

Bhadra Oil Mills vs Food Safety And Standard Authority Of ... on 25 February, 2021

Equivalent citations: AIRONLINE 2021 KER 1295

Author: N.Nagaresh

Bench: N.Nagaresh

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

THURSDAY, THE 25TH DAY OF FEBRUARY 2021/6TH PHALGUNA, 1942

WP(C).No.8408 OF 2020(A)

PETITIONER:

BHADRA OIL MILLS,
14/548A, NAYARANGADI,
KODASSERRY P.O.,
THRISSUR-680 271,
REPRESENTED BY PROPRIETOR,
SHAJU I, S/O. ITTAMAN,
AGED 44 YEARS,
CHITTIYETH HOUSE,
KODASSERRY,
THRISSUR 680 271.

BY ADV. SHRI.M.C.JOHN

RESPONDENTS:

- 1 FOOD SAFETY AND STANDARD AUTHORITY OF INDIA,
FDA BHAVAN,
KOTLA ROAD,
NEW DELHI 110 002,
REP. BY ITS JOINT DIRECTOR.
- 2 THE COMMISSIONER OF FOOD SAFETY AND
STANDARDS AUTHORITY,
GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM - 695 001.
- 3 THE ASSISTANT COMMISSIONER OF FOOD SAFETY,
THRISSUR,

PIN-680 001.

4 THE ASSISTANT COMMISSIONER AND
DESIGNATED OFFICER, (FSSAI),
KOZHIKODE, PIN-673 001.

W.P.(C) No.8408/2020

:2:

5 THE ADJUDICATING OFFICER AND SUB
COLLECTOR, KOZHIKODE 673 001.

R1 BY ADV. SRI.SANTHAN V.NAIR
R2-5 BY SR. GOVERNMENT PLEADER, SRI.V.MANU

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 25-02-2021, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

W.P.(C) No.8408/2020

:3:

[CR]

N. NAGARESH, J.

.....
W.P.(C) No.8408 of 2020
.....

