
(2016) 05 DEL CK 0225

In the Delhi High Court

Case No : Writ Petition (C) No. 10666 of 2015

Unlimited Nutrition Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 23-05-2016

Acts Referred:

Food Safety And Standards Act, 2006 — Section 2(1)(j), 2(1)(k), 16(1), 16(5), 18, 22, 47, 89, 92, 93

Customs Act, 1962 — Section 111(d), 111(m), 112, 125

Food Safety And Standards (Licensing And Registration Of Food Businesses)

Regulations, 2011 — Regulation 2.12.1, 2.2.2(6), 2.2.2(8), 2.2.2(9), 2.2.2(8), 2.3.1(ii)

Citation : (2016) 338 ELT 398

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

Bench : Division Bench

Advocate : Mrs. Anjali J. Manish with Priyadarshi Manish, Advocates, for the Petitioner; S/Shri Kamal Nijhawan, Sr. Standing Counsel, Manish Jha, Dy. Commissioner with R. Ashok, Mehmood Pracha and Rudro Chatterjee, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

S. Muralidhar, J.—This writ petition raises important questions concerning the interpretation of the relevant provisions of Food Safety and Standards Act, 2006 ("FSS Act") and the functioning of the Food Safety and Standard Authority of India ("FSSAI"). It also involves interpretation of the relevant provisions of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 ("FSS Regulations 2011") and the Food Safety and Standards (Packaging and Labelling) Regulations, 2011 ("FSS Packaging Regulations, 2011").

The two issues

2. There are two broad issues that arise in this petition. The first concerns the question whether proprietary foods are outside the purview of the FSS Act, the FSS Regulations, 2011 and the FSS Packaging Regulations, 2011. The second

issue is whether on the facts of the present case, the petitioner can be said to have complied with the FSS Packaging Regulations, 2011.

3. The first issue has been comprehensively dealt with by this Court on 18th January, 2016. The Court in that order, which will be referred to hereafter, held that in the facts and circumstances of the case the stand taken by the FSSAI that the proprietary foods imported by the petitioner fall outside the ambit of the FSS Act, Rules and Regulations was not borne out on a correct and holistic reading of Section 22 of thereof together with the FSS Regulations, 2011.

4. As regards the second issue concerning the compliance with the labelling requirements, the matter was further examined after the said date and the present order proposes to deal with the said issue.

Background facts

5. The petitioner, M/s. Unlimited Nutrition Private Limited ("UNPL") is registered under the Companies Act, 1956 and has its registered office in Mumbai. It is engaged in the import of food items, including "energy gel" and "energy chews" of different flavours. The respondents in the petition are The Commissioner of Customs, (Respondent No. 1), the FSSAI (Respondent No. 2), The Joint Commissioner of Customs, ICD, Patparganj, Delhi, The Deputy Commissioner of Customs (Import Shed) (Respondent Nos. 3 and 4 respectively).

6. 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. In terms of the FSS Act for the import of any food articles, the FSSAI issues a "No Objection Certificate" ("NOC") in order that the Customs Department may issue an "Out of Charge" ("OOC") order. The FSSAI grants such NOC on the basis of the report of a Food Analyst at a lab notified by the FSSAI. For the purpose of a "one window" clearance, the Customs has, in terms of Circular No. 3/2011-Cus., dated 6th January, 2011, devised a procedure of sending an online request to the FSSAI for getting the NOC for the purpose of clearance of goods particularly at ICD, Tughlakabad and Patparganj.

7. On arrival of goods at ICD, Patparganj, the petitioner filed the first check Bill of Entry No. 2540559 ("B/E"), dated 9th September, 2015 for clearance for home consumption. The B/E indicated that the consignment was of 94 cartons which in turn contained boxes and each box contained 24 packets/sachets. 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.

8. 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 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 the FSS Regulations, 2011.

9. 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 B/E was finally assessed by the Deputy Commissioner (Group) on the basis of the report received from 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.

Proceedings in this Court

10. 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.

Re-notify on 26th November, 2015.

