

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

WEDNESDAY, THE 22ND DAY OF FEBRUARY 2023 / 3RD PHALGUNA, 1944

WP (C) NO. 24915 OF 2022

PETITIONER/S:

- 1 HISHAM TRANSPORTS
15/ 332B VADACODE P.O. KANGARPADY MUNDAMPALAM ERNAKULAM
682021 REPRESENTED BY ITS MANAGING PARTNER UBAID M.I.,
PIN - 682021

- 2 TRESA BINI
AGED 45 YEARS
KUMARANCHATH HOUSE, NAZERATH ROAD, CHEERAKADA, ALUVA
683101, PIN - 683101

BY ADV PREMJIT NAGENDRAN

RESPONDENT/S:

- 1 FOOD SAFETY STANDARDS AUTHORITY OF INDIA
FDA BHAVAN, KOTLA ROAD, NEW DELHI 110 002 REPRESENTED
BY ITS CHIEF EXECUTIVE OFFICER, PIN - 110002

- 2 FOOD SAFETY OFFICER, KOCHI CIRCLE
KOCHI CIRCLE 682009, PIN - 682009

- 3 FOOD SAFETY OFFICER,
ALUVA CIRCLE 683585, PIN - 683585

- 4 ASSISTANT COMMISSIONER OF FOOD SAFETY (DESIGNATED
OFFICER)
EROOR SOUTH P.O. TRIPUNITHURA 682 306,

BY ADVS.
CHITHRA P.GEORGE
SRI. JUSTIN JACOB

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
22.02.2023, ALONG WITH WP(C).15880/2021, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

WEDNESDAY, THE 22ND DAY OF FEBRUARY 2023 / 3RD PHALGUNA, 1944

WP(C) NO. 15880 OF 2021

PETITIONER/S:

- 1 P.A.NIZAR
PALACHUVATTIL HOSUE, KAKKANAD WEST P.O.,
COCHIN-682 030.
- 2 P.ABDUL AZEEZ
PALACHUVATTIL HOUSE, KAKKANAD WEST P.O.,
COCHIN-682 030.

BY ADV PREMJIT NAGENDRAN

RESPONDENT/S:

- 1 FOOD SAFETY AND STANDARDS INSTITUTE OF INDIA
FDA BHAVAN, KOTLA ROAD, NEW DELHI-110 002
REPRESENTED BY ITS CHIEF EXECUTIVE OFFICER.
- 2 FOOD SAFETY OFFICER
THRIKKAKARA CIRCLE, THRIKKAKARA, ERNAKULAM, PIN-682
030.
- 3 ASSISTANT COMMISSIONER OF FOOD SAFETY
(DESIGNATED OFFICER)
EROOR SOUTH P.O. TRIPUNITHURA 682 306.

BY ADVS.
CHITHRA P.GEORGE
GP JIMMY GEORGE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 22.02.2023, ALONG WITH WP(C).24915/2022, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

This order of mine shall dispose of two writ petitions; WP(C) No.15880 of 2021 titled as P.A Nizar and another v Food Safety Standards Institute of India and others (first writ petition) and WP(C) No.24915 of 2022 titled as Hisham Transports and others v. Food Safety and Standards Authority of India and others (second writ petition).

2. Challenge in the first writ petition has been laid to the communication Ext.P5 dated 14.1.2021 whereby report of analyst ,vide Ext.P5(2) was communicated to the petitioner regarding the standard of the water having lesser PH value, which did not conform to the standards prescribed for drinking water as per IS 10500:2012 specification, read with Regulation 2.10.9 of Food Safety and Standards (Food Products Standards & Food Additives) Regulation 2011 (hereinafter called 'the Regulations') and as per Section 3.1.(zx) of Food Safety and Standards Act, 2006 (hereinafter called '2006 Act'). Second writ petition challenge has been laid to communication dated 17.3.2021, Ext.P13 and the report showing that 240 MPN/100 ml of Coliform was found in the sample.

3. The bone contention of the petitioner, who is stated to have been a holder of licence for the period 2022 to 2027 for

carrying out business of sale of water and has been supplying the water by purchasing it from a well owner to different consumers in a container/tanker with a writing on it as 'drinking water' is that the well water has not been prescribed under the 2006 Act and Regulation 2011. Therefore, the designated officer defined under the provisions of the Act did not have the power to take the sample and obtain report from the concerned analyst and call upon the petitioner to file an appeal as per the provisions of sub Section 4 of Section 46 of the 2006 Act.