Dated this the 25th day of February, 2021

JUDGMENT

~~~~~ The petitioner, a proprietary concern running an Oil Mill, is before this Court seeking to quash Exts.P6 and P7 orders. By Ext.P6 order, the Designated Officer under the Food Safety and Standards Act, 2006 accorded sanction to the Food Safety Officer, Kunnamangalam Circle to file an application for adjudication before the Revenue Divisional Officer and Adjudicating Officer, Kozhikode under Section 36(3)(e) of Food Safety and Standards Act, 2006 read with Rule 3.1 of Food Safety and Standards Rules, 2011, against the petitioner. By Ext.P7, the Adjudicating Officer and Sub Collector of Kozhikode issued summons to the petitioner to answer to a charge in the case filed by Food Safety Officer, Kozhikode South Circle under Section 3(1)(zx), 26(1)(2)(ii) & 49 and 51 of Food Safety and Standards Act, 2006 read with Regulation 2.2.1:(1) of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 and Regulation 2.2.1:1 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, for Selling Prohibited Coconut Testa Oil.

2. The petitioner is engaged in the manufacture, packing and sale of edible oils. The petitioner holds Ext.P1 licence dated 10.09.2017 issued by the Government of Kerala, Commissionerate of Food Safety. The licence is valid till 09.09.2022. The 3rd respondent-Assistant Commissioner of Food Safety came to the petitioner's Oil Mill and took samples of Coconut Testa Oil. A notice was served on the petitioner stating that the 2nd respondent-Commissioner of Food Safety and Standards Authority, Kerala has issued a general order banning the manufacture and sale of Coconut Testa Oil for a period of one year.

3. The sample taken from the Oil Mill was tested in the Regional Analytical Laboratory, Kozhikode. The test report stated that the sample labelled as proprietary food does not qualify any of the standards of quality of any of the edible oil prescribed under the Food Safety and Standards Act, 2006 and Regulations, 2011. The petitioner filed a statutory appeal against the said test report invoking Section 46(4) of the Act read with Rule 2.4.6 of the Rules, 2011. The petitioner also sought a referral report. The sample was again tested by the Referral Food Laboratory, Pune. The said Referral Laboratory issued Ext.P2 report dated 18.09.2019. Ext.P2 stated that the sample does not come under any regulation/standards and cannot be treated as proprietary food.

4. The petitioner on 25.10.2018 submitted Ext.P3 application before the 1st respondent-Food Safety and Standards Authority of India for approval of the product as proprietary food. The 1st respondent issued Ext.P4 on 25.03.2019 granting approval to Coconut Testa Oil under Food Safety and Standards (Approval for Non-Specified Food and Food Ingredients) Regulations, 2017. Consequently, the Central Licensing Authority issued Ext.P5 licence to the petitioner for manufacturing proprietary food.

5. In spite of the afore facts, the 2nd respondent- Commissioner of Food Safety and Standards Authority, Kerala issued Ext.P6 order dated 05.11.2019 holding that Coconut Testa Oil will not come under the category of 'Proprietary Food' and the petitioner is liable to be proceeded under Section 58 of the Act, 2006. The 2nd respondent was directed to file an application for adjudication against the petitioner. On the basis of Ext.P6, the 5th respondent-Adjudicating Officer and Sub Collector initiated prosecution proceedings. As per Ext.P7 Summons dated 07.03.2020, the 5th respondent required the petitioner to appear before him to answer the charges.

6. The counsel for the petitioner argued that Ext.P1 licence was issued by the Assistant Commissioner of Food Safety having convinced that the product Coconut Testa Oil qualify the Food Safety Standards of edible oil prescribed under the Act, 2006. The ban on sale and manufacture of Coconut Testa Oil for one year was without making any studies. On the application of the petitioner, a sample of Coconut Testa Oil was subjected to chemical analysis and the product was approved by the 1st respondent as proprietary food. The petitioner was also issued with licence to manufacture and sell Coconut Testa Oil. Exts.P6 and P7 proceedings are therefore illegal and unwarranted and liable to be interfered with by this Court, contended the learned counsel for the petitioner.

7. The 3rd respondent resisted the writ petition filing counter affidavit. The 3rd respondent stated that the sample taken from the Oil Mill was subjected to examination and it was found that the sample did not meet the standards of the quality of any of the edible oils prescribed under

