

* **HIGH COURT OF DELHI: NEW DELHI**

% Judgment pronounced on: 02.07.2012

+ **WP(C) No.3752/2012 & C.M. No.7869/2012**

MEAD JOHNSON NUTRITION (THAILAND) LTD Petitioner
Through Mr. Sandeep Sethi, Sr. Adv. with
Ms. Krishna Sarma, Ms. Minakshi
Sarma, Ms. Vartika Sahay,
Mr. Navneet Kumar & Mr. Lovejeet
Singh, Advs.

versus

BUREAU OF INDIAN STANDARDS (BIS) Respondent
Through Mr. Jos Chiramel, Adv. with
Mr. Ramesh Kumar and Mr. Daniel
James, Advs.

AND

+ **WP(C) No.3751/2012 & C.M. No.7867/2012**

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CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH
MANMOHAN SINGH, J.

1. The common order is being passed in the above-mentioned two writ-petitions, as the issues involved in both the matters are the same. However, the learned counsels for the parties have made their submissions in WP(C) No.3752/2012.

2. The respondent has filed an affidavit in Court. Both the petitions have been filed by the petitioner through its authorized Indian Representative in Bombay, for quashing of notice dated 16th May, 2012 and e-mail dated 14th May, 2012.

Petitioner's Case

3. The case of the petitioner in both the petitions is that the petitioner-company is a manufacturer of more than 70 infant food products. The petitioner has its presence in more than 50 countries. The Ministry of Health and Family Welfare, Department of Health vide Notification GSR No.257(E) dated 3rd May, 1991 notified standard for Milk-cereal base weaning foods under the Prevention of Food Adulteration Act, 1954.

4. In 2006, a checklist for documents to be submitted in the list along with the application for grant of licence under the respondent's certification scheme for foreign manufacturer was available on the respondent's website.

5. Therefore, on April 02, 2007, based on the above checklist, an application was submitted by the petitioner before the respondent for grant of licence under respondent's certification scheme IS 14433. Along with the application, (i) a covering letter was filed indicating the process of

manufacturing is dry blending operation; (ii) extant documents were submitted in respect of Manufacturing Process Flow Chart, Quality Control Plan, RM, PM, Blending and FG (Enclosure # 4); and, (iii) details of Precertification of raw materials (Enclosure # 6).

6. It is submitted that CMD-1 took six months time from April 09 to October 18, 2007 for scrutinizing the documents. Further, the petitioner was asked to furnish additional information with respect to the organization, manufacturing and testing facilities. The petitioner complied with all such requests including information about providing of documents of KERRY Ingredient's Recipe Detailed Report in respect of Base Powder and documentary evidence for quantitative addition to Choline and other formalities as asked by the respondent from time to time. On April 04, 2008, the respondent sent a letter to the petitioner, informing the grant of respondent/BIS Certification Marks Licence for Infant Milk Substitute as per IS No.14433:2007. The number assigned to this licence is CM/L-4011329 and was valid up to April 03, 2009. As per the licence, the petitioner and its authorized India representative were granted the licence to use the Standard Mark for its Infant Milk Substitute which was manufactured in accordance with/conforms to the related Indian Standard(s) IS: 14433:2007 Infant Milk Substitute – Type II – Infant Formula – Specification as from time to time amended or revised.

7. It is submitted that on April 06, 2009, the petitioner notified the respondent about the change in name. On May 04, 2009, the respondent wrote to the petitioner intimating them of their renewed Certification Marks Licence from April 04, 2009 to April 03, 2011. From 31st August, 2010 to

2nd September, 2010, Mr. Biman Chattopadhyay, Scientist-F and Head (Laboratory), Respondent/BIS conducted a first Surveillance Inspection at the petitioner's factory situated at Amata Nakorn Industrial Estate, Phase 4, 700/428, Moo 7, Don Huaroh, Muang Choburi, Thailand 20000. On April 07, 2011, the respondent intimated the petitioner upon renewal of the instant Certification Marks Licence CM/L – 4011429 as per IS 14433:2007 had been renewed from April 04, 2011 to April 03, 2013.

