

ANALYSIS OF THE NESTLE JUDGMENT

INTRODUCTION

The Hon'ble Bombay High Court in a recent judgment¹ pronounced on 13th August 2015 set aside the ban imposed on 9 variants of Nestle Maggi Noodles by the Food Safety and Standards Authority of India ("FSSAI") and the Commissioner of Food Safety, State of Maharashtra on the ground that the orders imposing ban were arbitrary and the principles of natural justice were not followed while imposing the aforesaid ban by the Respondents.

The Hon'ble High Court directed that 5 samples from each batch cases out of 750 crates retained by the M/s Nestle India Limited (Petitioner- Company) may be tested in three laboratories mentioned therein within 6 weeks and if the lead is found within permissible limits then the Petitioner- Company would be permitted to manufacture all the variants of the noodles for which product approval has been granted by the Food Authority. The Hon'ble High Court directed the laboratories to follow the procedure laid down under Section 47² and other relevant provisions/Regulations of the Food Safety and Standards Act, 2006 (the Act). The Hon'ble High Court although refused to accept the suggestion that the 4th sample in the possession of the Respondents should also be tested for the reason that procedure of sampling was not under taken as per section 47 (1)³ of the Act. The Hon'ble High Court also directed the Petitioner to seek product approval for the "Maggi Oats Masala Noodles with Tastemaker".

The Hon'ble High Court also agreed with the statement made by the Petitioner that the declaration "No added MSG (Monosodium Glutamate)" on its product would be deleted.

The judgment has been discussed in detail herein below.

FACTS OF THE CASE

The Petitioner - Company is a manufacturer of "Maggi Noodles" and its 9 variants ("Products") in India. After reading the media reports regarding excess lead in its product, Petitioner-Company immediately made announcement on 04th June 2015 regarding withdrawal of its products from the market till its name was cleared of the allegations. The Petitioner however clarified that the product as per their reports is safe. The Respondent No.1 (FSSAI) and Respondent No. 2 (CEO, FSSAI), on the basis of the various reports of the Food Analyst, passed an order dated 05th June 2015 imposing ban on all the 9 variants of "Maggi Noodles" on the following grounds:-

- Lead was found to be in excess of the permissible limits;
- The product was misbranded since it was stated in the packet "No added MSG", however MSG was found in the product;
- Maggi Oats Masala Noodles was being sold without any product approval/risk assessment.

Similar order dated 06th June 2015 was also passed by the Respondent No.3 (State of Maharashtra) and

Respondent No. 4 (Commissioner of Food Safety, State of Maharashtra) imposing ban on the manufacturing, sale, distribution and supply of the Petitioner's products in the State of Maharashtra.

CONTENTIONS OF THE PETITIONER

The Petitioner assailed the said orders before the Hon'ble High Court on the following grounds:-

- Violation of the principles of natural justice;
- The impugned orders have been passed under section 34⁴ of the Act and even if the orders are passed under section 30⁵ of the Act, doctrine of *audi alteram partem* must have been complied with;
- The reports of the Food Laboratories on the basis of which the orders were passed were either not accredited by the National Accreditation Board for Testing and Calibration Laboratories (NABL) or notified under section 43⁶ of the Act and even if they were accredited they were not accredited for the purpose of testing lead in the product;
- Product was not tested in accordance with its intended use;
- Placed reliance on the reports of its own laboratories wherein lead was found within permissible limits;
- Question of challenging the reports of Food Analyst did not arise since the issue was already predetermined by passing of the orders under challenge and therefore writ petition was preferred.

