concerned laboratory and place the same on record, as observed by us.

6. At this stage, Mr. Nankani submits that in so far as the Pigeon peas are concerned, there is no hurdle for clearance of such goods, which can be cleared by the Petitioner without the same being entangled in the proceedings qua soyabean.

7. In such context, the Mumbai Port Authority has addressed a letter dated 11th May 2023 to the Petitioner setting out the storage/ demurrage charges. As seen from the said letter, the Petitioner is required to pay the balance amount of Rs,3,63,75,668/- upto 7 th June 2023.

8. We are of the opinion that as soyabean cargo is now the subject matter of clearance which is lying with the Mumbai Port Authority, and as there is no issue in regard to the clearance of the Pigeon peas, such goods need to be permitted to be cleared.

9. We accordingly order that the Pigeon peas be permitted to be cleared by the Mumbai Port Trust for which the petitioner shall pay storage / demurrage charges proportionate to the quantity of the Pigeon peas being cleared. The petitioner shall accordingly make payment of such charges to the Mumbai Port Trust, which shall be without prejudice to the rights and contentions of the parties. Needless to observe that on this count whatever demurrage is paid by the petitioner, an account of the same shall be maintained by the Mumbai Port Trust and the same shall be later reconciled.

10. Stand over to 3rd July 2023. High on Board."

7. Thereafter the proceedings were adjourned from time to time, when

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on 18 July, 2023, this Court heard the parties on the backdrop of the earlier orders and on the Laboratory reports of Geo Chem Laboratories Pvt. Ltd. as also the reply affidavit filed on behalf of respondent no.7-the Food Safety and Standards Authority of India, as also the report of second

laboratory namely Kochi Laboratory, as relied upon by the Customs. The Court noted the stand taken by the Genetic Engineer Appraisal Committee (GEAC) as stated on affidavit, that the GEAC was dependent on the test which would be undertaken by respondent nos.7 and 9 (FSSAI). The Court also recorded a statement as made in the affidavit of Dr. Krishna Methekar filed on behalf of the FSSAI dated 17 March, 2023 in which the FSSAI stated that the sample was found to be complaint by FSSAI's accredited Laboratory being the subject matter of relevant bills of entry. The Court also recorded the contention as urged on behalf of the FSSAI that there ought not to be an objection for clearance of the said goods from the point of view of FSSAI Standards. The contention as urged on behalf of the petitioner that the FSSAI had granted a certificate to that effect, and therefore, clearance of the said goods ought to be granted, was also recorded by the Court. However, the Court observed that it was desirable that in terms of the observations as made by the Court, a specific approval of the FSSAI and a statement to that effect,

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needs to be placed on affidavit on behalf of FSSAI-Respondent No.7. The Court observed that FSSAI needs to file such affidavit as the Customs was also dependent on the FSSAI, which is supposed to be the custodian on food safety and standards and which would be seriously concerned for clearance of such goods/items before they are put to human consumption.

In so far as the contention on behalf of Customs Department was concerned, the Court observed that the customs department was also struggling with lot of uncertainty on the issues, referring to the report of the Kochi Laboratory. The Court however, observed that once the initial stand of the GEAC itself is clear i.e. to call for the test report from the FSSAI, then certainly, the role of the FSSAI was crucial. Peculiarly the objection as urged on behalf of the Customs Department on the report of the FSSAI and the assertion of the Customs Department that some more tests are required to be undertaken on the basis of some questionnaire which has received by Mr.Mishra, learned counsel for the Customs Department from the Customs Officer, as placed on record was also noted. However, what is significant is that in the context of such objection of the Customs Department, a clear statement as made on behalf of the petitioner by Mr. Nankani, learned Senior Counsel that the clearance / home consumption of the Soybean was intended for extraction of oil, and

