

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

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Date of decision: 22nd April, 2015

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LPA No.659/2014

**FOOD SAFETY & STANDARDS
AUTHORITY OF INDIA**

..... Appellant

Through: Mr. Mehmood Pracha with Mr. Rudro
Chatterjee, Advs.

Versus

DANISCO (INDIA) PVT. LTD. & ANR.

..... Respondents

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.
Arjun Pall, Adv. for R-1.
Mr. Akshay Makhija, Adv. for R-
2/UOI.

AND

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LPA No.711/2014

**FOOD SAFETY & STANDARDS
AUTHORITY OF INDIA**

..... Appellant

Through: Mr. Mehmood Pracha with Mr.
Rudro Chatterjee, Advs.

Versus

**UNITED DISTRIBUTORS
INCORPORATION & ORS.**

..... Respondents

Through: Mr. Virag Gupta, Adv. for R-1.
Ms. Sonia Sharma & Mr. V.C. Jha,
Ms. Neha Sharma, Advs. for R-3.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. These two intra-court appeals though against different judgments (of the same learned Single Judge), but both concerning interpretation of the provisions of The Food Safety and Standards Act, 2006 (FSS Act) and Rules and Regulations made thereunder and filed at or about the same time, were taken up together for hearing.

LPA No.659/2014.

2. This appeal is preferred against the judgment dated 13th August, 2014 in W.P.(C) No.2644/2014 filed by the respondent No.1 / writ petitioner (respondent No.2 is Union of India). The said writ petition was filed impugning the order of the appellant authority holding the consignment of 'Lactic Culture' imported by the respondent No.1 / writ petitioner to be non-compliant with the Food Safety and Standards (Packaging and Labelling) Regulations, 2011 (hereinafter referred to as 'Packaging and Labelling Regulations') and thus refusing the 'No Objection Certificate' (NOC) to enable the respondent No.1 / writ petitioner to have the said

consignment released from the Customs Authorities. The learned Single Judge by the judgment impugned in this appeal held the provisions of the Packaging and Labelling Regulations, for the reason of non-compliance wherewith the NOC was refused, to be not applicable and hence directed the appellant authority to issue the NOC if the consignment was otherwise found to be in conformity with the description as available on the consignment as well as the product description sheet provided by the respondent No.1 / writ petitioner.

3. The respondent No.1 / writ petitioner claims to be engaged in the business of import, distribution and sale of wide range of products that are used by manufacturers of food and beverages, dietary supplements and pet food. The consignment aforesaid imported by the respondent No.1 / writ petitioner and to which these proceedings pertain was of “YO-MIX 305 LYO 50 DCU” which is a blend of defined strains of lactic acid bacteria that is used for direct vat inoculation into milk for preparing yogurt and fermented milk products. The said product is a freeze-dried concentrated lactic culture comprising of *lactobacillus bulgaricus* and *streptococcus thermophilus*, along with sucrose and maltodextrin as carriers. According to the respondent No.1 / writ petitioner, the said product is a permitted ‘food

additive’ within the meaning of The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 (hereinafter called the Safety and Standards Regulations) and was being imported for sale / supply to distributors and customers.

4. The appellant authority however vide letter dated 21st February, 2014 refused the NOC on the ground that ‘ingredients list was not mentioned on the label’ and thus the safety of the product could not be assessed without knowing the mandatory labelling requirements as per the Packaging and Labelling Regulations.

5. The respondent No.1 / writ petitioner represented that the said product was for industrial use only and not for retail sale and thus the labelling on the said product did not have to disclose the list of ingredients in terms of the Packaging and Labelling Regulations. Upon the representation not meeting with any success, the respondent No.1 / writ petitioner preferred the statutory appeal but which also was dismissed vide communication dated 22nd April, 2014, on the same grounds and also observing that there is no exemption under the Packaging and Labelling Regulations if the package is meant for industrial use. The respondent No.1 / writ petitioner was thus

advised to export back the consignment to the country of origin and have it re-labeled with a label that discloses the list of ingredients. Thereafter, the writ petition from which this appeal arises was filed. Needless to state that the appellant authority contested the writ petition.

6. The learned Single Judge, in the impugned judgment, has found / observed / held:-

- (i) that Section 23 of the FSS Act mandated that packaged food products be labeled or marked in the manner prescribed by the Packaging and Labelling Regulations;
- (ii) though the expression ‘food products’ is not defined under the FSS Act but the definition of ‘food’ in Section 3(1)(j) of the FSS Act is couched in wide terms to mean any substance which is intended for human consumption including any substance used into the food during its manufacture, preparation or treatment;
- (iii) that the goods imported by the respondent No.1 / writ petitioner being intended for use in preparation of yogurt, would fall

within the wide definition of expression ‘food’ and its packaging and labelling would require to be compliant with the Packaging and Labelling Regulations;

- (iv) Section 25(1)(iii) of the FSS Act prohibits import of any article of food in contravention of the provisions of the FSS Act or any Rule or Regulation made thereunder;
- (v) that it was the admitted case of the parties that the subject goods fall within Category 99 of Indian Food Code which includes “substances added to food which are not for direct consumption as food” and sub-category 99.6 whereof covers “microorganisms and microbial preparations”;
- (vi) that it was the contention of the respondent No.1 / writ petitioner that since the definition of ‘yogurt’ in Regulation 2.1.12:1 of the Safety and Standards Regulations describes yogurt as containing cultures of suitable lactic acid producing harmless bacteria, which are precisely the goods in question; the said goods are ‘permitted food additive’;

- (vii) that the subject goods were a food additive even as per the definition thereof in Section 3(1)(k) of the FSS Act;
- (viii) that Regulation 2.2.2:2 of the Packaging and Labelling Regulations and on the ground of non-compliance wherewith the appellant authority had refused to give the NOC, was applicable in respect of 'pre-packaged' foods;
- (ix) that as per Regulation 1.2.1:8 of the Packaging and Labelling Regulations defining 'pre-packaged or pre-packed food' read with Section 3(1)(f) of the FSS Act defining 'consumer', pre-packaged or pre-packed food means food which is ready for sale to persons and families purchasing and receiving food in order to meet their personal needs;
- (x) that thus the products though falling under the definition of 'food', meant not for direct human consumption but for sale to industrial consumers for use in manufacture of articles of food, would be excluded from the definition in Packaging and Labelling Regulations of pre-packaged or pre-packed food;

- (xi) that thus the ground, of the subject goods being non-compliant with Regulation 2.2.2:2 of the Packaging and Labelling Regulations, for refusing the NOC, was bad;
- (xii) that even otherwise, in the light of the Guidelines dated 23rd March, 2012 issued by the appellant authority specifying the labelling information for various kinds of packages of food consignment, the consignment in question substantially complied with the labelling requirements except that the name and address of the importer was not printed on the package;
- (xiii) that nutritional information in any event was inapplicable as the goods in question are lactic cultures which are to be used in manufacture of yogurt;
- (xiv) that the goods in question being for industrial use, the requirement, of logo indicating whether the goods are 'vegetarian' or 'non-vegetarian', was also inapplicable;
- (xv) that thus, irrespective of the non-applicability of Regulation 2.2.2:2 of the Packaging and Labelling Regulations, the

labelling of the goods in question provided sufficient information and the respondent No.1 / writ petitioner in addition had also furnished the detailed product description of the goods and the composition, properties and physical / chemical specifications as well as microbiological specifications;

(xvi) that all the aforesaid was sufficient for the appellant authority to test whether the goods in question conform to the description.