Dasti under the signature of the Court Master."

11. On the subsequent hearing on 26th November, 2015 it was realized that the Customs Department had not transmitted to the FSSAI the B/E message. The Court then passed the following order :

"The "B/E" 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 3-12-2015."

12. Pursuant to the order dated 26th November, 2015 an officer of the FSSAI visited the ICD, Patparganj, Delhi but declined to lift the sample. The stand taken by the FSSAI in its letter dated 2nd December, 2015 addressed to the Deputy Commissioner of Customs, ICD, Patparganj, Delhi stating that the reasons are not lifting the sample were as under :

"(1) The category of imported products mentioned on the label were as Energy Gel (salted caramel, peanut, butter, mandarin orange, vanilla, bean, chocolate outrage, bribery, espresso, love, lemon, sublime, strawberry banana, caramel macchiato, vanilla orange, sea salt chocolate and strawberry kiwi flavours) and energy chews (orange champs, strawberry, orange and 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. & manufacture 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) and 2.2.2(6) of the FSS (Packaging and Labelling) Regulation, 2011 respectively."

The order dated 18th January, 2016

13. In its order dated 18th January, 2016 the Court comprehensively dealt with the issue whether the proprietary foods were outside the purview of the FSS Act. The relevant portion of the said order discussing the said issue, is as under :

"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, nutraceuticals, 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 nutraceuticals 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 nutraceuticals 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."

14. The Court in its order dated 18th January, 2016 [2016 (334) E.L.T. 255 (Del.)] dealt with the two objections raised by FSSAI relating to the non-compliance with the labelling requirements. The Court in its order dated 18th January, 2016 then observed as under :

"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 authorised 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."

Packages do not comply with labelling requirements

15. Pursuant to the above order, the FSSAI when inspected the consignment found that none of the packages contains label which confirms the requirements of FSS Packaging Regulations, 2011. Therefore, no sample was drawn by the FSSAI. An affidavit to the above effect was filed on 4th February, 2016 by Mr. Anil Mehta, Deputy Director and an authorised officer of FSSAI. The affidavit pointed out that the name and complete address of the manufacturer has not been shown on the labels. Only the name of the distributor was indicated. The other objection was that "the batch number/code number/lot number required to be mentioned on the label for ascertaining the traceability of the manufacture and distribution chain of the product" in terms of Regulation 2.2.2(8) of the FSS Packaging Regulations, 2011, had not been mentioned. It is further pointed out that in terms of notification issued by the Director General of Foreign Trade ("DGFT") only food products with a remaining shelf-life of 60% can be allowed to be imported. In the absence of the date of manufacture, it was not possible to vary if the shelf-life of the products was 60% or not. According to FSSAI, none of the packages of the imported consignments satisfied the requirement of the FSS Regulations, 2011.

16. The above stand of the FSSAI was contested by Ms. Manish, learned counsel for the petitioner. She volunteered that if the packets were photographed, they would show that the details are available on the packets which, according to her, satisfied the requirements of the FSS Packaging Regulations, 2011.

17. The Court in its order dated 15th February, 2016 directed as under :

"4. Since this is a contentious issue and since the Court does not have before it any photograph or specimen of the packet which have been imported, the Court is constrained to direct that both the representative of the FSSAI and the AR of the Petitioner to remain present at the Customs Warehouse Officer on 19th February, 2016 at 11 am. On the strength of the present order, the Superintendent-in-Charge of the Customs Warehouse where the imported consignment is stored at present will be permit the AR of the petitioner and the representative of the FSSAI to photograph the one pouch/packet for each flavour.

The photographs in digital form shall be submitted to the Court by both parties on the next date of hearing."

18. At the hearing on 1st March, 2016, the Court perused 161 photographs that were filed. The following order was passed on that date :

"1. 161 photographs have been placed in the Court file. These are photographs of the packets as well as boxes of the imported consignment. The sticker labels are of the petitioner and a sample reads as under :

"Imported By

UNLIMITED NUTRITION PVT. LTD.