8. It is also submitted that from April 03 to April 05, 2012, Ms. Sashi Rekha, Scientist E, CMD-II, respondent/BIS did the second surveillance inspection at the petitioner's factory of the above said premises in Thailand. During the inspection, the I.O. raised the issues verbally and requested certain documents/undertaking, inter-alia, that the respondent was unaware of the fact that base powder used in the manufacture of infant formula was spray dried at KERRY Speciality Ingredients, Malaysia. On April 05, 2012, the I.O. generated a Discrepancy/Variation Report during the inspection, stating that the test methods being used for testing phosphorous, iodine, copper, manganese, zinc, sodium, potassium, chloride, selenium, vitamin E and staphylococcus aureus are different from those specified in IS 14433:2007. The petitioner vide letter dated April 05, 2012 intimated to the respondent that the HACCP flow chart provided to the I.O. during preliminary inspection on January 23-25, 2008 was erroneously submitted to their office (as manufacturing process flow chart) and enclosed a correct Flow diagram reflecting the actual manufacturing process in detail as requested by the I.O. Further, it was reiterated that the base powder is manufactured by KERRY ingredients and that the base powder is accepted only after the verification of Certificate of Analysis supplied by Kerry

Ingredients. On April 12, 2012, the petitioner wrote to the respondent requesting for using the services of respondent's recognized Microchem Lab for testing of quality parameters.

9. It is submitted that the respondent served a notice dated 14th May, 2012 via e-mail directing the petitioner to stop marking immediately. The reason provided was that the actual manufacturing process in the factory as seen during second surveillance inspection between April 3-5, 2012 was different from the process verified during the preliminary inspection during January 23-25, 2008. Further, not only was no prior evaluation/approval taken for the revised manufacturing process from the respondent, but also no intimation was given either. This tantamount to violation of Clause 5(7)(b)(iv) of Regulations. It is also alleged that during second surveillance inspection between April 3-5, 2012, milk powder and base powder are separately indicated in the process flow but there is no mention of milk powder in the list of raw materials. It was also mentioned that the Test Certificate of Milk Powder was not provided during the second surveillance inspection.

10. After receipt of e-mail dated 14th May, 2012 and the letter dated 16th May, 2012 issued by the respondent regarding stoppage of marking, the petitioner vide letter dated 18th May, 2012 sent the information to the respondent and in para-2 of the said letter, it was mentioned by the petitioner that they have not made any changes in the manufacturing process of their products verified during the preliminary inspection carried out in 2008. They also sent the copy of the Manufacturing Process Flow Diagram provided at the time of recording of their application and during

preliminary inspection. It was also mentioned in the letter that during the last surveillance inspection from 3rd April, 2012 to 5th April, 2012, certain documents were provided to the officer and also clarified that the manufacturing process was the same as that in 2008. Along with the letter, the petitioner sent manufacturing process flow and other manufacturing details of raw material and process etc. As per the petitioner, no reply was received from the respondent.

11. The petitioner again on 8th June, 2012 sent another letter, clarifying their stand. It was also informed to the respondent by the said letter that by means of the direction to stop marking and dispatching the goods, the petitioner has suffered financial loss and damages of Rs.34 lac as on 9th June, 2012 and shall suffer further loss of Rs.1.15 crore as on 7th August, 2012 due to obsolescence of raw materials, and there is no violation of Section 5(7)(b)(iv) of the Bureau of Indian Standards (Certification) Regulations, 1988 (hereinafter referred to as the 'Regulations').

12. The respondent has filed the counter-affidavit of Mr. Sanjay Gupta who was employed as Scientist-E with the respondent. The Annexure-14 is also filed by the respondent after obtaining the liberty of the Court.

13. **Respondent's Case**

(a) The respondent in its counter-affidavit has submitted that it was clearly stated in the 'check list' that "Manufacturing status is clearly stated." The respondent thereafter decided to grant certification mark licence to the petitioner, a communicated to the petitioner vide letter dated 4th April, 2008 wherein it was clearly stated in para 10, as under:

“This licence is being granted for your factory situated at Amata Nakoran Industrial Estate, Phase 4, 700/428, Moo 7, Don Huroh, Muang Chonbury – Thailand 20000 and the rights and privileges under the licence shall not be exercised by any other factory/company/factory location etc. This licence is not transferable. In the event of shifting of the manufacturing and testing equipment from the licenced premises to some other place, use of the Standard Mark shall be stopped till the new premises are inspected and found to be satisfactory by us in respect of manufacturing and testing facilities available there and the address of new premises is endorsed in the licence.”