7. Aggrieved from the aforesaid, this appeal was preferred. Though the same was entertained, but the interim stay sought of the judgment of the learned Single Judge refused. The counsel for the appellant authority, on 26th September, 2014 informed that in inspection pursuant to the directions of the learned Single Judge, the contents of the consignment were not found to be in conformity with the description available on the package.

8. The counsel for the appellant authority before us argued:

(a) that India has become a dumping ground for unsafe food;

- (b) without proper labelling, the laboratory of the appellant authority cannot check whether the goods are what they are labeled as;
- (c) that the Packaging and Labelling Regulations are also intended to disclose the origin of food and to enable the consumers to make a choice;
- (d) that before the FSS Act, the right to take action with respect to “bad food” was only under the law of tort and which was a very weak right;
- (e) that the appellant authority was constituted as the regulatory authority under the FSS Act and has the onus to protect the interests of the consumers;
- (f) that Regulation 1.2.7 of the Packaging and Labelling Regulations defines ‘non-vegetarian’ food as an article of food which contains whole or part of any animal including birds, fresh water or marine animals or eggs or products of any animal origin but excluding milk or milk products as an ingredient and

Regulation 1.2:11 defines ‘vegetarian’ food as any article of food other than non-vegetarian food;

- (g) that the Packaging and Labelling Regulations require the label to disclose whether the goods are vegetarian or non-vegetarian and the label on the subject goods does not disclose so;
- (h) that Section 23 of the FSS Act providing for ‘packaging and labelling of foods’ prohibits manufacture, distribution, sale or exposing for sale or dispatch or delivery to any agent or broker for the purpose of sale any packaged food products which are not marked and labelled in the manner prescribed; thus pre-packaged or pre-packed food does not necessarily mean food ready for sale to consumer but would also include wholesale packages and which are defined in Regulation 1.2:12 of the Packaging and Labelling Regulations as containing a number of retail packages which are intended for sale, distribution or delivery to an intermediary but not intended for sale direct to a single consumer and commodity of food sold to intermediary in

bulk to enable such intermediary to sell, distribute or deliver such commodity of food to the consumer in small quantities;

- (i) that subject package is thus a wholesale package which requires labelling;
- (j) that the note to Regulation 1.2:8 defining ‘pre-packaged or pre-packed food’ also provides that the expression ‘package’ wherever it occurs shall be construed as package containing pre-packed food articles, again indicating that pre-packaged or pre-packed food includes wholesale packages;
- (k) that Section 3(zc) of the FSS Act defines ‘manufacture’ as a process or adoption or any treatment for conversion of ingredients into an article of food, which includes any sub-process, incidental or ancillary to the manufacture and Section 3(zd) defines ‘manufacturer’ as a person engaged in the business of manufacturing any article of food for sale and includes any person who obtains such article from another person and packs and labels it for sale; that a combined reading of the said provisions with the definition of ‘consumer’ in

Section 3(f) of the FSS Act leaves no manner of doubt that the labelling requirements are for manufacturer of food also, whether the said food is for direct sale to the consumer or to an intermediary;

- (l) that Regulation 2.2.2 of the Packaging and Labelling Regulations requires *inter alia* the list of ingredients to be disclosed and the said requirement cannot be obviated by otherwise submitting the list of ingredients as the respondent No.1 / writ petitioner had done and which has been held by the learned Single Judge to be a sufficient compliance.

9. We had during the hearing enquired from the counsel for the appellant authority, whether an exporter of foods to India can be expected to comply with the provisions of FSS Act and the rules and regulations framed thereunder, besides with the laws, rules and regulations of its own country / place of manufacture and whether there is any corresponding obligation on the exporter of foods from India to, besides complying with the laws, rules and regulations of India, also comply with laws, rules and regulations of the country to which the goods are being exported.

10. The counsel for the appellant authority drew our attention to Section 25 of the FSS Act, sub-section (1)(iii) whereof prohibits import into India any article of foods in contravention of any of the provisions of the Act or any rule or regulation made thereunder or any other Act and stated that there is no similar provision for export of goods from India.

11. We further enquired from the counsel for the appellant authority, whether not the deficiency, if any in compliance with the Packaging and Labelling Regulations or any other applicable regulations qua the goods imported in India, if capable of being made up, can be permitted to be made up in India before the release of the goods, as the exporter of goods to India cannot ordinarily be expected to be aware of Packaging and Labelling Regulations and other such regulations of India.

12. No clear answer was forthcoming.

13. Per contra, the senior counsel for the respondent No.1 / writ petitioner supported the judgment of the learned Single Judge.

14. We had during the hearing enquired, whether not food additive was different from food.

15. The counsel for the appellant authority contended that if food additive was held to be not food, nothing in the Act or the rules and regulations framed thereunder would regulate the food additives and which will be contrary to the provisions and spirit of the Act. Attention was also invited to Section 19 of the Act providing that no article of food shall contain any food additive or processing aid unless it is in accordance with the provisions of the Act and the regulations made thereunder. On the basis thereof, it was argued that a food additive also has to follow all the laws, rules and regulations. It was also contended that if food additive was held to be not food, the provisions of Section 25 of the Act with respect to import of articles of food would also not be applicable to food additives. Similarly, it was stated that if such a view was to be taken, the appellant authority as well as other agencies would cease to have jurisdiction under Sections 16 & 18 of the Act qua food additives. Attention was also invited to Regulation 2.1.12 of the Safety and Standards Regulations specifically dealing with Fermented Milk Products and providing the parameters therefor including for Yoghurt and it was contended that without the subject consignment / goods complying with the Packaging and Labelling Regulations, the appellant authority would be unable to test, whether the said parameters were met or

not. It was also argued that the respondent No.1 / writ petitioner was hesitating to make the declaration as required by the Packaging and Labelling Regulations, as it will in the said declaration have to declare the harmful bacteria contained in the goods. It was yet further argued that without declaration in terms of the Packaging and Labelling Regulations on the consignment, no lab can carry out the requisite test.

16. The senior counsel for the respondent No.1 / writ petitioner though in his initial argument contended that a food additive is included in the definition of food in Section 3(1)(j) but in subsequent hearing contended that a food additive is distinct from food. We may in this regard notice that the contention of the respondent No.1 / writ petitioner before the learned Single Judge was of a food additive being not food and thus the Packaging and Labelling Regulations being not applicable to food additives. However, the learned Single Judge appears to have not accepted the said argument and held the Packaging and Labelling Regulations to be not applicable for the reason of the subject goods being not pre packaged or pre packed food-ready for sale to consumer. The learned Single Judge also held that even if the Packaging and Labelling Regulations were applicable, the same had been substantially complied with by the respondent no.1 / writ petitioner. It is

perhaps for this reason that the senior counsel for the respondent No.1 / writ petitioner in the opening arguments had supported the judgment of the learned Single Judge but subsequently reverted to the original argument.

