Nestle India Limited and anr Vs. Union of India and ors

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Court : Delhi

Decided On : May-31-2013

Judge : Siddharth Mridul

Appellant : Nestle India Limited and anr

Respondent : Union of India and ors

Judgement :
IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on:

31. 05.2013 W.P.(C) 4832/1995 NESTLE INDIA LIMITED & ANR ..... Petitioners versus UNION OF INDIA & ORS ..... Respondents Advocates who appeared in this case: For the Petitioner : Mr. Ashok Desai, Sr. Advocate with Mr. Rajesh Batra, Ms. Mallika Joshi, Mr. Amit Agarwal, Ms. Amrita Chatterjee and Mr. Rajan Narain, Advocates. For the Respondent :Mr. Rajeev Mehra, ASG with Ms. Meera Bhatia and Mr. Ashish Virmani, Advocates for R-1/UOI Mr. C.V. Singh, Sr. Advocate with Mr. Ajay Kumar, Advocate for the Intervener (ACASH) CORAM: HON'BLE MR. JUSTICE BADAR DURREZ AHMED HON'BLE MR. JUSTICE SIDDHARTH MRIDUL JUDGMENT SIDDHARTH MRIDUL, J.

1. By way of the present writ petition under Article 226 of the Constitution of India, the petitioners, inter alia, are seeking the following reliefs:- (i) Declare the provisions of Sections 2(1)(f), 6 (1)(a), (b) and (c) of the Infant Milk Substitutes, feeding Bottles and Infant foods (Regulation of Production, Supply and Distribution) Act, 1992 (hereinafter referred to as the IMS Act) and Rules 6 and 7

(a) and (c) of the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Rules, 1993 (hereinafter referred to as the IMS Rules) to be invalid; and (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. (iii) Pass such further and other orders as may be deemed just and necessary. At the outset, Mr. Ashok Desai, the learned Senior Counsel appearing for the petitioners has submitted that he is restricting the scope of the present writ petition to the relief no. (ii) only.

2. The factual matrix unfolds as under:(i) Petitioner No.1 is a company incorporated under the Companies Act, 1956 dealing with manufacturing of infant food products namely, LACTOGEN and CERELAC. The petitioner company is currently selling products in the category of Infant Milk Substitutes and Weaning Foods. (ii) In the year 1994, a complaint was filed by an organization namely Association on Consumer Action on Safety and Health (ACASH), the Intervener in the present writ petition, against the petitioner company under Section 6 and 7 of the IMS Act, on the ground that on the products of the petitioner company, important notice is printed as BREAST MILK IS BEST FOR YOUR BABY instead of MOTHERS MILK IS BEST FOR YOUR BABY. It was also alleged that this notice was not printed in its Hindi equivalent in Devnagiri script. It was further alleged that the English version contained some material and deliberate alterations which were violative of the IMS Act and the IMS Rules. The complainant further alleged that the petitioner company has infringed Section 6(1)(c) of the IMS Act as the mandatory warning that the infant milk substitutes or the 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. It was also alleged that the petitioner company has violated Rule 7(a) of the IMS Rules as the typed letters on the boxes were less than 5mm in size as prescribed and that the petitioner company has