(b) The respondent thereafter carried out first surveillance inspection of the petitioner’s factory premises from 31st August, 2010 to 2nd September, 2010 through Shri Biman Chattopadhyay, Scientist ‘F’ posted at its Kolkata office, wherein it was stated that the ‘production control’ was ‘satisfactory’.

(c) Thereafter, second surveillance inspection of the petitioner’s factory premises at Amata Nakorn Industrial Estate, Phase 4, 700/428, Moo 7, Don Huaroh, Muang, Chonbury, Thailand 20000 was carried out by Ms. Shashirekha, Scientist ‘E’ (Director) of the respondent posted at its Central Marks Department II, New Delhi from 3rd April, 2012 to 5th April, 2012. During the course of inspection it was seen that certain raw materials like flavor, DHA/ARA indicated in the HACCP flow chart were not permissible as per the relevant Indian standard. The petitioner submitted a declaration dated 5th April, 2012 (pg. 75 of the paper book) to the effect that these were not added to products manufactured under the

BIS licence in question, but there was no independent method of verifying the same.

(d) Serious discrepancy observed by the inspection officer during the course of surveillance inspection was that the base powder and spray dried milk powder were not being manufactured within the factory premises of the petitioner. These were procured from third party, and only the blending was carried out in the factory premises. Hence no manufacturing process was in fact being carried out by the petitioner, which was sine qua non for grant, renewal and continuation of the BIS certification marks licence in question. The flow diagram submitted by the petitioner during the preliminary inspection did not tally with the actual activities being carried out in the factory premises of the petitioner.

14. It is alleged by the respondent that the petitioner submitted a letter dated 5th April, 2012 admitting that the flow diagram submitted during the preliminary inspection was not correct, and the only explanation forthcoming was that “.... The said flow diagram was erroneously submitted....”, and requested the respondent to ignore the same. The petitioner submitted a fresh process flow diagram to the inspection officer of the respondent. The petitioner further stated in the letter that –

“....base powder is manufactured by Kerry Ingredients according to the recipe provided us”

15. It was, thus, apparent, as alleged by the respondent, that the petitioner had outsourced the manufacturing process in respect of the product for which the licence was granted, amounting to blatant breach/violation of the terms and conditions of the licence.

16. It is stated that the respondent on receipt of the surveillance inspection report from its inspecting officer, processed the same, and took the decision to stop mark the licence w.e.f. 11th May, 2012, as communicated to the petitioner vide e-mail dated 14th May, 2012 and letter dated 16th May, 2012 and submitted reply dated 18th May, 2012 admitting that :

“.....The base powder is manufactured at Kerry Ingredients according to the recipe provided by Mead Johnson Nutrition.....”

17. In the counter-affidavit, it is alleged that the petitioner's representatives met the officials of the respondent at their headquarters in New Delhi once again on 29th May, 2012, when they were clearly explained the specifications as per the relevant Indian Standard, and conditions which are sine qua non for grant of BIS certification mark licence, which stood clearly breached by the petitioner by outsourcing of the manufacturing process of third parties outside the licensed factory premises. The petitioner in the circumstances submitted an additional reply dated 8th June, 2012 once again alleging that no change whatsoever was made in the manufacturing process from the time of recording of the application for licence in the year 2007, which was patently false. The petitioner however admitted that there was variation between the raw materials verified during the inspection in April 2012 as compared to those furnished by the petitioner during the inspection in January 2008, which was sought to be explained by alleging that –

“It is respectfully submitted that alleged variation is solely due to the varying levels of details in different formats sought by the two IOs during the respective inspections.”

