
(2014) 08 DEL CK 0116

In the Delhi High Court

Case No : Writ Petition (Civil) 3708/ 2014 and CM No. 7515/2014

United Distributors Incorporation

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-08-2014

Acts Referred:

Food Safety and Standards Act, 2006 — Section 23, 3(1)(z)

Citation : AIR 2015 Delhi31 : (2015) 3 Crimes 432

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Virag Gupta, Advocate for the Appellant; Vijay Chandra Jha, Sonia Sharma and Mehmood Pracha, Advocate for the Respondent

Judgement

Vibhu Bakhru, J

1. Belgium is known for its chocolates amongst other things. And, Guylian is a renowned brand of Belgium chocolates, which are sold in several countries. As coveted as these chocolates may be, the Food Safety and Standards Authority of India (hereinafter referred to as the "FSSAI") has found these chocolates to be non-compliant with the Food Safety Standards Act, 2006 (hereinafter referred to as the "Act") and the Regulations made thereunder. The petitioner being aggrieved on account of non-clearance of these chocolates, has filed the present petition inter alia seeking a direction to the respondents to clear and deliver the consignments imported by the petitioner.

2. The petitioner had imported assorted chocolates manufactured by Chocolatier Guylian N.Y. weighing approximately 4000 kgs. These chocolates were essentially of 20 different types. Whereas, four types of the said chocolates were cleared, FSSAI had, by its letter dated 05.05.2014, refused to grant a no-objection certificate to the remaining 16 types of chocolates. According to FSSAI, eight types of chocolates were found to be non-compliant with the Food Safety and Standards (Packaging and Labelling) Regulations, 2011 (hereinafter referred to as the "Labelling Regulations") and the balance eight types of chocolates were

found to be non-compliant with the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 (hereinafter referred to as the "Food and Additives Regulations") .

3. Brief facts of the present case are that the petitioner is primarily engaged in the business of importing and selling of chocolates of international brands. On 30.11.2012, FSSAI granted a license (being No.10012022001121) to the petitioner under the category of Distributor and Importer and the same is valid upto 29.11.2017.

4. The petitioner imported 20 different "Guylian" chocolates of various assortments weighing approx. 4000 Kgs. (hereinafter referred to as the "goods") under Invoice No. SO 15765 dated 05.11.2013 to be delivered at ICD Dadri. The said goods arrived at the facility of respondent no.2 at ICD Dadri on 03.01.2014 and the petitioner filed a bill of entry - BE no.4295463 dated 08.01.2014, with respondent No.2.

5. On 17.01.2014, the petitioner submitted an online application seeking inspection and issuance of a No-Objection Certificate, in respect of goods. In this context, various communications were also exchanged between the petitioner and FSSAI during 17.01.2014 to 04.03.2014. The petitioner, by its letter dated 05.03.2014 and also by e-mails dated 06.03.2014 and 13.03.2014 requested FSSAI to release the goods citing that the goods in question were perishable in nature with limited shelf life and a consignment of similar chocolates from the same manufacturer imported earlier, was found to be in conformity with the parameters set by FSSAI and cleared.

6. The Assistant Commissioner (Customs) - respondent no.2, by its letter dated 22.03.2014, directed FSSAI to collect samples of the goods as FSSAI was neither collecting samples of goods nor accepting the samples that were sent to them. Subsequently on 07.04.2014, the goods were inspected by FSSAI and samples of only four types of chocolates out of twenty types of chocolates were taken and tested by FSSAI and a NOC with respect to those four types of chocolates was issued. FSSAI did not draw samples of eight types of chocolates citing labelling defects and no reason was assigned for not drawing samples of the remaining eight types of chocolates. Therefore, respondent no.2 addressed a letter dated 30.04.2014 to FSSAI to assign reasons for not drawing samples of those eight types of chocolates.

7. In response, FSSAI addressed a letter dated 05.05.2014 to respondent no.2 stating that NOC with respect to eight types of chocolates was refused on the ground that the mandatory requirement, prescribed under the Labelling Regulations, of providing the "Date of Manufacturing" on the label had not been complied with and safety of the goods could not be assessed without knowing the mandatory labeling requirements. With regard to remaining eight types of chocolates, it was stated that the same were rejected online as the same were not as per the specifications provided under Regulation 2.7.4 of the Food and

Additives Regulations. Aggrieved by the said letter dated 05.05.2014 whereby request for a No-objection Certificate was rejected with respect to the goods (i.e. sixteen types of chocolates) , the petitioner has filed the present petition.