Regulation 2.3.15(1)(a) of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 read with Sections 3(1)(zx), 26(1)(2)(ii) and 49 and 51 of the Food Safety and Standards Act, 2006.

8. The 3rd respondent received the claim of the petitioner that Coconut Testa Oil is proprietary food. The 3rd respondent contended that any deviation in quality parameters of a standardised food as specified in the Regulations made under the Food Safety and Standards Act, 2006, shall not qualify the resultant product as a proprietary food. According to the 3rd respondent, the Coconut Testa Oil is a deviation in quality parameters prescribed for coconut oil and hence will not satisfy the definition of proprietary food.

9. The learned Government Pleader representing the 3rd respondent argued that when standards are prescribed for a particular product, making a similar product with a deviation in quality parameters and claiming it to be a proprietary food, is impermissible under law. The Coconut Testa Oil manufactured and sold by the petitioner is either adulterated coconut oil or is made from substandard raw material, thereby deviating from the prescribed quality parameters of coconut oil.

10. I have heard Sri. M.C. John, learned counsel appearing for the petitioner, Sri. Santhan V.Nair, learned counsel for the 1st respondent-Food Safety and Standards Authority of India and Sri. V. Manu, learned Senior Government Pleader appearing for respondents 2 to 5.

11. The following questions arise for consideration in this writ petition:-

1. Whether Coconut Testa Oil is a proprietary food or is it a deviation of coconut oil?
2. Whether Coconut Testa Oil is mandatorily required to keep any standards prescribed under the Food Safety and Standards Act, 2006?
3. Whether the petitioner is liable to be prosecuted under Section 3(1)(zx), 26(1)(2)(ii) & 49 and 51 of the Food Safety and Standards Act, 2006 read with Regulation 2.2.1(1) of the Food Safety Standards (Food Product Standards and Food Additives) Regulations, 2011 and Regulation 2.3.15 (1)(a) of the Food Safety and Standards (Prohibition and Restriction of Sales) Regulations, 2011?

The word 'Testa' indicates the protective outer covering of a seed. It is the seed coat. Coconut Testa is the outer covering of coconut kernel. Coconut Testa is distinct from Coconut Kernel even in the context of Plant Anatomy.

12. Clause 2.12.1 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 defines proprietary food. Clause 2.12.1(1) of the Regulations, 2011 reads as follows:-

"2.12.1 : For the purpose of these regulations-

(1) Proprietary food means an article of food that has not been standardised under these regulations, but does not include novel foods, foods for special dietary uses, foods for special medical purposes, functional foods, nutraceuticals, health supplements and such other food articles which the Central Government may notify in this behalf:

Provided that any deviation in quality parameters of a standardised food, as specified in the Food Safety and Standards Regulations made under the Food Safety and Standards Act, 2006 shall not qualify the resultant product as a proprietary food."

13. Thus, to satisfy the definition of proprietary food, a material:

1. must be an article of food;
2. must not be one standardised under the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011;
3. must not be one notified by the Central Government as novel foods, foods for special dietary uses, foods for special medical purposes, functional foods, nutraceuticals, health supplements or such other food articles and;
4. should not be any deviation in quality parameters of a standardised food.

There is no dispute that Coconut Testa Oil is an article of food. It is an admitted position that Coconut Testa oil has not been standardised under the Regulations. No one has a case that Coconut Testa Oil has been notified by the Central Government as a novel food, food for special dietary use, food for special medical purpose, functional food, nutraceutical or health supplement.

14. Even then, if the Coconut Testa Oil is a 'deviation in quality parameters of a standardised food', as specified in the Food Safety and Standards Regulations, then Coconut Testa Oil shall not be a proprietary food. The question, therefore, is whether Coconut Testa Oil is a deviation in quality parameters prescribed for Coconut Oil. Coconut Kernel is distinct from Coconut Testa.

15. Coconut Oil is produced from Coconut Kernel whereas Coconut Testa Oil is manufactured from Coconut Testa. The very raw materials from which Coconut Oil and Coconut Testa Oil are manufactured, are different. Therefore, the products, Coconut Oil and Coconut Testa Oil, are distinct and different and by no stretch of imagination, can the coconut testa oil be treated as a deviation in quality parameters of coconut oil which is a standardised food.