43-45 & 52, Nawab Building

4th Floor, D.N. Road, Fort

Mumbai - 400 001 India

Supplier : GU Energy Labs USA

Qty. : (1 Serving x 24)

Net Weight : 768 gm

Desc of goods : GU Roctame Energy Gel

MRP Rs. 4,000/- (Inclusive of all taxes)

Mfg. Date: 06/2015

Exp. Date : See the Box

Date of Import : 09/2015"

2. In light of the submissions made by Mr. Mehmood Pracha, learned counsel for respondent No. 2/FSSAI, the Court would like the petitioner to answer the following questions regarding the sticker labels

(i) on what basis were the details set out in the label prepared and by whom?

(ii) where were the sticker labels printed and how was the information depicted in the sticker label made available to the person who printed it

(iii) Were the labels affixed by GU Energy Labs USA at the place of export or thereafter at the place of import and

3. Ms. Anjali J. Manish, learned counsel for the petitioner states that an affidavit answering the above questions will be filed by the petitioner within one week from today with an advance copy to learned counsel for the respondents.

4. List on 10th March, 2016."

19. The petitioner filed an affidavit in response to the above order on 17th

March, 2016. After perusing the said affidavit on 22nd March, 2016, the Court passed the following order :

"1. The affidavit filed by the petitioner in response to the order passed by this Court on 1st March, 2016 raises more questions than it answers.

2. The Court had in its order clearly set out in para 2 of the above mentioned order, the specific questions that were required to be answered by the petitioner. One particular question was with regard to the place where the labels were affixed on the packets that were imported. While the affidavit states that it is the importer who prepared and affixed the labels, the affidavit is silent on where exactly the labels were affixed. During the course of her submission today, learned counsel for the petitioner volunteered that these labels were affixed by the petitioner in the Customs area itself and that there were circulars that permitted the petitioner to do so. It is also stated that the permissions were obtained from the concerned Customs officials for that purpose. However, these details do not find place in the affidavit.

3. It appears to the Court that the petitioner has not been forthcoming with the entire facts of the matter. The Court gives the petitioner one more opportunity to come clean on where the labels were printed, which Customs officials permitted it to enter the Customs area and affix the labels. The petitioner will also enclose the copy of the orders/permissions granted to the petitioner for that purpose.

4. Mr. Kamal Nijhawan, learned Senior Standing Counsel for the Customs states that they will file a detailed response to the affidavit already filed and to the further affidavit that is to be filed, before the next date of hearing.

5. The Court makes it clear that it would like the entire matter to be fully enquired into and taken to its logical conclusion.

6. The further affidavit of the petitioner be filed not later than 29th March, 2016. The response thereto of the Customs department be filed before the next date.

7. List on 25th April, 2016."

20. The petitioner filed a further affidavit on 21st April, 2016 stating that G-Card holder who was handling the file had left the employment of the CHA of the petitioner and therefore, the petitioner was unable to produce a copies of the permissions/orders of the customs authorities under which the labels were affixed "on the master box of 24 sachets" comprising the imported consignment.

21. At the hearing on 25th April, 2016 Ms. Manish conveyed that the petitioner wished to re-export the consignment. The Court then issued the following directions :

"2. In the light of the above affidavit, the customs authorities shall inform the Court by filing an affidavit on (i) whether there exists any practise of permitting affixing of labels on goods that are imported after their arrival at the port of entry and if so the relevant rules/instructions be enclosed; (ii) whether in the

present case any such permission/order was issued to the petitioner for affixing labels on the imported consignment (iii) can the petitioner be permitted to re-export the goods and if so under what circumstances and subject to what conditions?"

