

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

WP(C).No. 20548 of 2015 (P)

PETITIONER :

**MONIESH ENTERPRISES
1ST FLOOR, 1-A, RONDALA GOVINDAN STREET
SHEVAPET, SALEM
TAMIL NADU-636 002
REPRESENTED BY ITS CO-PARCENER MR. MONIESH**

**BY ADVS.SRI.MATHEWS K.UTHUPPACHAN
SRI.TERRY V. JAMES
SRI.T.C.THOMAS**

RESPONDENT(S) :

**1. FOOD SAFETY AND STANDARDS AUTHORITY OF INDIA
(MINISTRY OF HEALTH AND FAMILY WELFARE) FDA BHAVAN
KOTLA ROAD, NEW DELHI – 110002
REPRESENTED BY THE DIRECTOR**

**2. THE AUTHORISED OFFICER
COCHIN SEA PORT AND AIR PORT
FOOD SAFETY AND STANDARDS AUTHORITY OF INDIA
MINISTRY OF HEALTH AND FAMILY WELFARE), 1ST FLOOR
MARINE BUILDING, NORTH END, WILLINGTON ISLAND
KOCHI-682 009, KOCHI - 682 009.**

***ADDL. R3 IMPEADED**

***ADDL.R3. THE DEPUTY COMMISSIONER OF CUSTOMS (IMPORT)
CUSTOMS HOUSE, KOCHI, WILLINGTON ISLAND
KOCHI – 682 009.**

***ADDL. R3 IS IMPEADED AS PER ORDER IN IA NO. 11571/2015 DATED
10/08/2015**

**R1 & R2 BY ADVS. SRI.PAUL JACOB, SC
SRI.MEHMOOD PRACHA
ADDL.R3 BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL, SC**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 6-08-2015,
THE COURT ON 10-08-2015 DELIVERED THE FOLLOWING:**

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...2/-

APPENDIX

PETITIONER'S EXHIBITS :

- EXT.P1 : COPY OF PACKING LIST OF M/S. Siira.
- EXT.P2 COPY OF THE BILL OF ENTRY NO. 8199954 DATED 4-2-2015.
- EXT.P3 COPY OF LETTER DATED 16-2-2015 WITH PAYMENT RECEIPT DATED 12-2-2015.
- EXT.P4 COPY OF THE REJECTION REPORT DATED 18-2-2015 OF THE SECOND RESPONDENT.
- EXT.P5 COPY OF THE LETTER DATED 20-2-15 OF Siira.
- EXT.P6 COPY OF JUDGMENT DATED 12.5.2015 IN WP(C) NO. 10853/2015 OF THE HON'BLE KERALA HIGH COURT.
- EXT.P7 COPY OF THE ORDER DATED 5.6.2015 OF THE 2ND RESPONDENT REJECTING THE REQUEST TO CURE DEFECTS.
- EXT.P8 COPY OF LAWYER'S NOTICE SENT TO THE 1ST AND 2ND RESPONDENTS DATED 9.6.2015.
- EXT.P9 COPY OF GUIDELINES ISSUED BY THE 1ST RESPONDENT WITH REGARD TO FOOD IMPORT CLEARANCE PROCESS BY FSSAI'S FOR AUTHORIZED OFFICERS DATED 23.3.2012.

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.S. TO JUDGE

Mn

'C.R.'

K. VINOD CHANDRAN, J.

W.P.(C) No. 20548 of 2015 (P)

Dated this the 10th day of August, 2015

J U D G M E N T

The petitioner is concerned with the import clearance of 'Annatto Seeds', which has been refused, due to non-issuance of a 'No Objection Certificate' (NOC) by the 2nd respondent, an authority under the Food Safety and Standards Act, 2011 (for brevity the 'Act').

2. The petitioner imported, from Cote De Ivoire, 32000 kilo grams of Annatto Seeds, which is a food additive used as a colouring agent, in processed food products. M/s. SiiRA of Abidjan is said to have collected the Annatto Seeds and packed it for export to India, making them the exporter. On arrival at Cochin Port on 4.2.2015, the customs insisted for PQ and FSSAI clearance. When a request was made for taking samples for the purpose of the aforesaid clearance,

the 2nd respondent refused the same by Ext.P4. Ext.P4 remarks that, on physical verification, the name and complete address of the packer as required under 2.2.2:6 of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011 (for brevity 'Regulations') was not available in the consignment. The request to draw sample was hence rejected. In fact, Ext.P5 issued by the importer would indicate that the packing was not done as per the instructions of the importer.

