(2015) 09 KL CK 0015

In the High Court Of Kerala

Case No : W.A. Nos. 907, 1010, 1078, 1079, 1278 and 1320 of 2015 and W.P. (C) Nos. 14944, 15399, 15400 and 15407 of 2015

M.R.J. Trading — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Food Safety And Standards Act 2006 — Section 3(zk), 3(j), 3(zz), 3(d), 3(zx), 5, 16, 16(1), 16(2), 18, 18(3), 19, 20, 21, 22, 25, 25(2), 92, 92(2)(i)
Income Tax Act, 1922 — Section 23A
Food Safety And Standards Act (Prevention Of Food Adulteration Act, 1954 — Section 97(1)
Destructive Insects And Pests Act, 1914 — Section 3(1)
Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011

Citation : (2015) 09 KL CK 0015

Hon'ble Judges : Ashok Bhushan and A.M. Shaffique, JJ.

Bench : Division Bench

Advocate : C.K. Karunakaran and Jophy Pothen Kandankary, Advocates, for the Appellant; N. Nagaresh, Assistant Solicitor General, K.R. Rajkumar, Addl. CGSC, N. Neelakantan Elayath, Mehmood Pracha, Paul Jacob, Tasween Ahmadi, Advocates John Varghese and Thomas Mathew Nellimoottil, SCs, for the Respondent

Judgement

A.M. Shaffique, J.—Since common issues arise for consideration in the writ appeals and in the writ petitions, they are heard and decided together.

2. The writ appeals have been filed against a common judgment dated 6/4/2015 of the learned Single judge in six writ petitions. During hearing of the cases, it was brought to the notice of this Court regarding pendency of similar writ petitions before the learned Single Judge and therefore, on consent of parties, W.P.(C) Nos. 14944 of 2015, 15400 of 2015, 15407 of 2015 and 15399 of 2015 have been called for and heard along with the writ appeals.

3. The appellants and the writ petitioners in all the writ petitions are commonly

referred as the petitioners.

4. The facts involved in the cases are almost similar. For easy reference, we are referring to the facts as narrated in WA No. 1078 of 2015 which arises from W.P.(C) No. 10977/2015.

5. Petitioner in the said case imported raw areca nut commonly known as betel nuts in ungarbled form. The material was imported from Sri Lanka through Cochin Port.

6. After filing of bill of entry, the Commissioner of Customs issued Ext.P2, Examination order dated 19/3/2015, imposing a condition that the consignment should be allowed clearance only on receipt of clearance from Food Safety and Standards Authority of India (hereinafter referred as FSSA)/Port Health Officer. According to the petitioner, the standard practice followed by Customs Authority all over India is to put the consignment to plant Quarantine test in accordance with the provisions of Clause 3(16) of the Plant Quarantine (Regulation of Import into India) Order, 2003 issued under Sub-section (1) of the Destructive insects and Pests Act, 1914. Normally when the consignment passes the test, the same is cleared by the customs authorities. Petitioner submits that the consignment had been cleared by the Plant Protection Officer, Government of India. Petitioner relied upon the judgment dated 15/10/2014 by which while deciding a batch of writ petitions, a learned Single Judge of this Court held that in the absence of any specific standards under the Food Safety and Standards Act, 2006 (hereinafter referred as the FSS Act), the authorities are bound to follow the standards of Codex Alimentarius, if any, for determining the standards. Reference is also made to a judgment dated 4/12/2014 in W.P(c) No. 32484 of 2014, wherein a learned Single Judge of this Court directed release of the imported goods by forming an opinion that no standards were prescribed for betel nuts under the FSS Act and Regulations.

7. The contention of the petitioner is that despite reference being made to various judgments by which, betel nuts were permitted to be released and the Court finding that no standards were prescribed for betel nuts, the order directing testing of the consignment under the FSS Act was totally unsustainable. Hence the petitioner sought for a declaration that the raw ungarbled betel nuts imported by the petitioner do not attract the provisions of FSS Act, the rules and regulations framed thereunder, for a direction to quash Ext.P2, by which a direction had been issued to conduct test and obtain no objection certificate from FSSA, for clearance of raw betel nuts and for a direction to the customs authorities to release all the consignments of the petitioner on passing the Plant Quarantine Test, without mandating any other test and no objection certificate under the FSS Act, Rules and Regulations.

8. The other appeals and writ petitions contain similar set of facts and grounds and therefore the individual facts of each case are not narrated, unless it is required during the course of discussion.

9. The learned Single Judge having considered the matter, placing reliance on the judgment in W.A. No. 1317 of 2014 disposed of the writ petitions directing the Commissioner of Customs to hand over the proceedings to FSSA and to arrange an inspection to consider the matter in the light of the observation made by the Division Bench in W.A. No. 1317/2014.

