(2016) 01 DEL CK 0146

In the Delhi High Court

Case No : W.P. (C) 10666/2015

Unlimited Nutrition Pvt. Ltd. — APPELLANT

Vs

Commissioner of Customs and Others — RESPONDENT

Date of Decision : 18-01-2016

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 3
Food Safety and Standards Act, 2006 — Section 22, Section 47

Citation : (2016) 01 DEL CK 0146

Hon'ble Judges : Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Anjali J. Manish, Priyadarshi Manish and Karan Chawla, Advocates, for the Appellant; Sumit Gaur, Proxy Counsel for Kamal Nijhawan, Senior Standing Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

1. The Petitioner, Unlimited Nutrition Pvt. Ltd. (''UNPL''), is engaged in the import of food items, i.e., ''energy gel'' and ''energy chews'' of different flavours. UNPL placed orders on GU Energy Labs, 1609 4th St. Berkeley, CA, USA on 5th June 2015 for supply of ''energy gel'' and ''energy chews'' amounting to USD 13,317.60. Pursuant to the above order, the said goods were shipped on 13th June 2015. The place of delivery was the Inland Container Depot (ICD), Patparganj.

2. On arrival of goods at ICD, Patparganj, the Petitioner filed the first check bill of entry No. 2540559 (''BE'') dated 9th September 2015 for the purpose of clearance for home consumption. A copy of the BE indicates that the consignment was of 94 cartons which in turn contained boxes and each box contained 24 packets/sachets. It appears that in terms of the provisions of the Food Safety Standard Act, 2006 (''FSS Act'') for the import of any food articles, the Food Safety Standard Authority of India (''FSSAI'') issues a ''No Objection Certificate'' (''NOC'') in order that the Customs Department may issue an ''Out of

Charge'' (''OOC'') order.

3. It is stated by learned counsel for the Petitioner that there were 17 different types of energy gel and energy chews that formed part of the imported consignment. One sample of each was drawn by the Customs officer and sent for testing to M/s. Ozone Pharmaceuticals Limited (''OPL'') which was notified as accredited laboratory by the National Accreditation Board for Testing and Calibration Laboratories in terms of the Notification dated 1st April 2015 of the Ministry of Health and Family Welfare. OPL tested the samples drawn and submitted its report under cover of letter dated 12th October 2015 certifying in respect of each of the samples that the condition of seals on the poly pouch was intact and satisfactory and the sample was ''energy gel'' falling under Regulation No. 2.12.1 of Food Safety and Standards (Food Products Standards and Food Additives) Regulation 2011 (''FSS Regulation 2011''). Inter alia the test report mentioned that each of the samples contained the manufacturing date, best before date and country of origin. Against the column ''manufacturer''s name and address'', the report mentioned ''GU Energy Labs Berkeley CA 94710''. Enclosed with the submitted report was Form ''B'' in terms of the Regulation (ii) of 2.3.1 of FSS Regulation 2011.

4. This was followed by the Petitioner''s letter dated 19th October 2015 to the Customs Department stating that the imported goods would be sold in India in full boxes only and that the individual sachets would not be sold in the market. In the office noting of the Department it was stated that the BE was finally assessed by the Deputy Commissioner (Group) on the basis of the report received from M/s. OPL. However, the online system had failed to accept the final assessment. The Petitioner was given the understanding that overriding permission would be sought for issuance of the OOC order. The Petitioner''s case is that it deposited the requisite customs duty of Rs. 4,78,355 for the purpose of clearance. However, the OOC order was not passed and the goods were not cleared. In those circumstances, the present writ petition was filed.

5. At the hearing on 20th November 2015 the Court passed the following order:

"It appears that there is a software glitch at the end of the Customs Department as a result of which the Indian Customs Single Window Project is not functioning properly. Because of this, the Customs Department has not been able to transmit the ''BE message'' to FSSAI, even though the assessment has been completed in respect of the said bill of entry. Unless and until, the online communication takes place, the FSSAI would not be in a position to give the clearance.

Mr. Nijhawan, the learned counsel appearing on behalf of the Customs Authority, requests for some time to ensure that the glitch is removed.