3. The petitioner was before this Court with W.P.(C) No.10853/2015, which was disposed of by Ext.P6 judgment dated 12.05.2015. The official respondents before this Court contended that in terms of Section 23 of the Act, the petitioner's goods cannot be released. This Court, as an interim measure, directed the samples to be taken for analysis, which report of analysis was placed before Court in a sealed cover. By Ext.P6 judgment, this Court recorded

the fact that the report reveals the goods to be in conformity with the standards and that there is no impurity or contamination. Accepting the petitioner's contention that the defects are curable by the importer itself, subject to such curing being effected, the goods were directed to be released.

4. The 2nd respondent, however, issued Ext.P7, again relying on Section 23 of the Act and Regulation 2.2.2:6 of the Regulations. It was specifically noticed that the name and complete address of the Manufacturer/Packer, to be declared on every package of food in a non detachable manner, as per Regulation 2.2.1:4 of the Regulations and Section 23 of the Act, has not been complied with on the packages. The label attached was found to be on the jute bags and did not have the name and complete address of the packer.

5. The petitioner contends that a 'food additive' is not a 'food' as defined under the Act and that Section 23 of the Act would not be applicable to imports, and in any event the labels could be affixed by the importer before clearance and hence the defect is a curable one. The petitioner also relies on the Division Bench decision of the Delhi High Court in **FSSAI v. Danisco (India) Pvt. Ltd - LPA No.659/2014**. The Department, however, asserts on its operational experience that there is downloading of inferior goods into developing countries which has to be checked scrupulously and the provisions of the Act be diligently enforced. The learned Standing Counsel for the respondents would rely on a Single Bench decision of the High Court of Judicature at Madras in **M/s. Amrut Distilleries Limited v. The Authorised Officer, Chennai Seaport & Airport and another - W.P.No.33478 of 2014 and M.P. Nos. 1 and 2 of 2014** and a Division Bench of the High Court at Calcutta in **Food Safety and**

Standards Authority of India v. Heartland Trading Company Pvt. Ltd & others - MAT No.1252 of 2014.

6. The Delhi High Court in the aforesaid decision was concerned with two writ petitions where two different products, being 'Lactic Culture' and 'Chocolate', were refused to be issued with NOC under the Regulations. We are not concerned with the pronouncement with respect to chocolates since that was on a controversy as to the 'expiry date' and 'best before date'. The consignment of 'Lactic Culture' was found to be not complying with the Regulations for the reason that the ingredients list was not mentioned on the label. The goods imported was again a 'food additive' being a blend of defined strains of lactic acid bacteria, used in preparing yogurt and fermented milk products. The refusal of the Department was set aside by a learned Single Judge of that Court, holding that the Regulations will not be applicable. The Department was in appeal before the Division Bench.

7. The importer, in **Danisco** (supra), argued that the product was for industrial use and not for retail sale and thus the imported product need not disclose the list of ingredients in terms of the Regulations. Though, the learned Single Judge did not find favour with the argument that a 'food additive' was not 'food', the Regulations were said to be not applicable for reason of the goods being not pre-packaged or pre-packed food ready for sale and consumption by the consumer. The Division Bench referred to the judgment of the Calcutta High Court afore cited and it was distinguished, since therein the goods were sugar confectionery, which is primarily a 'food' and not a 'food additive'. The Division Bench framed the following issues:

- "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."

8. It was found, that a 'food additive' is distinct from, and is not a 'food'; for reason that a 'food additive' is not normally consumed as a 'food'. The argument of the Department that such a finding would impair the provisions of the Act, insofar as food additives are concerned, since then it would be taken out of the purview of the Act, was found to be misplaced. Section 16(2)(b) of the Act specifically provided for the authority to specify, by Regulations the limits of food additives and, hence, the apprehension was misplaced, was the finding. It was held that the offences and penalties under the Act and the

adjudicative mechanism provided would be applicable to the food additives also. But, it was also observed that the reference to 'food' in Section 16(1) would take in 'food additives' also. Section 23 of the Act was held to have no application to 'food additives' and the power to make regulations thereunder with respect to packaging and labelling was held to be not applicable to 'food additives'. Issues 'D' and 'E' were not answered since 'A', 'B' and 'C' were found in favour of the importer.