17. The counsel for the appellant authority in rejoinder:

- (a) contended that if food additive is held to be not food, the same will negate the Act;
- (b) relied on judgment dated 22nd September, 2014 of the Division Bench of the High Court of Calcutta in MAT No.1252/2014 titled ***Food Safety and Standards Authority of India Vs. Heartland Trading Company Pvt. Ltd.*** holding that the deficiency in affixing appropriate labels could not be rectified and the articles could be re-labelled, if at all, only by their foreign manufacturer that had originally labeled them;
- (c) relied on another judgment dated 5th September, 2014 of another Division Bench of the High Court of Calcutta in W.P. No.472/2014 titled ***Authorized Officer, Food Safety and Standards Authority of India Vs. Sarad Kumar Bohra*** also holding that the

name of the ingredients used in the product have to be listed at the time of its manufacture and if such listing is not done at the time of manufacture, the importer cannot be permitted to put the label;

(d) relied on order dated 27th August, 2014 of the Division Bench of this Court in W.P.(C) No.3668/2013 titled ***Lok Jagriti Vs. Union of India*** laying down that what is prohibited under the FSS Act and the rules and regulations framed thereunder, even if permitted by CODEX Alimentarius will still be regarded as prohibited in terms of the law of India (we may add that CODEX Alimentarius is a collection of internationally recognized standards, codes of practice, guidelines and other recommendations relating to foods, food production and food safety).

18. The senior counsel for the respondent No.1 / writ petitioner pointed out that ***Heartland Trading Company Pvt. Ltd.*** supra was a case of edible grade refined oil with respect where to, specific regulations exist and not relating to food additives and that ***Sarad Kumar Bohra*** supra was a case of sugar confectionary which also is a food and not a food additive. It was further contended that on the contrary, the present case is not concerned with

a pre-packed food but with a food additive and particularly described in the Safety and Standards Regulations as a food additive and which also lay down the parameters thereof.

19. Both counsels have also since filed written submissions and the counsel for the appellant authority has on 12th March, 2015 also handed over copy of the judgment dated 4th February, 2014 of the Division Bench of the High Court of Kerala in W.A. No.1317/2014 titled *Authorized Officer, Cochin Sea Port and Airport Food Safety and Standards Authority of India Vs. Mondelez India Food Limited* holding Cocoa bean to be a food and subject to the Act and the Regulations made thereunder.

20. The appellant authority in his written submissions is not found to have stated anything new.

21. The respondent No.1 / writ petitioner in its written arguments has contended that lactic acid is a food additive and not a food and thus the Packaging and Labelling Regulations and the Guidelines dated 23rd March, 2012 are not applicable thereto.

22. On an analysis of the controversy which has unfolded and the rival contentions, in our view the following issues arise for adjudication:-

- A. What is the nature of the subject goods; whether they are a food or a food additive;
- B. Whether a food additive is also a food.
- C. If the goods are a food additive, distinct from food, whether the Packaging and Labelling Regulations are applicable thereto.
- D. If the Packaging and Labelling Regulations are applicable, whether the subject goods comply therewith.
- E. Whether the deficiency if any in the imported goods complying with Packaging and Labelling Regulations can be permitted to be made up / cured in India.

23. As far as the first of the aforesaid issues is concerned, the subject goods having specifically found mention in the Safety and Standards Regulations as a food additive, there is no manner of doubt that the same is a food additive. The counsel for the appellant authority also has really not disputed the same but has contended that a food additive is also a food.

24. The definitions of food and food additive in Sections 3(1)(j) & (k) of the Act are as under:

“3. Definitions:—(1) In this Act, unless the context otherwise requires—

- “(j) “food” means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.*
- (k) “food additive” means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include “contaminants” or substances added to food for maintaining or improving nutritional qualities.”*

25. In our opinion a food additive, is distinct from, and is not a food.

26. Food, in Section 3(1)(j) is defined as “any substance, ...which is intended for human consumption....”. The definition thereafter proceeds to

provide, that food “includes primary food, genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drinks, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment....”. It would thus be noticed that the definition, after providing that food is any substance intended for human consumption, includes within its fold certain items, some of which are also separately defined, but does not mention a food additive.

27. Per contra, Food Additive, in Section 3(1)(k) is defined as “any substance not normally consumed as a food itself or used as a typical ingredient of food....” and which is intentionally added to food for manufacturing, processing, packaging etc. of the food.

28. Substance is defined in Section 3(1)(zw) as any natural or artificial matter, whether in solid, liquid, gaseous or vapour form.

29. Thus, while food, essentially is something intended for human consumption, food additive, essentially is something not normally consumed as a food itself. Though both definitions, after so providing, proceed to be inclusive but in our understanding of the principles of Interpretation of

Statutes, the various items in the 'inclusive portion' of the definitions will have to satisfy the essential test.

30. Justice G.P. Singh in *Principles of Statutory Interpretation*, 13th Edition (2012) has authored that a definition in the form "mean and include" will be considered as exhaustive and will embrace only what is comprised within the ordinary meaning of the "means" part together with what is mentioned in the "includes" part of the definition. Reference is made to *Mahalaxmi Oil Mills Vs. State of A.P.* (1989) 1 SCC 164 where tobacco seeds which were not mentioned in the inclusive part of the definition of tobacco as any form of tobacco were held to be not tobacco.

31. It would thus follow that non-mentioning of food additive in the definition of food, has to be interpreted as food additive not falling within the definition of food.

32. Supreme Court in *Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III* (2009) 9 SCC 193 was concerned with the definition in Rule 2(G) of the CENVAT Credit Rules, 2002 of "input" as, meaning goods used in or in relation to manufacture of final product whether contained in the final product or not and including lubricating oils, paint, packing

material etc. It was held that the expression “goods used in or in relation to manufacture of final products” was the crucial requirement of the definition and anything mentioned in the inclusive part of the definition, till it also fulfilled the requirement of the crucial part of the definition, would not fall within the definition of "input". The legislative intention was held to be that the inputs falling in the inclusive part of the definition must have nexus with the crucial part of the definition. It was further held that in each case it has to be established that input mentioned in the inclusive part is used in or in relation to the manufacturing of the final product and that the definition has to be read in its entirety. It was yet further held that where the definition is in two parts namely the specific part and the inclusive part, both the parts are required to be satisfied.

33. To the same effect are *Board of Revenue Vs. A.M. Ansari* (1973) 3 SCC 512 (Para 26) and *The State of Himachal Pradesh Vs. Maharani Kam Sundari* MANU/HP/0062/1984 (DB) (Para 20).

34. Thus, a substance which is not normally consumed as a food by itself or used as a typical ingredient of a food and which may be a food additive, cannot be a food as only those substances which are intended for human

consumption can be food. Merely because a food additive may fall within the expression "...and includes any substance.....used into the food during its manufacture, preparation or treatment" within the inclusive part of the definition of food will not make a food additive food because a food additive fails to satisfy the crucial part of the definition of food i.e. "intended for human consumption". Similarly, because a food additive is added for technological purpose in the manufacture, processing, packaging etc. of food and becomes a component of or affects the characteristics of such food would also not make it a food because a food additive by itself is normally not consumed as a food.

