
DELEGATED LEGISLATION WITH SPECIAL REFERENCE TO FOOD SAFETY AND STANDARDS ACT, 2006

Vidhi Jain, Narsee Monjee Institute Of Management Studies

INTRODUCTION

One of the most debatable issues in the realm of legal theory is Delegated Legislation. Democracy in India rests on three pillars and these are the **Legislature**, the **Executive** and the **Judiciary**. These pillars are empowered by the Constitution and technically, they cannot interfere in the matters of others¹. The Legislature has legislative powers, the Executive has the power to execute and implement the laws and the Judiciary is tasked with the power to resolve disputes. But it is essential to keep in mind that there are multiple functions that have to be performed by the Legislature in welfare state and it is not an easy task to look after each matter by the Legislature.

Legislature is not able to make time to legislate on every minute detail. They have limited themselves to policy matters and majority of the work is left to the Executive to make rules to carry out the policy/purpose of the legislature. In this type of situation, an organized system of delegated legislation is very important as well as helpful. Therefore, the need for delegation is necessary and is sought to be justified on the grounds of flexibility, adaptability and speed.

There are various aspects in Food Industry, including manufacturing, packaging, processing, wholesale and distribution of food. Compromising quality of these products is essentially compromising the health and safety of the nation. Therefore, the quality and standard of food that reaches the public has to be above a certain benchmark. This benchmark is basically set down by **Food Adulteration** laws.

The subject of Food Adulteration is contained in **Concurrent List** of the Constitution². To regulate the Food Industry in India, **Food Safety and Standards Act, 2006**³ (hereinafter

¹ This concept is known as **Separation of Powers**.

² Constitution of India, Schedule VII, List III, Entry 18

³ Food Safety and Standards Act, 2006

https://www.indiacode.nic.in/bitstream/123456789/7800/1/200634_food_safety_and_standards_act%2C_2006.pdf

referred to as “FSS Act”) was passed by the Legislature.

It was not possible for the Legislature to make laws regarding all the aspects of Food Industry which are mentioned above. Hence, in **Section 91, 92 and 93** of FSS Act, Legislature has empowered and delegated some of its ancillary power to Central Government, Food Authority and State Government respectively for framing of rules. Therefore, the rules framed under this section will be treated as **Delegated Legislation**.

Here, Central Government, Food Authority and State Government, being subordinate to Legislature are exercising some ancillary functions which is entrusted to them by the Legislature. In this research paper, I will be focusing on aspects related to Delegated Legislation to Food Authority i.e., The Food Safety and Standards Authority of India.

DELEGATION TO FOOD AUTHORITY

The Food Safety and Standards Authority of India (hereinafter referred to as “FSSAI”) has been established under FSS Act which consolidates various acts and orders that have hitherto handled food related issues in various Ministries and Department. FSSAI has been created under **Section 4 of FSS Act** for laying down science-based standards for articles of food and to regulate manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption. Legislature might not be **scientifically sound**; hence, it was necessary to delegate some of its power to FSSAI in order to make regulations which are more technical in nature.

Section 92⁴ of FSS Act empowers the Food Authority to frame regulations. It reads as follows: “Power of Food Authority to make regulations- 1) The Food Authority may, with previous approval of Central Government and after publication, by notification, make regulations consistent with this act and the rules made thereunder to carry out the provisions of this act.” Clause 2 of this section is an exhaustive list which enumerates various subject matters on which Food Authority can make regulations.

Types of Delegated Legislation

Above mentioned section shows that Food Authority has the **Power to make rules and Supplying Details**.

⁴ Section 92 of FSS Act, 2006

- 1) **Power to make rules:** This form of Delegated Legislation is considered as one of the most common forms of DL. This form mandates that such rules and regulations framed by the executive authority must be laid before the Parliament. Hence, in this act too, **Section 93⁵** states that Regulations must be laid before Parliament. Also, this form of DL mandates that Legislature should have the power to amend, modify or repeal such regulations. Therefore, Section 93 further provides that Parliament has the power to make any modification in the rule or regulation. Such modification made by the Parliament shall be made applicable prospectively and not retrospectively.

“Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.”

- 2) **Supplying Details:** This form of Delegated Legislation is not much different from the previous one. In this form, a Legislative policy is formulated by the Legislature but the task of supplying details for giving effect to the policy is left to executive, in this case, FSSAI. In this act, **Section 18, establishment of FSSAI, Chapter VI**, etc. are the legislative policies which are laid by the Legislature, and task of supplying details for giving into effect this policy is left to executive, in this case, FSSAI, for example, **the manner of marking and labelling of foods, procedure in getting the food analysed, procedure to be followed by officials**, etc. This has been provided under Section 92(2) of FSS Act. Details are supplied by the executive authority in the form of Regulations, as mentioned below.

