* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment:12.03.2014.*

\+ CRL.REV.P. 368/2012

NESTLE INDIA LTD. ..... Petitioner

Through Mr.Maninder Singh, Sr.Adv. with Mr.Rajesh Batra and Mr.Amit Agarwal, Advocates.

versus

STATE OF DELHI & ANR.

..... Respondents

Through Ms. Kusum Dhalla, APP

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This revision petition is directed against the impugned order dated 01.12.2011 whereby the charge had been framed against the petitioner company for violating the provisions of Sections 3, 6 (1)(a), 6 (1)(b) & 6 (1)(c) of the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Productions, Supply and Distribution) Act, 1992 (hereinafter referred to as the IMS Act). A detailed order had been passed.

2 The petitioner submits that in view of the judgment of a Division Bench of this Court, the controversy which was raging before the trial

Court pursuant to which the aforenoted charge has been framed against him has been set to rest. This judgment of the Division Bench was passed in W.P.(C) No. 4832/1995 *Nestle India Limited and Anr. Vs. Union of India & Ors.* delivered on 31.05.2013.

3 The aforenoted writ petition had been filed seeking two reliefs. The second relief is relevant and reads herein as under:-

"(ii) Declare that until there was an alignment of the two Acts i.e., the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the "PFA Act") read with the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the 'PFA Rules') and the 'IMS Act' read with the 'IMS Rules' on 15.09.1997, it was open to the manufacturers of the Infant Milk substitutes or the Infant Foods to follow one or the other of the provisions made there under for the purposes of labeling of Infant Milk Foods/substitutes, without being exposed to the penal provisions under the said law."

4 In fact the learned senior counsel appearing for the petitioner had restricted the scope of the aforenoted writ petition to relief (ii) only.

5 Record shows that the petitioner company was the manufacturer of infant food products namely 'Lactogen' and 'Cerelac'. On 30.11.1994, a complaint was filed by respondent No. 2, an organization namely Association on Consumer Action on Safety and Health (ACASH). This complaint was premised on the averment that the petitioner company was violating the provisions of Sections 6 & 7 of the

IMS Act as the products of the petitioner company were printing “breast milk is best for your baby” instead of “mother’s milk is best for your baby”. It was also alleged that notice was not printed in its Hindi equivalent in Devnagiri script; English version contained some deliberate alterations which were violative of the IMS Act and IMS Rules. Further allegation in the complaint being that the petitioner company had infringed Section 6 (1)(c) of the IMS Act as the mandatory warning that infant milk substitutes or infant food is not the sole source of nourishment for the infant had not been inscribed properly on the packaging of the milk substitute products; violation of Rule 7 (a) of the IMS Rules was also alleged as the typed letters on the boxes were less than 5 mm in size as prescribed; there was also a violation of the provisions of Section 2 (f) of the IMS Act by printing the words “from 4 months of age” instead of “after the age of 4 months”. This was the gist of the complaint.

6 Record shows that on 09.03.1994 the Directorate General of Health Services had issued a communication to the Food (Health) Authorities noting the inconsistencies between the provisions of Prevention of Food Adulteration Act (PFA Act) and IMS Rules. The

relevant extract and a portion of this letter is reproduced herein as under:-

"Some of the provisions of this Act and the Rules made under PFA Rules are not aligned at present. This Directorate is taking urgent action to amend PFA Rules to align with the provisions of this Act as early as possible. In the meantime, the provisions of both that statues may please be implemented in such a way that complete harmony are maintained without any contravention in implementing the provisions as stated above.

Efforts may also be made that manufactures of Infant Milk Substitute & Infant Food may not be harassed if they are complying the requirements of one of the statute and in doing so the provisions of other statute (which are not aligned with other statute) are not complied with"

7 On 16.01.1995, the learned Magistrate had taken cognizance of the present complaint.

8 This writ petition was filed thereafter i.e. December, 1995.

9 On 15.09.1997, during the pendency of the writ petition, the PFA Rules were amended to align them with the provisions of the IMS Act.

10 The Division Bench in the context of the arguments which were advanced by the respective parties which included the intervenor (respondent No. 2) had framed the following question:-

"In this back drop, the neat legal issue which arises for consideration is whether there existed an apparent conflict between the two legislations namely, the PFA Act along with the PFA Rules and the IMS Act till their alignment and if such an

inconsistency existed, whether it was possible for the petitioner company to follow both the legislations simultaneously."

11 Arguments of the respective parties i.e. the petitioner and Additional Solicitor General appearing for the Union of India (respondent No. 1) and intervenor (respondent No. 2) had been noted. The Division Bench had noted that it was an admitted fact that the petitioner company for the period under question i.e. from 01.08.1993 (IMS Act came into force) till 15.09.1997 (when the provisions of the IMS Act and the PFA Rules were aligned), was complying with the law laid down in the PFA Act and PFA Rules. It was also an admitted position that the penal provisions for non-compliance of the provisions of the PFA Act are more stringent qua the provisions of the IMS Act; the fact that the petitioner company was complying with the provisions of PFA Act had not been disputed; the Division Bench had noted that in view of the inconsistencies existing between IMS Act and PFA Rules as framed under the PFA Act and which has also been noted by the Government in terms of its communication dated 09.03.1994 issued by the Directorate General of Health Services, the aforenoted inconsistencies were finally aligned by the Central Government on

