

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

+ W.P.(C) 10418/2009

M/S PLASTO INDIA PVT. LTD Petitioner

Through Mr. Rishi Manchanda, Adv.

versus

UOI & ORS Respondent

Through Ms. Maneesha Dhir with Ms. Preeti Dalal,
Mr. K.P.S. Kohli, Advocates for R-1, 3 & 4.
Mr. Mukesh Anand, Advocate for customs
department.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

% **ORDER**
 03.09.2009

The petitioner M/s. Plasto India Pvt. Ltd. had imported cashew kernel LP (broken) from Vietnam. Sample was drawn and sent to Central Food Laboratory, Ghaziabad and as per the report dated 1st July, 2009 received from the said laboratory, the sample failed in two parameters.

2. The petitioner made representations for second testing of sample relying upon judgment of this Court in ***Magma India Vs. Union of India***

2005 (189) ELT 261 but the respondents did not send sample for testing.

The petitioner thereupon approached this Court by way of the present writ petition.

3. The writ petition was listed on 27th July, 2009 and Court after noticing the limited controversy and the decisions of the Delhi High Court, issued notice for 11th August, 2009 with liberty to the respondents to take instructions and, if required, file a short reply. On 11th August, 2009, counsel for the respondents prayed some more time to obtain instructions in terms of order dated 27th July, 2009 and the matter was adjourned to 19th August, 2009. On the said date again time was taken to obtain instructions. Counsel appearing for the Commissioner of Customs had stated as recorded in the order dated 19th August, 2009 that as per the provisions of Prevention of Food Adulteration Act/Rules, no second sample could be sent for re-testing.

4. Counsel appearing for the respondent No.3 today states that under the statute, there is no provision of re-testing but in view of the judgment of this Court in Magma India (Supra) and other cases, sample can be sent to a different laboratory.

5. This Court in Magma India (Supra) had examined the similar

controversy and had observed as under:-

“5. The analysis of the provisions of the PFA Act discloses that if there is dissatisfaction with the report of the Public Analyst the Petitioner has another opportunity to prove that the food sample is not adulterated or is otherwise unfit for human consumption by having it re-tested by the Central Food Laboratory. There appears to be no justification for vesting absolute finality to the Report of the CFL only because it pertains to an import.

6. x x x x x

7. Counsel for the CFL have not been able to cite any provision of law which prohibits the carrying out of second testing of a food sample, especially where the Authority who has forwarded the first sample makes a request to do so. In my opinion, where there is no statutory power or prohibition from carrying out a second testing there is no justification in deducing that it is not permitted. In the event that the second testing is found to be favourable to the Petitioner the question that would still have to be answer is whether the first report/testing should be ignored or discounted. This burden would have to be discharged by the Petitioners. In WP© No.4200/2003, dated 29th August, 2003, a Division Bench of this Court had given imprimatur to a second test being carried out.

8. x x x x x

9. It is admitted position that whilst there is no permission there is also no prohibition for the carrying out of second test. One must not forget that to err is human and therefore a person should be allowed an opportunity to challenge the veracity of a finding. In my opinion, therefore, since there is no statutory prohibition from carrying out a second testing, there is no justification in deducing that this

not permitted. It has been contended by learned Counsel for the Petitioner that the audi alteram partem rule has been violated in that the Petitioners were not informed or given an opportunity of being heard before the Report of the Central Food Laboratory was finalized. I am unable to agree that this Rule is violated where only an analysis and report, founded of objective criteria, is prepared. If another opportunity is available to test another of the three samples drawn at the relevant time, the Petitioners can scarcely have any further grievance. Since there are four Central Food Laboratories in India, it would be in the interest of all concerned, if on a request being made by the party concerned, the sample retained by the Customs Department is forwarded to any of the other Centres. In the event that the testing is found to be favourable to the Petitioner the question would still have to be answered by the Authority concerned whether the first Report should be ignored or discounted.”

6. The said judgment has been followed in W.P.(C) Nos. 12574-75/2006 titled Global Corporation Limited Vs. Commissioner of Customs decided on 19th October, 2006 and W.P.(C) No. 10942/2009 titled Kuldeep Kundlia Vs. Commissioner of Customs & Another.

7. In view of the aforesaid, it is directed that the respondents should sent the sample to another Central Food Laboratory except Central Food Laboratory, Ghaziabad for the purpose of re-testing. However, the petitioner will not be informed about the laboratory, to which sample is

send. The process of sending of sample will be completed within a period of 15 days from today.

The writ petition is accordingly disposed of.

Dasti to the counsel for the parties.

SANJIV KHANNA, J.

SEPTEMBER 03, 2009

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