Regulations notified by FSSAI

FSSAI used the power entrusted to them under Section 92(1) of FSS Act and drafted six principal regulations⁶ through extensive consultation and deliberations/meetings with the

⁵ Section 93 of FSS Act, 2006

⁶ Regulations by FSSAI fssai.gov.in

stakeholders. These regulations have been notified in the Official Gazette of India on August 1, 2011 and came into force on August 5, 2011.

Following are the regulations which were enacted by the FSSAI:

- Food Safety and Standards (Licensing and Registration of Food Businesses) Regulation, 2011
- Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011
- Food Safety and Standards (Prohibition and Restriction of Sales) Regulation, 2011
- Food Safety and Standards (Packaging and Labelling) Regulation, 2011
- Food Safety and Standards (Contaminants, Toxins and Residues) Regulation, 2011
- Food Safety and Standards (Laboratory and Sampling Analysis) Regulation, 2011

In addition to the Six principal regulations notified on August 01, 2011, following new regulations are notified. These are:

- Food Safety and Standards (Health Supplements, Nutraceuticals, Food for Special Dietary Use, Food for Special Medical Purpose, Functional Food and Novel Food) Regulations, 2016.
- Food Safety and Standards (Food Recall Procedure) Regulation, 2017
- Food Safety and Standards (Import) Regulation, 2017
- Food Safety and Standards (Approval for Non-Specific Food and Food Ingredients) Regulation, 2017
- Food Safety and Standards (Organic Food) Regulation, 2017
- Food Safety and Standards (Alcoholic Beverages) Regulation, 2018
- Food Safety and Standards (Fortification of Food) Regulation, 2018
- Food Safety and Standards (Food Safety Auditing) Regulation, 2018
- Food Safety and Standards (Recognition and Notification of Laboratories) Regulation, 2018
- Food Safety and Standards (Advertising and Claims) Regulation, 2018
- Food Safety and Standards (Packaging) Regulation, 2018
- Food Safety and Standards (Recovery and Distribution of Surplus Food) Regulation, 2019
- Food Safety and Standards Authority of India (Business Transaction) Regulation, 2019

As we can notice, FSSAI, from time to time, have notified several regulations, as and when need arose. Along with notifications, FSSAI also issues orders and advisories about several matters mentioned in Section 92(2) of FSS Act.

ANALYSIS OF DELEGATION TO FSSAI THROUGH CASE LAWS

***M/S Nestle India Limited v. The Food Safety and Standards Authority of India and Others*⁷ (popularly known as “Maggie Ban” case)**

This case is one of the most popular cases of 2015 known as “Maggie Ban case.” In this case, I will not explain and analyze the whole case but only focus on aspects related to Delegated Legislation. M/S Nestle India contended that FSSAI, while imposing ban, FSSAI was not within the powers entrusted to them. They further argued that their products are within the regulations formulated by the FSSAI. And with regard to the release of “Maggi Oats Masala Noodles with tastemaker” without getting it assessed for risk/safety and without obtaining product approval, the representatives of the company argued that it was at a time when Advisory dated 11.05.2013 issued by FSSAI was under stay granted by court.⁸

Food Safety and Standards (Packaging and Labelling) Regulation, 2011⁹ provides that mandatory information needs to be present on a label, such as name of food, list of ingredients, nutritional information, declaration of veg/non-veg and additives, address of manufacturer, etc. In this case, there was a violation of this particular regulation, as the packets of Maggie were labelled as “No Added MSG” but the test showed presence of MSG.

Food Safety and Standards (Contaminants, Toxins and Residue) Regulation, 2011¹⁰ tabulates the list of crop and metal contaminants, toxic substances and insecticides, the presence of which should not be there in the food products. In this case, the test showed presence of lead, which was more than permitted amount, in Maggie.

Food Safety and Standards (Food Recall Procedure) Regulation, 2011¹¹ enumerates on

⁷ 2015 SCC ONLINE BOM 8526

⁸ Vital Nutraceutical Private Limited v. Union of India.

⁹ Food Safety and Standards (Packaging and Labelling) Regulation, 2011
https://www.fssai.gov.in/upload/uploadfiles/files/Packaging_Labelling_Regulations.pdf

¹⁰ Food Safety and Standards (Contaminants, Toxins and Residue) Regulations, 2011
https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Contaminants_Regulations_20_08_2020.pdf

¹¹ Food Safety and Standards (Food Recall Procedure) Regulation, 2011
https://archive.fssai.gov.in/dam/jcr:81156e22-a327-4237-998f61e39f0dd432/Guidelines_Food_Recall_28_11_2017.pdf

what basis FSSAI can ask the company to recall of its products. There are two types of Recall:

Recall 1- for those food products which can cause health problems

Recall 2- for those who are not likely to cause health issues, but do not comply with the provisions of FSS Act and regulations made therein.

