

MISBRANDED FOOD UNDER FOOD SAFETY AND STANDARDS ACT 2006

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Misbranding of food has been defined under Section 3 (zf) of Food Safety and Standards Act, 2006. Despite various rules and regulations being laid down by different acts and statutes, the misbranding of food continues to be prevalent in some form or the other. It is used as a deceptive technique by various food operators. In order to deal with it, section 52 of the FSS Act has made misbranding an offence. But there seems that the provisions are not implemented with full effect as this problem continues to be prevalent in our society. Therefore, the author, through this article tries to analyse various aspects of Misbranding that are helpful in determining the scope of this provision in future.

India is the second¹ largest food manufacturer in the world. This particular sector (food industry) is on its path of gaining a lot of importance because of ever growing population and hence the consumer demand in India. Due to this, great opportunities have

been opened up in the food industry, in whatever form it may take.

With regards to food shopping, Indian customers still have extremely traditional practices, they use small stores, for example, bakeries and butchers including push truck merchants. Most of the dry goods and household items are purchased from kirana stores, which, most of the times, are family owned and they have also started offering home delivery. Though there was no early acceptance and market for the American and other packaged food as Indians generally prefer freshly prepared food in place of readymade ones. However, with the passage of time, there has been a great acceptance of the ready to eat food products, especially among young consumers and urban middleclass, owing to the reason of changed lifestyle.²

There is a variety of range of food items that can be seen in retail stores in major cities, which include potato chips, chocolates,

¹ <<https://www.investopedia.com/articles/investing/100615/4-countries-produce-most-food.asp>> accessed February 22,2019

² Prabhakar K., A practical guide to food laws and regulations (1st edition, B100msbury Publishing India)

soups, biscuits, pastas, noodles, fruit juices, ketchup and many other similar items. Having said that, the change in the consumer habits is still attributable to various factors like educational level, age, income etc. and the safety of a food product is the most important factor in the consumer industry³. Often, consumers compare prices of different food articles.

Amongst all the things, one important thing that every consumer will look for will be the **label**⁴ of a product. For *example*, a person with a high blood pressure would likely choose products with low sodium content. Therefore, if one wants to buy a sauce, one would definitely choose the one with the lowest salt content. The manufacturers do provide certain labeling information in respect of all products. Primarily the information is provided on the labeling for easy perusal for the consumers when they eventually compare products.

So, it becomes imperative to consider that whenever consumers buy something, they give a certain amount of importance to the labeling of the package. In daily life we see that the labeling of different products give

claims like zero trans fat, sugar free etc. Observing them makes us think or challenge the veracity of these claims and whether these tests actually guarantee a good product. Unfortunately, many of these claims turn out to be false.

In order to keep a regular check on these activities, the *Food Safety and Standards Act, 2006* has brought in some guidelines which are required to be followed by the manufacturers while bringing their products into the market. The labels and advertisements have to be in accordance to the act. However still many companies violate those guidelines and mislead consumers.

This does not mean that the manufacturers have been denied to the right to healthy business. It only means that the manufacturers must work under the umbrella of rights that they have been given and should not transgress them. They should give true and actual information which can prove helpful for a consumer to arrive upon a decision.

³ < [https:// www. thebetterindia. com/ 98604/india-eating-habits-food-50-years-culture/](https://www.thebetterindia.com/98604/india-eating-habits-food-50-years-culture/)> accessed February 23,2019

⁴ Roseann B. Termini, “The Prevention of Misbranded Food Labeling: The Nutrition Labelling and Education Act of 1990 and Alternate Enforcement Mechanisms” ONULR 18 77

False information leads to the misleading of a consumer in terms of his/her rights. This means that their needs and expectations do not match and hence they do not get what they are supposed to get. This is what eventually leads to be called as “**misbranded food**”.

Before understanding misbranded food, we need to know what is meant by the term ‘**Brand**’. The word ‘brand’ means any mark, identification or any feature that makes one seller’s products different from that of others. Under the trademark legislations, the misbranding of label gives remedy only to the trademark owner and not the misled consumers, which shows how grossly consumer rights are neglected. Some acts that define ‘misbranding’ are given below

1. *Food Safety and Standards Act, 2006 (hereinafter ‘FSS Act’)*
2. *Insecticides Act*⁵
3. *Drugs and Cosmetics Act*⁶
4. *Competition Act (where it is called as unfair trade practices)*⁷

It was in the year 2013 that the Food Safety and Standards Act, 2006 was fully implemented. Along with this, the Food

Safety and Standards Authority of India adopted the food safety regulations in accordance with that of **Codex Alimentarius**⁸. And after this, a series of changes and amendments were introduced to the existing food labeling and packaging guidelines, especially on that of imported products.