8. The learned counsel appearing for FSSAI submitted that eight types of chocolates were not compliant with the Labelling Regulations inasmuch as the manufacturing date and expiry date had not been mentioned on the labels. It was submitted that the said date was essential because as per DGFT Guidelines, minimum 60% of shelf life was required before an item could be cleared for being released in the domestic market. It was contended that a manufacturing date on the label was essential in order to ascertain whether 60% of the shelf life of the product remain unexpired. And, a "best before date" would not assist in calculating the unexpired shelf life of the product.

9. It was further submitted that the standard of "chocolate" specified under clause 2.7.4 of Food and Additives Regulations does not permit any vegetable except cocoa butter in "chocolate". It was submitted that initially the Codex Alimentarius did not allow the use of vegetable fats in chocolates, however, from the year 2003, the addition of vegetable fats was allowed upto 5% of the finished product, after deduction of total weight of any other added edible foodstuffs, without reducing the minimum contents of cocoa materials. According to FSSAI, eight types of chocolates imported by the petitioner failed this test. The said chocolates were found to be exceeding the prescribed limit. The relevant extract from the counter affidavit filed by FSSAI articulating its objections to the goods in question, is quoted as below:-

"4. That the Petitioner in the instant case has imported 20 consignments of Chocolatier Guylian from Belgium of which NOC was given for 4 consignments. It is submitted that 8 consignments have been rejected on the grounds of violation of regulation 2.2.2.9 of FSS (Packaging and Labelling) Regulation, 2011 wherein the petitioner has fail to declare on the label the date, month, year in which the commodity is manufactured, packed or pre-packed. Further in case of products having more than three months "best before date" as well as products having less than three months shelf life validity have to state the date, month and year in which the commodity was manufactured.

It is further submitted that 8 products have been rejected on the grounds of non-compliance with regulation 2.7.4 "Chocolate" of Food Safety and Standards (Food Products Standards and Food Additives) Regulations 2011 wherein the chocolate products shall not contain any vegetable fat other than cocoa butter. "Filled Chocolates means a product having an external coating of chocolate with a centre clearly distinct through its composition from the external coating, but does not include flour confectionery pastry and biscuit products. The coating shall of chocolate that meets the requirements of one or more of the chocolate types mentioned above. The amount of chocolate component of the coating shall not be less than 25 per cent of the total mass of the finished product". The chocolates imported by the petitioner contain the filling of vegetable oil which is

not permitted as per the said above regulation."

10. The learned counsel for the petitioner contended that the Labelling Regulations are not applicable on the goods of the petitioner as Regulation 2.6:5 of the Labelling Regulations provides that the labelling requirements are not applicable on wholesale packages. It was further submitted that the labelling requirement is applicable only at the time of sale of product to the consumer and not at the time of import of the product. It was contended on behalf of the petitioner that the defect of not providing a "Date of Manufacture" on the label was curable in view of the instruction issued by FSSAI on 15.12.2011 and the petitioner was ready to cure the defects before release of goods from the custom area by affixing non-detachable stickers. It was submitted that stickers were not prohibited under the Labelling Regulations and stickers would fall within the meaning of "label" as defined under Section 3(1) (z) of the Act.

11. It was further submitted that whilst vegetable fats were not allowed in the shell of the chocolate, there was no prohibition from using vegetable fats in fillings encased by chocolate. The counsel drew the attention of this court to Regulation 2.7.4 of the Food and Additives Regulations, letter of FSSAI dated 31.10.2012 and the clarification dated 14.11.2012 issued by FSSAI. It was stated that no vegetable fats were used in the shell of the chocolate and vegetable fats were used only in the fillings and, therefore, the goods complied with requirements of Regulation 2.7.4 of the Food and Additives Regulations. The learned counsel for the petitioner also referred to the letter of Guarantee dated 25.02.2014 issued by the manufacturer company confirming the above fact. It was also pointed out that the similar products from the same manufacturer were previously cleared by the FSSAI.

12. The controversy that is required to be addressed involves two issues. The first being whether the goods in question are compliant with the Labelling Regulation. And, if not whether the defect is curable. The second issue is whether the goods in question are non-compliant with Regulation 2.7.4 of the Food and Additives Regulations.

13. With respect to the first issue regarding the requirement of labelling, it is relevant to refer to section 23 of the FSS Act. Section 23 of the FSS Act prohibits any person from manufacturing, distributing, selling or exposing for sale any packaged food product which are not marked and labelled in the manner as specified by Regulations. Section 23 of the FSS Act 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."