violated 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. (iii) On 09.03.1994, the Directorate General of Health Services issued a communication to Food (Health) Authorities reflecting upon the inconsistencies between the provisions of the PFA Rules and IMS Act. The contents of the said communication are pertinent in view the controversy raised and the same are being extracted below:DR. B.K. TIWARI ASSTT. DIRECTOR GENERAL (PFA) D.O. NO.P-15025/139/92-ZB DIRECTORATE GENERAL OF HEALTH SERVICES NIRMAN BHAWAN, NEW DELHI DATED THE 09.03.1994 Dear Dr./Shri This is to invite your kind attention to the Infant Milk Substitute, Feeding Bottle and Infant Food (Regulation & Production, Supply and Distribution) Act, 1992 which came into force w.e.f. 01.08.1993. Though the Act has been enacted on the instance (sic) of Deptt. of Women & Child Development of Ministry of Human Resource Development but some of its provisions have to be implemented by the Food (Health) Authorities who are implementing PFA ActRules, in addition to the provisions of PFA Act/Rules. I am enclosing a copy of the Act and Rules made their under for your perusal. The Section 12 of this Act empowers Food Inspectors appointed under Section 9 of the PFA Act 1954 for implementing the provisions of Section 6 and 11 of this Act. Section 6 of this Act deals with the information on Containers & Labels of Infant Milk Substitute or Infant Food and Section 11 deals with Standards of Infant Milk Substitute, Infant Food and Feeding Bottles. No separate specifications or (sic) Infant Milk Substitute/Infant Food have been prescribed under this Act but the Standards already laid down under PFA Rules have to be implemented. There are no standards of feeding bottler under PFA Rules but these have to be seen if these have the BIS marks or not which is compulsory in this case also. 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. In view of above, I, therefore, request you to kindly instruct the Food Inspectors/Public Analysts and Local (Health) Authorities of your States for taking urgent action in the implementation of the provisions of this Act also and send monthly reports regarding its implementation lacuna, if any, to this Directorate regularly. An immediate action is solicited. With kind regards. Yours sincerely, Sd/(Dr. S.K. TIWARI) To Food (Health) Authorities Of States/U.T.s. this is to invite your (Underlining added) (v) However, by an order dated 16.01.1995, the learned Metropolitan Magistrate took cognizance and issued summons on the complaint case filed by ACASH against the petitioner company. (vi) Thereafter in 1995, the petitioner company preferred the present writ petition challenging the constitutional validity of certain provisions of the IMS Act as being contradictory to the provisions of the PFA Act read with PFA Rules. (vii) Subsequently, on 15.09.1997, Rules 2(db), 2 (dc), 37 (1)(a), 37B (1)(b) and 37B (1)(c) of the PFA Rules were amended to align them with the provisions of the IMS Act. (viii) The Learned Metropolitan Magistrate on 17.03.2012 framed the charge in complaint case bearing CC No.82 of 2001 against the petitioner company which reads as under: CHARGE I, Bhupinder Singh, Metropolitan Magistrate, Rohini Courts, Delhi do hereby charge you Nestle India Ltd. Through AR Sh. D.H. Kotak, Sales Manager, Nestle India Ltd. as under:That on dated 19/10/94 or before you being manufacturer and marketing company of Cerelac, Lactogen violated the provisions of Sec. 3,6(1)(a), 6(1)(b), 6(1)(c), of The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of production supply and Distribution) Act 1992 by printing the notice BREAST MILK IS BEST FOR YOUR BABY instead of MOTHERS MILK IS BEST FOR YOUR BABY and by not printing the important notice in Hindi Devnagari Script and also by not printing the information/warning that Infant Milk Substitute or Infant food is not the sole source of nourishment of an infant on the containers of Lactogen and also printed BREAST MILK instead of MOTHERS MILK and important notice in Hindi Version was smaller in size as prescribed size of 5mm on the container of Cerelac and also all the mandatory information of Sec. 7(1) of IMS Act was not incorporated in the advertisement of magazines like Greh Shobha, Sarita, Womens Era, Parenting and Meri Saheli and thereby you have committed an offence punishable U/s 20(1) & 20(2) of The Infant

Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of production supply and Distribution) Act 1992 and within my cognizance. And I hereby direct you to be tried by this Court for the aforesaid offence. Bhupinder Singh MM/Rohini/Delhi (ix) Against the order of charge, the petitioner company had preferred a revision petition before this Court under Section 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.). The said petition is captioned as Criminal Revision Petition No.368 of 2012 and is pending adjudication.

3. 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.

