
(2014) 10 MAD CK 0213
In the Madras High Court
Case No : Writ Petition No. 24999 of 2014

M. Mohammed

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 10-10-2014

Acts Referred:

Food Safety and Standards Act, 2006 — Section 2, 2(j), 3, 3(2), 3(j)
Prevention of Food Adulteration Act, 1954 — Section 2(5)

Citation : (2015) 316 ELT 542 : (2014) 8 MLJ 7

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—The petitioner has filed this Writ Petition for issuance of a Writ of Certiorarified Mandamus to quash the proceedings of the third respondent, dated 19.06.2014, imposing a condition on the petitioner to obtain No Objection Certificate from the second respondent and for a consequential direction to release consignment covered under bill of entry BE No. 5853707, dated 19.06.2014.

2. The petitioner filed bill of entry dated 19.06.2014 for clearance of 50.94 Metric Tones of Areca Nuts (Betel Nuts) classifying the product under (CTH)-08028010 and tariff item 50.940000. The goods were from Sri Lanka and to support the same, the petitioner relies upon the Certificate of Origin issued by the exporter dated 16.06.2014. On examination, the third respondent filed a report dated 19.06.2014, imposing the condition that the petitioner must obtain a certificate from the second respondent under the provisions of Food Safety and Standards (Food Products Standards and Food Additives) Regulation.

3. The case of the petitioner is that the said test certificate cannot be insisted from the petitioner and the product imported by him does not require such certification. In the affidavit filed in support of the petition, the petitioner would state that the betel nuts being imported by him is in its raw un-garbled form and it has to be processed further for human consumption and in case of import of

betel-nuts, the standard practice followed by the Customs Authority, all over India is to put the consignment imported to Plant Quarantine test (PQ test) in accordance with the provisions of clause 3(16) of the Plant Quarantine (Regulation of Import into India) Order, 2003, which is issued under Sub-Section(1) of the Destructive Insects and Pests Act, 1914. If the consignment passes the test, then the same is cleared by the Customs Authorities. The importer thereafter washes, cleans, dries and sorts the betel nuts, after which the same are soaked in water for ten days. Thereafter, the betel nuts are boiled, cleaned and dried again and the outer shell is removed. It is only after the said process, the betel nuts become consumable and fit for sale as a food item. In the imported form the betel nuts do not qualify as a food item as the same cannot be consumed directly. Moreover the importer does not bring the betel nuts for the purpose of direct sale to the public. The betel nuts are sold to betel nut vendors after the same are refined and processed by cleaning and drying, when the nuts are mature. It is further submitted that the test for betel nuts applied by the second respondent falls under clause 2.3.47(5) of the said Regulations and it is the same test under A28.04 of Appendix B under the Prevention of Food Adulteration Act. It is further submitted that the test is not meant for raw betel-nuts in un-garbled form, the current form, in which it has been imported. In support of their contention, the petitioner places reliance on the decision of the Hon"ble Division Bench of High Court of Kerala in W.A. No. 2144 of 2006, dated 04.01.2007 [Al Marwa Traders vs. Assistant Commissioner of Imports]. It is submitted that the Division Bench of the Kerala High Court has held that the betel-nuts are not liable to be tested for the standards prescribed under the Food Adulteration Rules, 1955 and the said decision is equally applicable to the case on hand, since the same standards are mentioned in the test contemplated under the Food Safety and Standards Act, 2006. Therefore, the petitioner would state that the betel-nuts imported by the petitioner is raw un-garbled form and the question of obtaining no objection certificate from the second respondent does not arise.

4. The learned counsel appearing for the petitioner after elaborately referring to the factual situation invited the attention of this Court to the decision of the Hon"ble Division Bench of the High Court of Kerala and submitted that the test contemplated under the Prevention of Food Adulteration Act and Food Safety & Standards Act being identical and the decision of the Hon"ble Division Bench of the Kerala High Court squarely applies to the case of the petitioner and that the petitioner having imported betel-nuts in un-garbled form, cannot be compelled to obtain a No Objection Certificate/Test Report from the second respondent. The learned counsel further submitted that the decision of the Hon"ble Division Bench of the Kerala High Court has been followed by the learned Single Judges of the Kerala High Court in the Writ Petitions.