35. That brings us to the fear expressed by the counsel for the appellant authority, of not treating food additives as food, taking the food additives outside the purview of the FSS Act.

36. The aforesaid argument of the counsel for the appellant authority, in our view, is based on a complete misconception of the scheme of the Act.

37. The FSS Act, as per its Preamble has been enacted to inter alia consolidate the laws relating to food and to regulate manufacture and storage etc. to ensure availability of safe and wholesome food for human

consumption. Section 2 of the Act also declares it to be expedient in public interest that the Union Government takes under its control the food industry, as the purpose of the Act. Thereafter as aforesaid, the definitions Section 3, besides "food", defines "food additive". The inclusion in the definitions Section 3 of the definition of 'food additive' is indicative of the expressions "laws relating to food", "standards of articles of food", "regulated manufacture....of food" and "ensure availability of safe and wholesome food" in the preamble and "control the food industry" in Section 2, taking within the ambit of the Act, food additives also. Section 4 of the Act provides for establishment of the FSS Authority of India i.e. the appellant authority herein to exercise the powers conferred on it and to perform the functions assigned to it under the Act. Section 13, while providing for establishment by the appellant authority of scientific panels, in Section 13(3)(a) provides for establishment of a panel on food additives, flavourings, processing aids and materials in contact with food. Section 16(1) prescribes the duty of the appellant authority to regulate and monitor the manufacturing, processing and import of food so as to ensure safe and wholesome food. The definition of food in Section 3(1)(j) is "unless the context otherwise requires". The context in which the word food is used in

Section 16(1) takes within its ambit food additives also which are intentionally added in the manufacture, processing etc. of food and which thus necessarily play a vital role in ensuring safe and wholesome food. Without regulating and monitoring food additives which go into manufacture and processing of food, safe and wholesome food cannot be ensured. Not only so, Section 16(2)(b) specifically provides for the appellant authority to by Regulations specify the limits for use of food additives and the context in which the word food is used in other clauses of Section 16(2) would also take within its ambit food additives.

38. The appellant authority is thus clearly wrong in its assertion that without holding food additives to be also food, it would not have authority to regulate and monitor manufacture and processing, distribution, sale and import of food additives. The Act, takes within its ambit, food as well as food additives and the two being different, makes separate provisions with respect to two. However, the context in which food is used in some of the provisions of the Act, take within their ambit food additives also. What the appellant authority is however wanting to do is to make the provisions of the Act made in context of foods, applicable to food additives also and which cannot be permitted.

39. This becomes further evident from Section 19 of the Act which prohibits any article of food from containing food additives or processing aid unless such food additive or processing aid is in accordance with the FSS Act and Regulations made thereunder.

40. The expression "genetically modified or engineered food" used in the definition of food in Section 3(1)(j) is defined in Explanation (2) to Section 22 as food composed of or containing genetically modified or engineered organisms through modern biotechnology. Section 23 of the FSS Act and in exercise *inter alia* of power whereunder the Packaging and Labelling Regulations have been framed, prohibits sale of "any packaged food products" which are not marked and labelled in the manner as specified by the Regulations. A question would arise whether the said prohibition and the power to make Regulations for packaging and labelling extends also to food additives - whether the word food therein would also include "food additives". The word "sale" is defined in Section 3(1)(zr) as sale of any article of food whether by wholesale or retail for human consumption or use. A food additive, as aforesaid is not normally for human consumption and we are thus of the opinion that Section 23 has no application to food additives

and the power to make Regulations thereunder qua packaging and labelling do not apply to food additives.

41. Section 25 deals with import and prohibits import into India of unsafe or misbranded or sub-standard food and any article of food in contravention of any provision of the Act or Rules or Regulations made thereunder. Since the Act contains provisions with respect to food additives, it follows that the prohibition against import into India shall be applicable to food additives unless the same are in accordance with the provisions of the FSS Act or any Rule or Regulation made thereunder.

42. Since the Act contains provisions with respect to food additives, the enforcement mechanism under Chapter VII of the Act, the provision relating to offences and penalties under Chapter IX of the Act and the adjudicatory mechanism provided under Chapter X of the Act would be applicable to food additives also.

43. That brings us to the third issue i.e. of the applicability of the Packaging and Labelling Regulations to the food additives.

44. The said Regulations have been made in exercise of powers under Section 23 of the FSS Act read with Section 92(2)(k) of the FSS Act.

Section 92(2)(k) empowers the appellant authority to make Regulations under Section 23. We have hereinabove held that the context in which the word food is used in Section 23, does not allow inclusion of food additives therein. It thus follows that the Packaging and Labelling Regulations do not apply to food additives. A reading of the Packaging and Labelling Regulations also shows that the same can possibly have no application to food additives. This also becomes evident from the anomalies arising from the intent of the appellant authority to apply the said Regulations to food additive with which we are concerned. We had during the hearing enquired from the counsel for the appellant authority, as to how possibly for a food additive of the nature with which we are concerned in the present case, any information on the label thereof of nutritional value or whether it is veg. or non-veg. can be given. The counsel though, when we enquired whether he would classify lactic acid / lactic culture as veg. or non-veg., stated that it is non-veg. but when we enquired, whether yogurt, for use in manufacture whereof it is used would classify as veg. or non-veg., he was nonplused.

45. Per contra, the Safety and Standards Regulations made under Section 16 read with Section 92(2)(e) of the FSS Act, in addition to prescribing the safety and standards of food products also specifically deal with food

additives. Chapter 2 thereof prescribes the standard of different food products, mainly milk and milk products, fats, oils and fat emulsions, fruit and vegetable products, cereal and cereal products, meat and meat products, fish and fish products, sweet and confectionaries, sweetening agents, salts, spices, condiments and retail products, beverages and certain other proprietary foods. Chapter 3 of the said Regulations deals with food additives and in Regulation 3.1.12 thereunder, dealing with sequestering and buffering agents, lactic acid finds mention and use whereof is prescribed only as an acidulant in miscellaneous foods and limited to quantities mentioned thereunder. Appendix A of the said Regulations prescribing the use of food additives in food products, in Table 14 thereunder listing food additives for use in milk products, under the sub-heading acidifying agents also lists lactic acid together with the quantities thereof which can be used in different kinds of food, cheese, cheese spread, yoghurt, evaporated milk, sweetened condensed milk, butter, milk fat, milk powder, cream powder, ice cream, kulfi, casein products, whey powder, paneer. We may mention that the maximum quantity of lactic acid that can be used in yoghurt has been left blank.

46. It is not as if the appellant authority is prohibited from making any other Regulations qua food additives as the one with which we are concerned, in the present case, if the need to provide any other restriction/limit, with respect to the same is felt. As aforesaid, Section 16 of the FSS Act vests wide powers in the appellant authority to make Regulations to ensure safe and wholesome food. If the appellant authority feels that to ensure safe and wholesome food, any Regulations qua packaging and labelling of food additives are also required to be made, the appellant authority under Section 16 read with Section 92(2)(e) would be entitled to do so. Not only so, Section 19 read with Section 92(2)(h) also enables the appellant authority to make Regulations qua additives to be used in the manufacturing of food. However the appellant authority cannot be permitted to apply to food additives, Packaging and Labelling Regulations made under Section 23—for food, and application whereof to food additives would lead to ridiculous results.