10. While impugning the judgment, the petitioners have contended that W.A. No. 1317 of 2014 was decided with reference to cocoa beans, where appropriate standards were available under the Bureau of Indian Standards (BIS), whereas there is no such standard prescribed for raw betel nuts and the appropriate test as mentioned in the writ appeal judgment has no application. The next ground is that a Division Bench of this Court has already held in Al Marwa Traders Vs. Asst. Commissioner of Imports, that betel nuts do not come within the category of ''dry fruits and nuts'' and therefore the standards prescribed for ''dry fruits and nuts'' cannot be made applicable to betel nuts. Another ground taken is that there is substantial difference between ''food'' and ''article of food'' and therefore the standards prescribed for ''article of food'' cannot be made applicable to betel nuts, by treating it as ''food''. According to the petitioners, the only necessity was to confirm to the plant quarantine test and other than that no standards are available either under the FSS Act, Rules and Regulations, BIS or any approved standards to enable the FSSA to exercise jurisdiction in the matter. It is also contended that an absolutely wrong procedure was adopted by the FSSA in the matter. When it was found that there was no standard prescribed under the statute, they are finding out various other methods to ensure that import does not take place. It is also argued that being a farm produce, the Act has no application.

11. In W.A. No. 1078 of 2015, counter affidavit has been filed by 2nd respondent, the FSSA, inter alia contending that the subject products namely betel nuts are standardised under clause 2.3.47(5) of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 (hereinafter referred as the ''Standards Regulations''). Further it is contended that the Madras High Court while disposing of W.A. No. 1491 of 2014, in M. Mohammed v. Union of India and others, by judgment dated 10/2/2015 held that Al-Marwa Traders'' case (supra) no longer holds the field, since the said judgment was with reference to the Prevention of Food Adulteration Act, 1954 (hereinafter referred as the ''PFA Act''), which has already been repealed. Reference is made to Section 22 of the FSS Act to contend that an article of food for which standards have not been specified but is not unsafe is treated as ''Proprietary and Novel food''. It is therefore contended that the issue being covered by judgment in W.A. No. 1317 of 2014, the petitioners cannot have any grievance.

12. The learned counsel appearing on behalf of the respondents relying upon the documents produced by the petitioners submits that the products imported by the petitioners failed to satisfy two tests viz., it did not comply with the

standards prescribed for ''dry fruits and nuts'' and that it did not satisfy the limit prescribed for ''Article of food'' as per clause 2.2.1 in the Contaminants Regulations, especially regarding the requirement of standards prescribed for ''Aflatoxin''. Learned counsel for respondent relied upon the Madras High Court judgment in WA No. 1491 of 2014.

13. Learned counsel for petitioners argued that a Division Bench of this Court in Al Marwa Traders (supra) had clearly found that ungarbled betel nuts cannot be categorized as ''dry fruits and nuts''. It is pointed out that though the said judgment was rendered in the light of the standards prescribed under the PFA Act, as far as the categorization and standards prescribed for the said commodity or food item is identical, the said judgment squarely applies to the facts of the case. In regard to crop contaminants and naturally occurring toxic substances as referred to in clause 2.2.1 in the Food Safety and Standards (Contaminants Toxins and Residues) Regulations, 2011 (hereinafter referred as the ''Contaminants Regulations''), it is contended that the said provision has no application, since at no point of time has the FSSA insisted for ''aflatoxin'' test during the last several years, though such a provision was very much in the statute book, evenwhile PFA Act was in force. Further it is argued that ''article of food'' indicated food which is capable of consumption and not substances which are used in the manufacture of ''article of food''. It is argued that betel nuts imported by the petitioners will have to undergo a manufacturing process and thereafter before it is marketed, it will have to undergo all the required tests and therefore it is contended that such rigid standards shall not be imposed on the import of betel nuts. It is also argued that betel nuts are being imported from Sri Lanka based on a bilateral agreement between two contracting countries as per WTO agreement to maintain trade relations, which is absolutely necessary to maintain friendly relations with foreign countries. Petitioners are entitled for certain concessions when betel nuts are being imported from Sri Lanka or through Sri Lankan ports. When it is a policy of the Government, taking into consideration the bilateral trade relations between the contracting Governments to permit import of betel nuts, a highly technical approach is being taken by the FSSA. It is argued that goods are imported after obtaining the phytosanitary certificate issued by the competent authority in the country of origin and what is required is only confirmation of the phytosanitary test which alone is required for the purpose of import.