5. The learned counsel appearing for the second respondent by referring to the counter affidavit filed, submitted that the definition of Primary Food as contained in Section 3(zk) of the Food Safety and Standards Act means an article of food,

being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its nature form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching and betel-nut falls within the definition of primary food, since it is an article of goods being produced by agriculture/horticulture. Further it is submitted that Section 3(j) of the Food Safety and Standards 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) of Section 3 of the Food Safety and Standards Act. Therefore, it is submitted that the definition of "Food" includes anything that is meant for human consumption directly or through manufacturing process. It is further submitted that the Regulation provides the authorised laboratory for analysing the samples at the relevant Regulation is 2.3.47(5) of the Food Safety and Standards (Food Product Standards and Food Additives) 2011 Regulation. It is further submitted that the petitioner himself applied through the Food Inspection Clearance System (FICS) whereupon the samples were drawn and sent for analysis and the samples were found not conforming with the standards. Further at the request made by the petitioner, the matter was sent to the referral laboratory, which also held that the samples does not conform to the standards.

6. Further it is submitted by the learned counsel that the decision of the Hon'ble Division Bench of the Kerala High Court came to be rendered in the light of the definition of "Food" as under the Prevention of Food and Adulteration Act and there is an marked difference between the definition of food and primary food as contained in the Food Safety & Standards Act and the Prevention of Food and Adulteration Act and therefore, the petitioner is not justified in stating that the decision of the Hon'ble Division Bench of the Kerala High Court is squarely applicable to his case. Further the decision of the Kerala High Court in the case of Al Marwa Traders vs. Assistant Commissioner of Imports, (referred supra) lays down a mandatory condition for Food Regulation Authority to ensure that the imported betel-nuts are not injurious to the health of the ultimate consumers. Further it is submitted that the petitioner has not stated in the imported documents that the areca-nuts imported is in un-garbled form. Therefore, such averment is put to strict proof by the petitioner himself. Further, it is submitted that so far as the Writ Petition which was filed before the Kerala High Court in W.P. No. 26785 of 2013, the Department has filed a petition for modification of the order passed by the Kerala High Court. Further, the learned counsel reiterated that the report of the Food Safety Authority of India, dated 27.06.2014 clearly states that the Areca-Nuts (Betel-Nuts) does not confirm with the standard laid down under 2.3.47(5) of the Food Safety & Standards Act and the Regulation. Further that the petitioner submitted an application for retesting of the samples and it was sent to the Referral Laboratory at Mysore and the Referral Lab by report dated 01.08.2014 confirmed that the samples do not conform with the standards laid down for dry fruits and nuts. Therefore, it is submitted the prayer sought for in the Writ Petition is misconceived and cannot be granted.

7. In reply, the learned counsel for the petitioner referred to averments made in the affidavit filed in support of the Writ Petition more particularly in paragraph 4 and submitted that the petitioner has imported raw un-garbled form of betel-nuts, which has to be processed further for human consumption. Further, it is submitted that unless and until the product imported by the petitioner is fit for human consumption, the same will not fall within the definition of "Food" as defined under Section 3(j) of the Food Safety and Standards Act and therefore, the impugned proceedings are liable to be set aside.

8. Heard the learned counsel appearing for the third respondent.

9. The issue which falls for consideration is whether the third respondent was justified in directing the petitioner to obtain a No Objection Certificate from the second respondent, who is the authority under the Food Safety and Standards Act, 2006.

10. The sheet anchor of the arguments as placed by the learned counsel for the petitioner is by placing reliance on the decision of the Hon"ble Division bench of the High Court of Kerala in the case of Al Marwa Traders (referred supra), it is not in dispute that the said decision was rendered by interpreting the provisions of the Prevention of Food Adulteration Act, 1954 and the Rules framed there under.