Renotify on 26th November 2015.

Dasti under the signature of the Court Master."

6. On the subsequent hearing on 26th November 2015 it was realized that the

Customs Department had not transmitted to the FSSAI the BE message. The Court then passed the following order:

"The ''BE'' shall be manually supplied by the Customs Authorities to the FSSAI within one day. The FSSAI shall also draw the samples, if necessary, within one day. The report of the FSSAI shall be made available to this Court by the next date of hearing.

Renotify on 03.12.2015.

Dasti under the signatures of the Court Master."

7. At this stage it must be mentioned that the case of the Petitioner hinges on the Single Window Clearance System that was introduced by Circular No. 9 of 2015 dated 31st March 2015 issued by the Central Board of Excise & Customs, New Delhi (''CBEC'') with the purpose of facilitating online customs clearance ''at a single point only with the Customs''. The purpose of the system was to facilitate the obtaining of permissions from other regulatory agencies like Animal Quarantine, Plant Quarantine, Drug Controller, Textile Committee etc. without the importer/exporter having to separately approach these agencies. The Single Window also provided the importers/exporters a single point interface for customs clearance of import and export goods thereby reducing interaction with governmental agencies, dwell time and cost of doing business. The CBEC decided to implement an electronic online message exchange between the FSSAI and the Customs with effect from 1st April 2015 at JNPT (Nhava Sheva), ICD, Tughlakabad and ICD, Patparganj. The idea was to provide "seamless online exchange in real time of the Customs Bill of Entry (Import declaration) with these agencies and Release Order (''RO'') from both the agencies would be received by the Customs in electronic message format."

8. The broad scheme of this Single Window Clearance System (also known as ICEGATE) was that the Indian Customs EDI (''ICES'') would transmit a ''BE message'' to the FSSAI on completion of assessment of the relevant BEs. On processing of the message by FSSAI, the said agency would electronically transmit a Release Order (RO) to the Customs Department. The Customs Department would not issue an OOC till such time the RO was received from the FSSAI for all the relevant food items.

9. In terms of Circular 9 of 2015 the following six types of ROs may be provided by FSSAI to the ICES:

(a) Release - goods can be released by the Customs

(b) Destruction - goods to be destructed by the Customs

(c) Deportation - goods to be exported back to the country of origin

(d) No Objection Certificate (NOC) - goods can be released by the Customs

(e) NCC (Non-compliance Certificate) - non-rectifiable defects observed in the goods

(f) Product out of scope - goods are out of scope for FSSAI/PQIS."

10. If the RO fell under types (b), (c) and (e) above, the OOC would not be allowed by the ICES. On receipt of the RO online, the Customs ICES would integrate the data in the ICES database which would then be available to the Customs officer concerned.

11. In Circular No. 9 of 2105, a reference is made to the earlier Circular No. 3 of 2011 dated 6th January 2011 and it is stated that import consignments that have been tested on previous five consecutive occasions under the 2011 Circular and found in order may not be referred to FSSAI.

12. As far as the present case is concerned, it appears that the sample was drawn by the Customs Officer and sent for testing to M/s. OPL in terms of the previous Circular No. 3 of 2011 dated 6th January 2011 although in terms of Circular No. 9 of 2015, the Customs had to first send a BE message to FSSAI.

13. Ms. Anjali Manish, learned counsel for the Petitioner, submitted that this was perhaps on account of the fact that the ICD at Patparganj did not have any authorized officer under the FSS Act and therefore, in terms of para 11 of the said Circular No. 3 of 2011, the sample was drawn by the Customs Officer and sent it to one of the accredited laboratories, i.e., OPL.

14. However, it is stated by Ms. Tasneem Ahmadi, learned counsel for Respondent No. 2 FSSAI, that her instructions are that an officer of FSSAI is available at ICD, Patparganj and FSSAI ought to have been kept in the loop when the above exercise was carried out by the Customs.