18. In the affidavit, it is mentioned that the petitioner alleged in the additional reply that in the covering letter dated 17th July, 2007 to the application for licence it was clearly represented that the base power was manufactured by Kerry Speciality Ingredients, Malaysia, which was patently false. The petitioner also alleged that Kerry's Certificate of Analysis of the base power was provided during the inspection in 2008 and directly to the respondent's office on 20th March, 2008 which was also wholly false and baseless. The respondent considered the two replies received from the petitioner, and was in the process of taking further steps for cancellation of the licence when the petitioner has filed the present writ petition with a view to somehow or the other obtain stay of the stop marking of the licence, and to continue using the BIS certification mark on their product imported to India, even though they do not manufacture the product, and nor have in effect any control over its manufacture, or for that matter, to ensure that the product is manufactured strictly as per the relevant Indian Standard specifications.

19. Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the petitioner has argued that the notice issued by the respondent regarding the stoppage of marking demonstrates arbitrariness and has been issued in infringement of the basic legal rights of the petitioner. He submits that despite of reply given by the petitioner vide letters dated 18th May, 2012 and 8th June, 2012 wherein it was specifically stated that the petitioner has not made any change in the manufacturing process of its products verified during the preliminary inspection carried out in 2008 and also the petitioner

sent all the requisite documents in order to prove its stand in the said two letters, no response was given by the respondent.

20. The learned Senior counsel further submits that even before sending the letters dated 14/16th May, 2012 directing the petitioner to stop the marking of the products, the petitioner wrote two letters dated 5th April, 2012 and 12th April, 2012 explaining the discrepancies/ variation report during the inspection of Ms. Sashi Rekha, Scientist E, from 3rd April, 2012 to 5th April, 2012.

21. The respondent herein by breaching the fundamental doctrine of natural justice, stopped the petitioner's business, as no opportunity of hearing/representation was accorded to the petitioner by the respondent before directing the petitioner to stop marking and dispatching their products. He submits that there is no specific exclusion of opportunity of hearing in the said provision. Thus, the fundamental rights of the petitioner have been infringed by the respondent by stoppage of marking.

22. He also argued that unless the specific provision in the Act is provided for non-grant of opportunity of hearing, the benefit of doctrine of natural justice would apply in favour of the petitioner. Mr. Sethi has referred the judgment of the Supreme Court passed in the case of **Sahara India (Firm), Lucknow vs. Commissioner of Income Tax, Central-I and another**, reported in (2008) 14 Supreme Court Cases 151, para-19 of which reads as under:-

“19. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the

requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.”

23. Mr. Jos Chiramal, learned counsel appearing on behalf of the respondent submits that the petitioner in its letter dated 2nd April, 2007 enclosing the application for licence had alleged that they were manufacturers of the product, but now it has been revealed during the second surveillance inspection conducted from 3rd April, 2012 to 5th April, 2012 conducted by the respondent at the factory premises of the petitioner in Thailand that the petitioner has outsourced the entire manufacturing process to third parties, and are only dry blending some of the raw materials into the said manufactured product, which amounts to breach of the terms and conditions of the licence issued in favour of the petitioner and in case, any stay of the stop marking of the product is granted by this court, the same is likely to affect the health and well-being of infants in India who would be fed with the product, for which BIS Certification Mark licence is mandatory. Mr. Chiramal submits that there is no ground in the writ petition that the respondent’s actions are motivated by any lack of bona fide or for extraneous considerations.

24. It is not disputed by either of the parties that the scheme under which the petitioner has obtained the licence is in respect of ‘foreign manufacturers’ of products to be imported to India, and its is mandatory under the scheme, as also as per the specific provisions of BIS

(Certification) Regulations, 1988 that the product must be manufactured within the licensed premises.

25. Relevant provision of Section-15 of the Bureau of Indian Standards Act, 1986 reads as under:

“ the Bureau may, by order, grant, renew, suspend or cancel a licence in such manner as may be determined by the Regulations. Further, the grant or renewal of the licence under the said Section, shall be subject to such conditions and on payment of such fees as may be determined by the regulations. As per Section 38 of the Act, the Executive Committee of the Bureau is empowered, with the previous approval of the Central Government, by notification in the Official Gazette, to make regulations consistent with the Act and the Rules, generally to carry out the purpose of the Act, and particularly, inter alia, the manner of grant, renewal, suspension or cancellation of licence under sub-section (1) of Section 15, and the conditions subject to which a licence may be granted or renewed and the fees payable therefor under sub-section (2) of Section 15. It is provide in Rule 15 of the BIS Rules, 1987 that the manner of grant, renewal, suspension and cancellation of licence shall be as determined by the Regulations.”