4. Mr. Ashok Desai, the learned Senior Counsel appearing on behalf of the petitioner company has raised the following contentions:(a) The PFA Act was enacted by the Parliament in the year 1954 for the purpose of labelling and maintaining the quality and standards of the food. The PFA Rules were introduced in the year 1955. The petitioner company has throughout been complying with the provisions of the PFA Act and the PFA Rules since they were brought into force. Subsequently, in the year 1993, the Government introduced the IMS Act and the IMS Rules, in order to regulate the production, supply and distribution of infant milk substitutes and infant foods which included the specific and detailed labelling requirements for infant milk substitutes and infant foods. It is submitted that after the enactment of the IMS Act there was a considerable overlap between the spheres of the operation of the provisions of the PFA Act and its Rules and the provisions of the IMS Act and its Rules. (b) In both PFA Act and IMS Act there were several common aspects and both the Acts applied to Infant Milk Products. However, certain anomalies and inconsistencies were present in both the legislations on account of differing languages and requirements pertaining to labelling etc. under the two enactments. A table has been annexed by the petitioner company indicating the inconsistencies and contradictions between the two legislations which has been reproduced herein below:- Sl. No.

1. POSITION UNDER PFA ACT AND RULES 28 05.1954 POSITION UNDER IMS ACT AND RULES 01 08.1993 POSITION AFTER AMENDMENT 15 09.1997 Provisions Rule 37-B(2)(i) Section 6(1)(a) IMPORTANT NOTICE IMPORTANT BREAST MILK IS BEST MOTHERS MILK IS BEST FOR YOUR BABY FOR YOUR BABY NOTICE are same under both Acts i.e. IMPORTANT NOTICE MOTHERS MILK IS BEST FOR YOUR BABY. (by amendment made in PFA Rules w.e.f. 15.09.1997) 2. (i) Rule 37-B(2)(i) Section 2(1)(f) provided further that in Infant food Any food being case of weaning food the marketed statement or otherwise shall be represented as complement to by the mothers milk to meet the statement from 4 months of growing nutritional needs of age. the infant after the age of 4 accompanied months. Provisions are same under both Acts (by amendment made in PFA Rules w.e.f. 15.09.1997). (ii) Provisions under both PFA Rules and IMS Act were again amended w.e.f. 25.06.2004 and 01.11.2003 respectively i.e. After the age of 6 months and upto the age of 2 years.

3. Provisions Rule 37-B(2)(i) Rule 7(a) No size of lettering is Declaration provided for declarations on containers or of every infant label except for the words milk substitute or infant food IMPORTANT NOTICE- or their advertisement shall BREAST MILK IS BEST contain letters not less than 5 FOR YOUR BABY (shall mm in size. on labels or are under both Acts- The words same IMPORTANT NOTICE-MOTHERS MILK IS BEST FOR YOUR BABY shall not be less than 5mm in size not be less than 5mm in size). Rule 7(a) of the IMS Rules was amended w.e.f. 22.01.1999 i.e. The types of letters used shall not be less than 5mm in size for IMPORTANT NOTICE and the statement MOTHERS MILK IS BEST FOR YOUR BABY shall not be less than 5mm in size.

4. Provisions Rule 37-B(2)(i) Rule 7(c) The declaration starting with The declaration starting with the words IMPORTANT the NOTICE- BREAST MILK NOTICE- MOTHERS MILK IS IS BEST FOR YOUR words BEST IMPORTANT FOR YOUR BABY can be on any panel BABY has to be on the of the label with respect to central panel of the label or W.P.(C) 4832/1995 under are both same Acts- IMPORTANT NOTICE- MOTHERS MILK IS BEST FOR YOUR BABY has to weaning food container or advertisement of the label or container of Infant food or Infant milk substitutes amendment PFA (by made Rules in w.e.f. 15.9.1997) 5.

Earlier no provision existed akin to Section 6(1)(c) of the IMS Act. Provisions Section 6(1(c) Warning-Infant milk substitutes or infant food is not the sole source of nourishment of an infant. are same under both the ActsWarning- Infant milk substitutes or Infant food is not the sole source of nourishment of an infant (by amendment made in PEA Rules w.e.f. 15.09.1997.

6. Earlier no provision existed akin to Section 6(1)(b) of the IMS Act Provisions Section 6 (1) (b) Declaration that Infant milk substitute or Infant food should be used only on the advise of a health worker.. are same under both the ActsDeclaration that Infant milk substitutes or Infant food shall be used only on the advise of a health worker.. (by amendment made in PFA Rules w.e.f. 15.09.1997.

