
(2014) 08 DEL CK 0112

In the Delhi High Court

Case No : Writ Petition (Civil) 2644/ 2014

Danisco (India) Private Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:

Food Safety and Standards Act, 2006 — Section 23, 25(1)(iii), 3(1), 3(1)(f), 3(1)(k)

Citation : (2014) 08 DEL CK 0112

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Sandeep Sethi, Sr. Advocate, Arjun Pall and Ishita Bhardwaj,
Advocate for the Appellant; Mehmood Pracha, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The present petition has been filed by the petitioner seeking quashing of an email/communication dated 22.04.2014 (hereinafter referred to as the "impugned communication") of Technical Officer, Food Safety and Standards Authority of India whereby the petitioner's appeal, challenging the order refusing to grant a No-objection certificate (NOC) to the consignment imported by the petitioner, was rejected on the ground that the said consignment did not comply with the requirements prescribed under the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. The petitioner has also sought a direction to respondent no.2 to issue a No-objection certificate (NOC) to the petitioner.

2. The Food Safety and Standards Act, 2006 is hereinafter referred to as the "FSS Act" and the Food Safety and Standards Authority of India is hereinafter referred to as the "FSSAI". The Food Safety and Standards (Packaging and Labelling) Regulations, 2011 are hereinafter referred to as "Labelling Regulations" and the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 are hereinafter referred to as "Food Additives Regulations".

3. Brief facts of the present case are that the petitioner company is primarily

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. On 07.02.2014, the petitioner imported from Danisco France SAS "YO-MIX 305 LYO 50 DCU" (hereinafter referred to as the "goods") which is a blend of strains of lactic acid bacteria, that is used for direct vat inoculation into milk for preparing yogurt and fermented milk products.

4. By a letter dated 06.02.2014, the petitioner notified the Additional Drugs Controller that the said goods were permitted food additives under the Food Additives Regulations and were imported for subsequent supplies to its distributors and customers. On 10.02.2014, the Customs Authorities referred the said goods to FSSAI for the issuance of a no-objection certificate (NOC) . By its letter dated 13.02.2014, the petitioner furnished the description of the goods to FSSAI and requested for release of the consignment.

5. Subsequently, an Authorized Officer of FSSAI addressed a letter, dated 21.02.2014, to the Deputy Commissioner of Customs thereby informing him of the decision of refusal to issue NOC on the ground that the inspection/analysis of the consignment was carried out on 20.02.2014 and it was found that "List of Ingredients" was not mentioned on the label. He further stated that the safety of the product cannot be assessed without knowing mandatory labelling requirement prescribed under the Labelling Regulations and guidelines issued by FSSAI. The FSSAI also sent a rejection report dated 21.02.2014 to the Deputy Commissioner of Customs.

6. Thereafter, the petitioner sent a letter dated 25.02.2014 to the FSSAI, explaining that the goods were for industrial use and not for retail sale and did not fall within the definition of "pre-packed food". Therefore, the petitioner was not required to disclose the list of ingredients in terms of the Labelling Regulations. Subsequently, on 02.04.2014, the petitioner filed an appeal before the FSSAI challenging the decision dated 21.02.2014 of the Authorized Officer of refusal to issue NOC. The said appeal was dismissed, by the impugned communication dated 22.04.2014 on the ground that the petitioner had failed to comply with the mandatory labelling requirement as prescribed under Regulation 2.2.2:2 of the Labelling Regulations and a non-conforming certificate was issued with respect to the goods. Aggrieved by the same, the petitioner has filed the present petition.

7. The only controversy that is required to be addressed is whether Regulation 2.2.2:2 of the Labelling Regulations is applicable, in entirety, to the goods imported by the petitioner. And, whether the labelling on the said goods is compliant with the statutory requirements of the FSS Act.

8. Before proceeding further, it would be necessary to refer to Section 23 of the FSS Act, which reads as under:-

"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."

9. It is apparent from a plain reading of Sub-section (1) of Section 23 of the FSS Act that it is mandatory that "packaged food products" be labelled or marked in the manner as may be specified by regulations. Although, the expression "food products" is not defined under the FSS Act, the expression "food" is defined under clause (j) of the Section 3(1) of the FSS Act which reads as under:-

"(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:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;"

10. As is apparent from the above, the definition of food 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. Since, the goods in question are intended for being used in preparation of Yogurt, they would fall within the wide definition of the expression "food" and its packaging and labelling would require to be compliant with any regulation made in that regard.

11. It is also necessary to note that Section 25(1)(iii) of the FSS Act, inter alia, prohibits import of any article of food in contravention of any other provision of the FSS Act or any rule or regulation made thereunder.

12. Before examining whether the Labelling Regulations are applicable to the goods imported by the petitioner and, if applicable, whether the same have been

complied with, it would be necessary to note the nature of the goods in question. The goods are stated to be a blend of strains of lactic acid bacteria, that is used for direct vat inoculation into milk for preparing yogurt and fermented milk products. The label on package describes the goods "to be freeze-dried concentrated lactic cultures comprising of lactobacillus bulgaricus and streptococcus thermophilus along with sucrose and maltodextrin as carriers".