11. Before examining the question as to whether the decision of the Kerala High Court could be made applicable to the petitioner's case, this Court proposes to examine the factual situation and the conduct of the petitioner. The petitioner filed bill of entry for home consumption dated 19.06.2014 in BE No. 5853707 and the description of the item in the bill of entry is Areca-Nuts (Betel-Nuts). The petitioner classified the item under chapter heading under (CTH)-08028010. The product was imported from Sri Lanka and to state that the product is from Srilanka, the petitioner relied upon the certificate of origin issued by the Sri-Lankan Exporter. The goods on arrival was subject to inspection by the third respondent and the petitioner had applied through the FICS, which provides for inspection of the goods by drawing samples to examine as to whether it satisfies the standards laid down under the Food Safety and Standards (Food Product Standards and Food Additives) 2011 Regulation. At this stage, it has to be mentioned that the terms of Section 97(1) of the Food Safety and Standards Act, with effect from such date as the Central Government may appoint in that behalf, the enactment and orders specified in II Schedule of the Act shall stand repealed. Serial No. 1 of the II Schedule is the Prevention of Food Adulteration Act, 1954. Thus, by virtue of Section 97, the Prevention of Food Adulteration Act, 1954, stood repealed and the provisions of the Food Safety and Standards Act alone shall be applicable to all imports including the import done by the petitioner.

12. The petitioner's application under the FICS system was considered and samples were drawn. The sample was sent to the Laboratory for testing, the product was Areca-nuts (Betel-nuts) and the Laboratory tested the samples and

issued certificate of analysis in Form B dated 27.06.2014. The operative portion of the report reads as follows:-

Sl.No

Quality Characteristics

Name of the Method of the test used

Results

Prescribed Standard as per 2.3.47(5) Food Safety and standards Act 2006 and Rules

(Food Products and Food Additive) Regulation, 2011

1

Extraneous Vegetable Matter

DGHS

NIL

Not more than 1.0%

2

Damaged/Discoloured Units

-do-

22.83%

Not more than 2.0%

3

Acidity of extracted Fat expressed as oleic acid

-do-

0.65%

Not more than 1.25%

4

Total Flats Count

Petrifilm AOAC 19th Ed 2012, 990.12

1200/gm

Not more than 40,000

Opinion: And I am of the opinion that the sample Areca Nuts (Betel Nuts) does not conform to the standard laid down under 2.3.47(5) of FSS Act 2006 and

Rules, Regulations, 2011 thereof.

13. The petitioner was not convinced with the report submitted by the notified Laboratory and therefore, submitted an application for retesting the samples by sending the same to the Referral Laboratory. The request was favourably considered and the sample was sent to the Referral Laboratory at Mysore. The Referral Laboratory submitted a report dated 01.08.2014 and the operative portion of the report reads as follows.

Sl. No

Quality Characteristics

Method of the test used

Result

Prescribed Standard as per FSS (Food Products Standards and Food Additives) Regulations 2011. As per Regulation No.(2.347.5)

1

Damaged Units/discoloured units % by wt.,

IS 1797:1985

52.5

Not more than 2.0%

2

Extraneous matter % by wt.,

IS 1797:1985

NIL

Not more than 1.0%

3

Aflatoxins., ug/kg

AOAC 18th EDN 2005, 968.22

Less than 20ppb

Not more than 30

Opinion:

And I am of the opinion that the sample does not conform to the standards laid down for Dry Fruits and Nuts under the provisions of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 thereof in that

a) Mould growth was observed on the split of the areca nut.

b) Damaged/discoloured units exceeds the maximum permissible limit.

14. From the above reports, it is evidently clear that the sample drawn from the import consignment does not conform with the standards laid down under the provisions of the Food Safety Regulations 2001. In fact the Referral Laboratory at Mysore observed mould growth on the split of the Areca Nuts; damaged/discoloured units exceed the maximum permissible limit. The reports submitted by the notified Laboratory as well as by the Referral Laboratory are against the petitioner and the samples does not satisfy the statutory requirement. This appears to be the undisputed factual position. In such circumstances, the petitioner cannot come forward with a case that the consignment should be cleared without insisting upon a No Objection Certificate from the second respondent, more particularly, when the petitioner himself applied through the FICS system pursuant to which samples were drawn, analysed and found to be not in conformity to the standards laid down, and thereafter, it sent to the Referral Laboratory at the instance of the petitioner, which also reported that the samples do not conform with the standards. Hence the petitioner is estopped from seeking for the relief as prayed in this Writ Petition. Therefore, on this ground alone, the Writ Petition is liable to be dismissed.