7. Rule 33 Language of the particulars on the labels shall be in W.P.(C) 4832/1995 Section 6 of the IMS Act Provisions continue. and Rule 6 of IMS Rules. No amendments. English or Hindi in Devnagri Script. requires the important notice to be in capital letters in such language as may be prescribed and also prescribes the other declaration to be in the same language. Rule 6 however of the same Act prescribes the word Important Notice to be in English equivalent in and its Hindi Languages.

8. Provisions continue. No Section 11, 12, 20 Section 20 and 21 Sanctions are required and No sanctions are provided Safeguards are given to the before manufacturer before proceedings before violation initiation of proceedings of the IMS Act and neither against it by the concerned is any safeguard provided initiating amendments. criminal authority.

9. Section 17- Section 22 Provides further No such safeguard in the safeguards-if offence Provisions continue. No amendments. Act committed by a company, appointed nominee to be proceeded against and not the directors. (c) In view of the irregularities in the said enactments, the petitioner company was in a quandary whether to follow the IMS Act or the PFA Act as certain provisions in the former were inconsistent with those of the latter. As such it was not possible for the petitioner company to comply with the requirements of law stipulated in either of the enactments without contravening the provisions of the other. (d) Both the laws required a mandatory compliance and attracted punishments under Section 16 of

the PFA Act and Section 20 of the IMS Act. The petitioner had duly/strictly complied with the requirements of the PFA Act at all relevant times since the violation of the said Act entailed more severe punishment. (e) The labels which were printed on the infant substitute products had been approved by the government concerned under the PFA Act. In fact, the Government taking notice of the anomalies and inconsistencies present in the two enactments, issued the said communication dated 09.03.1994 directing that manufacturers of Infant Milk Substitute and Infant Food may not be harassed if they are complying with the requirements of one of the statutes and in so doing the provisions of the other statute (which are not aligned with other statute) are not complied with. In this premise, it is submitted that the Respondent No.3 cannot go behind its own order and directions and resile from the same as it would lead to maladministration. (f) As there were irreconcilable contradictions between the two Acts, the principle of Lex non cogit ad impossibilia i.e., the law does not compel the doing of impossibilities, is attracted and the petitioner company could not have been compelled to follow both the laws at the same time. To buttress the said contention, the learned Senior Counsel has placed reliance on Cochin State Power & Light Corporation Ltd. vs. State of Kerala, AIR 196.SC 168.wherein the Supreme Court held: ..In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of December 2, 1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitia ad impossibile (the law does not compel the doing of impossibilities), and sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years.. (Underlining added) In Vinod Krishna Kaul vs. State, (1996) 1 SCC 41.the Supreme Court made the following observation:. Clause 3 was, therefore, not intended to apply to a government servant who neither had the occupation of a house owned by him nor the right to its immediate possession. The legal maxim lex non cogit ad impossibilia has to be borne in mind, i.e. the law does not compel a person to do the impossible. In the present case, in view of the subsisting lease

in favour of the tenant, the commencement of the lease being prior to 1-1-1976 and the entire period in question being covered by the period of that lease, the provisions in clauses 3 and 4 could not be applied to the appellant, even if he is assumed to be the owner of the house for this purpose. Recovery of the higher rent/damages from the appellant in accordance with clauses 3 and 4, as aforesaid, is therefore not justified. (Underlining added) (g) Section 6 of the IMS Act deals with Information on containers and labels of infant milk substitutes or infant foods. Clause(1) of Section 6 provides that:- Without prejudice to the provisions of the Prevention of Food Adulteration Act, 1954 (37 of 1954) and rules made there under, no person shall produce, supply or distribute any infant milk substitute or infant food unless every container thereof or any label affixed thereto indicates in a clear, conspicuous and in an easily readable and understandable manner, the words important notice in capital letters in such language as may be prescribed and indicating there under the following particulars in the same language, namely:(i) a statement mothers milk is best for your baby in capital letters; (ii) a statement that infant milk substitutes or infant food should be used only on the advice of a health worker as to the need for its use and the proper method of its use; (iii) a warning that infant milk substitutes or infant food is not the sole source of nourishment of an infant; .. . Section 6 dealing with the labelling, begins with a without prejudice clause and hence, the enactment of IMS Act did not wipe out the compliance of obligations under the PFA Act which were strictly complied with by the petitioner company till the alignment of the two acts took place in 1997. Thus, even after the IMS Act came into force, the labelling requirements were continued to be governed by the PFA Act. Further, Section 11 of the IMS Act provides that the no person shall sell or otherwise distribute any infant milk substitute or infant food unless it conforms to the standards, specified for such substitute or food under the PFA Act and the rules made there under. The proviso to Section 11(1) of the IMS Act reads as under:.Provided that where no standards have been specified for any infant milk substitute or infant food under the Prevention of Food Adulteration Act, 1954 (37 of 1954), no person shall sell or otherwise distribute such substitute or food unless he has obtained the approval of the Central Government in relation to such substitute or food and the label affixed to the container thereof under the rules made under that Act. Section 11 of the IMS Act