4. Till 29.1.2019, Regulation, 2011 covered only two types of water namely mineral water ie., sub-regulation 2.10.7 and packaged drinking water ie., sub-regulation 2.10.8. On 29.1.2019 a new regulation was inserted as sub-regulation 2.10.9 which brought in a new entry as Drinking water (purified). All these aforementioned standardization in regulation do not envisage drinking water derived from well. The proposed action to be taken under 2.10.9 of the Regulation 2011 which pertains to only drinking water purified through a vending machine would not be applicable. Therefore the process initiated is without jurisdiction. The reply of the Central Government also supports the case of the petitioner with regard to the non inclusion of water derived from well in the Regulation 2011.

5. On the other hand, learned counsel representing the Food Safety and Standards Authority of India countered the arguments by submitting that even if the drinking water derived from well is not prescribed under the Regulation 2011 except Mineral water, Packaged Drinking water and Drinking water (purified) but any other category of water based drink would either be a Proprietary Food under Regulation 2.12.1 or Beverages Non-Alcoholic – Carbonated under Regulation 2.10.6 of the FSS (Food Standards and Food Additives) Regulations, 2011. As per Section 2(1)(o) of the 2006 Act wherein such persons in relation to food business would mean a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder. Section 26 of the Act, casts the responsibilities as to the food safety on a food business operator to ensure that the articles of food safety ie., the water in the present case, should satisfy the requirement of this Act and the rules and regulations made thereunder at all stages of production, processing, import, **distribution and sale** within the business under his control and neither he himself or by any person in this behalf manufacture, store, **sell or distribute** any article of food which is unsafe, misbranded, substandard, contains extraneous matter, for which licence is required or prohibited by the Food

Authority or contravention of the provisions of the Act.

6. As per Regulation 2.3.14.174, no person shall manufacture, sell or exhibit for sale packaged drinking water except under the bureau of Indian Standards Certification Mark. Regulations aforementioned were amended in 2019, whereby 12.10.9 Drinking Water (Purified) was introduced. Obtaining of the licence by the petitioner is the testimony that he has to abide by the provisions of the Act, Rules and Regulations framed thereunder. Food Safety Officers are also not denuded for inspection of the food business, drawing of the sample and sending them to food analysis on the basis of the report of the food analysts, which has already come on record, and the designated officer can refer the matter to the Commissioner of Food safety for taking an action for launching a prosecution under Section 42 of the Act.

7. I have heard the learned counsel for the parties and appraised the paper book. Section 2(j) and 2(o) of the Act reads as under:

(j) — Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or

psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality (o) —food business operator// in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder;

Section(j)deals with the definition of food whereas (o) defines food business operator. The responsibilities of the food business operator has been enshrined under Section 26 of the Act. The same reads as under:

26. Responsibilities of the Food business operator.—(1) Every food business operator shall ensure that the articles of food satisfy the requirements of this Act and the rules and regulations made thereunder at all stages of production, processing, import, distribution and sale within the businesses under his control. (2) No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food—

(i)which Is unsafe;or (ii) which is misbranded or sub-standard or contains extraneous matter; or (iii) for which a licence is required, except in accordance with the conditions of the licence; or (iv) which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health; or (v) in contravention of any other provision of this Act or of any rule or regulation made thereunder.

(3) No food business operator shall employ any person who is suffering from infectious,contagious or loath some disease.

(4) No food business operator shall sell or offer for sale any article of food to any vendor unless he also gives a guarantee in writing in the form specified by regulations about the nature and quality of such article to the vendor: Provided that a bill, cash memo, or invoice in respect of the sale of any article of food given by a food business operator to the vendor shall be deemed to be a guarantee under this section, even if a guarantee in the specified form is not included in the bill, cash memo or invoice.

(5) Where any food which is unsafe is part of a batch, lot or consignment of food of the same class or description, it shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment within a specified time, it is found that there is no evidence that the rest of the batch, lot or consignment is unsafe: Provided that any conformity of a food with specific provisions applicable to that food shall be without prejudice to the competent authorities

taking appropriate measures to impose restrictions on that food being placed on the market or to require its withdrawal from the market for the reasons to be recorded in writing where such authorities suspect that, despite the conformity, the food is unsafe.

8. On perusal of the same, the food business operator is mandatorily required to adhere to the provisions of the Act, Rules and Regulations, at all stages of (distribution and sale) relevant for adjudication in the present writ petition. No doubt when the regulation 2011 came into being, only Regulation 2.10.7 was carved out whereas 2.10.8 came into being in 2016 and 2.10.9 in November 2019.

9. Impugned notices in both the cases issued by the designated officer were actuated from the report made on the basis of the sample of the water taken from the tanker owned by the petitioner.