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that as per the certification of the FSSAI, the goods when permitted to be cleared, they would not be released for any agriculture purpose on any other purpose and the same would be used only for extraction of oil, came to be recorded and accepted. The Court also accepted on record the office memorandum dated 05 July, 2023 as tendered by Ms. Shehnaz Bharucha, learned counsel for respondent nos.1, 8 and 10, as also recorded the

contents of paragraph 4 of the Office Memorandum, which stated that permission for import of soybean was given by FSSAI which was inter alia established under Food Safety and Standards (FSS) Act, 2006 for laying down science-based standards for articles of food to ensure availability of safe and wholesome food for human consumption, also came to be recorded being the stand taken on behalf of respondent nos.1, 8 and 10. It would be imperative to note such order passed by this Court, which recorded the said developments. The order dated 18 July, 2023 reads thus:-

"1. On the backdrop of the earlier orders, we have heard learned counsel for the parties. We have also perused the laboratory reports of Geo Chem Laboratories Pvt. Ltd. as annexed to the reply Affidavit filed on behalf of Respondent No.7 the Food Safety and Standards Authority of India (for short "the FSSAI"). We have also perused the laboratory report of the Kochi Laboratory relied on behalf of the Customs.

2. Insofar as the stand taken by the Genetic Engineer Appraisal Committee (GEAC) is concerned, it clearly appears from its Affidavit that such a committee has nowhere come to any

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final conclusion in regard to the clearance of these goods on the parameters being followed by it under para 6 of ITC (HS), 2017, Schedule 1 - Import Policy, (General Notes regarding Import Policy), as set out in para 5 of its Affidavit. The GEAC is dependent on the test which would be undertaken by the FSSAI.

3. We have perused the Affidavit of Dr. Krishna Methekar filed on behalf of the FSSAI dated 17th March 2023. In para 4(vii), the following statement is made in regard to the Petitioner's consignment of Soybean.

"4(vii) It is respectfully submitted that vide order dated 12th September 2016 wherein the order provides for drawing

of one homogeneous sample out of the commingled cargo for multiple importers with same IGM Number, the Cargo of soyabean having BOE No.2295860 dated 03.09.2022 IGM No.2320828 was scrutinized, visual inspection conducted and sample was drawn. The sample was found to be complaint by FSSAI's accredited Laboratory, due to which the Soya beans consignments having Bill of entry No.2295993, 2296035, 2296070, 2296076 was cleared against the Bill of Entry No.2295860 dated 03.09.2022, IGM No.2320828."

4. It is also argued before us on behalf of FSSAI that there ought not to be an objection for clearance of the said goods from the point of view of FSSAI Standards. The reply affidavit of FSSAI has also noted various obligations of the FSSAI. It refers to Section 22 which pertains to genetically modified goods, organic goods, functional goods, proprietor goods, etc. and the regulation of such products. However, what we note is that a specific statement in such affidavit filed on behalf of the FSSAI has remained to be made that the 'Soybean' sought to be cleared by the Petitioner and subject matter of the present proceedings, in no manner whatsoever would be harmful for human consumption/health in whatever form, in the light of the requirements and parameters of the FSSAI Act, 2006 and the Rules framed thereunder, if these goods are permitted to be cleared.

5. Mr. Nankani has stated that already the FSSAI has granted a certificate to that effect, however, we would desire that in terms of what we have observed specific approval and statement to that effect needs to come on affidavit on behalf of FSSAI-Respondent No.7. If FSSAI files such affidavit, in our opinion, the Customs who is also dependent on such authorities like the FSSAI who are supposed to be the custodians on food

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safety and standards who in our opinion would be seriously concerned for such goods/items before they are put to human consumption.

6. We may also observe that the customs department is also struggling with lot of uncertainty on these issues, referring to the report of the Kochi Laboratory. However, in our opinion, once

the initial stand of the GEAC itself is clear i.e. to call for the test report from the FSSAI then certainly the note of the FSSAI becomes crucial in such matters.