14. Learned counsel for the petitioners relied upon various judgments to substantiate their contentions:--

"(i) In The Member, Board of Revenue Vs. Arthur Paul Benthall, , a Constitution Bench of the Supreme Court while considering the provisions of Indian Stamp Act, 1899 had observed that the expression ''distinct matters'' in Section 5 of the Act is different from the expression ''distinct categories''. It is held that whether a document comprises distinct matters or not will depend on whether the interests of the executants in the subject matter of the power are separate or joint. Going through the factual narration of events in the above case, we do not think that the same can be made applicable to the facts of the present case.

(ii) Another judgment relied upon is Commissioner of Income Tax, New Delhi (Now Rajasthan) Vs. East West Import and Export (P) Ltd., (Now Known as Asian Distributors Ltd.), Jaipur, . That was a case concerning the meaning of the word ''course'' appearing in the explanation to Section 23-A of the Income Tax Act, 1922. It was held that "course" ordinarily conveys the meaning of a continuous progress from one point to the next in time or space and conveys the idea of a period of time; duration and not a fixed point of time. This judgment also has no factual relationship to the case on hand.

(iii) Reference is made to the judgment in Joshy Vs. State of Kerala, . That was a case concerning the question whether supply and sale of chewing tobacco could be prohibited by the authorities constituted under the FSS Act. Reference was made to the notification issued by the FSSA on 22/5/2012 prohibiting the manufacture, storage, sale and distribution of gutkha and pan masala containing tobacco or nicotine as ingredients. It was held that chewing tobacco is not food as defined under the FSS Act nor can it be considered as a food product. Since we are concerned with betel nuts, the above judgment can have no application to the facts of the case.

(iv) Another judgment relied upon is Food Safety and Standards Authority of India v. Danisco (India) Pvt. Ltd. and others in LPA Nos. 659 and 711 of 2014 of a Division Bench of the Delhi High Court. The issue was with reference'' to the consignment of lactic culture imported by the writ petitioner. The question was whether the same confirmed to the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. After an elaborate consideration of the factual situation and the legal issues relating to the same, it was found that Packaging and Labelling Regulations are not applicable to food additive and the defective labelling of imported goods are curable in India before the goods are released by the customs authorities. The said judgment also has no application to the facts of the case."

15. Heard the learned counsel appearing for petitioners Sri. C.K. Karunakaran, Sri. Madhu Radhakrishnan, Sri. Devan Ramachandran, senior counsel Smt. Tasneem Ahmadi, Sri. Paul Jacob, Sri. John Varghese and the learned Assistant Solicitor General of India Sri. Nagaresh appearing on behalf of the respondents.

16. Having regard to the factual and legal issues pointed out by the learned counsel on either side, the questions to be considered are:

"(i) whether betel nuts is a farm produce which is exempted from the provisions of FSS Act?

(ii) whether there is any difference between ''food'' and ''article of food'', and if so, whether the standards for ''article of food'' applies for betel nuts?

(iii) whether betel nuts fall under the category of ''dry fruits and nuts'' as described in clause 2.3.47(5) of Standards Regulations.?

(iv) whether betel nuts imported by the petitioners should satisfy the aflatoxin test as provided under clause 2.2.1 of Contaminants Regulations?

(v) whether betel nuts can be imported after verifying and certification of plant quarantine test alone?"

17. Before proceeding further, it will be useful to consider the argument as to whether betel nut is a farm produce which is exempted from the provisions of FSS Act. The argument is based on Section 18(3) of the FSS Act which reads as under:

"18. General principles to be followed in administration of Act-The Central Government, the State Governments, the Food Authority and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles, namely:--

****

(3) The provisions of this Act shall not apply to any farmer or fisherman or farming operations or crops or livestock or aquaculture, and supplies used or produced in farming or products of crops produced by a farmer at farm level or a fisherman in his operations."

Section 18 , in fact provides for the general principles to be followed by the Central Government, State Government, Food Authority and the agencies while implementing the provisions of the Act. Sub-section (3) however exempts application of the Act to any farmer, fishermen, farming operations, crops, livestock, aquaculture and supplies used or produced in farming or products of crops produced at farm level or fishermen in his operations. It is apparent from the statute itself that the exemption applies only in respect of the crops or supplies used or produced in farming products of crops produced "at farm level". The words "at farm level" clearly indicates that such an exemption may not apply to a procurer of the produce of crops at a different level especially for the purpose of trading. In other words, the Act applies when the product or food product or farm product leaves the farm. This is further clear from the definition of "primary food" under section 3(zk) wherein it is clearly indicated that primary food among other things is an article of food being produce of agriculture in its natural form, in the hands of a person other than a farmer. Primary food is also included within the meaning of ''food'' in terms of Section 3(j) . Hence the above argument that betel nuts being a farm produce is exempted from the provisions of FSS Act is unsustainable.