required that label affixed to the infant milk products had to be accorded approval by the Central Government under the PFA Act. It is submitted that labels in the present case were accordingly, got approved by the petitioner company from the Central Government before displaying them on their box containing infant milk powder and food products. (h) Section 25 of the IMS Act provides that provisions of the IMS Act are in addition to and not in derogation of the PFA Act. Therefore, the provisions of the IMS Act did not in any way repeal the provisions of the PFA Act. In fact, the provisions of the IMS Act are in addition to the PFA Act. (i) The Union of India, Respondent No.1, in its counter affidavit has admitted that the inconsistencies present between the two Acts have been removed by way of the 1997 amendment brought into the PFA Rules. This is indicative of the fact the two legislations under consideration were non-aligned till 1997 and discrepancies were present in them. (j) The Union of India has itself admitted that there is no difference between breast milk and mothers milk as both the phrases are used interchangeably. Therefore, the petitioner company is not at fault as it followed the labelling under Rules 37B of the PFA Rules which provided for printing the following statement in bold letters BREAST MILK IS BEST FOR YOUR BABY. (k) On the aspect whether relief in the nature of declaration affirming that the two legislations were inconsistent for a limited period can be granted or not, the learned Senior Counsel appearing for the petitioner company has submitted the Supreme Court in K K Kochuni vs. State of Madras, AIR 195.SC 72.has held that in giving a relief under Article 226 or Article 32 of the Constitution of India, no technicalities should be allowed to prevail and declaratory relief can be given in appropriate cases to suit the exigencies.

5. The learned Additional Solicitor General appearing on behalf of Union of India, Respondent No.1, has raised the following contentions rebutting the arguments advanced on behalf of the petitioner company:(a) The PFA Act is a general statute which was brought into force for setting up a standard for food products and to prevent contamination of food articles by keeping a check on adulteration whereas the IMS Act is a special statute which has been subsequently enacted to encourage and protect breast feeding and to prescribe measures to control marketing and promotion of infant food products and milk substitutes. Therefore, as per rules of interpretation and doctrine of implied repeal, provisions of law laid

down in special statutes will prevail over the requirements of law mandated in a statute of general nature. In support of the said contention, the learned ASG has placed reliance on the decision of the Supreme Court in Jeevan Kumar Rawt vs. CBI, (2009) 7 SCC 52.wherein it was held that the procedure provided under the special statue will prevail over the procedures provided under a general statute. (b) Both the IMS Act and PFA Act were enacted with different set of objectives and same is demonstrable from the preamble and statement of objects of the two enactments. The PFA Act, as mentioned above, was enacted for maintaining the standard of food articles which included infant food as well whereas the IMS Act aimed at creating awareness about benefits of breast feeding and to prevent incorrect information from reaching the mothers. The area of operation of the two acts is different and, therefore, both the legislative enactments can be construed harmoniously as they operate in their independent fields. (c) As per the hierarchy of laws, the substantive provisions in an act will be given precedence over the rules made under an earlier statue as the rules are complementary in nature and cannot be applied so as to contravene a substantive provision in a statutory enactment. The petitioner company ought not to have followed Rule 37 B of the PFA Act which deals with labeling of infant food as Section 6 and Section 11 of the IMS Act comprehensively dealt with labelling and information to be printed on infant milk substitutes or infant foods. In this premise, it is urged that in case of conflict between a statutory rule and substantive provision in another enactment, the statutory provision would prevail over the rule. In this behalf, the Union of India, Respondent No.1 has placed reliance on the observations of Supreme Court in Ispat Industries Ltd. vs. Commr. of Customs, (2006) 12 SCC 583:- 27. In this connection, it may be mentioned that according to the theory of the eminent positivist jurist Kelsen (the pure theory of law) in every legal system there is a hierarchy of laws, and whenever there is conflict between a norm in a higher layer in this hierarchy and a norm in a lower layer, the norm in the higher layer will prevail (see Kelsen's The General Theory of Law and State).