7. Accordingly, we expect such an Affidavit to be filed on behalf of FSSAI on or before the adjourned date of hearing. Copy of the Affidavit be served upon the parties.

8. We also record Mr. Mishra's objection on the report of the FSSAI and his contention that some more test would require to be undertaken on the basis of some questionnaire which he has received from the department, whereby the department has asked certain questions to the Kochi Laboratory. We may however observe that as submitted by Mr. Nankani, that the clearance of the Soybean is intended for extraction of oil and that if at all as per the certification of the FSSAI, the goods are permitted to be cleared, they would not be released for any agriculture purpose on any other purpose and the same would be used only for extraction of oil. Accepting such statement of Mr. Nankani, we shall hear the parties on the adjourned date of hearing, considering the Affidavit to be filed on behalf of Respondent No.7-FSSAI.

9. Ms. Shehnaz Bharucha, learned counsel for Respondent Nos.1, 8 and 10 has placed on record office memorandum dated 5th July 2023, in the context of the present petition. The said office memorandum is taken on record and marked 'X' for identification. Our attention is drawn by Ms. Bharucha to para 4 of the said office memorandum which reads thus:-

"4. In this regard, it is to apprise that permission for import of soybean in this matter was given by FSSAI. The FSSAI is established under Food Safety and Standards (FSS) Act, 2006 for laying down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto."

10. List the matter on 25th July 2023, High on Board.

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11. Permission to file Affidavit-in-rejoinder on FSSAI is

granted."

8. It is on such backdrop, the proceedings were thereafter substantively heard on 07 August, 2023 when for the first time, Mr. Devang Vyas, learned ASG having taken over charge at Mumbai, entered appearance in the proceedings, on the backdrop of what had been transpired in the matter so far. Elaborate submissions were made by the learned counsel for the parties and on the discussion which had taken place during the course of hearing, the Court recording the submission of learned ASG that he would take appropriate instructions, so that further orders can be passed, after hearing the parties, the proceedings were adjourned to 09 August, 2023 (yesterday). The order dated 07 August, 2023 is required to be noted, which reads thus:-

"1. On the several orders passed on the earlier occasion, Mr.Nankani has made elaborate submissions. Mr. Devang Vyas, learned ASG is appearing for the first time in the present proceedings after he has taken over as ASG at Mumbai, has also made submissions. We have also heard Mr. Aman Kacheria, learned Counsel for respondent Nos.7 and 9 - FSSAI on whose contentions, we would make observations, in the later part of this order and the other Counsel appearing for the respondents.

2. The primary question is whether the contention of the petitioner in regard to the clearance of the soyabean as imported, can be accepted in view of the observations as made by the Court in the previous orders and the recent affidavit as filed on behalf of FSSAI - respondent Nos.7 and 9.

3. In such context, apart from material on record, Mr.

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Nankani has brought to our notice a Tabulation of Imports,

which is sought to be obtained from the Ministry of Commerce & Industry that soyabean (HS Code 12019000) was imported in the quantity of 6,55,895.50MT in the year 2021-2022 and in the quantity of 5,22,553.22MT in the year 2022- 23. We have requested the learned ASG and Mr.Mishra, to keep ready whatever material in this regard before the Court and, more particularly, the details of the laboratory certificates on the basis of which clearance was granted to the imports of the year 2021-22 and 2022-23.

4. Mr. Vyas, learned ASG for Respondent Nos. 1, 8 and 10, has also stated that, on the backdrop of today's discussion, he would take appropriate instructions, so that further orders can be passed after hearing the parties.

5. Mr. Bhalwal, learned Counsel for Respondent No.4, intends to file rejoinder affidavit. The same be filed in the office with proper pagination and served on all the parties.

6. We are also of the opinion that the affidavit dated 24 th July 2023, filed on behalf of the FSSAI, in pursuance of our order dated 18th July 2023, is not satisfactory. The said affidavit ought to have been in terms of our observations made in paragraph 3 of said order dated 18 th July 2023. Learned Counsel for the FSSAI has stated that he shall place on record an additional affidavit as expected in terms of our observations as contained in the said order. Let such affidavit be placed on record and served on all the parties."