14. The mandatory labelling requirements have been provided under Regulation 2.2.2 of the Labelling Regulations. Regulation 2.2.2:9 of the Labelling Regulations refers to the requirement of providing "Date of manufacture or packing" on the label and provides that if "Best Before Date" of the product is more than three months then the month and the year of manufacture, packing or pre-packing of the commodity shall be provided in the label and if the life span of commodity is short and less than three months then the date, month and year in which the commodity is manufactured, packed or pre-packed, shall be given on the label. Regulation 2.2.2:10 of the Labelling Regulations refers to the "Best Before and Use By Date" on the label. The relevant portion of Regulation 2.2.2:9 and Regulation 2.2.2:10 of the Labelling Regulations are extracted hereinbelow:-

"9. Date of manufacture or packing.-

The date, month and year in which the commodity is manufactured, packed or pre-packed, shall be given on the label:

Provided that the month and the year of manufacture, packing or pre-packing shall be given if the "Best Before Date" of the products is more than three months:

Provided further that in case any package contains commodity which has a short shelf life of less than three months, the date, month and year in which the commodity is manufactured or prepared or pre-packed shall be mentioned on the label.

10. Best Before and Use By Date

(i) the month and year in capital letters upto which the product is best for consumption, in the following manner, namely:-

"BEST BEFORE.MONTHS AND YEAR"

OR

"BEST BEFORE.MONTHS FROM PACKAGING"

OR

"BEST BEFORE.MONTHS FROM MANUFACTURE"

(Note:

" blank be filled up) "

15. A plain reading of the aforequoted Regulations indicate that it is mandatory for a label to indicate the date of manufacture or packing of the commodity and even where the "best before or use by date" is mentioned on the label, the date of manufacturing or the month and year of manufacturing is necessary depending upon whether the best before date is more than three months or less than three months.

16. In the present case, admittedly the labels on goods in question indicates the best before date, however, the date of manufacturing is not mentioned on the label. According to the FSSAI, eight types of the chocolates have been rejected on account of failure to mention the manufacturing date on the label. The question that remains to be addressed is whether this defect is curable. The learned counsel for the respondent has referred to an ad-hoc instruction issued by the FSSAI on 15.12.2011. In terms of the said instruction, if the date of manufacture mentioned on the label is in the Julian format, the defect could be rectified in the customs warehouse by affixing a sticker. The relevant portion of the said instructions is quoted below:-

"The "Date of manufacture" will be given in date, Month and year format on sticker in addition to the "Date of manufacture" in Julian format already present in the labels along with the rectifiable labelling requirements viz. Name and address of the importer and vegetarian/non-vegetarian logo. The sticker should be pasted in a way that it does not mask the original "Date of manufacture" in Julian format present in the labels. The defect may be rectified strictly in the custom"s warehouse under supervision of customs department."

17. Although, the said instruction is not applicable in the facts of the present case and in any event is stated to be valid only for a period of three months. Nonetheless, it is apparent that affixing a sticker to cure a defect in labelling is not entirely prohibited under the Regulations.

18. A label is defined under Section 3(1) (z) of the Act is as under:-

"(z) "label" means any tag, brand, mark, pictorial or other descriptive matter , written, printed, stencilled, marked, embossed, graphic, perforated, stamped or impressed on or attached to container, cover, lid or crown of any food package and includes a product insert;"

19. It is clear from the aforesaid definition that it is not necessary that a label be printed directly on the cover, wrapper of the container but can also be attached as a sticker, provided that the sticker conforms to Regulation 2.2.1:4 of the Labelling Regulations. In other words, the sticker should be "applied in such a manner that they will not become separated from the container".

20. The petitioner has also furnished a certificate from the manufacturer giving the details of the manufacturing and the expiry dates in respect of each of the consignments. Thus, FSSAI can also satisfy itself that the labelling put by the

petitioner correctly reflects the manufacturing date on the packages.

21. It is also relevant to note that the petitioner is a distributor and the goods in question have been imported in wholesale packages and, therefore, the labelling on the wholesale package is also to conform with the Labelling Regulations.

22. While, it is mandatory that the goods are labelled in a manner as specified by the Labelling Regulations, the purpose of providing labels should not be lost sight of. The object of labelling the packaged products is to ensure that relevant information regarding the product is available on the package for the benefit of the consumers. Such information includes the name of the food item, the ingredients, the date of manufacture, expiry date, best before use date, the name of the manufacturer, the name of the importer as well as the nature of the product i.e. whether it is a meat or a vegetable product. Since the idea is to ensure that the consumer is duly informed of the product being purchased/consumed by him, a non-detachable sticker providing all information would sufficiently meet this object.

23. The next question that needs to be addressed is whether the goods in question, containing vegetable fat in the fillings, are compliant with the requirements of Regulation 2.7.4 of Food and Additives Regulations. Regulation 2.7.4 of Food and Additives Regulations defines "Chocolate" and the relevant extract of the said clause is quoted below:-

"2.7.4: Chocolate

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

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

The chocolates shall be of the following types:-

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

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

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

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

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

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

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

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

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

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

- (a) edible salts.
- (b) spices and condiments.
- (c) permitted emulsifying and stabilizing agents.
- (d) permitted sequestering and buffering agents.