28. In our country this hierarchy is as follows: (1) The Constitution of India; (2) The statutory law, which may be either parliamentary law or law made by the State Legislature; (3) Delegated or subordinate legislation, which may be in the form of rules made under the Act, regulations made under the Act, etc.; (4) Administrative

orders or executive instructions without any statutory backing.

29. The Customs Act falls in the second layer in this hierarchy whereas the Rules made under the Act fall in the third layer. Hence, if there is any conflict between the provisions of the Act and the provisions of the Rules, the former will prevail. However, every effort should be made to give an interpretation to the Rules to uphold its validity. This can only be possible if the Rules can be interpreted in a manner so as to be in conformity with the provisions in the Act, which can be done by giving it an interpretation which may be different from the interpretation which the rule could have if it was construed independently of the provisions in the Act. In other words, to uphold the validity of the rule sometimes a strained meaning can be given to it, which may depart from the ordinary meaning, if that is necessary to make the rule in conformity with the provisions of the Act. This is because it is a well-settled principle of interpretation that if there are two interpretations possible of a rule, one of which would uphold its validity while the other which would invalidate it, the former should be preferred. (d) Section 25 of the IMS Act provides that the provisions of the said Act are in addition to and not in derogation of the PFA Act. The legislative intent is manifest from the bare reading of Section 25 of the IMS Act that provisions of the both the Acts operate independently as they are supplementary to each other and not in contravention. Therefore, the petitioner company could have been prosecuted under either of the two legislations. The Respondent No.1, in this behalf, has placed reliance on the judgment of the Supreme Court in ICICI Bank Limited v. APS Star Industries Ltd., (2010) 10 SCC 1.(e) The petitioner company is entitled to raise the grounds and contentions urged in this writ petition as their defence before the trial court where prosecution under the IMS Act is pending adjudication. The petitioner company by way of the present writ petition under Article 226 of the Constitution of India cannot be permitted to circumvent the criminal proceedings pending against it.

6. The learned Senior Counsel for the intervener ACASH has made the following submission:- (a) The PFA Act along with the rules made therein is a legislation actually directed towards prevention of adulteration of food articles whereas the IMS Act is a special legislation enacted for the purpose of encouraging breast feeding in mothers and dealing with infant substitutes and food products. The

learned Senior Counsel, in this behalf, has drawn our attention towards the statement of reasons and objects behind the enactment of the IMS Act. The said statement of reasons reveal that the IMS Act was brought into force to give effect to the principles laid down in the International Code for marketing of Breast Milk Substitutes adopted by the World Health Assembly in May 1981 for the proper nutrition and health for the worlds children. The Government of India recognized this Code and adopted the Indian National Code for Protection and Promotion of BreastFeeding (hereinafter referred to as the Code) in December, 1983. The Code envisaged that there shall be no advertising or other form of sales promotion of infant milk substitutes, feeding bottles and teats. The Code, in accordance with this general principle enjoined, the health authorities to encourage and protect breast feeding and also prescribed several measures to control the marketing and promotion of infant milk substitutes, feeding bottles, teats and infant foods. Therefore, the IMS Act was specifically aimed towards boosting breast feeding through mothers and to ensure that in the marketing of infant milk substitutes no impression is given that feeding of these products is equivalent to, or better than, breast feeding. Therefore, once the IMS Act and IMS Rules had come into force, it became the special statute dealing with infant substitutes and being a later special statute would prevail over the PFA Act which was an earlier general statute. The learned Senior Counsel, in this regard, has cited the decisions of Supreme Court in Ashok Marketing vs. Punjab National Bank, (1990) 4 SCC 40.and Municipal Corporation of Delhi vs. Shiv Shanker (1971) 1 SCC 442.It is further submitted that Rule 37 B of the PFA Rules was introduced as a stop-gap measure to fill in the lacunae which was later on cured by the enactment of the IMS Act. Therefore, after the IMS Act came into force, there was no occasion for the petitioner company to follow the said Rule 37 B as the same stood impliedly repealed by IMS Act and IMS Rules. (b) Section 3 of the IMS Act dealing with prohibitions in relation to infant milk substitutes, feeding bottles and infant foods provides:No person shall(a) (b) give an impression or create a belief in any manner that feeding of infant milk substitutes is equivalent to, or better than, mothers milk; or (c) .. It is submitted that in Section 3 of the IMS Act the words employed are mothers milk as opposed to breast milk and, therefore, the import of the said section was to ensure that correct and not misleading opinion is expressed to the mothers. Thus, the