7. We adjourn the proceedings to 9th August 2023. "High on Board".

9. Accordingly on 09 August, 2023, the Court had set down the proceedings for hearing. Mr. Vyas, learned ASG had made his submissions and informed the Court that considering the peculiar facts of the case, the following approach can be adopted:-

i. The respondents be permitted provisional release of the

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goods, however, on the petitioner furnishing a bank guarantee for the differential duty;

ii. The petitioner would also furnish a bond with appropriate undertakings in regard to the payment of duty and other necessary statements so as to co-operate in the investigation which is being undertaken by the Customs authorities in regard to the exact country of origin of imports, which would have a material bearing in regard to the clearance of the goods from the duty perspective as also on the nature of imports;

iii. That the petitioner shall also strictly adhere to the use and consumption of the goods for the purpose of extraction of oil and that the product as manufactured shall also be subjected to further FSSAI clearance.

10. Mr. Nankani, learned senior counsel for the petitioner fairly accepted the stand as taken by Mr. Vyas, the learned ASG, on the provisional release of the Soyabean consignment be permitted.

11. On the above backdrop when the Court was about to pass an order, the concern of the Court was primarily on stand taken on behalf of respondent nos.1, 8 and 10 coupled with the fact that the FSSAI had taken

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a clear position that the import in question was permissible for home consumption, as the same was within the norms and fulfillment of standards of FSSAI under the provisions of the Act and the rules made thereunder. In such context, the Court had intended to verify the compliance of the observations as made by the Court in paragraph 4 of its order dated 18 July, 2023, which was to the effect that the goods being imported were safe for human consumption. It is in such context, the Court noted that the affidavit filed on behalf of the FSSAI was not in compliance on what was observed by the Court in paragraph 4 of the order dated 18 July, 2023, and in such context, as a clear affidavit to that effect was not placed by the FSSAI, the Court expressing its dissatisfaction, had adjourned the proceedings for today, to enable FSSAI to place on record clear affidavit in terms of what the Court expected in paragraph 4 of its order dated 18 July, 2023. The Court accordingly passed the following order on 09 August, 2023 adjourning the proceedings today:-

". On the earlier occasion, we had adjourned the present proceedings for today to enable the FSSAI to place on record a short clarifactory affdavit for the reason that although our order dated 18 July 2023 was crystal clear, an affdavit in terms of our observations in paragraph (4) of the said order, was not placed on record. Thus, in our opinion, though it was to be only one paragraph affdavit, however, even to place on record such an affdavit, such a long time has been taken and that too on the backdrop of series of earlier orders passed. In these circumstances, we although quite unwillingly grant one more day's time to FSSAI to place on record such affidavit by adjourning the

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proceedings for tomorrow. If such affidavit is not fled by the FSSAI, we shall be constrained to pass further appropriate orders and there shall be no other alternative.

2. Stand over to 10th August 2023 at 10.30 a.m. "High on Board".

12. Today in compliance of our orders passed yesterday (09 August, 2023), affidavit of Mr. Sukant Chaudhary, Deputy Director, Food Safety and Standards Authority of India is placed on record. In the context of our order dated 18 July, 2023, in paragraph 4 such affidavit states thus:-

"4. That in view of the above, the answering Respondent submits and brings on record before this Hon'ble Court that 'Soybean' sought to be cleared by the Petitioner and subject matter of the present proceedings, in no manner whatsoever would be harmful for human consumption/health in whatever form, in the light of the requirements and parameters of the FSSAI Act, 2006 and the Rules framed thereunder, if these goods are permitted to be cleared."