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

(emphasis supplied)

24. Indisputably, a chocolate which contain vegetable fat beyond the prescribed limit would be non-compliant with the standards as prescribed under the Food and Additives Regulations. In the present case, the goods in question which have been found to be non-compliant with Regulation 2.7.4 of the Food and Additives Regulations are filled chocolates i.e. a shell made with chocolate with a filling inside. It is not disputed that the W.P.(C) 3708/ 2014 Page 14 of 16 chocolate shell itself does not contain any vegetable fat. The vegetable fat is found in the filling and on this basis the FSSAI has found the goods in question to be non-compliant with the said Regulation of the Food and Additives Regulations. In my view, this decision of FSSAI cannot be sustained as Regulation 2.7.4 of the Food and Additives Regulations clearly indicates that in case of filled chocolates "the coating shall be of chocolates that meets the requirement of one or more of the

chocolate types" mentioned in Regulation 2.7.4. It is, thus, apparent that specification with regard to vegetable fat has to be confined only to the chocolate shell and not to filling contained by the chocolate shell. Clause 2.2.2 of the Codex Standard for Chocolate and Chocolate Products describes "Filled Chocolate" as under :-

"2.2.2 Filled Chocolate

Filled Chocolate is a product covered by a coating of one or more of the Chocolates defined in Section 2.1, with exception of chocolate a la taza, chocolate familiar a la taza and products defined in section 2.1.7.4 (chocolate para mesa) , the centre of which is clearly distinct, through its composition, from the external coating. Filled Chocolate does not include Flour Confectionery, Pastry, Biscuit or Ice Cream products. The chocolate part of the coating must make up at least 25% of the total weight of the product concerned.

If the centre part of the product is made up of a component or components for which a separate Codex Standard exists, the component(s) must comply with the applicable standard."

25. The above definition also indicates that centre of the chocolate is clearly distinct, through its composition, from the external coating. The standards prescribed for "chocolate", cannot be applied as the filling is distinct from the outer shell.

26. It is relevant to state that even FSSAI had accepted this view as is evident from the letter dated 31.10.2012 which was issued by FSSAI in respect of the consignment imported by other entities. FSSAI also issued a clarificatory order dated 14.11.2012 wherein the exemption, granted to some of the companies on 31.12.2012 who had filed the representations with FSSAI, was made applicable for all future consignments. It was also clarified that edible vegetable oils, fats including partially hydrogenated vegetable oils were also considered as filler material in filled chocolate. The relevant extract of the letter dated 31.10.2012 is quoted below:-

"2. The case has been examined and the action may kindly be taken as indicated below.

a) With regard to the consignments of M/s. Mars International India Pvt. Ltd. and M/s. Ferrero, the consignments may be allowed as the vegetable oil is in the filling part of the Filled Chocolate. Both FSS Regulations, 2011 and Codex Standard are silent on the use of vegetable fat in the filling part of the Filled Chocolate. Hence, filled chocolate with vegetable fat in the filling may be allowed. On similar lines, in the case of M/s. K K Overseas, if the chocolates are in the Filled Chocolate category, vegetable fat is allowed in the filled part of the chocolate."

27. This court by an order dated 04.07.2014 directed FSSAI to forthwith test the petitioner's consignment in accordance with the FICS System. Apparently, the

only objection with respect to the eight types of chocolates is with regard to the vegetable oil in the fillings and the same, as discussed earlier, is not sustainable. Accordingly, it is directed that the said goods be cleared subject to the petitioner complying with the other requirements. It is noted that goods in question have been lying in a warehouse since 03.01.2014. The goods being perishable are required to be cleared with utmost expedience. Respondent no.2 is also directed to ensure that clearance of goods is not impeded on account of any further clearances from FSSAI in respect of the eight types of chocolates that FSSAI had found to be non-compliant only in respect of Regulation 2.7.4 of the Food and Additives Regulations.

28. With respect to the eight types of chocolates where the labelling was found to be defective, the petitioner shall cure the same within the customs warehouse by affixing a non-detachable label giving all particulars as are necessary under the Labelling Regulations. The respondent no.2 shall also ensure that sufficient access to the goods is provided to the petitioner in order to enable the petitioner to affix the necessary labels on those goods which have been found to be non-compliant of the Labelling Regulations. FSSAI shall ensure that the goods in question are cleared once the necessary labels have been affixed as directed.

29. The writ petition is, accordingly, allowed with the aforesaid directions. The parties are left to bear their own costs.