9. The Madras High Court was dealing with the issue of the Regulations not having been complied with, in the matter of labelling requirements, insofar as the 'best before date' and 'expiry date' having not been shown separately. Though, Section 23 of the Act and Regulations were referred to, the issue was not considered in the context of the same being a 'food additive'. As was noticed in the judgment of the Division Bench of the Delhi High

Court; the decision of the Calcutta High Court also was with respect to a food product and not a food additive. However, on the question of labelling of imported food articles, the Division Bench of the Calcutta High Court specifically held that "it was not the law that if the imported food articles are found to be safe and wholesome for consumption, then the Food Authority is bound to grant an NOC even if such labelling does not fulfill the requirement of the Regulations." (sic)

10. The Delhi High Court's decision is in favour of the contention of the petitioner that a 'food' as defined under the Act does not include a 'food additive' and hence, there being no application of Section 23 of the Act or Regulations framed thereunder. However, the Division Bench of the Calcutta High Court found that merely because goods are imported, it cannot be said that it would stand outside the scope of Section 23 of the Act. So was the finding of the

Madras High Court too. Perfectly understanding the persuasive effect of the precedents afore cited, this Court has to look into the provisions of the Act.

11. Clause (j) of subsection (1) of Section 3 of the Act defines 'food' to be 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 etc. 'Food additive' is defined as any substance not normally consumed as a food by itself, whether used as a typical ingredient of the food and whether or not it has a nutritive value, or a technological purpose in the manufacture, processing etc, by clause (k) of subsection (1) of Section 3 of the Act. Clause (zk) of subsection (1) of Section 3 of the Act defines 'primary food' as an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form.

12. Going by the definitions of 'food' and 'food additive', this Court, with due respect, is unable to follow the findings of the Delhi High Court that a 'food additive' would not be a 'food'. 'Food' as defined under the Act is something which is intended for consumption and a 'food additive' would be any substance which is not normally consumed as a food or used as a typical ingredient of the food; but by its use in the manufacture of a food, results in it being a component of the food; otherwise affecting its characteristics. The 'Annatto seed' imported by the petitioner is said to be used as a colouring agent and definitely, in processing, becomes a component of the food manufactured, affecting the characteristic of the food; herein, affecting the colour of the product, which is intended for human consumption.

13. 'Food additive' is that substance which is not normally consumed as a food, but however by its processing or use in the manufacture of the food product, would

necessarily become a component of the food product and thus is intended for consumption by the consumer. A 'food additive' definitely would be included in the definition of a 'food', but however, is treated differently since the said material would not normally be used for consumption. But, all the same, it is intended for consumption, which is the specific words employed in the definition of 'food'. The reasoning otherwise could be accepted, only if the definition has the words intended and 'ready for consumption'. If that was the case, a 'food additive' would definitely be not a 'food'. But the intention of the legislature being very clear, this Court would not attempt a 'Caussus Omissus'. This Court in that finding is further fortified by the decision of a Division Bench in W.A. No.1317/2014 dated 4.2.2015, in which 'cocoa bean', a seed used in the manufacture of chocolate, was held to be a 'food'.

14. Now we come to Section 23 of the Act, which is extracted hereunder:

“23. Packaging and labelling of foods:

- (1) No person shall manufacture, distribute, sell or expose for sale or despatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labelled in the manner as may be specified by regulations:

Provided that the labels shall not contain any statement, claim, design or device which is false or misleading in any particular concerning the food products contained in the package or concerning the quantity or the nutritive value implying medicinal or therapeutic claims or in relation to the place of origin of the said food products.

- (2) Every food business operator shall ensure that the labelling and presentation of food, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium, does not mislead consumers.”

15. Section 23 of the Act specifically deals with manufacture, distribution, sale or exhibition for sale or despatch or delivery for the purpose of a sale any packaged food products which are to be marked and labelled in the manner as may be specified by the Regulations. Herein, it is to be specifically noticed that Section 23 does not take in import. The activities enumerated under Section 23 contemplates those carried on within the Country, and cannot have any application to an import. But an import too would have to be in conformity with safety standards prescribed by this Country. Though an exporter may not be bound by the laws of the Country to which the products are imported;for permitting such import necessarily the goods and the manner in which it is imported has to conform to such safety standards. Import is specifically dealt with in Chapter V under Section 25 of the Act,which is extracted hereunder:

“25. All imports of articles of food to be subject to this Act:-

- (1) No person shall import into India-
 - (i) any unsafe or misbranded or sub-standard food or food containing extraneous matter;
 - (ii) any article of food for the import of which a license is required under any Act or rules or regulations, except in accordance with the conditions of the license; and
 - (iii) any article of food in contravention of any other provision of this Act or of any rule or regulation made thereunder or any other Act.
- (2) The Central Government shall, while prohibiting, restricting or otherwise regulating import of articles of food under the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), follow the standards laid down by the Food Authority under the provisions of this Act and the rules and regulations made thereunder.”