26. The relevant provision of Section 5(7)(b)(iv) of the Regulations for the purpose of deciding the present dispute is reproduced as under:-

“Section 5(7)(b)(iv)

(b) If, at any time, the Bureau has sufficient evidence that the product carrying the Standard Mark may not be conforming to the Indian Standard, the licensee shall be directed to Stop Marking of such product. Such evidence is not limited to, but may include one or more of the following situations :

(i) non conformance of products established after factory or independent testing

- (ii) non-implementation of the provisions (s) of the Scheme of Testing and Inspection
- (iii) non-availability of testing personnel and no alternate arrangements made
- (iv) significant modification (s) in the manufacturing process, plant, machinery etc without prior evaluation and approval of the Bureau
- (v) relocation of plant and machinery
- (vi) prolonged closure of factory
- (vii) marking non-conforming products
- (viii) marking on products other than those included in the licence.

The resumption of marking shall be permitted by the Bureau after satisfying itself that the licensee has taken necessary actions and sufficient evidence is available about the conformity of the product to the relevant standard.”

27. On bare perusal of the said provision as referred above, it is clear that there is no requirement of notice and giving a hearing to the licensee before directing the licensee to stop marking the product. This is due to the reason that the moment the Bureau has sufficient evidence of breach, the licensee shall be directed to stop the use of the Standard mark upon the products which are not confirming the requirements mentioned in the provision pending the satisfaction of the bureau for resumption of the marking or otherwise.

28. Upon reading the regulation 5 in its entirety, it is clear that the said regulation 5 prescribes different kinds of eventualities under which different actions are required to be taken by Bureau and likewise the requirement of hearing or prior notice wherever warranted has been prescribed making the regulation code in itself.

29. In cases relating to cancellation of licence under sub regulation 5 of Regulation 5 which relates to taking away or forfeiture of the license which is the right or privilege granted, the requirement of prior notice as well as the hearing has been provided. The sub regulation (8) of regulation 5 has further provided that the grounds of arriving at such decision of cancellation shall be intimated to the licensee. Similarly, before rejecting the application for license, similar right of hearing as well as reasoned decision has been provided under sub regulation 4 of regulation 4 read with sub regulation 8 of regulation 5.

Furthermore, there are separate kinds of cases where the licensee does not pay renewal fees or inspection or test charges, in those type of cases, upon 14 days prior notice giving one opportunity to cure the defect, the direction to stop marking can be issued without any requirement of any further hearing in the matter and leaving the resumption of marking open upon the payment of the renewal fees.

There is however a third kind of eventuality where the bureau has sufficient evidence that the product carrying the standard mark does not confirm either of the requirements prescribed under sub regulation 7 (b) and those situations are the underlying basis on which the license was earlier granted and goes into the root of the matter, thus in such cases, an emergent action is required with a direction to stop marking pending the further decision on resumption on further satisfaction. Therefore, the said eventuality is distinctly prescribed under sub regulation 7 (b) of regulation 5 where under no right of hearing or prior notice is prescribed as there is already sufficient evidence of the violation of basic terms of the license and

the post decisional hearing mechanism is prescribed in those cases so that upon satisfaction of the conditions, the marking can be resumed.

30. It is further noteworthy that the wordings used in the regulation 5(7) (b) is “directed to stop marking” as against the sub regulation 5 of regulation (5) are the cases relating to cancellation of the license. In cases falling under regulation 5 (7), upon prima facie satisfaction, only the marking is stopped pending the further satisfaction of the bureau and the license right is not taken away and on the other hand, in the cases relating to cancellation, the right or privilege of the license itself is taken away which is a decision on merits. Thus, the cases relating to sub regulation 5 and sub regulation 7 cannot be equated so far as the hearing requirement is concerned. Similarly, where the bureau has evidence that such products are being sold under the standard mark which are not in conformity with the terms of the license, the bureau is empowered to take such immediate or emergent action in interest of the health and the safety of the people as warranted to stop the marking pending further satisfaction of resumption on the post decisional hearing basis.