1. People in the food industry are unaware of FSS Act (regarding the rules laid down)
2. Although the industry appreciates the consolidation and unification of different acts, but there is lack of simplicity or clarity.
3. There is still a hope in the industry for International Harmonization(i.e., for the adoption of new rules in FSSAI in accordance with the Codex standards)
4. There is also insecurity regarding inadequate representation in the international organizations.
5. People happen to think that FSSAI should also include regular guidelines and FAQs from time to time for easy implementation.

In this research, I have tried to highlight the above issues and how misbranding of food

⁵ The Insecticides Act, 1968

⁶ Drugs and Cosmetics Act, 1940

⁷ The Competition Act, 2002

⁸ <<http://www.fao.org/fao-who-codexalimentarius/en/>> accessed February 21, 2019

continues to be a problem that needs a proper implementation.

Statute

The basic objective of the FSS Act on defining the ‘Misbranding of food’ is to ensure food safety and prevention of deceptive marketing strategies used for the promotion of sales.

CONSUMERISM (In relation to COPRA⁹)

Consumer awareness has been on a positive note in India. In recent times, a growing concern for consumer rights has been observed in India as well as at international level. A proper movement has started that is leading the consumers to be aware of their rights and duties. This is referred to as Consumerism. The purpose of this movement is to protect the rights of the consumers at large. The consumer is someone who:

- buys any goods for a consideration, or
- hires or avails of any services for a consideration; as according to section 2(1)(d) of the Consumer Protection Act, 1986

Now the basic rights¹⁰ of the consumers, as propagated, in a broader sense are:

1. Right to Safety: The Consumer Protection Act defines this right as a protection against goods and services that are ‘hazardous to life and property.
2. Right to Information: This right suggests the need for the consumers to be informed about the quality and quantity of goods being sold.
3. Right to Choose: There must exist a right to choose the products available at competitive prices.
4. Right to Seek Redressal: Whenever a consumer feels that his/her right has been exploited, then there must exist a right to approach a consumer court to file complaint.
5. Right to be Heard: The purpose of this right is that the consumer gets due recognition to his/her complaints.
6. Right to Consumer Education: The consumers must be aware of their rights and must have adequate access to the pool of information that governs his or her market understanding.

UNFAIR TRADE PRACTICES

In order to increase sales, some food operators go on to injure the public interests by falsely representing goods and services, or

⁹ Consumer Protection Act, 1986

¹⁰ Consumer Protection Act 1986, section 6

misleading consumers to believe in their marketing strategies.

Monopolies and Restrictive Trade Practices Act, 1969

This act was enacted in 1969 and became effective from 1 June, 1970. The aim¹¹ of this act was to ensure that the operation of the economic system does not result in the concentration of economic power to the common hand, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and other related matters. This Act had no provisions for the protection of consumers against the false or misleading advertisements or other unfair practices. So in the year 1984, by way of an amendment¹², section 36A was introduced into the act defining “unfair trade practices” which are of immediate concern to consumers. This was introduced on the recommendation¹³ of the high-powered Sachar Committee, in consonance with the consumer interests. The main logic behind this recommendation was that consumers have started relying on advertisements and sales promotion for choosing different products. So it becomes imperative that the

goods represented be not misbranded. Therefore, Sachar Committee recommended that a separate chapter for the unfair trade practices and its other components. Although MRTTP Act has now been repealed and replaced by Competition Act, 2002.

Originally, even the Consumer Protection Act, 1986 did not contain any provision for “unfair trade practices”. It was only added in the year 1993 by way of an amendment.

In the light of these amendments, it has to be recognized that the dissemination of information by the food business operators becomes very important and it has to be true to its content so that it can be relied upon. If a little information is dangerous, then misinformation can be disastrous. There will be no real choice if the options available to a consumer are all untruthful deceptions.

GENERAL

Indian government’s recent update on the food and safety was that all food related legislations were clubbed into one single and unified act, i.e. FSS Act, 2006. This Act was fully implemented on 5th August, 2011. The act created a statutory body called the

¹¹ <[http:// www. economicdiscussion. net/ essays/essay-on-the-monopolies-and-restrictive-trade-practices/19157](http://www.economicdiscussion.net/essays/essay-on-the-monopolies-and-restrictive-trade-practices/19157)> accessed September 22, 2019

¹² Law commission report

¹³ Sachar Committee Report, 8 June 2006

Food Safety and Standards Authority of India.