Labelling of imported goods

22. Pursuant to the above order, an affidavit dated 5th May, 2016 has been filed by Mr. Manish Kumar Jha, Deputy Commissioner (Legal), ICD, Patparganj, Delhi. The affidavit refers to the DGFT's Notification No. 44 (RE-2000)/1997-2002, dated 24th November, 2000 which requires the Customs to examine the compliance with the labelling requirements before clearance of the goods by the proper officer. It is pointed out that by Circular No. 19/2011, dated 15th April, 2011 issued by the Central Board of Excise & Customs ("C.B.E. & C.") and pursuant to the Public Notice No. 16/2013, dated 15th October, 2013 issued by the Commissioner of Customs (Imports & General), New Delhi, the facility of labelling of imported goods has been extended to importers, subject to certain procedural conditions. The importer or CHA has to submit a letter to the Assistant Commissioner ("AC")/Deputy Commissioner (DC) (Import Shed) seeking permission for labelling the imported goods. However, this labelling has to happen prior to the registration of the goods and not after payment of the duty, if any. The AC/DC Shed concerned while giving such permission is expected to instruct the Shed Officer to verify compliance. If it is found that the importer has got the B/E registered without such permission, and the imported goods do not bear the requisite labels, appropriate action including penalty proceedings is to be initiated under the Customs Act, 1962 ("CA"). The above procedure has been made available to all the goods covered under the DGFT Notification dated 24th November, 2000.

23. It is pointed out that the FSSAI has issued the following instructions on 21st December, 2015 regarding rectifiable and non-rectifiable labelling requirements in the Customs bonded warehouses by importers :

"Subject : Rectifiable and Non-Rectifiable Labelling requirements - Reg.

Sir,

With regard to the subject cited above, this is to inform that the labelling requirements and the manner in which these are to be depicted on the label of the food products are mentioned in the Food Safety and Standards (Packaging and Labelling) Regulation, 2011. All the labelling requirements are mandatory. However, to facilitate trade, FSSAI has permitted rectification of 3 labelling requirements in the custom bonded warehouses by the importers, the details of which are as under :

Mandatory/non-rectifiable labelling requirements

Rectifiable labelling requirements

(i)

The name of Food

(i) Declaration regarding Veg or Non-Veg

(ii)

List of ingredients

(ii) Name and Address of the Importer

(iii)

Nutritional Information

(iii) FSSAI Logo and license number

(iv)

Declaration regarding food additives

(v)

Name and complete address of the manufacturer

(vi)

Net quantity

(vii)

Lot/Code/Batch identification

(viii)

Date of manufacture or packing

(ix)

Best before and use by date

(x)

Country of origin of imported food

(xi)

Instructions for use

The labelling requirements of food products is directly related to the safety of food. It has been reiterated in several judgments of various High Courts and Supreme Court that labelling of food products is important for traceability and for giving an opportunity to the consumer for making an informed choice."

No permission given for affixing labels

24. As far as the present case is concerned, the categorical statement of the

Customs in the above affidavit is that "no request for affixing of the labels in the Customs area was ever received by the respondent, i.e., Customs Department. Hence, there is no question of granting any permission for the same."

25. In response to the petitioner's assertion that the labels were affixed on the master boxes on 6th October, 2015, before the goods were examined by the Customs, when they were lying in the CWC, the above affidavit of Mr. Jha states : "CWC has denied any permission having been given to the petitioner for affixing of labels as has been contended by it."

26. The letter dated 5th April, 2016 written by CWC to the Customs in this regard has been enclosed. The said letter reads as under :

"This is with reference to your letter No. VIII(6)/ICD/PPG/ WP/Unltd Nut/Import/Shed/1396/15/7120, dated 2nd April, 2016 on the above cited subject. In this regard, it is to inform that no permission from Customs was produced before CWC, neither any label was affixed on the boxes of M/s. Unlimited Nutrition Private Limited, in the presence of CWC nor CWC has charged any fee regarding the labelling of boxes from the party."

27. In the terms of the above affidavit, it transpires that the petitioner has not been forthcoming as to who, if any one at all, gave permission for affixation of labels on the master boxes while they were lying in the CWC warehouse. This aspect will have to be enquired into by the Commissioner of Customs to unearth the truth. It is a matter of some concern that an importer has been able to affix labels on imported food articles after their arrival in India and while being kept at the notified warehouse.