Thus, it can be stated that yes, the action taken by FSSAI was in accordance to the law, as elucidated by the provisions of product recall process above. In addition to this, the Maggie product was not produced in accordance with the other regulations as it violated the packaging and labelling regulations. Also, there was existence of lead in excess amount which can cause health issue. Thus, the action taken by FSSAI was in accordance to law.

Nestle challenged this ban in High Court of Bombay and High Court gave its judgement that Nestle will provide 5 sample of each batch to 3 accredited laboratories. If the test results shows that lead is within permissible limits then the company can start its manufacturing process and further company can sell it in the market. Nestle India, on 16th October, 2015 in a press release, stated that lead is found within permissible limits. Therefore, Nestle India can now manufacture its product, Maggie.

***Vital Nutraceuticals Private Limited and Another v. Food Safety and Standards Authority of India*¹²**

The Supreme Court of India dismissed the Special Leave Petition filed by FSSAI against the order dated June 30, 2014 passed by the Hon'ble High Court of Bombay in the writ petition filed by the Vital Nutraceuticals for striking down the advisories which was issued from time to time by the FSSAI on the product approval and mainly the last advisory of May 11, 2013¹³ which superseded all the earlier advisories.

Earlier, product approval was only required if there was new ingredient or additive in the product to be launched in the Indian Market. However, the May 11, 2013 advisory of FSSAI on product approval broadened this to cover all products even if there are approved ingredients or additives which are within the permissible limits. Aggrieved by this advisory, Vital Nutraceuticals challenged the legality, validity and propriety of such advisories issued by

¹² Writ Petition No. 2746 of 2013

¹³ Advisory dated May 11, 2013 fssai.gov.in/advisories

FSSAI. These advisories were challenged on the ground that they are without any statutory force and contrary to the provisions of the FSS Act. The validity of the said advisory was also challenged on the ground that it has an effect of amending the regulations framed under Section 92 and Section 93 of FSS Act.

The issue which was considered by the Bombay High Court in the said matter was whether the FSSAI has power and authority to issue this advisory without following the procedure as contemplated under Section 92 and 93 of the FSS Act.

The Bombay High Court in this case, held that the product approval process which was issued through May 11, 2013 advisory has no force of law because procedure laid in Section 92 and 93 of the FSS Act was not followed and that such advisories should have been issued only after appropriately placing them before the Parliament and seeking approval for the same.

Relying on Section 22 of the FSS Act, the FSSAI appealed to the Supreme Court against the Bombay High Court order against its May 11, 2013 advisory. Section 22 of the FSS Act states that no person shall manufacture, sale, distribute or import novel food, GM food, irradiated food, organic food, dietary food, nutraceuticals, proprietary food, health supplements and such other articles of food which the Central Government may notify in this behalf. The FSSAI argued that if the product approval process is invalidated then in the light of Section 22 of FSS Act, the Food manufacturers manufacturing the food articles mentioned in the said section would be in trouble. As Section 22 imposes a restriction on launch of new products falling under the category of articles mentioned in section 22 and also that amendment in the regulations to incorporate a process like product approval may take time. Therefore, to avoid the delay in the launch of such food products and loss to Food manufacturers, the product approval process is necessary. The Supreme Court agreeing with the views taken by the High Court rejected this argument of the FSSAI and dismissed the appeal in this regard.

These two case laws clearly prove that it is very important for the executive authority, in this regard, FSSAI to stay well within its limits. The actions taken by them are also subjected to judicial review. But I do not agree with the judgement pronounced by Supreme Court in Vital Nutraceuticals case. In my opinion, FSSAI was implementing the policy which was laid down by legislature in Section 22. Hence, I feel that advisory issued by the FSSAI dated May 11, 2013 was completely valid as the main policy was laid down by Parliament in Section 22 and FSSAI was empowered to issue appropriate notification. Nevertheless, a proper check has to

be kept on executive, through Parliament and Judiciary, so that it cannot exploit and abuse the power given to them and does not step out of the boundaries.

HOW HAS DELEGATING THE ANCILLARY POWER TO FSSAI HELPED LEGISLATURE: A CRITICAL ANALYSIS

Delegation is one of most important functions of the Legislature, which the Legislature has to entrust it to executive very carefully. It has been in practice since the ancient times, when kings used to delegate some of the power to their officials. This has been practiced even during the colonial rule, when East India Company would implement and make rules under the power conferred to them by the British Parliament.

Section 92 of FSS Act, 2006 explains, in detail, which legislative functions can be exercised by FSSAI. Entrusting the incidental/ancillary powers to the executive body has definitely benefitted the Legislature.