31. Thus, upon analyzing the scheme of the regulations, it is clear that the eventuality prescribed under sub regulation 7 (b) is distinct from the other kinds of the eventualities like cancellation, suspension or non payment of the renewal fees. Further, it is kind of action which bureau can take when it has sufficient evidence of non conformity of the terms of the license on emergent basis in the interest of health and safety of the people without taking away the right of the licensee of the license and accord the post decisional hearing in the matter for further satisfaction. I think that

such kind of the mechanism is sufficient compliance of the natural justice requirement in such kind of cases.

32. The principles of natural justice have twin ingredients. Firstly, the person likely to be adversely effected by the action of the authorities should be given notice to show cause or granted reasonable opportunity of being heard in consonance with the maxim audi alteram partem. Secondly, the order so passed by the authorities should give reasons for arriving at any conclusion showing proper application of mind. Violation of either of these principles normally would render an order particularly quasi-judicial in nature invalid. Violation of principles of natural justice is violation of basic rule of law and would invite judicial chasticism. However, this rule is not without exceptions. Of course, the exception to such a rule are rare. Where the legislative scheme of provisions of a statute suggest that intent of the legislature is to take emergent action, in that event and subject to fulfillment of ingredients of the provisions, an order could be passed without affording pre-decisional hearing and an expeditious post-decisional hearing may amount to substantial compliance with the basic rule of law.

33. In **Union of India v. Tulsiram Patel**, 1985 SCR Supl. (2) 131 , the Supreme Court observed :

"The audi alteram partem rule can be excluded where the right to prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action; or where the nature of the action to be taken, its object and purpose and scheme of the relevant statutory provisions warrant its exclusion; or importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so

demands. If legislation and the necessities of a situation can exclude the principles of natural justice including audi alteram partem rules; fortiori so can a provision of the Constitution, for a Constitutional provision has a far greater and all-pervading sanctity than a statutory provision."

34. 18. It will be useful to refer to the decision of **Olga Tellis v. Bombay Municipal Corporation, 1985 SCR Supl. (2) 51**, wherein a question arose in the context of section 314 of the Bombay Municipal Corporation Act as to whether the Court should direct remand to the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or foot-paths should not be removed. The Supreme Court observed that remand was not necessary because the opportunity which was denied by the Commissioner was granted by the Court in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Thus the question whether post-decisional hearing is a sufficient compliance with the principles of natural justice and fair play will have to be determined in the context of the facts of the case. The court while affirming that section 314 of the Act excludes the natural justice observed thus:

"Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in

circumstances which warrant it. Such circumstances must be known to exist, when so required, the burden being upon those who affirm their existence.”
(Emphasis Supplied)

35. This legal position is reiterated by the Supreme Court in the case of **Carborundum Universal Limited v. C.B.D.T.**, 1989 Supp. (2) S.C.C. 462. The Supreme Court held that exclusion of principles of natural justice can be made expressly or impliedly by statutory provisions. It was also held that personal hearing cannot always be insisted upon. In a judgment of the Supreme Court in **State of U.P. v. Pradhan Sangh Kshetra Samiti**, 1995 SCC Supl. (2) 305, the question arose whether action of de-limitation of Panchayat areas and Gram Sabhas, without giving an opportunity of hearing in view of the urgency, was valid. The Supreme Court observed that in a matter which is urgent even post-decisional hearing is sufficient compliance of the principles of natural justice, namely, audi alteram partem. Accordingly, the authorities were directed to grant post-decisional hearing to the petitioners in that case.