15. Be that as it may be, pursuant to the order of the Court dated 26th November 2015, it appears that an officer of FSSAI did go to ICD, Patparganj. However, he declined to lift any sample from the consignment. By a letter dated 2nd December 2015 addressed to the Deputy Commissioner of Customs, ICD, Patparganj, he gave the following reasons for not drawing the samples:

"1. The category of imported products mentioned on the label were as Energy Gel (salted caramel, peanut butter, mandarin orange, vanilla bean, chocolate outrage, triberry, espresso love, lemon sublime, strawberry banana, caramel macchiato, vanilla orange, sea salt chocolate & strawberry kiwi flavours) and Energy Chews (orange chomps, strawberry, orange & black cherry flavours) which are not defined in FSSR, 2011. Hence all the 17 products mentioned in the BE were found proprietary in nature which cannot be cleared as per section 22 of FSS Act, 2006.

2. Date of manufacture was not mentioned on the label of all the products as per BE which contravene the regulation no. 2.2.2(9) of FSS (Packaging and Labelling) Regulation, 2011.

3. Lot No. & manufacturer name and address were not specified on the label of

all the products mentioned in the BE which contravene the regulation no. 2.2.2(8) & 2.2.2(6) of FSS (Packaging and Labelling) Regulation, 2011 respectively."

16. One of the central issues that arise is whether proprietary foods are completely outside the purview of the FSS Act, particularly in terms of Section 22 thereof, which reads as under:

"22. Genetically modified foods, organic foods, functional foods, proprietary foods, etc. - Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.

Explanation.- For the purposes of this section,- (1) "foods for special dietary uses or functional foods or neutraceuticals or health supplements" means:

(a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely:-

(i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;

(ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);

(iii) substances from animal origin;

(iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;

(b) (i) a product that is labelled as a "Food for special dietary uses or functional foods or neutraceuticals or health supplements or similar such foods" which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration;

(ii) such product does not include a drug as defined in clause (b) and ayurvedic, sidha and unani drugs as defined in clauses (a) and (h) of section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940) and rules made thereunder;

(iii) does not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;

(iv) does not include a narcotic drug or a psychotropic substance as defined in the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and rules made thereunder and substances listed in Schedules E and EI of the Drugs and Cosmetics Rules, 1945;

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology;

(3) "organic food" means food products that have been produced in accordance with specified organic production standards;

(4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe:

Provided that such food does not contain any of the foods and ingredients prohibited under this Act and regulations made thereunder.

17. It has been urged by Ms. Manish, learned counsel for the Petitioner, that in terms of the opening words of Section 22 of FSS Act, "save as otherwise under this Act", read with Explanation (4) thereof, unless the proprietary food is unsafe or contains any of "the foods and ingredients prohibited under this Act and the regulations made thereunder", proprietary food was not as such outside the ambit of the FSS Act. She buttressed the above submission with a reference to the decisions of the Supreme Court in State of Rajasthan v. Shri Noor Mohammad , (1972) 2 SCC 454 and Lalu Prasad Yadav v. State of Bihar , (2010) 5 SCC 1 and to the fact that FSS Regulation 2011 makes a specific reference to ''Proprietary Food'' under Regulation 2.12.1 read with Appendices A and B thereof. It is further submitted that once the consignment satisfied the requirement of the FSS Act there was no justification for FSSAI to withhold the NOC.

18. Countering the above submissions it is submitted by Ms. Ahmadi that the understanding of the FSSAI was that unless specifically permitted under any of the regulations under the FSS Act, proprietary food is generally not permissible to be imported in terms of Section 22 of the FSS Act. It is pointed out that none of the Regulations mention energy gel or energy chews products. Therefore, according to the FSSAI, the consignment cannot be permitted to be imported under Section 22 of the FSS Act.