CONTENTIONS OF THE RESPONDENT

The Respondents contested the petition and made the following submissions:-

- Petitioner had the alternative remedy to file an appeal under section 46(4)⁷ of the Act;
- Show cause notice was issued to the Petitioner and the Petitioner instead of satisfying the Food Authority approached the Hon'ble High Court under Article 226⁸ of the Constitution of India;
- Objection to the analysis by non-accredited/non-notified food laboratories is an afterthought;
- Suppression of material facts by the Petitioner;
- Petitioner was destroying the evidence by burning the manufactured goods in order to avoid further prosecution;
- Food Authority has a discretion in prescribing the standards of proprietary food and that they were not bound even by the Regulations⁹ framed in respect of additives and contaminants which were found in proprietary foods;
- Petitioner had violated the terms which were imposed on it while granting the product approval with regard to the lead content in the product;
- Food Authority can pass order of prohibition in public interest;
- Respondent No.1 and 2 had passed the order under section 10 (5)¹⁰, 16(1)¹¹, 16(5)¹², 22¹³, 26¹⁴ and 28¹⁵ of the FSS Act and Respondent No. 3 passed the order under section 30¹⁶ of the Act.

ISSUES

The Hon'ble Court framed the following 12 issues for the adjudication of the dispute:-

- Whether the writ petition filed by the Petitioner – Company under Article 226¹⁷ of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternate remedy of filing an appeal under section 46 (4)¹⁸ of the

Act?

- Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence, disentitling the Petitioner from claiming any relief from the Court?
- Whether the Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum permissible limits laid down under the Regulations¹⁹?
- Whether the Food Authority had an unfettered discretion to decide what are the standards that has to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations²⁰ and the Schedules appended thereto?
- Whether in view of the provisions of section 22²¹ of the Act, there was a complete ban on the manufacture of sale and products mentioned in the said section?
- Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?
- What is the source of power under which the impugned orders were passed and whether such orders could have been passed under sections 10(5)²², 16(1)²³, 16(5)²⁴, 18²⁵, 22²⁶, 26²⁷, 28²⁸ and 29²⁹ of the Act?
- Whether the analysis of the product manufactured by the Petitioner could have been made in the Laboratories in which the said product was tested by the Food Authority and whether these Laboratories are accredited Laboratories by the NABL and whether the reports submitted by these Laboratories can be relied upon?
- Whether the reliance can be placed on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?
- Whether the Food Analyst was entitled to test the samples in any Laboratory, even if it was not accredited and recognised by the Food Authority?
- Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained "No added MSG"?
- Whether Respondent Nos.2 to 4 were not justified in imposing the ban on all the 9 variants of the Petitioner, though tests were conducted only in respect of 3 variants and whether such ban orders are arbitrary, unreasonable and violative of Article 14³⁰ and 19³¹ of the Constitution of India?

COURT'S DECISION

The Hon'ble Bombay High Court, after giving a detailed hearing, allowed the petition filed by the Petitioner and set aside the ban orders passed by the Respondents. The Hon'ble High Court allowed the petition on the following grounds:-

- With regard to the maintainability of the petition, the Hon'ble High Court held that the impugned order cannot be strictly said to be a show cause notice since the order imposes ban on manufacture, sale, distribution of 9 variants of Maggi Noodles thereby imposing a complete ban on the product. The Hon'ble High Court, relying upon the Hon'ble Apex Court judgment in *Whirlpool Corporation v. Registrar of Trade*

*marks, Mumbai and others*³², held that alternative remedy is not always a bar in approaching the High Court under Article 226³³ of the Constitution of India, particularly when the Petitioner challenges the order on the ground of principles of natural justice. The Hon'ble High Court therefore concluded that the petition is maintainable under Article 226³⁴ of the Constitution of India.