36. Applying the present principles of law enunciated by Supreme Court as well as other courts to the present case, it can safely said that the kind of eventuality prescribed under the sub regulation (7) (b) of regulation 5 is distinct from the others where upon prima facie satisfaction in cases where the bureau has a sufficient evidence that the product carrying the standard mark is not confirming the conditions prescribed under the said regulation which are also the basis of the license granted, the bureau can direct to stop marking pending further satisfaction. In the said regulation itself, it is provided that the resumption of the marking shall be permitted by the bureau after the satisfying itself that the licensee has taken necessary

actions and sufficient evidence of the conformity is available. All this would mean that it is kind of emergent measure in interest of health and safety which the bureau is empowered to take without cancelling the license directing the licensee “to stop marking” pending the further satisfaction. The said further satisfaction can be in the form of representation or by according the post decisional hearing. I think the same is sufficient compliance of the principles of the natural justice as no license or privilege has been taken away and thus, the resumption of the marking is possible once the representation is made before bureau with sufficient evidence showing the steps towards the compliance.

37. This distinction which exists between the cancellation, suspension of the license on one hand and non payment of the renewal fee on the other and different requirements of hearings and notice under the regulation 5 of the BIS regulation has been also noticed by the learned single judge of this court in the case of **S.K.N. Associates Pvt. Ltd. vs Union Of India (Uoi) And Anr.** (Hon’ble BD Ahmed J) decided on 5th September, 2007 wherein the learned single judge came to the conclusion that the said scheme must be adhered to and no additional requirement of hearing can be imported as in the case of non payment of renewal, the license right is not lost. The learned single judge observed thus:

“A plain reading of the provisions of Section 15(1) indicates that the Bureau may, by order, grant, renew, suspend or cancel a license in such manner as may be determined by regulations. The regulations have prescribed that before the Bureau cancels any license, it shall give the licensee not less than 14 days notice of its intention to cancel the license [See: Regulation 5(5)(c) of the bids Certification Regulations, 1988]. It is further provided under Regulation 5 (5) (d)

that on receipt of such notice, the licensee may submit an explanation on his behalf to the Bureau within seven days thereof. If an explanation is submitted, the Bureau may consider the explanation and give a hearing to the licensee within 14 days from the date of receipt of such explanation or before the expiry of the notice whichever is longer. Regulation 5 (5) (e) provides that if no explanation is submitted, the Bureau may, on the expiry of the period of notice, cancel the license. Under Regulation 5 (8), it is provided that the decision of the Bureau under Regulation 4 (4) or Regulation 5 (5) together with the grounds for arriving at such decision shall be communicated, in writing by registered post, to the applicant or the licensee, as the case may be. It is, therefore, clear that as per the manner determined by the Regulations, a license can be cancelled only after a notice is given and if an explanation is submitted by the noticee after hearing is given to him. The decision is also required to be a reasoned decision in writing and is required to be communicated to the licensee by registered post. But, there is no such procedure or requirement for renewal or non-renewal.

17. If one looks at Section 15 of the said Act one finds that it has reference to (a) grant of a license; (b) renewal of a license; (c) suspension of a license; and (d) cancellation of a license. All these fall in distinct and different categories. Renewal of a license is not the same as a grant and it is definitely distinct from suspension or cancellation. The three Division Bench decisions of this Court in Gayco Pvt. Ltd (supra), Kaushalya Devi (supra) and Falcon Air Cargo (supra) make it very clear that a non-renewal does not amount to a cancellation. The primary reason for this cancellation is that a license does not have a vested right in renewal. Whereas in the case of a cancellation a right vested in the license is taken away. It is for this reason that renewal and cancellation have been treated differently. While the right to hearing incumbent before a vested right is taken away by a cancellation of a license, no such right enures in favor of a licensee while his license is being considered for renewal.”
(Emphasis Supplied)

38. On reading the observations of the learned single judge in **S.K.N. Associates(Supra)**, it is clear that the learned single judge distinguished the cases where the license right is taken away and in those cases where it is not. Thus, the distinction is made in cases where there is forfeiture of license where the hearing and the complete mechanism is essential and in those where such forfeiture or right is not taken away as in those case no such right of hearing can be enure to the licensee. I find that there is no reason why such distinction should also not be extended and applied to the cases where there is a mere “direction to stop marking” leaving the licensee to the post decisional hearing or further satisfaction. The said further satisfaction by way of the post decisional hearing can resume the marking upon the satisfaction of the bureau with the evidence as prescribed in the regulation. Thus, the distinct eventuality under sub regulation 7 (b) has to be treated difference and it can safely satisfy the rules of the natural justice if the post decisional hearing for the resumption is accorded to the licensee in order to All satisfy the bureau.