47. In the light of the above, issues D and E culled out by us hereinabove do not arise for adjudication. Therefore, without intending to return any conclusive finding on the said aspect we may only observe that the whole purpose of labelling is to make the persons dealing with the product aware of

the nature and character thereof. The prohibition in Section 23(1) against the manufacturer of food products not marked and labelled in the manner prescribed cannot possibly apply to a manufacturers of a food product situated outside India. However, the same would apply to distribution, sale / exposure for sale and delivery of such products in India and before which is done, the said products would definitely be required to be labelled in the manner prescribed. However, the responsibility for such labelling cannot be of the foreign manufacturer of such food products and we see no bar to the requirement of such labelling being fulfilled by the person who distributes, sells, dispatches or delivers the said imported goods in India. In our opinion, insistence on reshipping of the said goods to the foreign manufacturer thereof does not serve any purpose. It would also mean, reliance being placed on the declaration on the label by a foreigner, rather than an Indian and which is unacceptable.

48. We thus, though for the reasons aforesaid and which are different from the reasons which prevailed with the learned Single Judge, dismiss this appeal and the appellant authority itself, which is the framer of the Regulations, having misapplied the same, is burdened with costs of Rs.20,000/-.

LPA No.711/2014

49. This appeal is preferred against the judgment dated 20th August, 2014 in W.P.(C) No.3708/2014 preferred by the respondent No.1 / writ petitioner (respondent No.2 is Union of India and respondent No.3 is the Additional Commissioner of Customs). The said writ petition was filed impugning the action of the appellant authority of holding, part of the consignment of chocolates imported by the respondent No.1 / writ petitioner, to be non-compliant with the Packaging and Labelling Regulations and thus refusing the NOC to enable the respondent No.1 / writ petitioner to have the said consignment of chocolates released from the Customs Authority. The learned Single Judge, by the impugned judgment, directed the appellant authority and the Customs Authorities to, after the respondent No.1 / writ petitioner had put the requisite labels thereon, clear the said consignment, subject to complying with other requirements.

50. The learned Single Judge, in the impugned judgment, found / observed / held:

- (i) that the respondent No.1 / writ petitioner had imported assorted chocolates manufactured by Chocolatier Guylian N.Y.; these

chocolates which arrived at ICD, Dadri, on 3rd January, 2013, were essentially of twenty different types;

(ii) that while four types of the said chocolates were cleared, the appellant authority vide letter dated 5th May, 2014 refused to grant NOC to the remaining sixteen types of chocolates on the ground that eight types of chocolates were non-compliant with the Packaging and Labeling Regulations for not providing the date of manufacture and date of expiry on the label and the balance eight types were found to be having vegetable fats and thus non-compliant with Clause 2.7.4 of the Safety and Standards Regulations prohibiting any vegetable fat except cocoa butter in chocolate;

(iii) that the Packaging and Labelling Regulations required the label to indicate the date of manufacture or packaging of the commodity, even where the 'best before or use by date' is mentioned on the label;

(iv) that admittedly the labels on goods in question though indicated the best before date but did not mention the date of manufacturing; that thus the said eight types of the chocolates did indeed not comply with the Packaging and Labelling Regulations;

(v) however, it was also the contention of the respondent No.1 / writ petitioner that the defect was curable;

(vi) that as per the definition of label in Section 3(1)(z) of the FSS Act, it was not necessary that a label be printed directly on the cover, wrapper of the container but could also be attached as a sticker, provided that the sticker conformed to Regulation 2.2.1:4 of the Packaging and Labelling Regulations;

(vii) that the respondent No.1 / writ petitioner had furnished a certificate from the manufacturer giving the details of the manufacturing and the expiry dates in respect of each of the consignment;

(viii) that thus the appellant authority could satisfy itself that the labelling put by the respondent No.1 / writ petitioner correctly reflected the manufacturing date on the packages;

(ix) that the purpose of providing labels could not be lost sight of—the object of labelling the packaged products is to ensure that relevant information regarding the product is available on the package for the

benefit of the consumers; a non-detachable sticker providing all information would sufficiently meet this object;

(x) accordingly, the respondent No.1 / writ petitioner was permitted to cure the defect in labelling within the customs warehouse by affixing a non-detachable label giving all particulars as are necessary under the Packaging and Labelling Regulations and the Customs Authorities were directed to ensure that access to the goods was provided to the respondent No.1 / writ petitioner to enable it to affix the necessary labels on those goods and the appellant authority was directed to ensure that the goods in question were cleared, once the necessary labels had been affixed;

(xi) that the other eight types of chocolates were ‘filled chocolates’ i.e. a shell made with chocolate with a filling inside;

(xii) that the chocolate shell itself did not contain any vegetable fat;

(xiii) however, vegetable fat was found in the filling and on which basis the appellant authority had found the goods to be non-compliant with the Safety and Standards Regulations;

(xiv) however, Regulation 2.7.4 of the Safety and Standards Regulations indicates that in case of filled chocolates, the coating shall be of chocolate that meets the requirement of one or more of the chocolate types, meaning that the specification with regard to vegetable fat has to be confined only to the chocolate shell and not to the filling contained in the chocolate shell;

(xv) that even per Clause 2.2.2 of Codex Alimentarius Standard for Chocolate and Chocolate Products, the centre of the chocolate is distinct in composition from the external coating;

(xvi) that the standards prescribed for chocolate, could not be applied to the filling therein as the filling is distinct from the outer shell;

(xvii) that the appellant authority also had accepted this view in respect of consignments of chocolates imported by others;

(xviii) accordingly, it was directed that the said chocolates be also cleared, subject to the respondent No.1 / writ petitioner complying with the other requirements.

51. The appeal was entertained though no interim stay of the order of the learned Single was granted.

52. It was the contention of the counsel for the appellant authority:

(a) that the learned Single Judge has erred in holding that the defect in labelling could be rectified—reliance was placed on the judgments supra of the other High Courts holding the same to be not curable;

(b) that a filled chocolate is also a chocolate and therefore should comply with Regulation 2.7.4 of the Food Safety and Standards Regulations;

(c) that admittedly filling in the said chocolates contain vegetable fat in excess of the prescribed limit;

(d) that Regulation 2.7.4 supra prohibits use of vegetable fat in excess of prescribed limit—thus, the vegetable fat in excess of the prescribed limit cannot be permitted in the filling of the chocolate also;

(e) that the vegetable oil / vegetable fat does not melt in human body and is thus considered dangerous and not permitted beyond the prescribed limit;

(f) that Chocolatier Guylian also is not putting vegetable oil even in filling in chocolates meant for Europe and is using the same only for chocolates meant for India.