- 1) As we have already seen in the previous sections, that FSSAI has formulated number of regulations over the time, which explains in detail the procedure to be followed, guidelines to be followed by the officials, et cetera. If the Parliament had to jot down these details in the act itself, then it would have taken too much and it can only deal with a small amount of act in detail. Thus, Parliament laid down the General policy (skeleton) of the act and empowered the executive bodies to fill in the details (flesh and blood).
- 2) This act requires a lot of technical expertise, starting from **Technical Officer, Assistant Manager (IT), Central Food Safety Officer, Food Analyst**, etc. who have a sound knowledge in chemistry, Food Technology, Toxicology, Public Health, Life Science, Food Safety and Quality Assurance, etc. So, if it were to be with the Legislature, then the members of Parliament were required to know each and every detail but one cannot be a master of all fields. Therefore, it would have been difficult for the Parliament to make laws relating to Technology, Food Quality, et cetera. Hence, delegating the power to make regulations to FSSAI who have extra skills, experience and knowledge which is suitable for making a law.
- 3) Amendment in a particular act is time consuming process, especially with regards to Food Industry. Food Industry, being so dynamic in nature, would require amendments almost every year if Parliament wouldn't have delegated the powers to the executive.

The Regulations formulated by the FSSAI took into account the latest development in food science, food consumption pattern, new products and additives, advancement in the processing technology and food analytical methods. The executive body can formulate new regulations or make modifications in the previous ones, as and when required.

- 4) It is not possible for the Legislature to reach out to the stakeholders and ask for their opinion on a particular subject matter. The formulation of regulations involves several stages. After recommendation by the Scientific Panel, following the due process laid down including validation by the Scientific Committee, a regulation is approved by the FSSAI. After soliciting the comments of stakeholders and their considerations, final notification is issued for implementation. If this were to be done by the Parliament, a single act would take up all the time, and there would be no time left for other important matters.

Powers conferred to the executive definitely helps the Legislature but a proper system of check should also be in place so that this power is not misused by the executive.

Check by Legislature- Even though power has been conferred to FSSAI, a proper check is in place by the Legislature which is given under Section 93 of FSS Act. This provision clearly lays down that every regulation made under Section 92 shall be laid before the Parliament. Additionally, Parliament has the power to modify, repeal or amend the regulations.

Check by Judiciary- The Regulations formulated by the executive (FSSAI) is subjected to judicial review. These regulations cannot oust the jurisdiction of courts. If done so, they will be declared unconstitutional and invalid. As we have seen in the case of Vital Nutraceuticals that judiciary has the power to declare a particular DL invalid if it was not in consonance to parent act or against the general principles of law.

CONCLUSION

The above two case laws are a perfect example as to how important delegated legislation is and how it can be misused. In the Maggie ban case, it demonstrated that how essential it was to empower FSSAI. If the Food Authority was not entrusted with these powers, The fault in Nestle product would not have been found out, because Legislature would've lacked the expertise and the prohibitory orders from the Legislature would've taken time, which would have finally impacted the consumers. And maybe, this case wouldn't have existed.

However, in the second case law of *Vital Nutraceuticals*, we can notice that, even if FSSAI (executive authority) has the power to issue regulations, advisories, et cetera, that power is not unlimited and the authority cannot exercise it without keeping other two organs (Legislature and Judiciary) in loop. FSSAI tried to implement a certain advisory without placing it before the Parliament, which violates Section 93 of FSS Act. But this time, Judiciary stepped in and restore the imbalance.

The above case laws bring out the contrast in delegated legislation and establishes delegated legislation as “**Necessary Evil.**” As we can notice in the Food Safety and Standards Act, 2006, that without empowering FSSAI, implementing the policies of the act would have been difficult because of the technical expertise which is required for this act. When a certain power is conferred to an executive authority, it is essential for the legislature to keep a check on that power. We can notice this check in two instances, which has been mentioned in the paper, first one being, Legislature keeping check on the FSSAI, by mandating them to place regulations formulated by them to be laid before Legislature and power of Legislature to modify, repeal or amend the regulation¹⁴. Second one being, Judiciary keeping check on Executive power, how a certain advisory or regulation can be declared invalid if it didn’t comply with the provisions of the act¹⁵.

From my research, I would like to provide some suggestions with regards to how can the system of delegated legislation be made effective. Firstly, role of the committee of the Parliament should be strengthened. Secondly, a separate law should be passed which provides uniform laws of laying and publication. A similar law is in practice in U.K, Statutory Instruments Act.

It is true that whether it is doctrine of separation of powers or rule of law, both aims at independence of government organs and therefore delegated legislation becomes unfavorable. But the fact that both these doctrines cannot be implemented without effective mechanism of the rule making power cannot be neglected. In modern world, where there is growing need of viability, technicality, experiments, etc. delegated legislation become mandatory.

¹⁴ Section 93 of FSS Act

¹⁵ *Vital Nutraceuticals and Another v. FSSAI*