15. However, since the learned counsel for the petitioner placed reliance on the decision of the Division Bench judgment of the High Court of Kerala in the case of *Al Marwa Traders vs. Assistant Commissioner of Imports*, (referred supra), this Court proceeds to consider the said contention also. The case before the Hon'ble Division Bench of High Court of Kerala arose out of two Writ Petitions filed by importers of un-garbled betel nuts. At this juncture, it has to be pointed out that the bill of entry filed by the petitioner herein does not described product as un-garbled betel-nut and only in the affidavit filed in the writ petition, the petitioner attempts to state that the product is un-garbled betel-nuts. This cannot be permitted, since the petitioner is bound by the declaration made by him in the bill of entry. Therefore, on that score itself, the decision of the Hon'ble Division Bench of the Kerala High Court, cannot be applied to the facts of the present case.

16. Be that as it may, in the case of *Al Marwa Traders vs. Assistant Commissioner of Imports*, (referred supra), was rendered while interpreting the provisions of the Food Adulteration Act, 1954 and the Rules framed there under.

17. The learned counsel appearing for the petitioner submitted that both statues are *pari materia* and there is no marked difference in the definition of "food" and "primary food" and the test also are more or less similar. This contention raised by the petitioner does not merit consideration in the light of the fact that the Prevention of Food Adulteration Act stood repealed after the enactment of the Food Safety Act. That apart, there is a marked distinction in the definition of "primary food" and "food" as defined under the Food Safety and Standards Act

and for better appreciation, the same are referred to hereunder:-

3(1)(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.

18. From the above definition, it is clear that the "food" includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food and food means any article being a produce of agriculture or horticulture etc. Admittedly, the Areca nut (Betel-Nuts) is an agriculture product include to fall within the definition of primary food and such primary food is covered in the definition of food as contained in Section 3(2) Food Safety and Standards Act. The definition of food as contained in the provisions of the Prevention of Food Adulteration Act is quite different from that of the definition under the Food Safety and Standards Act referred supra and for better appreciation, the relevant definitions under the Prevention of Food Adulteration Act are quoted herein below:-

2(v) food means any article used as food or drink for human consumption other than drugs and water and includes:-

(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,

(b) any flavouring matter or condiments and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

2(xiia) primary food means any article of food, being a produce of agriculture or horticulture in its natural form.

19. Therefore, the petitioner cannot place reliance on the decision in the case of Al Marwa Traders (referred supra), to state that the decision could be squarely made applicable to the facts of the present case.

20. As noticed above, on facts in the case of Al Marwa Traders (referred supra), there was no dispute that the product which was imported was un-garbled betel-nuts. In the said context, the Division Bench of the Kerala High Court considered

the definition under the erstwhile Prevention of Food Adulteration Act and rendered the decision and therefore, the decision of the High Court of Kerala is clearly distinguishable on facts and cannot be made applicable to the case of the petitioner.

21. In the light of the above discussion, this Court has no hesitation to hold that the definition of "Food" as contained under Section 3(j) of the Food Safety Act is an inclusive provision including any substance whether processed, partially processed or unprocessed, which is intended for human consumption and also includes primary food to the extent defined under clause (zk) of Section 2 and also includes any substance used in the food during its manufacture, preparation or treatment to be an article of food as defined under the Food Safety and Standards Act.

22. Thus, by comparing the definition of food under Section 2(j) of the Food Safety Act with that of Section 2(5) of the Prevention of Food Adulteration Act, it is evident that the word "Food" under the provision of Prevention of Food Adulteration Act is a very general term and meant to include any article is used as food or drink for human consumption other than drugs and water.

23. In the light of the above discussion and taking into consideration of the fact that the petitioner himself had applied under the Food Inspection Clearance System, pursuant to which the samples were drawn and found to not meet the standards prescribed and also on being the referred to the Referral Laboratory at Mysore at the instance of the petitioner, have miserably failed to make out any case for granting the relief sought for in this Writ Petition and accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.