53. The counsel for respondent No.1 / writ petitioner argued:

(I) that the appellant authority in the past had allowed consignments of M/s Mars International India Pvt. Ltd. and M/s Ferrero, observing that the vegetable oil was in the filling part of the filled chocolate and the Safety and Standards Regulations and Codex Standard were silent on the use of vegetable fat in the filling part of the filled chocolate and had also issued a clarification dated 14th November, 2014 to the effect that edible vegetable oils, fats including partially hydrogenated vegetable oils were considered as filler material in filled chocolate;

(II) that the power of the appellant authority to issue such clarification had been taken away by order dated 27th August, 2014 of the Division Bench of this Court in W.P.(C) No.3668/2013 titled ***Lok Jagriti Vs. Union of India***;

(III) that goods such as chocolates are perishable items and though are required to be cleared within 24 hours but the appellant authority delayed the release of goods;

(IV) that the alleged defect in labelling also was communicated after five months of arrival of the consignment;

(V) that the labelling requirement arises at the time of sale, when the goods go into the hands of the consumers and not at the time of import;

(VI) that the appellant authority had undertaken to put suitable stickers to comply with the requirement;

(VII) that vegetable fats have no issue of safety, as they are edible fats commonly consumed—they are used and permitted to be used to reduce dependency on cocoa—use of vegetable fats is also known to

improve product hardness, enhance glossiness and prolong the shelf life of chocolates;

(VIII) that the appellant authority did not comply with the order of the learned Single Judge, causing huge loss to the respondent No.1 / writ petitioner as the goods expired and the respondent No.1 / writ petitioner had to abandon the goods.

54. The counsel for the Customs contended that though the Customs Authorities in compliance with the judgment of the learned Single Judge were ready to release the goods but the respondent No.1 / writ petitioner did not come forward and did not pay any duty and no NOC from the appellant authority also was produced.

55. As would be obvious from the aforesaid, the controversy in this appeal is twofold. The first is with respect to the curability of the defect, if any in labelling and the second is with respect to vegetable fat.

56. As far as the first aspect is concerned, we have already in our decision in the other appeal, though ultimately finding that the question did not arise for adjudication therein, nevertheless expressed our view that the FSS Act

and the Regulations made thereunder cannot be binding on a foreign manufacturer or supplier of food and considering the purpose of labelling, the defect / deficiency in labelling in imported goods is curable. We now confirm our said observations / findings

57. We have perused the judgment of the High Court at Calcutta, relied upon by the appellant authority in this regard and are unable to find therein any reason for holding, the defect in labelling to be not curable, other than that there is no provision therefor in the Act or the Regulations.

58. We are, with respect, unable to concur.

59. The object of labelling, as per the counsel for the appellant authority also, vis-à-vis the imported goods is to enable the appellant and other authorities to know what the imported goods are and to, if desire to satisfy themselves as to the veracity of the declaration on the label, carry out the requisite tests.

60. We have wondered that if the appellant authority is willing to accept the declaration on the label affixed by the foreign supplier / manufacturer at the time of dispatch of goods to India, what could be the objection of the

appellant authority, in the event of the same not furnishing any other particulars, in allowing the foreign supplier / manufacturer, before the goods are released in India, through any of the modes of communication now available, furnishing the said particulars. Similarly, we are unable to understand the objection of the appellant authority to in allowing the Indian importer of goods making up the said deficiency. No sanctity to the process of affixing label prior to receipt in India of the goods has been explained. Labels, in compliance of other laws viz. as to maximum retail price etc. are in any case put in India, on the imported goods.

61. As far as the reasoning accepted by the Calcutta High Court, of there being no provision in the FSS Act permitting making up of the deficiency, is concerned, Section 23 which is the relevant provision, in Sub-Section (1) thereof contains a prohibition and in Sub-Section (2) contains an obligation in this regard. While the prohibition is on the manufacturer, distributor, seller, retailer, dispatcher, the person making delivery, agent, broker, from manufacturing, distributing, selling, offering for sale, dispatching delivery, packaged food products which are not marketed or labelled in the manner prescribed, the obligation to ensure that the labelling and packaging does not mislead the consumer, is of the “food business operator”. A “food business

operator” is defined in Section 3(1)(o) as a person by whom the business is carried on or owned and is responsible for ensuring compliance with the provisions of the FSS Act and the Rules and Regulations made thereunder. As aforesaid, the FSS Act cannot and does not have extra-territorial operation, i.e. outside India. Thus, a food business operator, in relation to imported goods can be only a person in India who has imported the said goods and who distributes or sells the same in India and cannot be the foreign manufacturer or supplier or exporter of such goods. Section 25 also, prohibits import into India of any unsafe or misbranded or substandard foods or in contravention of the provisions of the Act or any Regulation made thereunder. We can understand, that non-compliance of some of the packaging regulations to ensure safety of goods may not be rectifiable as the damage from non-compliant packaging may already have been done. However, we fail to see the harm if any in allowing any defect / deficiency in labelling being permitted to be made up, in respect of imported goods, in India. We find no prohibition thereagainst in the Act or any Regulations. In our opinion, in case of imported foods, the obligation to comply with the provisions of the Act and the Regulations thereunder with respect to labelling is of the food business operator in India who imports the goods or

otherwise deals with them first after their arrival in India and thus the said obligation can be permitted to be performed in India.

62. We otherwise also see no purpose in insistence on the goods found deficient/defective qua labelling being re-shipped to the manufacturer to enable him to cure the said defect when such defect can be cured by him or anyone on his behalf, across oceans, in India itself.

63. As far as the aspect of vegetable oil / vegetable fat is concerned, Regulation 2.7.4 of the Safety and Standards Regulations, under Chapter 2 thereof titled “Food Product Standards”, with respect to the chocolate, is as under:

“2.7.4: Chocolate

*Chocolate means a homogeneous product obtained by an adequate process of manufacture from a mixture of one or more of the ingredients, namely, cocoa beans, cocoa nib, cocoa mass, cocoa press cake and cocoa dust (cocoa fines/powder), including fat reduced cocoa powder with or without addition of sugars, cocoa butter, milk solids including milk fat. **The chocolates shall not contain any vegetable fat other than cocoa butter.***

The material shall be free from rancidity or off odour, insect and fungus infestation, filth, adulterants and any harmful or injurious matter.

The chocolates shall be of the following types:—

Milk chocolates is obtained from one or more of cocoa nib, cocoa mass, cocoa press cake, cocoa powder including low-fat cocoa powder with sugar and milk solids including milk fat and cocoa butter.

Milk Covering Chocolate - as defined above, but suitable for covering purposes.

Plain Chocolate is obtained from one or more of cocoa nib, cocoa mass, cocoa press cake, cocoa powder including low fat cocoa powder with sugar and cocoa butter.

Plain Covering Chocolate-same as plain chocolate but suitable for covering purposes.

Blended Chocolate means the blend of milk and plain chocolates in varying proportions.

White chocolate is obtained from cocoa butter, milk solids, including milk fat and sugar.

Filled Chocolates means a product having an external coating of chocolate with a centre clearly distinct through its composition from the external coating, but does not include flour confectionery pastry and biscuit products. The coating shall be of chocolate that meets the requirements of one or more of the chocolate types mentioned above. The amount of chocolate component of the coating shall not be less than 25 per cent of the total mass of the finished product.