28. The Customs however states that as regards the petitioner's request for re-export of the goods, the adjudication authority will, after taking into account the extant rules and regulations, decide the issue. It is stated that since the goods have failed to meet the regulatory labelling requirement of the FSS Act and the FSSA Regulations, 2011, the goods are liable for confiscation under Section 111(d) and 111(m) of the CA. It is further stated that after confiscation, the adjudicating authority may give the importer an option to redeem the goods on payment of redemption fine under Section 125 and may impose penalty under Section 112 of the CA. Further, the adjudicating authority would like to verify that the remittance towards the goods has been recalled by the importer from the exporter. It is further stated that after the goods have been redeemed they will be allowed to be re-exported by the appropriate authority.

Overriding nature of the FSS Act as regards imported food items

29. Mr. Mehmood Pracha, learned counsel appearing for FSSAI refers to Section 89 of the FSS Act which states that "the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act." Mr. Pracha further refers to Section 25(1)(iii) of the FSS Act

which mandates that no person shall import into India any article of food in contravention of any other provision of the FSS Act or of any rule or regulation made thereunder. Mr. Pracha submitted that since the imported consignment was in the nature of the food articles, it was mandatory that FSS Act, Rules or Regulations should be strictly complied with as regards the fulfilment of the labelling requirements.

30. Mr. Pracha pointed out that the question whether the advisories issued by FSSAI had the force of law and were within the ambit and scope of its powers under the FSS Act, and the Rules and Regulations thereunder, was examined by the High Court of Bombay in Writ Petition No. 2746 of 2013 (Vital Nutraceuticals Private Limited v. Union of India). By an order dated 1st August, 2014 the High Court by majority of 2:1 held that the product approval advisory dated 11th May, 2013 of FSSAI does not have force of law and it is not within the ambit and scope of the power conferred on the FSSAI under the FSS Act, and the Rules and Regulations framed thereunder. It further held that FSSAI has no power and authority to issue any advisory under Section 16(1) read with Section 16(5) read with Sections 18 and 22 of the FSS Act without following the procedure laid down under Sections 92 and 93 of the FSS Act of placing the Advisories/Regulations before both the Houses of Parliament.

31. The above judgment of the Bombay High Court was affirmed by the Supreme Court by its order dated 19th August, 2015 in Special Leave Petition (Civil) Nos. 23872-23874 of 2014 (Food Safety and Standards Authority of India v. Vital Nutraceuticals Pvt. Ltd.). The Supreme Court dismissed the special leave petition holding that no ground for interference is made out. Mr. Pracha, therefore, submits that in view of the above decision of the Bombay High Court, the FSSAI may not be able to straightway issue any further advisories regarding labelling requirements.

32. On the other hand it is pointed out by Mr. Kamal Nijhawan, learned counsel for the Customs that there is a Co-ordination Committee comprising representatives of both the FSSAI as well as the Customs which meets once in a month to sort out the issue concerning import of food items that have to comply with the requirements of FSS Act and the Rules and Regulations framed thereunder.

33. The main object of the FSS Act is to lay down "science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption." The word "food" has been defined under Section 2(1)(j) of the FSS Act to include any substance, whether processed, partially processed or unprocessed intended for human consumption. It includes a variety of substances. The expression "food additive" has been separately defined under Section 2(1)(k) of the FSS Act.

34. The question in United Distributors Incorporation v. Union of India - AIR 2015

Del 31, was whether the chocolates which have been imported in India by the petitioner in that case were compliant with the labelling requirements under the FSS Packaging Regulations. The FSSAI had refused to grant NOC to 16 of the 20 types chocolates that were imported. According to FSSAI, 8 types of chocolates were found to be non-compliant with the FSS Packaging Regulations, 2011 and the balance 8 were found to be non-compliant with the FSS Regulations, 2011. In that context the learned Single Judge held that the sticker labels affixed on the packages provided all the information would meet the object of the FSS Packaging and Labelling Regulations, 2011. It was accordingly directed that the petitioner would cure the defects in respect of the eight types of chocolates by affixing non-detachable labels giving all particulars as are necessary under the FSS Packaging and Labelling Regulations. The Customs authorities were directed to ensure sufficient access to the goods to enable the petitioner to affix the necessary labels.