13. Accordingly, a clear stand of the FSSAI is on record that the Soyabean sought to be cleared by the petitioner and subject matter of the present proceedings, in no manner whatever would be harmful for human consumption/health in whatever form, in the light of the requirements and parameters of the FSSAI Act, 2006 and the Rules framed thereunder, if the goods are permitted to be cleared.

14. Considering such clear position on record, we are of the opinion that the approach as now sought to be adopted by the Customs

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Department and more particularly in the light of the position taken by respondent no.1-Union of India, respondent no.8-Genetic Engineering Appraising Committee as also respondent no.10-Ministry of Environment, Forest & Climate Change and most significantly by respondent no.7-Food Safety & Standards Authority of India, we are of the opinion that the approach as suggested by Mr. Vyas, learned ASG and as noted by us above, ought to be accepted, and the proceedings, without prejudice to the rights and contentions of the parties on any of the issues, which may arise, be disposed of by the following order:-

ORDER

i. The respondents are permitted provisional release of the goods, however, on the petitioner furnishing a bank guarantee for the differential duty;

ii. The petitioner shall also furnish a bond with appropriate undertakings in regard to the payment of duty and other necessary statements so as to co-operate in the investigation which is being undertaken by the Customs authorities in regard to the exact country of origin of imports, which would have a material bearing in regard to the clearance of the goods from the duty perspective as also on the nature of imports;

10 August, 2023 903-wpl 33250-22.odt iii. That the petitioner shall also strictly adhere to the use and consumption of the goods for the purpose of extraction of oil and that the product as manufactured shall also be subjected to further FSSAI clearance.

iv. Needless to observe that the bank guarantee shall be furnished before clearance and it shall be subject to the further actions, if any, which shall be taken by the Customs Department. Mr. Mishra, learned counsel for the Customs Department, would submit that an endeavour shall be made to complete the investigation as expeditiously as possible and within a period of one month from today.

v. We keep open all contentions of the parties on any further proceedings including on issues of investigation, and the stand of the Department on any such issue.

vi. As we have noted, that as the goods were lying at the Mumbai Port, the Port Authority was impleaded as a party (respondent no.4 to the present proceedings). We have also recorded that the customs have cleared the Pigeon Peas, after the petitioner paying the demurrage / storage charges

as being to be charged by the Port Authority. It appears

10 August, 2023 903-wpl 33250-22.odt from the submission as made by Mr. Setalwad, learned senior counsel along with Mr. Bhalwal, for the Mumbai Port Authority, that the petitioner is liable to pay the Port Authority the demurrage / storage charges, on the goods as leviable under the rules. It appears that there are disputes in this regard between the petitioner and the Port Authority, which were also subject matter of some reference in our earlier orders. Be that as it may, we find from the prayers as made in the petition that in the proceedings of this petition, we are not called upon to adjudicate any specific dispute between the petitioner and the Port Authority. However, in the peculiar facts of the case, Mr. Nankani would submit that the goods have suffered demurrage / storage charges, not due to the fault of the petitioner, but due to reasons which were not within the control of the petitioner and for such reasons, the petitioner ought not to suffer such expenditure, as sought to be levied by the Port Authority from the date of discharge of cargo from the vessel. Mr. Nankani submits that in this view of the matter, the petitioner may be permitted to make a representation to the Chairman of the Port Authority, who can consider all such facts and circumstances, and take a reasonable approach in regard to the levy of such charges. We find that such suggestion as made by Mr. Nankani needs to be accepted. The petitioner is accordingly permitted to make a

10 August, 2023 903-wpl 33250-22.odt representation to respondent no.4-Chairman, Mumbai Port Trust on the issue of demurrage / storage charges. If such a representation is made, the same be disposed of by the Chairman of Mumbai Port Trust, after hearing the petitioner, within a period of four weeks from the date of submission of the representation.

vii. Ordered accordingly.

viii. All contentions of the petitioner and that of the Port Authority are expressly kept open.

15. The petition is accordingly disposed of in the above terms. No costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]

10 August, 2023