- With regard to the suppression of facts by the Petitioner, the Hon'ble High Court, after perusing the tracking reports of Postal Department and its acknowledgment, held that the reports were received after the petition was filed and therefore there has been no suppression of facts on the part of the Petitioner. The Hon'ble High Court, relying on the minutes of the meetings held between the Petitioner and the Respondents, held that the Petitioner had taken every step as per the directions of the Food Authority and the Petitioner was directed to destroy the food packets manufactured by it. The Hon'ble High Court further opined that the Food Regulator is not expected to take adversarial stand in such matters.
- The Hon'ble Court observed that the interpretation that for proprietary foods, the FSS Regulations³⁵ would not apply and the Food Authority granting the product approval would decide what would be the limits prescribed for additives, contaminants and other substances that may be contained in the proprietary food, is fallacious and runs contrary to the provisions of section 22³⁶ of the FSS Act.
- The Hon'ble Court, relying on the Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011, further observed that the Food Authority does not have an unfettered discretion to decide the standards to be maintained by the manufacturers of proprietary food and is bound by the permissible limits of additives and contaminants mentioned in the said Regulations.
- With regard to the interpretation of section 22³⁷ of the Act, the Hon'ble High Court observed that the issue does not arise for consideration in the facts of the present case and therefore left it open to be argued in the appropriate matter.
- The Hon'ble High Court, with regard to issues (f) and (g), held that the Food Authority should have given a proper opportunity to the Petitioner – Company to prove that the product is safe for human consumption and it was not necessary to impose a nationwide ban on the product more particularly because the Petitioner had recalled its products till the authorities were satisfied till the safety of the product. The Hon'ble High Court opined that it is difficult to trace the origin of the power to ban the product on emergency basis to section 10(5)³⁸, 16(1)³⁹, 16(5)⁴⁰, 18⁴¹, 22¹, 26⁴³, 28⁴⁴ and 29⁴⁵ of the Act and observed that Respondent No.1 and 2 have passed the order under section 30⁴⁶ or 34⁴⁷ of the Act and Respondent No. 3 and 4 have passed under section 30⁴⁸ of the Act. The Hon'ble Court observed that the said stand was taken by the Respondent No.1 and 2 to justify their action of not giving show cause notice to the Petitioner before passing the order imposing ban on the product. The Hon'ble High Court, relying on the Hon'ble Apex Court judgments *C.B.Gautam v. Union of India and Ors*⁴⁹ and *Godawat Pan Masala Products I.P. Ltd. v. Union of India and Ors*⁵⁰, held that section 30⁵¹ of the Act although does not in terms mentions that principles of natural justice have to be followed, it is implied that such a course has to be normally followed. The Respondents, even being a delegate of the Parliament, should have provided the material to the Petitioner on the basis of which the impugned orders were passed so that the Petitioner – Company could have got an opportunity to give its reply to the material on the basis of which the impugned orders were passed.
- The Hon'ble High Court, with regard to the issues (h) to (k), held that the Food Analyst has to analyse the food only in such laboratory which is defined under section 3 (p)⁵² and recognised by the Food Authority under section 43 (1)⁵³ of the Act. The Hon'ble Court observed that it is not in dispute that the Laboratories where tests were conducted were either not accredited by NABL or not recognized by the

Food Authority under section 43(1)⁵⁴ of the Act or they were not accredited to make analysis in respect of lead in the samples. The Hon'ble Court also observed that there is no material on record to show whether the procedure of testing samples was followed or not and also expressed doubts on the reports of Avon Food Lab (Pvt.) Ltd. and therefore concluded that no reliance can be placed on such reports and therefore orders passed on the basis on these reports needs to be set aside. Similarly, the Hon'ble Court also refused to place reliance on the reports tendered by the Petitioner on similar grounds.