Composite Chocolate-means a product containing at least 60 per cent of chocolate by weight and edible wholesome substances such as fruits, nuts. It shall contain one or more edible wholesome substances which shall not be less than 10 per cent of the total mass of finished product:

Provided that it may contain artificial sweeteners as provided in regulation 3.1.3 and label declaration as provided under regulation 2.4.5 (24, 25, 26, 28 & 29) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011:

Provided further that in addition to the ingredients mentioned above, the chocolate may contain one or more of the substances as outlined below, under different types of chocolates.

(a) edible salts.

(b) spices and condiments.

(c) permitted emulsifying and stabilizing agents.

(d) permitted sequestering and buffering agents.

The product may contain food additives permitted in these regulations including Appendix A.

Chocolates shall also conform to the following standards namely:—

Sl. Characteristics No.	Requirements for					
	Milk Chocolate	Milk Chocolate	Plain Chocolate	Plain Chocolate	White Chocolate	Blended Chocolate
1. Total fat (on dry basis) per cent by weight. Not less than	25	25	25	25	25	25
2. Milk fat (on dry basis) Per cent by weight. Not less than	2	2	-	-	2	-
3. Cocoa solids (on Moisture-free and fat free basis) per cent by weight	2.5	2.5	12	12	-	3.0

Not less than						
4. Milk Solids (on	10.5	10.5	-	-	10.5	1
Moisture-free and fat-						
free basis) per cent						
by weight	-	-	-	-	-	9
Not less than/not more						
than						
5. Acid insoluble ash	0.2	0.2	0.2	0.2	0.2	0.2
(on moisture fat and						
Sugar free basis)						
per cent by weight						
Not more than						

”

(emphasis added)

64. It is clear from a plain reading of the aforesaid provision, that there is a prohibition against chocolates containing any vegetable fat other than cocoa butter.

65. The learned Single Judge however, relying on the description of filled chocolates as having an external coating of chocolate with a centre clearly distinct in composition from the external coating and from the further prescription with respect to filled chocolate that "the coating shall be of chocolate that meets the requirements of one or more of the chocolate types mentioned above" has held that the prohibition against chocolate not containing any vegetable fat/oil other than Cocoa Butter is only in the composition of the chocolate and does not prohibit vegetable fat/oil other than Cocoa Butter from being filled inside a chocolate shell/covering.

66. We however have the following reservations with respect to the aforesaid interpretation by the learned Single Judge of Regulation 2.7.4 supra:

(A) The prohibition in the definition of chocolate, against the same containing any vegetable fat/oil other than Cocoa Butter is worded in very wide language and the expression "shall not contain.....any vegetable fat/oil" would include within its ambit vegetable fat/oil being contained inside the chocolate though not in the composition of chocolate.

(B) The prescription in the description of filled chocolate is that the coating/shell thereof shall be of chocolate that meets the requirement of one or more of the chocolate types "mentioned above". The chocolate types "mentioned above" are milk chocolate, milk covering chocolate, plain chocolate, plain covering chocolate, blended chocolate and white chocolate. The requirement in each of the said types of chocolates is de hors the prohibition qua vegetable fat/oil other than Cocoa Butter - the said requirements cannot dilute the absolute prohibition against chocolates containing any vegetable

fat/oil other than Cocoa Butter but in the general definition/description of chocolates.

(C) The language of Regulation 2.7.4 commonly understood would be of there being a prohibition against chocolates containing vegetable fat/oil other than Cocoa Butter—a chocolate containing vegetable fat/oil other than Cocoa Butter, though not in its composition but inside it would nevertheless be understood as chocolate containing vegetable fat/oil.

(D) If consumption of vegetable fat/oil other than cocoa butter, by the consumers of chocolate is harmful so as to require the appellant authority to ban the same in chocolate, the said harm would still be caused by the vegetable fat / oil filled inside the chocolate rather than being homogeneously mixed with the other ingredients of the chocolate in its composition.

(E) A chocolate with the filling of vegetable fat would also be sold and marketed as chocolate only and nothing else and a buyer/consumer thereof is likely to assume that the same in

accordance with Regulation 2.7.4 does not contain any vegetable fat other than cocoa butter, thereby prejudicing the consumer interest.

(F) Our limited knowledge is that vegetable fat/oil are associated with bad cholesterol and risk of coronary heart disease. Perhaps vegetable fat/oil other than cocoa butter were prohibited in chocolates, being considered as bad for children perceived at least in our country as the largest consumer of chocolates, though we have strong doubts about such perception itself.

(G) If it were to be held that the prohibition against chocolate containing vegetable fat/oil other than Cocoa Butter does not extend to anything contained inside a chocolate covering / shell, it would mean that nearly anything, even non-vegetarian products, can be 'contained' inside the chocolate.

(H) Had the legislative intent been to exclude vegetable fat/oil other than Cocoa Butter, only from the mixture/composition constituting chocolate, Regulation 2.7.4 would have while defining the contents of the mixture excluded vegetable fat other than cocoa butter therefrom

and a separate prohibition using the word "contain" would not have been necessary.

(I) The word "contain", in Shorter Oxford Dictionary, 6th Edition is explained as, 'having in it', 'include as a part of the content', 'comprise', 'have inside itself' and would take within its ambit vegetable oil filling inside the chocolate shell.

(J) The chocolate content in a filled chocolate can be as low as 25%, leaving as much as 75% to comprise of other vegetable fat which though is not deemed good enough for being in the homogeneous mixture comprising chocolate but is permitted to be concealed inside chocolate, thereby misleading the consumers.

(K) In comparison, a composites chocolate, described "after" filled chocolate, is required to have at least 60% content of chocolate and remaining of other substances.

(L) We have not been able to fathom as to what difference it makes whether the vegetable oils / vegetable fats other than cocoa butter are contained in homogeneous product constituting chocolate or in a

cavity inside the said chocolate. It is not the argument that the qualities / characteristics / effect of vegetable oil / vegetable fat other than cocoa butter change upon being mixed with other ingredient of a chocolate, so as to become harmful, while on itself being not harmful.

67. At the same time, our research shows:

(a) There appears to be no bar *per se* against the consumption of vegetable fats / oils other than cocoa butter; if that were so, we fail to understand as to why the consumption thereof as a filling inside a chocolate should be barred.

(b) At least some material available on the internet indicates that the prohibition against use of vegetable fats other than cocoa butter in chocolate all over the world had more to do with maintaining the quality, flavor and taste of chocolate and for the benefit of the cultivators of the cocoa bean, than for the harmful effects of vegetable fats, though mention at places is also made of more harmful effects of vegetable fats other than cocoa butter.

(c) Though prior to 2nd August, 2003, the European Union had prohibited use of vegetable fats in chocolate throughout its member

states, since August 2003, certain vegetable fats (refined and /or fractioned) to the extent of five percent are permitted in chocolate

(d) Addition of vegetable fat other than cocoa butter, whether as a component of chocolate mixture or as a filling inside a chocolate shell is reported to reduce/ avoid 'blooming' of chocolates, increase shelf life of chocolates and add to the sheen/gloss of the chocolate; and to solidify the chocolate, all the said factors are beneficial to the distribution and sale of chocolate in India with its high climatic temperatures and vast distribution network requiring long shelf life.

(e) Vegetable fats being considerably cheaper than cocoa butter, also help reduce the price of chocolate.