16. There are further reasons to hold that Coconut Testa Oil is a Proprietary Food. Clause 2.12.1(2) of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 reads as follows:-

"2.12.1(2): Proprietary food shall contain only those ingredients other than additives which are either standardised or permitted for use in the preparation of other standardised food under these Regulations, except the ingredients which may be specified by the Authority from time to time.

Provided that a proprietary food may also contain vitamins and minerals in quantities not exceeding one RDA of the respective micronutrients."

Coconut Testa Oil is manufactured from Coconut Testa which is a part of Copra. As per Clause 2.2.1 of the Regulations, 2011, Coconut Oil is also extracted from Copra which is obtained from Cocos Nucifera Nuts (Coconuts). Standards are specified for Coconut Oil. Therefore, Coconut Testa Oil satisfied the requirements of a proprietary food, mandated under both Sub Clause (1) and Sub Clause (2) of Clause 2.12.1 of the Regulations, 2011.

17. The question then will be whether Coconut Testa Oil is required to keep any standards prescribed under the Act, 2006 or the rules/regulations made thereunder. As per Sub Clause 2.12.1(4) of the Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011, Proprietary Food shall comply with the microbiological requirements as specified in Appendix B of the Regulations and if no microbiological standards are specified for any food or food categories in Appendix B, Proprietary Food falling under such food categories shall not contain any pathogenic micro-organism at a level that may render the food product unsafe. Clause 2.12.1 also provides that the Food Business Operator shall be fully responsible for safety of the Proprietary Food for human consumption.

18. As the Coconut Testa Oil being Proprietary Food and the standard requirement prescribed to Proprietary Food being one laid down in Clause 1.12.1(4) of the Regulations, 2011, the further question is whether the petitioner is liable to be prosecuted under:

1. Section 3(1)(zx), 26(1)(2)(ii) & 49 and 51 of the Food Safety and Standards Act, 2006:
2. Clause 2.2.1(1) of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011:
3. Regulation 2.3.15(1)(a) of the Food Safety and Standards (Prohibition and Restriction of Sales) Regulations, 2011.

Section 3(1)(zx) of the Act defines "Sub-standard" and states that an article of food shall be deemed to be substandard if it does not meet the specified standards but not so far as to render the article of food unsafe. Section 26(2)(ii) provides that no Food Business Operator shall manufacture, store, sell or distribute any article of food which is misbranded or substandard or contain extraneous matter. Section 49 lays down general provisions relating to penalty and Section 50 stipulates quantum of penalty.

19. As the Act, 2006 and Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 do not prescribe any specified standards for Coconut Testa Oil, the product needs compliance of microbiological standards, if any, specified in Appendix B, and in the absence of such standards, need ensure that pathogenic micro-organism are unsafe level. Ext.P2 Test Report does not state that the Coconut Testa Oil sample tested by them does suffer from non-compliance of microbiological standards or pathogenic micro-organism levels. Therefore, the petitioner is not liable to be prosecuted under Sections 3(1) (zx), 26(1)(2)(ii), 49 or 51 of the Food Safety and Standards Act, 2006.

20. Clause 2.2.1(1) of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 defines Coconut Oil (Naryal Ka Tel) and mandates that Coconut Oil shall conform to the standards prescribed therein. As the Coconut Testa Oil is found to be a Proprietary Food distinct from Coconut Oil, no prosecution can be initiated against the petitioner based on a test report on Coconut Testa Oil, for not confirming to the Standards prescribed for Coconut Oil.

21. It is then to be considered whether any action of the petitioner should invite punitive action for violation of Regulation 2.3.15(1)(a) of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. Regulation 2.3.15 makes special provisions relating to sale of vegetable oil and fat. Regulation 2.3.15(1) reads as follows:-

"2.3.15: Special provisions relating to sale of vegetable oil and fat:

(1) No person shall sell or expose for sale, or distribute, or offer for sale, or dispatch, or deliver to any person for the purpose of sale any edible oil-

(a) Which does not conform to the standards of quality as provided in the Food Safety and Standards Act, 2006 (34 of 2006) and rules/regulations made thereunder; and