On day to day basis, consumers are buying products for their personal needs by relying on the advertisements. Even the educated people do not check the label regularly because somehow there is a presumption or reason to believe that the food is safe. The FSS Act provides regulations for manufacturers and business operators on how to make claims about their products.¹⁴ Despite this, there is a gross neglect, either deliberately or because of the ignorance of the less educated traditional food makers who fail to follow those guidelines. As a result, many consumers are misguided by this practice which leads to consumption of food which is unsafe and may bear future risks.

Food

Before understanding everything, we need to get an idea of what ‘food¹⁵’ and ‘misbranded food¹⁶’ stand for. ‘Food’ is defined under Section 3(1j) of FSS Act, 2006. It defines as:

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 3(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.

We see that the simple definition of food is too wide and it includes all the substance in any form, the only requirement being that it is intended for human consumption. All the judicial interpretations of the Prevention of Food Adulteration Act, 1954 were also taken into account. It has clearly given wider power to the state to declare any article as food.

¹⁴ Ibid

¹⁵ Food Safety and Standards Act 2006, section 3(1j)

¹⁶ Food Safety and Standards Act 2006, section 3(zf)

Misbranded food

‘Misbranded food’ is defined under the section 3(zf) of the FSS Act, 2006. It defines as:

“Misbranded food” means an article of food—

(A) if it is purported, or is represented to be, or is being—

(i) offered or promoted for sale with false, misleading or deceptive claims either;

(a) upon the label of the package, or

(b) Through advertisement, or

(ii) sold by a name which belongs to another article of food; or

(iii) offered or promoted for sale under the name of a fictitious individual or company as the manufacturer or producer of the article as borne on the package or containing the article or the label on such package; or

(B) if the article is sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer bearing his name and address but—

(i) the article is an imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labeled so as to indicate its true character; or

(ii) the package containing the article or the label on the package bears any statement,

design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular, or if the package is otherwise deceptive with respect to its contents; or

(iii) the article is offered for sale as the product of any place or country which is false; or

(C) if the article contained in the package—

(i) contains any artificial flavoring, colouring or chemical preservative and the package is without a declaratory label stating that fact or is not labeled in accordance with the requirements of this Act or regulations made thereunder or is in contravention thereof; or

(ii) is offered for sale for special dietary uses, unless its label bears such information as may be specified by regulation, concerning its vitamins, minerals or other dietary properties in order sufficiently to inform its purchaser as to its value for such use; or

(iii) Is not conspicuously or correctly stated on the outside thereof within the limits of variability laid down under this Act.

If we see the first clause of the definition, it states the misrepresentation through label or advertisement which can be by using false

data or untrue claims¹⁷. It may also extend to resembling another article of food for the purposes of cheating so as to gain unfair advantages over the other companies. This is mostly done by major FBOs so as to deceive people into making them believe their claims.¹⁸The FBOs may also give false or unreasonable information about the geographical origin of a product which can attract a major chunk of population. In some cases, the FBOs don't even provide the necessary information on the label like that of the use of artificial flavoring in a product which might go on to be labelled as an offence under misbranding. Therefore it is concluded that mentioning or not mentioning information which is misleading in itself will be covered under the offence of Misbranding.¹⁹

FOOD LABELING: PRESENTATION AND RESTRICTIONS

In one place where the PFA act²⁰ makes a clear distinction between adulteration of food and misbranding, the FSS act tries to broaden the scope of how an adulterant is defined. In general, broadening the scope has made it clear that any food which is unsafe or sub-

standard or lacks quality will be covered under misbranding and it will additionally focus on the misrepresentations made in respect of those food articles.

Section 23 of the FSS act talks about the packaging and labeling of the food whereas section 24 of the FSS act talks about the restrictions on the same as to the unfair trade practices. Other than this, section 48(2) clearly treats the failure to comply with the guidelines as an offence. Thus the labeling must not be misleading in itself.

The primary aim in making misbranding an offence is to prevent the FBOs from making deceptive claims. Labeling is defined under section 3(z) of the FSS Act as any tag, brand, mark, pictorial or other descriptive matter, written, printed, stenciled, marked, embossed, graphic, perforated, stamped or impressed on or attached to container, cover, lid or crown of any food package and includes a product insert. So this definition is actually regarding the visual representations. Section 3(b) of the same act defines advertisement as being verbal or any visual publicity through light, sound, smell or any other physical characteristics. Therefore it has made everything come under the ambit of

¹⁷ Nestle India Limited v The Food Safety and Standards Authority of India and Ors. (2015) WPL 1688

¹⁸ *ibid*

¹⁹ Bhatnagar, Commentary on food laws in India (7th edition, Whytes and c0., 2016)

²⁰ "Prevention of Food Adulteration Act, 1954"

misbranding which leads ordinary customers to be misled.