16. As noticed earlier, Section 23 refers to the manufacture, distribution etc of products within the country and does not speak of import and the transaction of clearing the goods from the Port by the importer does not relate to any of the activities as detailed in Section 23 of the Act. However, every import is also regulated by the provisions of the Act as also the Regulations framed thereunder. The Regulations are framed in exercise of the powers conferred by Clause (k) of subsection (2) of Section 92 read with Section 23 of the Act. The Regulation in Clause 2.2.2:6 specifically deals separately with the activities under Section 23 and imports, as hereunder:

“6. Name and complete address of the manufacturer

- (i) The name and complete address of the manufacturer and the manufacturing unit if these are located at different places and in case the manufacturer is not the packer or bottler, the name and complete address of the packing and bottling unit as the

case may be shall be declared on every package of food;

- (ii) Where an article of food is manufactured or packed or bottled by a person or a company under the written authority of some other manufacturer or company, under his or its brand name, the label shall carry the name and complete address of the manufacturing or packing or bottling unit as the case may be, and also the name and complete address of the manufacturer or the company, for an on whose behalf it is manufactured or packed or bottled;

- (iii) Where an article of food is imported into India, the package of food shall also carry the name and complete address of the importer in India:

Provided further that where any food article manufactured outside India is packed or bottled in India, the package containing such food article shall also bear on the label, the name of the country of origin of the food article and the name and

complete address of the importer and the premises of packing or bottling in India.”

The stipulation hence, as per clause 2.2.2:6(iii) is only the name and complete address of the importer to be on the package. The proviso also provides a subsequent sale within India to contain the country of origin, name and address of the importer and the address where packing is done within India; to be borne on the packages.

17. Significant, hence, is the decision of the Division Bench of the Delhi High Court, specifically paragraph 47 extracted hereunder:

“In the light of the above, issues D and E culled out by us herein above 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.”

The reasoning is apposite insofar as Section 23(1) being applicable to sale, distribution etc within India. But, the defects capable of being cured by the importer, according to this Court, is not correct and not possible too. Since no defect exists as per Regulation 2.2.2:6(iii), applicable to imports, there is no question of any curative measure at the port of entry.

18. The learned Standing Counsel appearing for the Department would, in fact, point out the specific averments made by the petitioner insofar as contending that the petitioner is not using the Annatto seeds for processing, but is selling the same to manufacturers of food products. Definitely, when a sale is made by the petitioner, of the imported Annatto seeds, then Section 23 of the Act would be applicable. But, insofar as import is concerned, what is specifically applicable is Regulation 2.2.2:6(iii) of the Regulations. The safety standards definitely, has to be scrupulously followed and in the present case the goods

were subjected to an analysis and it was found that the same conforms to such safety standards even as per the Act of 2011, which this Court has not looked into; but another learned Single Judge had looked into and recorded in Ext.P6 judgment. Hence, though the Act would be applicable to the imported goods, the Annatto seeds; applicability of the Regulations, in the case of import would be only to the extent indicated above; for the purpose of clearance of goods by the importer.

19. Further, it is to be noticed that even according to the counter affidavit of the respondent, specifically paragraph 17, the information regarding the Exporter's Name/Country, Importer's Name/Country, MRP in INR, Packing Date, Expiry Date, Gross Weight and Net Weight are disclosed. The specification insofar as Regulations 2.2.2:6(i) and (ii) of the Regulations to have the name and address of the manufacturer depicted on the label and in case of the packing being done by another, the packers

name and address also to be declared, would not apply to such import of goods as has been found earlier.

20. Ext.P7 is set aside for the aforesaid reasons. The 2nd respondent is directed to issue a 'No Objection Certificate', since the package conforms to Regulation 2.2.2:6(iii). The NOC shall be issued within a period of one week from the date of production of the certified copy of this judgment.

The Writ Petition would stand allowed. The parties shall suffer their respective costs.

Sd/-
K.VINOD CHANDRAN,
JUDGE