

*** HIGH COURT OF DELHI AT NEW DELHI**

+ CRL. M.C. No.1070/2005
CRL.M.C. No.1104/2005

Date of Decision : 29.3.2012

CRL.M.C. 1070/2005

M/S PEPSI FOOD P.LTD. Petitioner
Through Mr. R.K.Virman, Sr.Adv. with
Mr.Rajesh Batra, Adv.

versus

STATE & ANR. Respondents
Through Ms.Jasbir Kaur, APP

CRL.M.C. 1104/2005

M/S PEPSICO INDIA HOLDINGS LTD. Petitioner
Through Mr.R.K.Virman, Sr.Adv. with
Mr.Rajesh Batra, Adv.

versus

STATE & ANR. Respondents
Through Ms.Jasbir Kaur, APP

**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

V.K. SHALI, J. (Oral)

1. These are two petitions u/S 482 Cr.P.C. seeking quashing
of the proceedings in criminal case no.59/04 titled **Food**

Inspector Vs. Sh.N.K.Harihara Puthiran & Ors.” and the order of summoning dated 3.3.2004.

2. Briefly stated the facts of the case are that on 12.7.2002, Sh.O.P.S.Ahlawat, the Food Inspector had purchased a sample of 'Sweetened Carbonated Water' a food article, for analysis, from Sh.N.K.Harihara Puthiran of M/s Pearl Drinks Ltd., B-42, Lawrence Road, Industrial Area, Delhi where he was found conducting the business of said food article. The sample consisted of 9X 300 ml. sealed glass bottles of 'Pepsi Aha' 'Sweetened Carbonated Water' taken as such having identical label declaration. The sample was divided into three equal parts and each sample counterpart was separately packed, fastened and sealed according to PFA Act and Rules. Requisite formalities were completed. One part of the sample was sent to the Public Analyst, Delhi and the other two parts were deposited with the local Health Authority. The Public Analyst analyzed the sample and found it to be misbranded, however, the same was found to be

conforming to the quality and standards as laid down under the Rules. The report of the Public Analyst is as follows:-

"The sample is misbranded because the label gives picture of lemon without lemon being used as an ingredient. However, sweetened carbonated water conforms to the standard".

3. On the basis of the report of the public analyst dated 8.8.2002, the respondent no.2 filed a complaint before the learned MM, New Delhi on 3.3.2004. The complaint has been filed against 14 accused persons. Accused no.2 M/s Pearl Drinks Ltd. is the company from whose premises the sample was taken. Accused no.1 is the nominee of the company; accused no.2 M/s Pearl Drinks Ltd. has been arrayed in its capacity of being the manufacturer of 'Sweetened Carbonated Water' 'Pepsi Aha'. M/s Pepsico India Holdings Pvt. Ltd. has been arrayed as accused no.3 in its capacity of being the owner of the trademark; accused nos. 4 to 6 have been

arrayed as accused being officers of the company, accused no.3. Accused no.7 M/s Pepsi Foods Pvt. Ltd. has been arrayed as an accused being the supplier and manufacturer of concentrate and designer company of the sampled food article and its label and accused nos. 8 to 14 are arrayed as accused being the officers of the company, accused no.7.

4. The Trial Court took cognizance of the complaint as it was a complaint filed by a public servant in the discharge of his official duties, on the basis of the complaint itself. It is at this stage, that the petitioners have challenged the continuance of the complaint against them including the summoning order. The matter had come up before this Court for the first time on 7.4.2005 when an order was passed that no coercive steps be taken against the accused persons and the proceedings before the trial Court were stayed. The said stay of the proceedings has continued till date.

5. I have heard the learned senior counsel for the

petitioners as well as learned APP and gone through the record.