(f) The High Court of Andhra Pradesh in *Sanka Ravi Gopal Vs. The State of A.P* MANU/AP/1022/2011 relying upon a judgment of the Jharkhand High Court has taken the same view as the learned Single Judge while dealing with clause A 25.03 of Appendix B (definitions and standards of quality) to the Prevention of Food Adulteration Rules, 1955 with respect to chocolate and found to be identical to Regulation 2.7.4 (Supra) and held that in standards fixed

for preparation of the filled chocolate that there was no prohibition of the filled part of chocolate containing hydrogenated vegetable fat and that it was only the chocolate portion which should not contain vegetable fats. (The Prevention of Food Adulteration Act, 1954 whereunder the Prevention of Food Adulteration Rules, 1955 were framed stand repealed vide the FSS act. It appears that the appellate authority has merely copied the standard of chocolate from the PFA rules supra which were drafted when all the chocolate producing nations had prohibited the chocolates from containing vegetable fat and without noticing the change brought about in the said nations in the year 2003).

(g) With respect to a matter of safety standards of food items consumed all over the country, it is expedient that the standards are understood as the same all over the country and there is no inconsistency.

68. We have hereinabove recorded the thoughts which come to our mind. The subject is required to be dealt with by the experts and a body of which, i.e. the appellant authority has been established and it is not for us to take a final call on the matter. Though we could have in exercise of powers under

Article 226 of the Constitution of India also directed the appellant authority to so decide but we find that section 18 of the FSS act containing the general principles to be followed in administration of the Act, also in clause (c) of subsection (1) thereof permits a call on a persisting uncertainty, to be taken and in the interregnum make such arrangements as maybe appropriate. We accordingly direct the appellant authority to in accordance with Section 18 and after considering all the relevant factors including those highlighted by us hereinabove decide whether a filling of vegetable fat other than cocoa butter and to what extent is permitted in filled chocolates. We deem time of six months to be appropriate therefor. The said decision be accordingly taken within six months of today.

69. Section 18(2) also requires the appellant authority to take into account prevalent practices, international standards and practices. Our research shows that the “Guidance on Cocoa and Chocolate Products Regulations, 2003” published by the Food Standards Agency of the United Kingdom, in clause 7 thereof states that the Regulations allow the use of specified vegetable fats other than cocoa butter upto a maximum on five percent in the preparation of chocolate products including in filled chocolates. It thus appears that internationally, vegetable fat other than cocoa butter, though are

permitted in chocolates including as filling in filled chocolates but only of certain type and subject to maximum limits of 5% of the total content. The appellate authority while taking the decision aforesaid, may consider the said aspect also.

70. The next question which arises is of the interim arrangement to be made till the appellant authority so takes a decision. Having given our thought to the matter and particularly in light of:

(I) There being no per se prohibition against consumption of vegetable fats other than cocoa butter.

(II) At least two other High Courts besides the Learned Single Judge of this Court having taken a view that prohibition against vegetable fats in chocolates does not apply to a filling inside a chocolate.

We are of the view that for the said period of six months, the view taken by the Learned Single Judge in this regard be allowed to prevail.

71. As far as the reliance by the respondent No.1 / writ petitioner on the clearance earlier accorded to chocolates filled with vegetable fat of M/s Mars International India Pvt. Ltd. and M/s Ferrero India Pvt. Ltd. and the clarification issued is concerned, the same does not come in the way of the appellant authority refusing NOC to chocolates containing vegetable oil / vegetable fat, even as a filling, if otherwise the same is prohibited under the Regulations. There can be no estoppel against a statute. Even otherwise, a past mistaken view of the appellant authority cannot be held to bind the appellant authority. Similarly, an administrative clarification issued cannot override a statutory regulation. Supreme Court, in ***Vishal Properties Pvt. Ltd. Vs. State of U.P.*** (2007) 11 SCC 172 has held that no Authority can be directed to repeat the wrong illegal action done earlier and a mistake cannot be perpetuated on the ground of discrimination and hardship. To the same effect is, ***Maharishi Dayanand University Vs. Surjit Kaur*** (2010) 11 SCC 159. Recently in ***UOI Vs. Ashok Kumar Aggarwal*** 2013(14) SCALE 323 it was also reiterated that an Authority cannot issue executive instructions in contravention of statutory rules.

72. As far as the argument of the counsel for the respondent No.1 / writ petitioner of delays is concerned, we need only to observe that we do indeed

find considerable delay on the part of the appellant authority in dealing with the application of the respondent No.1 / writ petitioner for NOC for the subject goods. The appellant authority ought to keep the shelf life of the goods into consideration in this regard and cannot in its red-tapism make the goods redundant and of no value. The appellate authority to in future deal with such request in right earnest and without any delays. We however do not deem it appropriate to render any conclusive finding in this regard and leave it open to the respondent No.1 / writ petitioner to, if so desires take appropriate action against the appellant authority for the losses, if any caused to the appellant authority.

73. LPA No.711/2014 is accordingly partly allowed to the aforesaid extent with no order as to costs.

74. SUMMARY: The length of the judgment having stretched beyond intended, we deem it appropriate to summarise our findings as under:

A. A Food Additive, as defined in the FSS Act is distinct from food, also as defined in the Act.

B. The FSS Act deals with food as well as Food Additive and empowers the appellate authority to exercise specified powers with respect to Food Additive also.

C. While some of the provisions of the FSS Act are with respect to foods only and others are with respect to Food Additive only, yet in context of some other provisions, food additive are included in foods.

D. Section 23 of the FSS Act titled “Packaging and Labelling of Foods” is with respect to food only and not with respect to food additive.

E. Axiomatically the Packaging and Labelling Regulations made in exercise of power under Section 23 are with respect to foods only and not applicable to food additive.

F. The appellate authority, if so deems necessary to make Regulations concerning Food Additive, is empowered to make the same under Sections 16 and 19.

G. However without making the Regulations to cater specifically to the Food Additives, the appellate authority cannot apply Packaging

and Labelling Regulations meant for foods, to Food Additive, leading to anomalous results.

H. The defect in labeling qua the imported goods are curable in India, before the goods are released by the customs authorities.

I. The question, whether the prohibition in Regulation 2.7.4 of the Safety and Standard Regulations against chocolates containing vegetable fat other than cocoa butter applies also to the filling in the filled chocolates has been referred back to the appellate authority for taking decision in accordance with observations in the judgment, within six months of today.

J. Till the appellate authority takes such decisions, the view taken by the learned Single Judge and which is also found to be the view with respect to identical standards of chocolates under the old legislation will prevail i.e. the appellant authority will not consider filled chocolates to be in violation of Regulation 2.7.4 of the Safety and Standards Regulations for containing vegetable fat other than Cocoa Butter in the filling.

K. The appellant authority is directed to henceforth process the applications for NOC for release of imported foods/food additives from Customs Authorities on day-to-day basis, without any delay and having regard to the shelf life thereof.

75. LPA 659/2014 is dismissed with costs of Rs.20,000/- to the respondent No.1 / writ petitioner.

76. LPA No.711/2014 is partly allowed in terms of above.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

APRIL 22, 2015

‘gsr/bs’