- The Hon'ble High Court set aside the orders passed by the Respondents on the grounds that the orders were passed in arbitrary manner, there has been complete violation of principles of natural justice, mandatory provisions under section 47 (1) ⁵⁵of the Act has not been followed while analysis of the samples of the product and procedure followed by the Respondents were not fair and transparent. The Hon'ble High Court observed that Respondents have not undertaken any investigation for carrying out the risk analysis to decide that the product is unsafe for human consumption. The Hon'ble High Court, relying on the Hon'ble Apex Court judgment in *Pepsico India Holdings Private Limited v. Food Inspector and Another*⁵⁶, held that the provisions of sampling under the FSS Act are mandatory. The Hon'ble High Court also observed that samples of three variants were taken however ban has been imposed on all the 9 variants only on the basis that lead was found in excess of the permissible limits in three variants. The product approval was also granted for 8 out of the 9 variants of the product of the Petitioner Company. The Hon'ble High Court, for the aforesaid reasons, concluded that the orders are violative of Article 14⁵⁷ and 19⁵⁸ of the Constitution of India.
- The Hon'ble High Court observed that there is no material to substantiate that MSG was found despite the fact that packet contained declaration that there is "No added MSG". Further, it is nobody's case that the Petitioner had added the MSG though the Petitioner had declared that there is no added MSG. It was observed that even otherwise Glucomate is found naturally in certain types of food and accepted that the Petitioners have agreed to remove the declaration "No added MSG" from the packaging. The Hon'ble High Court, referring to the section 52⁵⁹ of the Act, held that misbranding of product therefore cannot be a ground for banning the product indefinitely.
- With respect to the Maggi Oats Masala Noodles, the Hon'ble High Court held that the Respondents could have asked the Petitioners not to produce, or sell the said variant and it was the duty of the Respondents to inform the Petitioner as to how the requirements with regard to the product approval were not complied with, so that the same can be complied with by the Petitioner – Company.

CONCLUSION

The Hon'ble Bombay High Court concluded that the Petitioner can manufacture and sell "Maggi Noodles" and its 9 variants subject to the outcome of the fresh tests to be conducted by the three laboratories within 6 weeks. The Hon'ble High Court also emphasised that public health and manufacture and sale of safe and wholesome food to the people of India is of utmost importance.

The judgment should also pave way for the Regulator to holistically look at the packaged food and not take adversarial steps which may affect packaged food market at large.

1. M/s Nestle India Limited v. Food Safety and Standards Authority of India and Ors. (Writ Petition (L) No. 1688/2015);
2. Sampling and Analysis;
3. *ibid*;
4. Emergency prohibition notices and orders;

5. Commissioner of Food Safety of the State;
6. Recognition and accreditation of laboratories, research institutions and referral food laboratory;
7. Functions of Food Analyst;
8. Power of High Courts to issue certain writs.
9. The Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011
10. Functions of the Chief Executive Officer;
11. Duties and functions of Food Authority;
12. *ibid*;
13. Genetically modified foods, organic foods, functional foods, proprietary foods, etc.;
14. Responsibilities of the food business operator;
15. Food recall procedures;
16. *Supra* note 5;
17. *Supra* note 8;
18. *Supra* note 7;
19. *Supra* note 9;
20. *Supra* note 9;
21. *Supra* note 13;
22. *Supra* note 10;
23. *Supra* note 11;
24. *ibid*;
25. General principles to be followed in administration of Act;
26. *Supra* note 13;
27. *Supra* note 14;
28. *Supra* note 15;
29. Authorities responsible for enforcement of the Act;
30. Equality before law;
31. Protection of certain rights regarding freedom of speech, etc;
32. AIR 1999 SC 22.
33. *Supra* note 8.
34. *ibid*;
35. *Supra* note 9;
36. *Supra* note 13;
37. *ibid*;
38. *Supra* note 10;
39. *Supra* note 11;
40. *Ibid*;
41. *Supra* note 25;
42. *Supra* note 13;
43. *Supra* note 14;
44. *Supra* note 15;
45. *Supra* note 29;
46. *Supra* note 5;
47. *Supra* note 4;
48. *Supra* note 5;
49. (1993) 1 SCC 78.
50. (2004) 7 SCC 68.
51. *Supra* note 5;
52. Food Laboratory;
53. *Supra* note 6;
54. *Ibid*;
55. *Supra* note 2;
56. (2011) 1 SCC 176.
57. *Supra* note 30;
58. *Supra* note 31;
59. Penalty for misbranded food;