18. The learned counsel for the writ petitioners/appellants argued that there is substantial difference between the meaning of the word ''food'' as available under section 3(j) and ''an article of food''. The learned counsel referred to the meaning of ''primary food'' under section 3(zk) , which reads as under:

"(zk) "primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman."

19. Section 19 relates to use of food additive or processing aid, which indicates that no article of food shall contain any food additive or processing aid unless it is in accordance with the provisions of the Act or Regulations framed thereunder. Similarly Section 20 deals with contaminants and naturally occurring toxins and it indicates that no article of food shall contain any contaminant or naturally occurring toxic substances or toxins or hormone or heavy metals in excess of such quantities as may be specified by regulations. Section 21 relates to restriction on insecticides and pesticide residues, veterinary drugs residues etc. in excess of tolerance limit as may be specified by regulations. Section 25 deals with import of all articles of food. Section 25 reads as under:

"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 licence is required under any Act or rules or regulations, except in accordance with the conditions of the licence; 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".

By section 25 of the FSS Act, restriction is imposed on any person to import into India any unsafe, misbranded, substandard food or food containing extraneous matter. Unsafe food is defined under section 3(zz) , which reads as under:

"(zz) "unsafe food" means an article of food whose name, substance or quality is so affected as to render it injurious to health:--

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or

(ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or

(iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or

(iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or

(v) by addition of a substance directly or as an ingredient which it not permitted; or

(vi) by the abstraction, wholly or in part, of any of its constituents; or

(vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or

(viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or

(ix) by the article having been infected or infested with worms, weevils or insects; or

(x) by virtue of its being prepared, packed or kept under unsanitary conditions; or

(xi) by virtue of its being misbranded or substandard or food containing extraneous matter; or

(xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations."

Clause (xi) indicates that unsafe food among other things is substandard food. It is again with reference to an article of food whose nature, substance or quality is so affected as to render it injurious to health. As per clause (xii), the article food becomes unsafe by virtue of it containing pesticides and other contaminants in excess of quantities specified by regulations.

20. Having gone through the various statutory provisions, we don''t find much relevance to consider whether there is any difference between the word ''food'' and ''article of food''. Since we are concerned with import of a ''primary food'', the question concerned is whether it is unsafe or substandard. Primary food is also defined as ''an article of food''. Probably the legislature had used the word ''article of food'' in different provisions, as only an article of food is taken for the purpose of analysis.

21. In corpus juris secundum, the word ''article'' has been given the following meaning:

"The word article is a nebulous concept of indefinite and neutral meaning".

It has been said that the word is derived from articulus, a joint; and, as generally used, it has been defined as meaning a joint connecting two parts of the body, or one of the parts thus connected.

It has also been defined as meaning a separate member or portion of anything, a distinct portion or part, or a joint or a part of a member, hells a single clause in any writing, a particular item of several that make up an account, or a portion of a complex whole; a distinct part, or a distinct portion of an instrument; one item of several, or one thing of many;.......

As applied to specific objects or things, it has been defined as a material thing as part of a class, or, absolutely a particular substance or commodity;.........."

Therefore, we do not think that treating food differently from article of food can render the petitioners any benefit to contend that it does not come within the purview of the FSS Act or that only an article of food capable of human consumption need comply with the standards prescribed under the statute.

22. As far as the third issue is concerned, the issue has been answered in the judgment in Al Marwa Traders'' case (supra), wherein the Division Bench having considered whether betel nuts come under the category of ''dry fruits and nuts'' opined that ungarbled betel nuts cannot be tested for the standards prescribed for ''dry fruits and nuts''. The Division Bench held as under:

"10. Under R.5 of the Food Adulteration Rules, 1955, standards of quality of the various articles of food items specified in Appendix B to the Rules are as defined in that Appendix. Appendix B contains the definitions and standards of quality which are prescribed under R.5.

11. Item No. A.28.04 of Appendix B which is the one relied on by the respondents reads as follows:

"A.28.04 Dry Fruits and Nuts means the products obtained by drying sound, clean fruits and nuts of proper maturity. The product may be with or without stalks, shelled or unshelled, pitted or unpitted or pressed into blocks. The product shall be free from mould, living/dead insects, insect fragments and rodent contamination. The product shall be uniform in colour with a pleasant taste and flavour characteristic of the fruit/nut free from off flavour, mustiness, rancidity and evidence of fermentation. The product shall be free from added colouring. The product shall conform to the following requirements:--

(i) Extraneous Vegetables matter (m/m) Not more than 1.0 percent

(ii) Damaged/Discoloured Units (m/m) Not more than 2.0 percent

(iii) Acidity of extracted fat expressed as Oleic Acid Not more than 1.25 percent.