39. On facts, it is noticed that the respondents have carried out the inspection at the premises of the petitioner in the month of April 2012 when the discrepancy to the manufacturing process, existence of the plant and machinery as well as the ingredient of the product were noticed. The petitioner itself supplied some evidence or documents at that point of time which were indicative of such discrepancy or inconsistency with the requirements of the license or the regulation. Consequently, the direction to stop marking was issued in the month of the 16th May, 2012. Thereafter, the

petitioner visited the office of the respondent through representative and also issued some letters with the documents controverting or refuting such non compliance and praying for the resumption of the marking.. The petitioner nowhere in the letters either demanded pre decisional hearing either after inspection once it was witnessed at the time of inspection that there exists the discrepancy and nor after the letter dated 16th May 2012 and only prayed for reinstatement of the marking. Though it is altogether different matter that I have found that the requirement of post decisional hearing is sufficient compliance of the natural justice. All this means that the petitioner grievance can be redressed once the post decisional hearing for further satisfaction is accorded to the petitioner.

40. Mr. Sethi, learned Senior counsel has taken pains to explain that there is no change in the manufacturing process and other requirements are also satisfied as they were existing prior to the direction of stopping of the marking (verified during the preliminary inspection carried out in 2008). An affidavit to this respect has also been filed by the petitioner's representative. Per contra, Mr. Chiramal strongly refutes such contention and urges that the petitioner has changed the corporate name as well as the manufacturing unit and is importing the material from Malaysia. It is stated the ingredient requirement of Kerry base powder is not complied with which means that the product is not suitable for the children and thus the petitioner is still noncompliant licensee.

41. It is a well settled principle of law that the writ court is not fact finding court and the enquiry of the court under article 226 of the constitution has to only confined to testing the reasonableness, fairness of

the decision making process and to see that the quasi judicial or administrative actions do not overstep their legitimate bounds.

42. Applying the said principle of law to the present case, I find that the rival contentions raised by the parties is a factual enquiry which has to be decided by the expert body which the Bureau of Indian Standard at the time of post decisional hearing. The court while exercising the jurisdiction under article 226 cannot indulge into this fact finding enquiry by supplementing its own opinion at this stage. This is more so when the matter is still pending for further satisfaction for the purposes of resumption. Thus, it would be wise if the parties are relegated to the fact finding authority which is the Bureau/ respondent which shall decide whether the petitioner with the existing evidence has fulfilled the requirements of the regulation 5 (7) (b) or not.

43. Under these circumstances, I am of the view that it was not obligatory on the part of the respondent to issue advance notice and give a hearing before passing direction to stop marking of product as the said directions are not the final order for cancellation of licence, and under the said direction, an opportunity is available to the petitioner under the regulation to satisfy the respondent by the licensee/ petitioner to take necessary actions about conformity. Hence, the submission of the petitioner that the direction to stop marking could not have been issued without notice and hearing, is without any substance and post decisional hearing is granted to the petitioner to make its representations before the authority.

44. Resultantly, both the petitions are disposed of, with the following directions:-

- (a) That the Director General of the respondent shall examine all the requisite documents produced by the petitioner and take his decision after hearing the petitioner or its authorized representative and consider the stand taking in the petition. The respondent is directed to pass a reasoned order upon clear finding of the facts as to whether the petitioner satisfies the requirements of the sub regulation 7 (b) or not.
- (b) The respondent while deciding the issue shall also take into consideration the further evidence submitted by the petitioner which shall acts as the steps of the petitioner towards the compliance of the of Regulation 5(7)(b) of the Act before passing the order.
- (c) That the petitioner shall appear before him on 13th July, 2012 at 11.00 a.m. for directions.

45. No further orders are required to be passed in the matters. Both petitions along with interim applications are disposed of.

46. No costs.

47. Copies of this order be given *dasti* to the learned counsels for both the parties.

MANMOHAN SINGH, J.

JULY 02, 2012