petitioner company was well aware of the fact that breast milk is not equivalent to mothers milk. (c) Section 25 of IMS Act which provides that provisions of the IMS Act are in addition to and not in derogation of the PFA Act does not imply that a person can choose at his whims as to which law he would comply with. It is also submitted that in case same violation is termed as an offence under two different enactments and a person follows one of the enactment which results in violation of the other, then Section 26 of the General Clauses Act, 1897, would come into play which protects a person/entity from double jeopardy. (d) There is no point in adjudicating the question of conflict between the PFA Act and IMS Act as the alignment of the two acts took place way back in 1997 and now in 2013, adjudication on this aspect would serve only an academic purpose. (e) The arguments raised by the petitioner company in the present writ petition can be raised before the trial court in their defence. In fact, the petitioner company has already raised these issues before the court concerned before the order on charge was passed. (f) The reliance placed by the petitioner company on the letter dated 09.03.1994 issued by the Directorate of Health is completely misconceived. The Central Government has power to issue such directions only under Section 22A of the PFA Act and these directions cannot be stretched to cover non-compliance of provisions under the IMS Act. In any event, the purport of the letter dated 09.03.1994 is to give primacy to the provisions of the IMS Act and not the PFA Act.

7. We have heard the rival contentions. It is an admitted position 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 requirements of law laid down in the PFA Act read with PFA Rules. It is also not in dispute that the penalty provided for non-compliance of the provisions of the PFA Act was more stringent than that provided in the IMS Act and accordingly, the petitioner company had duly complied with the provisions of the PFA Act.

8. From the table reproduced above, it can be seen that after the enactment of IMS Act, certain apparent inconsistencies existed between the IMS Act and the PFA Rules framed under the PFA Act. The same were 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 37B (1)(c) of the PFA Rules to align them with the provisions of the IMS Act. However, in the interregnum, to deal with the anomalous situation which existed on account of the prevalent inconsistencies between the two legislations, communication dated 09.03.1994 was issued by the Directorate of Health Services, recording that certain provisions of the IMS Act were in contradiction with the PFA Act and the PFA Rules. The contents of the letter have been quoted above in extenso. On perusal of the said letter, it is revealed that the Central Government was aware about the inconsistencies between the provisions of the IMS Act and the PFA Rules and urgent action was underway to take care of the said defects. The letters also states that till the time the conflict amid the statutes is resolved, efforts should be made to interpret them in such a manner that complete harmony is achieved without any contravention in implementing the provisions. In the said letter, it is also directed that till the time alignment fructified, manufacturers of infant milk substitutes and infant foods may not be harassed if they were acting in compliance with the requirements of one of the statutes and in so doing contravention of the other statute occurred. In the last paragraph of the said letter, report was called from the Food Inspector/Public Analyst for taking immediate action for implementation of the provisions of the IMS Act.

9. In the present case, the petitioner herein had complied with the provisions of the PFA Act and, therefore, in view of the letter dated 09.03.1994, the action of the petitioner company in abiding by the provisions of the PFA Act which led to the contravention of the provisions of the IMS Act cannot be faulted. The petitioner company followed the PFA Act and rules framed thereunder for the simple reason that harsher penalty would have been inflicted on them if they were found in violation of the PFA Act.