Explanation: For the purpose of this paragraph

(i) ''Extraneous vegetable matter'' means stalks, pieces of shells, pits, fibre, peel.

(ii) ''Damaged or Discoloured'' means units affected by sunburn, scars, mechanical injury, discolouration and insects."

Based on the decision of the Supreme Court in Dineshchandra Jamnadas Gandhi Vs. State of Gujarat and Another, , it was held that betel nut is not a fruit product. It was further held that:--

"Then the next question would be whether it is a dry nut. For attracting standards under A.28.04, the imported article must be products obtained by drying sound, clean fruits and nuts of proper maturity. It is not disputed before us that the betel nuts imported by the appellants are in the de-husked form but containing an outer layer, which has to be scraped and removed and dried for the purpose of making it fit for making Supari as is usually known to the market. In the context of the Prevention of Food Adulteration Act, when an agricultural product would be a primary food in the natural form was the subject matter of decision by a learned Single Judge of this Court in State of Kerala Vs. Thankappan and Others, . xxxxx"

The Division Bench after extracting the judgment in Thankappan''s case (supra) held that:

"We are in respectful agreement with the said finding in that decision which holds that the removal of the cover cannot be said to make a different shaping or different arrangement of the parts making it different from its natural form and that the natural form is still retained meaning thereby that such article would still continue to be primary food. Tested in the light of that decision, we are of opinion that despite the de-husking arecanut, the article now under reference would still be a primary food since it contains an outer layer which has to be scraped and removed for making betel nut edible as a food item. Going by the description of betel nut in the Encyclopedia Britanicana as noted by the Supreme Court, betel nuts after being deprived of their husks have to be prepared by boiling in water, cutting up into slices and drying it in the sun for making it fit for market or for consumption. According to the appellants, the imported betel nuts in the primary form have to be at a minimum, scraped to remove the outer layer and then dried so as to attract the definition and standards prescribed under clause A.28.04 as a dry nut. The respondents could not with any material in support could contradict this definite case of the appellants. On the other hand, they categorically admit that it is in the ungarbled form. Further Item A.28.04, speaks of products obtained by drying sound clean fruits and nuts of proper maturity. The respondents have no case that betel nuts imported by the appellants are products so obtained. That being so, the customs officers, by virtue of powers under 5.10 read with 5.6 cannot take samples of the betel nuts imported by the appellants as articles of food or adulterant for analysis, since, going by the proviso to 5.10(2) of the Act, no sample of any article of food, being primary food, shall be taken under the sub-section, if it is not intended for sale as such food. The respondents in their counter affidavit could not bring out either that the betel nut is not a primary food or that it is intended for sale as such food. On the other hand, the appellants have, with sufficient material on record, succeeded in proving that the betel nut imported by them is a primary food and that the same is not intended for sale as such food since for consumption, the same has to undergo a further process of scraping the outer layer and drying the same before making it into Supari as known to the market or at least to make it edible even as it is.

15. Therefore, we are satisfied that samples of the betel nut imported by the appellants cannot be taken for analysis under 5.10(2) and subjected to the tests for the standards prescribed under Item A.28.04 of Appendix B to the Act as a dry nut.

16. Apart from the legal aspects as elucidated above, there is a practical aspect of the same also in the commercial sense. It is not denied that the appellants themselves have been importing betel nuts in the present form for quite some time without having to undergone the present test prescribed for dry fruits and nuts. It is also abundantly clear that the betel nut in the form in which the appellants imported the same would not satisfy the standards prescribed in Item A.28.04. Therefore, the compulsory subjecting of such betel nuts to the test for the standards prescribed in item A.28.04 would have the practical effect of prohibiting the import of betel nut altogether.

17. However, in public interest, we make it clear that although betel nuts imported by the appellants cannot be subjected to test for the standards prescribed under Item A.29.04, certainly, the respondents can ensure that the same is not adultered in the sense mentioned in S. 2(b), (e) and (f) so as to see that the appellants are not importing betel nuts which are not injurious to the health of the ultimate consumer, who may consume the product made of betel nuts imported by the appellants. We are told by the counsel for the appellants that the inspection under the provisions of the Plant, Fruits and Seeds (Regulation of Import into India) Order 1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, would ensure the same. However, we leave it to the Customs Authorities to ensure, but without causing any delay in clearance of the goods on account of that, taking into account the perishable nature of the goods.