In some cases, the representation of the food product might be literally true but practically false. The standard has to be that of an ordinary prudent man. If the customer is induced in thinking of the product as that of too technical nature and consider it as extraordinary in nature, which it is actually not, then the mere confusion will also be termed as misbranding.

Labeling of package, in general

The primary purpose of labeling food is direct communication to the consumers in order to supply correct product information.²¹

This, in turn, ensures fair play in the market amongst the operating food businesses. The information has to be easily understandable by consumers.

Rectifiable or non- rectifiable labeling in respect of imported food

In *October 2011*, the FSSAI authority issued 'ad hoc guidelines²² relating to imported food clearance process by FSSAI's authorized officers'. According to these guidelines, the absences of necessary logos or name/address of the importer were considered 'rectifiable

labeling deficiencies' which could be corrected with the help of stickers but only at the end of the importer. However, the absence of the name and address of the manufacturer, expiry dates, manufacturing dates, batch number, net weight or volume, is not rectifiable with the help of stickers. Furthermore, FSSAI issued a corrigendum within two months according to which, the wholesalers are not exempted from labeling requirements, which was an even stricter move. So the wholesale/bulk shipments to India now require to be labelled with all the above requirements as mentioned in rectifiable or non rectifiable deficiencies.²³

However the Calcutta and Madras High Courts in the cases of FSSAI vs. Heartland Trading Company Pvt. Ltd.²⁴ and M/s. Gandour India Food Processing Pvt., Ltd., vs Union of India²⁵ respectively, gave a different view making it clear that in order to obtain a no objection certificate for the products, rectification of labeling requirements is not permissible under any circumstances for the major product details like manufacturing dates. So using stickers is not allowed. Rather the **labeling deficiencies**

²¹ *ibid*

²² <[http:// old. fssai. gov. in/ Portals/0/Pdf/Ad-hoc%20guidelines%20for%20imported%20Food%2813-10-2011%29.pdf](http://old.fssai.gov.in/Portals/0/Pdf/Ad-hoc%20guidelines%20for%20imported%20Food%2813-10-2011%29.pdf) > accessed March 12, 2019

²³ *United Distributors Incorporation v Union of India & Anr* AIR 2015 Del 31

²⁴ (2016) 332 ELT 456

²⁵ (2018) 9 GSTL 365

have to be taken care of at the export stage itself.

Sanctions imposed

In pursuance to the section 3(zf) and 23 of the FSS act, it becomes obligatory for the food manufacturers to follow the basic guidelines in order to ensure that the information they are supplying is not deceptive or false. Furthermore, section 48(2) (a) (ii) makes it important that the information relating to the adverse effects of a food product should be very clear so that it does not become unsafe for the consumer to use the product, in terms of short or long effects.

As per section 52 of the FSS act, any article of food which is misbranded according to the definition, will attract a penalty up to 3 lakhs rupees and the Adjudicating officer will also issue a direction to the food operator to either rectify the mistake or destroy the food.

Section 61 even imposes imprisonment for up to 3 months and also fine up to 2 lakhs, for providing information which is **knowingly** false or misleading. However, the section 80 (B) (2) (a) provides for relaxation if the defence is that the information was misleading due to any third person.

CONTROLLING MISLEADING AND COMPARATIVE ADVERTISING

It has to be ensured that adequate laws exist in order to combat against the misleading and competing advertisements which sometimes go on to promote unhealthy competition amongst the market players. Of course, the false complains are to be kept outside of the scope of this law.

Currently, India does not have any legal framework to regulate advertising standards in India. FSS has still not come up with any update on this. Though the “code for self regulation in Advertising”²⁶ has been created by the Advertising Standards Council of India (ASCI), which controls the contents of the advertisements and ensures that the advertising is used as a healthy measure, it makes it crystal clear that ASCI Code does not attempt to replace any other legal provisions that might affect legal provisions. It just complements other laws. Therefore ASCI and FSSAI are working together to regulate food advertisements in India.

FSSAI is heading towards making it mandatory for the advertisers²⁷ to prove their claims that they are going to show in the

²⁶ <<https://ascionline.org/index.php/ascicodes.html>> accessed March 2, 2019

²⁷ <<https://www.cseindia.org/good-beginning-but-major-changes-needed-in-it-to-make-it-more-effective-says-cse-of-the-draft-food-safety-and->

advertisements. Failing to take preventive measures will go on to prove heavy penalties for the advertisers. Just because rural people are not good enough to read the advertisements does not mean that they can be influenced by showing false claims through misleading advertisements²⁸.