10. 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. The reliance on the decision in Jeevan Kumar (supra) does not in any manner benefit the Respondent No.1 or the Intervener. In Jeevan Kumar (supra) the question involved was applicability of sub-section (2) of Section 167 of the Cr.P.C. in a case where cognizance has been taken under Section 22 of the Transplantation of Human Organs Act, 1994 (for short TOHO) on a complaint filed by the respondent. While dealing with the said question, the Supreme Court held that:- 19. TOHO is a special Act. It deals with the subjects mentioned therein, viz. offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative. xxxx xxxx xxxx 22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

23. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code. The investigation in terms of Section 13(3)(iv) of TOHO, thus, must be conducted by an authorised officer. Nobody else could do it. For the aforementioned reasons, the officer in charge of Gurgaon Police Station had no other option but to hand over the investigation to the appropriate authority. xxxx xxxx xxxx 26. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In

a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; sub-section (2) of Section 167 of the Code may not be applicable. (underlining added) From a bare perusal of the said paragraphs, it emerges that the procedures provided in a special statute would prevail over the procedures provided under a general statute. However, the said case is limited to conflict between the procedural aspects in two legislations, one of which was enacted later. It does not deal with incompatibility between the substantive provisions of law and hence, the ratio in the said case cannot be applied to the facts of the present case. It also does not deal with the effect of Section 25 of the IMS Act which provides that the provisions of the IMS Act are in addition to and not in derogation of the provisions of the PFA Act. 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 Blacks 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 petitioners action for giving adherence to PFA law cannot be termed as flawed.

11. The reliance placed by Respondent No.1 on the decision in Ispat Industries (supra) specifying hierarchy of laws does not come to the aid of the Respondent

No.1 as in that case rules were in contravention with the Act under which they were framed. In the present case, the PFA Rules were nonaligned with the IMS Act. Therefore, the rules were not in contravention with the Act under which they were enacted but were in conflict with the statutory provisions of another enactment.

12. Now adverting to the proposition that breast milk is not comparable to mothers milk, we note that the Union of India, respondent No.1 has admitted in the counter affidavit that there is no anomaly in the amendment of breast milk to mothers milk as both these phrases are used interchangeably. In view of the said averment, the said contention merits rejection.

13. As regards the label exhibited by the petitioner company on infant substitutes products, it is noticeable that the said labels were printed after due approval was granted for the same by the Central Government. The petitioner company has stuck to the label which was approved by the Central Government itself. Further, under the proviso to Section 11 of the IMS Act, it is clearly stated that a person has to seek approval of the label to be affixed under the PFA Rules from the Central Government. The petitioner company, in the case at hand, had sought the said approval and, therefore, the petitioner company cannot be said to have violated the provisions prescribed in the IMS Act.

14. Lastly, with respect to the remedy of declaration sought by the petitioner company, it is relevant to refer to the decision of the Supreme Court in Bool Chand vs. Chancellor, Kurukshetra University, AIR 196.SC 29.wherein it has been held:If a declaration is a suitable relief in the circumstances of a given case, the High Court in not precluded from granting it under Article 226.

15. The approach of the Court in granting relief must be flexible and liberal and not rigid or hyper technical. The Court has a very wide discretion in granting relief under Article 226 of the Constitution of India. The Supreme Court in Charanjit Lal vs. Union of India, AIR 195.SC 4.held that a petition under Article 226 should not be thrown away merely on the ground that proper relief is not asked for. Thus, under Article 226 relief can be granted by the Court even by moulding the relief, if justice so requires.

16. In view of the discussion above, we arrive at the conclusion that inconsistencies existed between the provisions of the PFA Act read with the PFA Rules on the one hand and the IMS Act on the other till the alignment took place on 15.09.1997, so as to make it impossible for the petitioner company to adhere to the provisions of both the enactments simultaneously. It is declared accordingly. Consequently, the writ petition is allowed, in these limited terms. SIDDHARTH MRIDUL JUDGE BADAR DURREZ AHMED JUDGE MAY 31.2013 dn