35. The above said decision was affirmed by the Division Bench of this Court in Food Safety & Standards Authority of India v. United Distributors Incorporation - (2015) 219 DLT 752 (DB). The Division Bench was of the view that FSSAI should have no objection to the Indian importer affixing labels in order to make up the deficiency in the labelling requirements after the goods arrived in India. The Division Bench failed to see any harm, if any, "in allowing any defect/deficiency in labelling being permitted to be made up, in respect of imported goods, in India. We find no prohibition there against in the Act or any Regulations."

36. The above decisions underscore the need for an importer to mandatorily comply with the labelling requirements in terms of the FSS Regulations and FSS Packaging Regulations. They also point to the concerns that may arise if such affixation of labels in India is not carefully monitored and regulated.

37. In the present case although the petitioner admitted to having affixed labels on the master boxes after they arrived in India, it is evident from the affidavit of the Customs authorities and the letter of the CWC that neither of them gave any permission to the petitioner to do so. Further, it is evident that the FSSAI also permitted the affixation of the labels on imported food articles only to a limited extent. viz., in order to (i) declare whether the product is Veg or Non-Veg (ii) disclose the name and address of the importer and (iii) indicate the FSSAI Logo and license number. It does not extend to affixing labels on the imported food articles after they have landed in India to indicate (i) the name of the food item (ii) the list of ingredients (iii) Nutritional Information (iv) Declaration regarding food additives (v) Name and complete address of the manufacturer (vi) Net quantity (vii) Lot/Code/Batch identification (viii) Date of manufacture or packing (ix) Best before and use by date (x) Country of origin for imported and (xi) Instructions for use.

38. The above classification of what can be permitted to be rectified by affixing labels after the imported goods have arrived and what cannot be so rectified is based on a rational criteria that conforms to the objects of the FSS Act. Much of

the non-rectifiable information, which would be within the exclusive knowledge of the manufacturer, cannot possibly be permitted to be affixed on to the imported food packages after they have arrived. The said information helps to trace the origin of the food product and provide other vital details that would enable the consumer to make an informed choice. Indeed there cannot be a dilution of the above requirements.

Directions to the respondents

39. The Court is of the view that the FSSAI should co-ordinate with the Customs authorities and work out the modalities of ensuring that the requirements of the FSS Act and the Regulations thereunder are complied with in respect of the import of food articles. It can adopt the device of issuing advisories provided they are placed before the Parliament. Additionally, it should be possible for the Customs to re-visit and strengthen the protocols that have been evolved at joint meetings with the FSSAI.

40. It is, therefore, directed that the issues and concerns voiced by the FSSAI in the present matter should be discussed at the meeting of the Co-ordination Committee of the Customs and the FSSAI within the next eight weeks and a protocol be drawn up and notified by way of a Circular by the Customs authorities to ensure that, in a co-ordinated manner, the requirements of the FSS Act, and Rules and the Regulations thereunder in relation to the imported food articles are complied with.

41. Further, it is directed that the Commissioner of Customs will initiate an inquiry into the affixation of labels in the present case by the petitioner on the master boxes after they arrived in India, and while they were at the CWC warehouse, without the permission of either the Customs or the CWC. The purpose of the enquiry would be ascertained where and how the lapses occurred, and what action requires to be taken against those involved including the importer and his CHA and other employees as well as officers/employees of the Customs and/or CWC. The enquiry will be completed within a period of three months from today. Appropriate action in terms thereof will be taken against all those found responsible for the lapse.

42. As far as the petitioner is concerned, its application for permission to re-export the consignment, if made within a period of ten days from today would be considered and disposed of in accordance with law by the Customs authorities. Further, it is clarified that the customs authorities will not be precluded from taking other appropriate action qua the imported consignments in accordance with law.

43. The writ petition is disposed of in the above terms but, in the facts and circumstances of the case, with no orders as to costs.