In *October 2009*, the FSSAI came up with the guidelines on the “Code of self-regulation in Food Advertisement” (COSRFA). The directive suggests that the any commercial or private communication by food operators has to be based on reasonable scientific claims that are genuine and strong and which can be validated at any point of time. So COSRFA says that there is a freedom for the food operator to claim the quality of the product but the claim should substantiated with true claims. The claim should also be comprehensible for a reasonable or an average person or consumer.

In *July 2010*, it was the first time that 7 major food and beverage companies had pledged committing themselves to responsible advertising and marketing to children. Amongst the signatories were majors such as Coca-Cola, PepsiCo, Nestle, Kellogg, Mars International, General Mills and Hindustan

Unilever. The reason for this was that children may not be able to make a reasonable interpretation out of an advertisement. So it becomes important that the companies use their broadcasting rights in a reasonable manner.

The following examples will give some idea about famous brands and their product claims clearly violate section 24²⁹ of the FSS Act, which in turn leads to misbranding of food.

By KELLOGGS

CLAIM: The advertisement says that ‘research shows that people, who eat low fat breakfast like Kellogg’s Special K, tend to be slimmer than those who don’t. This is inherently deceptive and misleading in nature.

By BRITANNIA VITA MARIE

CLAIM: That it is helpful in reducing cholesterol and being heart friendly.

By COMPLAN

CLAIM: Helps to improve memory power. Also contributes to charging memory powers.

By NUTRICHoice BISCUITS

standards-labelling-and-display-regulations-2018-8787> accessed April 4, 2019

²⁸ ibid

²⁹ ibid

CLAIM: That they have no added sugar and are diabetic friendly are apparently misleading in nature.

These are relevant because we get to see these claims in our ordinary life, everyday in some form or the other. We need to critically analyse the human behaviour in relation to relying on these claims made by the renowned brands. It is because ultimately consumers do go in for the **brand image** which is seen as a distinguishing factor in exercising the right to choice.

CONCLUSION

Unfair trade practices are not limited to using positive or active representations that are false in nature. It can also take place by the way things are said or the way things are not said (like misleading by silence). Businesses should be using the disclaimers as soon as they are accurate and clear about their content. The disclaimers should also be clearly visible so that a reasonable man is not misguided on a plain reading of it³⁰. They should be easily able to draw the attention of the consumers to the necessary terms and conditions.

To sum it up, the judicial pronouncements have from time and on, proved that any kind of misrepresentation in respect of important labeling on the products like manufacturing date, expiry date etc. can lead to gross violation of a consumer's right to information and hence there must be some reasonable backing on which the information can be said to be reliable. The sanctions are imposed so as to deter the food business operators from using deceptive techniques to get hold of the market. They are, therefore restricted from gaining unfair advantages as held in the case of M/s. Gandour India Food Processing Pvt., Ltd., vs Union of India. This was a major case citing the rectifiable or non rectifiable methods.

Generally the unfair trade practices that are prevalent do not impose a positive obligation on the companies to disclose their terms. However conditions might arise, where the seller knows that he/she has put the consumers in such a place where they are bound to be misled. This so called "manufacture confusion"³¹ goes on to become a bigger problem, in the end. In such a situation where there are a lot of options available to the consumer he/she may choose

³⁰ ibid

³¹ <[https:// www. business-standard. com/ article/specials/up-to-75-companies-who-adulterate-](https://www.business-standard.com/article/specials/up-to-75-companies-who-adulterate-)

[misbrand-food-go-scot-free-115070800173_1.html](https://www.business-standard.com/article/specials/up-to-75-companies-who-adulterate-misbrand-food-go-scot-free-115070800173_1.html)>
accessed March 21, 2019

something ignoring the cost information that could have been essential in determining the purchasing decision.

The growth of the law on 'Misbranding of Food' is completely dependent on the legislative and executive hands of a democracy. These have to be amended in the light of changes that our society is going through and should also appeal to the soul of the nation. Not only the framing part has to be looked in, the implementation has to be also seen. Like the FSS Act was fully implemented after 5 years of it becoming an Act. The period of implementation has to be kept in consideration as that would ultimately define the purpose of the law.

Therefore, the researcher concludes that the following can be the basic steps that can be undertaken to be protected against the misbranded food:

- Mandatory labeling and continuous monitoring of the food business operators in respect of the compliance rules.
- The promotional claims of the companies have to be also monitored so that they are in compliance with the regulations.
- It has to be assured that the labels are not damaged.
- To assure that the information available on the labels is not misleading.