15.09.1997 by bringing changes to Rules 2 (db), 2 (dc), 37 (1)(a), 37 B (1)(b) and 37 B (1)(c) of the PFA Rules to align them with the provisions of the IMS Act. It was reiterated that the petitioner had admittedly complied with the provisions of PFA Act and the Rules framed thereunder. The contentions raised by respondent No. 1 and the intervenor that the special law i.e. IMS would prevail over the general law i.e. the PFA Act and PFA Rules and even if there was any inconsistency between the provisions of the Rules accompanying a general legislation and a special legislation the latter would override the Rules had been answered by the Division Bench in the following words:-

"As regards the contention raised on behalf of the Union of India, Respondent No.1, and the intervener ACASH urging that the later special law overrides the earlier general law, we note that the Central Government itself issued the letter dated 09.03.1994. No assertion has been made before us by the Respondent No.1 denying or negating the contents of the said letter. The Respondent No.1 has only stated that the petitioner company has misconstrued the contents of letter but nothing has been shown to demonstrate the same. We have discussed the letter in detail above and we find that the words used in the said letter clearly indicate that the Central Government acknowledged the presence of inconsistencies between the two acts and efforts to reconcile the same were ongoing. The said letter gave options to the manufactures to follow either one of the enactments and in case a person/entity is found in violation of the other enactment, efforts may be made not to harass such

entities."

12 Section 25 of the IMS Act which provides that the provisions of the IMS Act are in addition to and not in derogation with the provisions of the PFA Act was dealt with in the following words:-

"From a plain reading of Section 25 of the IMS Act and keeping in mind the scheme of the Act, it is clear that the legislature intended to provide additional remedy for promoting breast feeding among mothers and to ensure curtailment of rampant use of infant milk substitutes instead of breast feeding in infants. However, the provisions of the PFA Act continued to apply even after the enactment of the IMS Act. In other words, the IMS Act does not have the effect of overriding the PFA Act with reference to matters dealt with in the former. We agree that the petitioner company could have been prosecuted under the provisions of the IMS Act as the said act was in addition to and not in derogation of the PFA Act. However, learned Senior Counsel has rightly drawn our attention to the maxim Lex non cogit ad impossibilia. This maxim has been explained in Black's Law Dictionary as "the law does not compel the doing of impossibilities." A statute will not be construed as imposing on an individual a duty which is not reasonably possible for him to perform. Further, law cannot be interpreted in a manner so as to become a trap for the unwary. In the instant case, the Union of India, Respondent No.1 by virtue of letter dated 09.03.1994 itself admits that the PFA Rules were irreconcilable with the provisions of the IMS Act. In such a situation, the petitioner's action for giving adherence to PFA law cannot be termed as flawed."

13 The Division Bench had also noted that the Union of India (respondent No. 1) had in its counter affidavit admitted that there is no anomaly in the use of words "breast milk" and "mother's milk" as one is

interchangeable with the other and the submission of respondent No. 1 that the breast milk is not comparable with mother's milk was thus rejected. The Division Bench had also noted that the labels affixed of the petitioner company on the infant substitute products was after a due approval by the Central government.

14 The additional submission of the learned senior counsel for the petitioner is that this judgment was assailed in the Supreme Court by respondent No. 2. It was permitted to be withdrawn on 06.01.2004. The Supreme Court had passed the following order:-

> *"Heard.*
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> *Permission to file the special leave petition is granted.*
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> *After arguing the matter at considerable length, Mr. Chandra Uday Singh, learned senior Court appearing for the petitioner, seeks leave to withdraw the special leave petition.*
>
> *The special leave petition is dismissed as withdrawn."*

15 The thrust of the learned senior counsel for the petitioner is that in view of this judgment of the Division Bench having been endorsed by the Supreme Court, the entire controversy raised by respondent No. 2 has now been set to rest; the complaint pending in the Court of the learned Magistrate and the charges framed by the impugned order are thus liable to be quashed.

16 At the outset, learned counsel for respondent No. 2 has sought to make certain submissions and had wished to point out certain parts of the judgment of the Division Bench which he felt were not in conformity with his submissions; submission being reiterated before this Court (as was before the writ Court) that the IMS Act is a special statute and has to override the general statute which is PFA Act and moreover the PFA Rules are not a part of a substantive legislation. It has been pointed out to the learned counsel for respondent No. 2 that this very same argument had been addressed by him before the Division Bench which was rejected and this rejection was affirmed by the Supreme Court by its order dated 06.01.2004.

17 There is thus now no argument left with the learned counsel for respondent No. 2. It being an admitted position that the inconsistencies between the PFA Rules and the IMS Act were prevailing till 15.09.1997 i.e. till the time they were aligned by the Government pursuant to its letter dated 09.03.1994 wherein these contradictions and inconsistencies had been noted by the Directorate General of Health Services in its aforenoted communication. The Division Bench noting all these facts and holding that it being an admitted position that the petitioner

company was in fact in this interregnum period i.e. till the time when the alignment of the Rules was made on 15.04.1997 was fully complying with the provision of the more stringent law which was the PFA Act and its Rules and by applying the maxim *Lex non cogit and impossibilia* i.e. no person can be expected to do something which is impossible.

18 Thus in this background, it is clear that the petitioner company could not have been prosecuted for the complaint which is now pending before the Magistrate. In this view of the matter, the impugned order of framing charge against the petitioner company for non-compliance of the provisions of IMS Act which provisions could not have been complied with as these provisions were admittedly inconsistent and contrary to the provisions of the PFA Act and PFA Rules (which admittedly the petitioner was complying with), the impugned order being an illegality is liable to be set aside. It is accordingly quashed.

19 Revision petition disposed off.

INDERMEET KAUR, J

MARCH 12, 2014
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