(b) Which is not packed in a container, marked and labelled in the manner as specified in FSSAI regulations.

Provided that the State Government may, in the public interest, for reasons to be recorded in writing, in specific circumstances and for a specific period by a notification in the Official Gazette, exempt any edible oil from the provisions of this Act."

The allegation against the petitioner therefore is that the petitioner has sold/exposed for sale/distributed/offered for sale/dispatched or delivered to any person for the purpose sale, oil which does not conform to the standards of quality as prescribed in the Act and the rules/regulations made thereunder. As already found, no standard has been prescribed for Coconut Testa Oil and Ext.P2 report does not indicate that the sample of Coconut Testa Oil taken does not satisfy microbiological standards or suffer from the vice of pathogenic micro-organism at an undesired level. Therefore, there is no reason to prosecute the petitioner for violating Regulation 2.3.15(1)(a) of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011.

22. Though in his counter affidavit, the 3<sup>rd</sup> respondent has stated that the Coconut Testa Oil sample contravened labelling provisions as per Regulation 2.3.1(5) of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, neither Ext.P6 nor Ext.P7 has alleged violation of the Regulation 2.3.1(5) by the petitioner. Therefore, Exts.P6 and P7 cannot be sustained on that ground.

23. The concern of the respondents 2 to 5 seems to be that Oil extracted from Testa are sold by the FPOs and consumers are buying Coconut Testa Oil on an assumption that it is Coconut Oil. Coconut Testa is a refuse in the manufacturing process of Virgin Coconut Oil and Coconut Testa Oil does not share the properties of Coconut Oil. It is true that if Coconut Testa Oil is sold as original Coconut Oil, it will be an offence.

24. But, in the case of the petitioner, there is no allegation that the petitioner has made any misrepresentation in the package, label or advertisement, to the effect that what is sold is Coconut Oil. If the respondents have such a case, the petitioner can be proceeded against under Section 23(2). But, the petitioner is not charged for an offence under Section 23(2) of the Act, 2006 for violation of packaging and labelling norms.

25. Perhaps, understanding the facts of the case in legal perspective, the Food Safety and Standards Authority of India as per letter dated 06.07.2020 has requested respondents 2 and 3 to review the decision of the 2<sup>nd</sup> respondent-Commissioner of Food Safety and Standards Authority, Government of Kerala, prohibiting sale of approved and licensed product "Coconut Testa Oil" and the prosecution proceedings launched consequentially. However, respondents 2 and 3 apparently have not reviewed their decision. The request remained unheeded and the petitioner remained a victim of bureaucratic obstinacy which prevailed over good sense.

In the facts and circumstances of the case and in view of the findings of this Court contained hereinabove, Exts.P6 and P7 orders are quashed. The writ petition is allowed as above.

Sd/-

N. NAGARESH, JUDGE aks/12.02.2021 APPENDIX PETITIONER'S EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE LICENSE DATED 10.09.2017 ISSUED BY THE  
3RD RESPONDENT TO PETITIONER.

EXHIBIT P2 TRUE COPY OF THE CERTIFICATE OF ANALYSIS DATED 18.09.2019 ISSUED BY  
THE REFERRAL FOOD LABORATORY PUNE.

EXHIBIT P3 TRUE COPY OF THE APPLICATION DATED 25.10.2018 FOR APPROVAL OF THE  
PRODUCT SUBMITTED BY PETITIONER.

EXHIBIT P4 TRUE COPY OF THE APPROVAL DATED 25.03.2019.

EXHIBIT P5 TRUE COPY OF THE LICENSE NO.



10019041001876 DATED 29.03.2019 ISSUED BY THE CENTRAL LICENSING AUTHORITY.

EXHIBIT P6 TRUE COPY OF THE ORDER NO.

2068/2019/ACFS (KKD), DATED 05.11.2019 BY THE DESIGNATED OFFICER KOZHIKODE.

EXHIBIT P7 TRUE COPY OF THE SUMMONS NO.M. 741/2020 DATED 07.03.2020 ISSUED BY THE 5TH RESPONDENT.

EXHIBIT P8                      TRUE      COPY      OF      THE      LICENSE  
NO.10019041001876      DATED      20/03/2020  
UNDER THE FGSSA, 2006

EXHIBIT P9                      TRUE      COPY      OF      THE      ORDER      NO.E1-  
8507/17/CFS DATED 0/12/2017 ISSUED BY  
THE SECOND RESPONDENT.

EXHIBIT P10                      TRUE      COPY      OF      ANALYSIS      REPORT  
NO.ENV/12-17/291 DATED 26/12/2017 OF  
THE ANALYST.

RESPONDENTS' EXHIBITS:

ANNEXURE R1(a)                      TRUE COPY OF THE RENEWED LICENSE DATED  
20.03.2020      ISSUED      BY      THE      1ST  
RESPONDENT.

ANNEXURE R1(b)                      TRUE COPY OF THE LETTER DATED 6.7.2020  
ISSUED FROM THE OFFICE OF THE 1ST  
RESPONDENT TO THE 2ND RESPONDENT.

SR