10. On cumulative reading of Regulations, no doubt the water drawn from the well has not been described. But this Court cannot remain as a mute spectator in ignoring the provisions of food operator as defined under Section 2(o) and Section 26 of the 2006 Act. Concededly, the petitioner in the 2nd case is a Food Operator. Though the well owner would also be a part of the food operator, but in the absence of the same, the role of the food operator would not come into play for purpose of distribution and

sale of the food products which includes water as well. It is not known whether the water is being exclusively used for drinking or for other purposes but the fact remains the tanker carrying the water the word 'drinking water' is written. The wisdom ought to have been drawn upon the designated officer or Commissioner of Food Safety by issuing mandate/directions to all the well owners indulging into selling of the water, food operators for the purpose of supply of drinking water to obtain licence under the provisions of the Act in order to prevent the sale of adulterated water or water not conforming to the standards as prescribed in the report, *ibid.* I am of the *prima facie* view that in the absence of the definition of water drawn from well, the petitioners cannot be permitted to urge this Court for issuing a mandate to the respondent not to take action under Regulation 2.10.9. Though it may not specifically be dealing with the water drawn from well as it only provides to dispensation but the fact remains the sum and substance is water meant for drinking. Thus the impugned orders calling upon the petitioners for availing the remedy of appeal as prescribed under sub Section 4 of Section 46 of the Act do not suffer from any illegality and perversity. Writ petitions are devoid of the merit and is accordingly dismissed.

11. In order to prevent further misuse of provisions of the

Act, at the hands of the well owner and food operators, I deem it appropriate to issue general directions to the State Government as well as respondent No.2 to publish a notice and personal notice to all the well owners and food operators who are indulging into the practice of selling the water through tankers to the general public to obtain licence and conform to the standards prescribed under the Act, Rules and regulations. This Court is sanguine of the fact that the respondent No.1 would come out with a notification for bringing the water drawn from well and standardizing the conditions of the water drawn from the well for the purpose of selling into general public.

Sd/-

sab

AMIT RAWAL
JUDGE

APPENDIX OF WP(C) 15880/2021

PETITIONER EXHIBITS

- Exhibit P1 A TRUE COPY OF THE REGISTRATION OBTAINED UNDER THE FSS ACT DATED 21.9.2017.
- Exhibit P2 A TRUE COPY OF THE REGISTRATION PERTAINING TO 9 VEHICLES BELONGING TO THE PETITIONERS
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- Exhibit P3 A TRUE COPY OF THE CLARIFICATION VIDE FILE NO.4(17)2016/KARNATAKA/ENF/FSSAI DATED 7.2.2018 AND TYPED COPY.
- Exhibit P4 AN EXTRACT OF THE REGULATIONS CONTAINING SUB-REGULATION 2.10.8 AND 2.10.9.
- Exhibit P5 A TRUE COPY OF THE LETTER NO.36/ADJ/2020-21/ACFS/EKM DATED 14.1.2021.

APPENDIX OF WP(C) 24915/2022

PETITIONER EXHIBITS

- Exhibit P-1 A TRUE COPY OF THE REGISTRATION
NO.113200007000002 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-2 A TRUE COPY OF THE REGISTRATION
NO.113200007000034 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-3 A TRUE COPY OF THE REGISTRATION
NO.113200007000035 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-4 A TRUE COPY OF THE REGISTRATION
NO.113200007000036 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-5 A TRUE COPY OF THE REGISTRATION
NO.113200007000037 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT
- Exhibit P-6 A TRUE COPY OF THE REGISTRATION
NO.113200007000038 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-7 A TRUE COPY OF THE REGISTRATION
NO.113200007000039 DATED 27.11.2021
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.
- Exhibit P-8 A TRUE COPY OF THE REGISTRATION
NO.113200007000731 DATED 12.05.2022
ISSUED TO THE FIRST PETITIONER UNDER THE
FSSA ACT.

- Exhibit P-9 A TRUE COPY OF THE REGISTRATION
NO.21317181000189 DATED 06.05.2022 ISSUED
TO THE SECOND PETITIONER UNDER THE FSSA
ACT.
- Exhibit P-10 A TRUE COPY OF THE CLARIFICATION VIDE
FILE NO. 4 (17) 2016/ KARNATAKA/ENF/FSSAI
DATED 07.02.2018
- Exhibit P-11 AN EXTRACT OF THE REGULATIONS CONTAINING
SUB-REGULATION 2.10.8 AND 2.10.9
- ExhibitP-12 A TRUE COPY OF THE LETTER NO.
01/ADJ/2019/ACFS/EKM DATED 30.04.2020
ISSUED BY THE SECOND RESPONDENT.
- Exhibit P-13 A TRUE COPY OF THE LETTER NO.44/PC/2020-
21/ACFS/EKM DATED 17.03.2021 ISSUED BY
THE THIRD RESPONDENT.
- Exhibit P-14 A TRUE COPY OF THE ORDER PASSED BY THIS
HON'BLE COURT IN W.P.(C) 15880 OF 2021
DATED 20.10.2022