19. Having considered the above submissions in light of the relevant provisions of the FSS Act and FSS Regulation 2011, the Court is of the view that the submission of the FSSAI that proprietary foods fall entirely outside the ambit of the FSS Act is not borne out on a correct and holistic reading of Section 22

thereof together with the FSS Regulation 2011 and other Regulations. As rightly pointed out by the Petitioner, the opening words of Section 22 ''save as otherwise provided under this Act'' are meant to narrowly tailor the prohibited categories, and not keep all proprietary goods of whatever nature entirely out of the ambit of the FSS Act and Regulations thereunder. The crucial words in Explanation (4) indicate that what is meant to be prohibited for import are proprietary foods that are ''unsafe''. The proviso thereto further indicates that proprietary food containing "any of the foods and ingredients prohibited under this Act and the regulations made thereunder" are meant to be kept out of the preview of Section 22 of the Act. If the intention was to not permit any proprietary food of any kind whatsoever, there would be no need to describe ''proprietary foods'' under Regulation 2.12.1 of FSS Regulation 2011 as under:

"2.12.1

(1) Proprietary food means a food that has not been standardized under these regulations.

(2) In addition, to the provisions including labelling requirements specified under these regulations, the proprietary foods shall also conform to the following requirements, namely:-

(i) the name describing as clearly as possibly, the nature or composition of food and/or category of the food under which it falls in these regulations shall be mentioned on the label;

(ii) the proprietary food product shall comply with all other regulatory provisions specified in these regulations and in Appendices A and B."

20. The mere fact that ''energy gel'' and ''energy chew'' are not mentioned in Appendices A and B would not ipso facto mean that they are prohibited from being imported. The FSSAI will have to examine if ''energy gel'' and ''energy chew'' which are proprietary foods are unsafe or contain any ingredient which is prohibited under the FSS Act.

21. Consequently, the Court is of the view that the first reason given by the FSSAI in its letter dated 2nd December 2015 addressed to the Customs for not drawing samples of the consignments in question is not justified in terms of Section 22 of FSS Act.

22. That brings us to the other two objections raised by the FSSAI in the said letter. These relate to the label on the packages and about them not mentioning the date of manufacture, and the manufacturer''s name and address and the lot number.

23. As far as this Court is concerned, it is not clear from the said letter whether any of the packages contained any of the above information as required by Clauses 6, 8 and 9 under Regulation 2.2 of the Food Safety and Standards (Packaging and Labelling) Regulations 2011 (''FSS Packaging Regulation 2011'').

Although the report of the OPL does appear to indicate that the samples sent to it did contain some of the above details, the FSSAI is right in its contention that it was not kept in the loop when samples were drawn by the Customs and sent to OPL and this was not in accordance with the procedure under Circular 9 of 2015.

24. Ms. Manish, learned counsel for the Petitioner, pointed out that as far as the Petitioner is concerned, it cannot be blamed for going along with the Customs Department which drew the sample and sent it to OPL in terms of the earlier Circular No. 3 of 2011. It is also pointed out that necessary charges for getting the samples tested by OPL have already been paid by the Petitioner. It was stated that the Petitioner cannot be asked to again incur expenses for getting the samples drawn and tested afresh.

25. The Court nevertheless is of the view that the Customs Department cannot be asked to issue the OOC without samples of the products, which are admittedly food items, being tested to the satisfaction of FSSAI, which is a requirement under Circular 9 of 2015.

26. Accordingly, it is directed that without any further wastage of time, the authorised officer of FSSAI will visit ICD, Patparganj not later than 11 am on Wednesday, i.e., 20th January 2016. In the presence of the authorized representative of the Petitioner, the officer of the FSSAI will visually inspect each of the packages and indicate to the Petitioner which of them does not satisfy the requirement of the FSS Packaging Regulation 2011. Thereafter samples will be drawn by the officer of the FSSAI from those packages that satisfy the FSS Packaging Regulation 2011. The procedure/protocol set out under Section 47 of FSS Act will be followed while taking samples. The test report of the ingredients of such samples shall be obtained by the FSSAI not later than two days thereafter. The test report shall be submitted to the Court on the next date of hearing. The FSSAI will proceed with the drawing of the samples and their testing without insisting, at this stage, upon the Petitioner making any payment for testing or any other charge. This will be subject to further orders that may be passed by this Court.

27. List on 28th January 2016. Order be given dasti to learned counsel for the parties under the signature of the Court Master.