13. It is not disputed by the learned counsel for FSSAI that the goods fall within category 99 of the Indian Food Code which includes "substances added to food which are not for direct consumption as food." The goods in question would be specifically included under sub-category 99.6, which covers "microorganisms and microbial preparations".

14. The goods are, admittedly, not meant for direct consumption but are intended for industrial use in manufacture of Yogurt and fermented milk products. The learned counsel for the petitioner had pointed out that Yoghurt is defined by Regulation 2.1.12:1 of the Food Additives Regulations. The relevant extract of the said definition reads as under:-

"1. Yoghurt means a coagulated product obtained from pasteurised or boiled milk or concentrated milk, pasteurised skimmed milk and/or pasteurised cream or a mixture of two or more of these products by lactic acid fermentation through the action of Lactobacillus bulgaricus and Streptococcus thermophilus. It may also contain cultures of Bifidobacterium bifidus and Lactobacillus acidophilus and other cultures of suitable lactic acid producing harmless bacteria and if added a declaration to this effect shall be made on the label. The micro-organisms in the final product must be viable and abundant. It may contain milk powder, skimmed milk powder, unfermented buttermilk, concentrated whey, whey powder, whey protein, whey protein concentrate, water soluble milk proteins, edible casein, and caseinates manufactured from pasteurised products. It may also contain sugar, corn syrup or glucose syrup in sweetened, flavoured and fruit yoghurt or fruits in fruits yoghurt..."

(emphasis supplied)

15. It is apparent from the above definition of Yogurt that it contains cultures of suitable lactic acid producing harmless bacteria, which are precisely the goods in question. Accordingly, the learned counsel for the petitioner had contended that the goods are permitted food additives.

16. "Food Additive" is defined under Section 3(1) (k) of the FSS Act which reads as under:-

"(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;"

17. A plain reading of the definition of the expression "Food Additive" indicates that the said expression means a substance which is not normally consumed as food or used as a typical ingredient of food but is a substance which is added to food for the purpose of manufacturing, processing, preparation, treatment etc. and which is reasonably expected to result in it either becoming a component of the food or otherwise affecting its characteristic. The goods imported by the petitioner clearly fall within the definition of food additive. The strain producing lactic acid is not for direct consumption but is required to be added to milk for production of yoghurt and ultimately becomes a component of the said food item. Given the definition of Yogurt, it is undeniable that the goods are permitted food additives.

18. The controversy whether the Labelling Regulations apply to the goods in question has to be considered in view of the context as discussed above. It is alleged by FSSAI that the goods are non compliant with regulation 2.2.2:2 of the Labelling Regulations and it is, therefore, necessary to refer to the relevant clauses of regulation 2.2.2 which is quoted below:-

"2.2.2: Labelling of Pre-packaged Foods

In addition to the General Labelling requirements specified in 2.2.1 above every package of food shall carry the following information on the label, namely,-

1. The Name of Food: The name of the food shall include trade name or description of food contained in the package.

2. List of Ingredients: Except for single ingredient foods, a list of ingredients shall be declared on the label in the following manner:"

(a) The list of ingredients shall contain an appropriate title, such as the term "Ingredients";

(b) The name of Ingredients used in the product shall be listed in descending order of their composition by weight or volume, as the case may be, at the time of its manufacture;

(c) A specific name shall be used for ingredients in the list of Ingredients:."

19. As is, plainly, apparent from the heading of Regulation 2.2.2, the same is applicable in respect of "Pre-packaged" foods. The opening words of the Regulation 2.2.2 also indicate that the requirement to carry labels is with respect to a "package" of food. The expression "Pre-packaged" is defined under Regulation 1.2.1:8 of the Labelling Regulations. The said Regulation reads as under:-

"8. "Pre-packaged" or "Pre-packed food", means food, which is placed in a package of any nature, in such a manner that the contents cannot be changed without tampering it and which is ready for sale to the consumer;

Note: The expression "package" wherever it occurs in these Regulations, shall be construed as package containing pre- packed food articles."

20. The expression "consumer" has not been defined under the Labelling Regulations but is defined under Section 3(1)(f) of the FSS Act as under:-

"(f) "consumer" means persons and families purchasing and receiving food in order to meet their personal needs;"

21. It is apparent from the conjoint reading of Regulation 1.2.1:8 with Clause (f) of Section 3(1) of the FSS Act that a pre-packaged or pre-packed food would mean food which is ready for sale to persons and families purchasing and receiving food in order to meet their personal needs.