In the result, we allow the Writ Appeals and set aside the judgment of the learned Single Judge and declare that the betel nuts imported by the appellants are not liable to be tested for the standards prescribed under item A.28.04 of Appendix B to the Food Adulteration Rules, 1955. However, for this purpose, we do not think it necessary to quash Ext. P1 except to clarify that Ext. P1 does not specifically require testing for standards prescribed under item A.28.04 as above at least for betel nuts." xxxx

23. However learned counsel appearing on behalf of FSSA, relied upon M. Mohammed''s case (supra) wherein a Division Bench of Madras High Court has distinguished the judgment in Al Marwa, by observing that, Al Marwa came to be decided under the PFA Act, whereas, the issue has to be considered in the light of the statutory provisions under the FSS Act. We have therefore, to consider whether the judgment in Al Marwa still holds the field despite the FSS Act coming into force. Let us now consider the manner in which M. Mohammed''s case was decided. The learned Single Judge of Madras High Court held that the Areca nut (Betel-Nuts) is an agriculture product which falls within the definition of primary food and such primary food is covered in the definition of food as contained in

Section 3(j) of the FSS Act. It is held that the definition of ''food'' as contained in the provisions of the PFA Act, 1954 is quite different from that of the definition under the FSS Act. The Division Bench considering the appeal filed by the importer while confirming the said view held as under:

"26. In so far as the present case is concerned, it is to be borne in mind that in the decision of the Division Bench of Kerala High Court in Al Marwa Traders Vs. Asst. Commissioner of Imports, ''Ungarbled Betel Nuts'' was the subject matter in issue, but in case on hand, the Appellant in the ''Bill of Entry'' had not mentioned the product as ''Ungarbled Betel Nuts''. However, in the affidavit filed in support of the Writ Petition, the Appellant/Petitioner had endeavour to mention that the product is as ''Ungarbelled Betel Nuts''. It is not in dispute that the Appellant/Petitioner, in the ''Bill of Entry'' for home consumption dated 19.06.2014 in B.E. No. 5853707 and it described the item as areca nuts (betel nuts). Admittedly, the product was imported from Srilanka. When the Appellant/ Petitioner had applied to FICS which specifies inspection of the goods by drawing samples to find out/examination as to whether meets the required standards prescribed under Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011. In this connection, this Court very significantly points out that by Section 97(1) of the Food Safety and Standards Act (Prevention of Food Adulteration Act, 1954, was repealed) and only the ingredients of Food Safety and Standards Act, 2006 is applicable to all kinds of exports (including import made by the Appellant).

27. It is to be noted that the Division Bench judgment of Kerala High Court in Al Marwa Traders case pertains to definition under the earlier Prevention of Food Adulteration Act, 1954 but in the instant case, only the Food Safety and Standards Act applies. To put it succinctly, in the Division Bench Judgment of the Kerala High Court in Al Marwa Trader''s case, the decision came to be rendered in interpretation of the Prevention of Food Adulteration Act, 1954 and the Rules made thereto.

28. Moreover, the term ''Food'' defined under the Prevention of Food Adulteration Act, 1954 is certainly different from that of the definition of ''Food'' mentioned under Food Safety and Standards Act. Viewed from that angle, this Court is of the considered view that the decision of Al Marwa Trader''s case relied on by the Appellant/Petitioner is to no avail to the Petitioner. At the risk of repetition, this Court pertinently points out that the term ''Food'' under the Prevention of Food Adulteration Act, 1954 is to include any article which is used as food or drink for human consumption other than drugs and water whereas word ''Food'' as defined under Section 3(d) of the Food Safety and Standards Act, 2006 is all inclusive and pervasive one dealing with any substance whether processed, partially processed or unprocessed which is intended for human consumption and include primary food to the extent defined in clause 3 (zk), genetically modified or engineered food etc.

29. In the light of qualitative and quantitative discussions and also, this Court on

an entire conspectus of the attendant facts and circumstances of the present case in a cumulative fashion, comes to an irresistible conclusion that the view taken by the Learned Single Judge in the impugned order dated 10.10.2014 in W.P. No. 24999 of 2014 to the effect that the Appellant/Petitioner had miserably failed to make it any case for granting the relief claimed by the Appellant in the writ petition in W.P. No. 24999 of 2014 suffers from no material irregularity or patent illegality in the eye of law. Consequently, the Writ Appeal fails."

24. The Standards Regulations, 2011 were framed in exercise of powers conferred by clause (e) of Sub-section (2) of section 92 read with section 16 of the FSS Act. Sections 16(1) and (2) read as under;

"16: Duties and functions of Food Authority

(1) It shall be the duty of the food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.

(2) Without prejudice to the provisions of Sub-section (1), the food Authority may by regulations specify

(a) the standards and guidelines in relation to articles of food and specifying an appropriate system for enforcing various standards notified under this Act;

(b) the limits for use of food additives, crop contaminants, pesticide residues, residues of veterinary drugs, heavy metals, processing aids, myco-toxins, antibiotics and pharmacological active substances and irradiation of food;

(c) the mechanisms and guidelines for accreditation of certification bodies engaged in certification of food safety management systems for food businesses;

(d) the procedure and the enforcement of quality control in relation to any article of food imported into India;

(e) the procedure and guidelines for accreditation of laboratories and notification of the accredited laboratories;

(f) the method of sampling, analysis and exchange of information among enforcement authorities;

(g) conduct survey of enforcement and administration of this Act in the country;

(h) food labelling standards including claims on health, nutrition, special dietary uses and food category'' systems for foods; and

(i) the manner in which and the procedure subject to which risk analysis, risk assessment, risk communication and risk management shall be undertaken."

25. Food product standards are specified in Chapter 2 of the regulations. Paragraph 2.1 dealt with dairy products and analogues, 2.2 dealt with fats, oils and fats emulsions, 2.3 dealt with fruit and vegetable products, of which

paragraph 2.3.47 dealt with nuts and raisins and sub paragraph 5 dealt with dry fruits and nuts. Paragraph 2.4 dealt with cereals and cereal products, paragraph 2.5 relates to meat and meat products, 2.6 fish and fish products, 2.7 sweets and confectionery, 2.8 sweetening agents including honey and 2.9 dealt with salt, spices, condiments and related products. Paragraph 2.10 dealt with beverages other than dairy, fruits and vegetables based. Paragraph 2.11 related to other food products and ingredients. In the said paragraph, clause 2.11.5 dealt with pan masala, 2.12 deals with proprietary food and 2.13 relates to the irradiation of food. Chapter 3 deals with substances added to food, viz., food additives, its standards etc. It is therefore relevant to note that standards had been fixed by the food authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.

26. A perusal of clause 2.3.47.5 which describes ''dry fruits and nuts'' and prescribes its standard is in fact a verbatim reproduction of ''dry fruits and nuts'' in the appendix to PFA Act itself. Therefore, when a Division Bench of this Court after evaluating the respective contentions of the parties had come to a definite finding that betel nuts cannot be categorized as ''dry fruits and nuts'', in the absence of any additional material to suggest that the Madras High Court had relied upon some other material to indicate that it comes within the category of ''dry fruits and nuts'', we do not think that the Madras High Court was justified in taking a different view.

27. There is no dispute about the fact that betel nuts comes under the general category of ''food'' as defined under the FSS Act. In fact the in Al Marwa case, the importers did not have a contention that ungarbled betel nuts are not food. The main contention urged was that no standards were prescribed under the PFA Act. When the Department took a contention that it comes within the standards prescribed for dry fruits and nuts, this Court was called upon to decide whether ungarbled betel nuts can be treated as ''dry fruits and nuts''. Even though FSS Act gives a wider definition to the word ''food'', as far as standards are concerned, especially in regard to betel nuts, when the FSS Authority intends to rely upon the standards prescribed for ''dry fruits and nuts'', we do not think that Al Marwa case can be distinguished on the said ground. It is taking into account the fact that betel nuts imported by the importers in the said case is used for manufacture of a commodity for human consumption, it is treated as food and directions were issued to insist for appropriate standards and to ensure that it is not adulterated in any form. In the said circumstances, we are of the view that the judgment in Al Marwa applies to the factual situation arising in the case and consequently it is held that ''betel nut'' cannot be categorized as ''dry fruits and nuts'' coming under paragraph 2.3.47.5 of the Standards Regulations, 2011.

28. The next contention urged is that there is no necessity for betel nuts imported by the petitioners to satisfy the aflatoxin test as prescribed in the Contaminants Regulations, 2011, which has been framed in exercise of powers

conferred under Section 92(2)(i) read with Sections 20 and 21 of the FSS Act.

29. Crop contaminant means any substance not intentionally added to food, but which gets added to articles of food in the process of their production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine) manufacture, processing, preparation, treatment, packing, packaging transport or holding of articles of such food as a result of environmental contamination. Regulation 2.1 deals with metal contaminants in different types of article of food and the names of metal contaminants are tabulated. Regulation 2.2 deals with crop contaminants. It states that no article of food specified in column (2) shall contain any crop contaminant specified in the corresponding entry in column (1) in excess of quantities specified in the corresponding entry in column (3). In respect of all articles of food, the entry in column (1) is aflatoxin and the entry in column (3) is 30 units (ug/kg). According to the respondents, the sample tested in respect of the imported betel nuts contained aflatoxin more than 30 units and therefore it is of substandard quality and unsafe for import.

30. The argument of the petitioners is that so far aflatoxin test has not been considered as prescribed test for betel nuts though such a provision was available even in the standards prescribed under the repealed PFA Act. Therefore aflatoxin can never be a test that could be achieved at present as it relates to crop contaminants. It is argued that the petitioners cannot have any control in respect of crop contaminants as they are only importing the betel nuts as per Government of India policy.