22. In my view, the expression "personal needs" would be determinative of the manner in which the expression "persons and families" as used in Section 3(1)(f) of the FSS Act ought to be interpreted. The expression "personal needs" plainly implies personal consumption. The word "personal", according to Oxford English Dictionary, Fifth Edition, inter alia, means "pertaining to, concerning, or affecting a person as an individual (rather than as a member of a group or of the public, or in a professional capacity etc.) ". In the given context of food consumption, the expression "personal needs" of "persons and families" would only imply needs of individuals. The words "persons and families" would in the present context mean individuals and families and applying the principle of ejusdem generis, the word "persons" would exclude any corporate or any juridical entity and only mean natural persons. Plainly, purchase or receipt of food for personal consumption is the operative condition before a person or family, qualify as "consumer" within the definition of Section 3(1)(f) of the FSS Act. Thus, an industrial user or an entity which purchases food items for utilising the same in their production process would be excluded from the definition of the expression "consumer" within the meaning of Section 3(1)(f) of the FSS Act. It, therefore, follows that products which fall 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 of "pre-packaged" or "pre- packed food". This, of course, does not mean that an item of packaged food, which is ready for personal consumption by persons or families, would cease to be pre-packaged food or pre-packed food if purchased by an industrial consumer. As long as packaged food contains food items, which are ready for personal consumption, the same would fall within the definition of pre-packaged or pre-packed food. And, items that are not meant for direct consumption by individuals would fall completely outside the definition of pre-packaged or pre-packed food. Applying the aforesaid tests, it is apparent that the goods in question are not items of pre-packaged or pre-packed food.

23. In view of the aforesaid, the impugned communication is liable to be set aside. The appeal filed by the petitioner before FSSAI had been rejected only on the ground that the goods in question did not conform to paragraph 2.2.2:2 of the Labelling Regulations. As discussed above, the aforesaid provisions are inapplicable since the goods are not pre-packaged or pre-packed foods.

24. The learned counsel for the FSSAI had contended that in any event, the goods ought to have been labelled appropriately as that would be essential for the safety of the ultimate consumers. He submitted that packaging ought to have, at the bare minimum, mentioned the list of ingredients, the name of the manufacturer, the date of manufacture and the expiry date.

25. Before concluding, it would be necessary to examine whether the packing of the goods in question is otherwise deficient as contended by the learned counsel for the FSSAI. The packing of the goods in question clearly mentions that the goods are "freeze-dried concentrated lactic cultures for direct-vat inoculation into milk. Packed in protected atmosphere. Consult technical documentation for conditions of use". The "date of manufacture" as well as "best before date" has been boldly printed on the packing. In addition, the packing discloses the name and address of the manufacturer, the country of origin as well as the net weight. Further, each packet mentions the lot number and also bears a bar code. The product is named "YO-MIX 305 LYO 50 DCU". It is also relevant to note that FSSAI had issued a guideline dated 23.03.2012 specifying the labelling information for various kinds of packages of food consignment. In terms of the said guidelines, minimum labelling requirements for pre-packaged or pre-packed food and wholesale packages (including semi finished/intermediary food products which will be further processed to make final product & packed as pre-packaged or pre-packed food) were as under:-

26. Even though, the said guidelines may not be applicable to the goods in question, nonetheless, it is apparent that the packages in question substantially comply with the said labelling requirements except that the name and address of the importer is not printed on the package. Nutritional information is in any event inapplicable as the goods in question are lactic cultures which are to be used in manufacture of yoghurt. The goods in question being for industrial use, the logo indicating whether the goods are vegetarian or non-vegetarian is also *ex facie* inapplicable.

27. In the given circumstances, it is apparent that even though the Regulation 2.2.2:2 of the Labelling Regulations is not applicable, the labelling of the goods in question provides sufficient information. In addition, the petitioner has also furnished the detailed product description of the goods and has also specifically provided the composition, properties, physical/chemical specifications as well as microbiological specifications. The said specifications are quoted below:-

"Composition

Streptococcus thermophilus

Lactobacillus delbrueckii subsp, bulgaricus

Carrier:

Sucrose

Maltodextrins

Properties

-Freeze dried form facilitates the storage and handling of cultures.

-YO-MIX™ 305 LYO 50 DCU is a blend of selected strains for direct vat inoculation of manufacturing milk, these strains have been carefully chosen and combined to answer your specific needs in term of acidification, texture and taste.

- Cultures in the YO-MIX™ 305 LYO 50 DCU gives quick acidification to pH 4.60-4.50 and then, a slower acidification to reach lower pH. This characteristic allows a good pH control for a constant optimized quality product.

Physical/chemical specifications

Microbiological specifications

28. Indisputably, this information is sufficient for the FSSAI to test whether the goods in question conform to its description. Accordingly, the impugned communication is set aside and the FSSAI is directed to examine the goods in question and issue a No-objection certificate within a period of 10 days from today, if the goods are found to be in conformity with their description as available on the package, as well as the product description sheet provided by the petitioner.

29. Accordingly, the present petition is allowed in the above terms. The parties are left to bear their own costs.