31. It is argued by the learned counsel appearing for respondents that insofar as primary food is treated as an article of food as defined under the Act, it has to confirm to the prescribed standards. Section 20 of the Act, clearly indicates that no article of food shall contain any contaminant in excess of such quantities as may be specified by regulations. Coming to the definition of unsafe food, it also takes in substandard food. ''Substandard'' is defined under section 3(zx) as an article of food which does not meet the specified standards but not so as to render the article of food unsafe. Further Section 25 , indicates that the food imported should comply with the prescribed standards that no person shall import into India any article of food in contravention of any other provisions of the FSS Act or of any rule or regulation made thereunder. Sub-section (2) of section 25 also indicates that the Central Government while prohibiting, restricting or otherwise regulating import of articles of food under the Foreign Trade (Development and Regulation) Act, 1992 shall follow the standards laid down by the Food Authority under the provisions of the Act and the rules and regulations made thereunder. While considering whether the imported food item or article of food is unsafe or substandard, it is always open for FSS Authorities to prescribe any test that shall apply to the product in question.

32. There is no dispute about the fact that the betel nut is a product of agriculture and while it is being imported it has to be verified whether there is any crop contaminant in excess of what is prescribed. Therefore, it cannot be

said that when standards had been prescribed in terms of Section 21 of the FSS Act under the Contaminant Regulations 2011, every importer is bound to comply with the said standards as well and it is well within the power of the FSSA to clear the goods only on satisfaction or compliance of the said test relating to crop contaminants. Having said so, we are of the view that the respondents were justified in testing the betel nuts imported by the petitioners for crop contaminants in terms of the Contaminants Regulations, 2011.

33. Yet another argument raised on behalf of the appellants/writ petitioners is in regard to the WTO agreement executed by the Government of India, with reference to import of goods to maintain trade relations. Though it is strenuously argued that the present attempt of the FSSA virtually runs contrary to the WTO agreement, we do not think that such arguments can have any relevance while importing food in terms with the FSS Act which clearly prescribes the measures to be taken by the FSSA, to ensure import of food which is neither unsafe nor substandard. In fact, Section 25(2) clarifies the above position as well.

34. However it would be useful to refer to the Plant Quarantine (Regulation of Import into India) Order, 2003 framed under Section 3(1) of the Destructive Insects and Pests Act, 1914 to consider the argument raised on behalf of the petitioners.

35. The aforesaid order applies to plant and plant products. ''Plant'' is defined as meaning living plants and parts thereof including seed and germplasm. Plant product is defined as meaning un-manufactured material of plant origin including grain and those manufactured products that, by their nature or that of the processing may create risk for the introduction and spread of pests. Though betel nuts also can be termed as plant products and appropriate procedure is prescribed for permitting import of plant and plant products, we are of the view that still the importer is bound to comply with the stipulations prescribed under the FSS Act.

36. Section 3(1) of the Destructive Insects and Pests Act, 1914 enables the Central Government to regulate import of plants and plant products which is likely to cause infection to any crop or of insects generally or by class of insects. Therefore, the very purpose of the aforesaid act is to ensure infection of insects or pests to crops. In other words, it has to be ensured that the plants or plant products that are imported into India does not contain any insect, fungus or other pests which are injurious to crops. The concept of FSS Act is totally different. It concerns about the health of the individual, who consumes the food product. When an article of food is imported to India, the FSS Authority is not concerned with the phytosanitary certificate issued by the Plant Quarantine Department. The Plant Quarantine Department is only concerned with compliance of the test prescribed under the regulations framed thereunder and does not conduct any test as to whether the article of food is unsafe or substandard. Under such circumstances, we are of the view that the contention urged on behalf of the appellants in this regard cannot be sustained.

37. Having said so, we do not think that the appellants/writ petitioners have made out a case for interference by this Court in the appellate jurisdiction or in the original jurisdiction. The learned Single judge was therefore justified in dismissing the writ petitions, against which appeals are filed. Petitioners while importing betel nuts are bound to comply with the restrictions imposed by the FSSA as stated above and the product has to satisfy the test to Contaminant Regulations, 2011.

38. In the light of the aforesaid discussions, our findings on various issues are summarized as under:--

"(1) That betel nut is a primary food which requires to be tested and approved by the FSSA in terms of the Contaminants Regulations, 2011.

(2) That the betel nuts imported by the petitioners, if it complies with the standards fixed for aflatoxin in the Contaminants Regulations, 2011, shall be released to them and if it does not prescribe the standards, it shall be open for the FSSA to issue appropriate directions in that regard."

The appeals and the writ petitions are dismissed with the aforesaid findings.