6. The learned senior counsel has prayed for quashing of the complaint and the order of summoning on two broad grounds.
7. The first ground which has been taken by him is to the effect that in the entire complaint, there was no averment to the effect that the article of food in respect of which the action was taken by the respondent no.2 was being manufactured by the present petitioners. On the contrary, it is the case of the respondent no.2 in the complaint that the sample of article of food which happens to be 'Sweetened Carbonated Water' was taken from the premises of M/s Pearl Drinks Pvt. Ltd.
8. The contention of the learned senior counsel is that the present petitioner is only the owner of the trademark 'Pepsi Aha'. There is no definite averment against the petitioner that it was manufacturing, selling or distributing the said food article, which essentially

constitutes the offence u/S 7 of the PFA Act. It has been contended by him that the Supreme Court in case of **M/s Pepsi Foods Ltd. and Anr. Vs. Special Judicial Magistrate**, 1998 SC 128 has quashed the summoning order and the complaint against the company, on the basis of this very fact. Merely because the Pepsi Food Ltd. happens to be the owner of the trademark and a Franchisee is given to a different organization for the purpose of manufacturing the drink that in itself would not be good enough to initiate the proceedings for adulteration under Section 7 r/w Sec. 16(1) (a) of the PFA Act against the owners of the trademark. In this regard, Mr. Virmani, learned senior counsel has drawn the attention of the Court to the following paragraphs of the case titled M/s Pepsi Foods Ltd.(supra):-

"29. No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under S. 482 of the Code or Art. 227 of the Constitution to have the proceeding

quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial. It was submitted before us on behalf of the State that in case we find that the High Court failed to exercise its jurisdiction the matter should be remanded back to it to consider if the complaint and the evidence on record did not make out any case against the appellants. If, however, we refer to the impugned judgment of the High Court it has come to the conclusion, though without referring to any material on record, that "in the present case, it cannot be said at this stage that the allegations in the complaint are so absurd and inherently improbable on the basis of which no prudent man can ever reach a just conclusion that there exists no sufficient ground for proceedings against the accused." We do not think that the High Court was correct in coming to such a conclusion and in coming to that it has also foreclosed the matter for the Magistrate as well as the Magistrate will not give any different conclusion on an application filed under S. 245 of the Code. The High Court says that the appellants could very well appear before the Court and move an application under S.245(2) of the Code and that the Magistrate could discharge them if he found the charge to be groundless and at the same time, it has itself returned the finding that there are sufficient grounds for proceeding against the appellants. If we now refer to the facts of the case before us, it is clear to us that not only that

allegation against the appellants make out any case for an offence under S.7 of the Act and also that there is no basis for the complainant to make such allegations. The allegations in the complaint merely show that the appellants have given their brand name to 'Residency Foods and Beverages Ltd.' for bottling the beverage 'Lehar Pepsi'. The complaint does not show what is the role of the appellants in the manufacture of the beverage which is said to be adulterated. The only allegation is that the appellants are the manufacturer of bottle. There is no averment as to how the complainant could say so and also if the appellants manufactured the alleged bottle or its contents. His sole information is from A.K.Jain who is impleaded as accused No.3. The preliminary evidence on which the 1st respondent relied in issuing summon to the appellants also does not show as to how it could be said that the appellants are manufacturers of either the bottle or the beverage or both. There is another aspect of the matter. The Central Government in the exercise of their powers under S.3 of the Essential Commodities Act, 1955 made the Fruit Products Order, 1955 (for short, the 'Fruit Order'). It is not disputed that the beverage in the question is a 'fruit product' within the meaning of Cl. (2) (b) of the Fruit Order and that for the manufacture thereof certain licence is required. The Fruit order defines the manufacturer and also sets out as to what the manufacturer is required to do in regard to the packaging, marking and

libeling of containers of fruit products. One of such requirement is that when a bottle is used in packing any fruit products, it shall be so sealed that it cannot be opened without destroying the licence number and the special identification mark of the manufacturer to be displayed on the top or neck of the bottle. The licence number of manufacturer shall also be exhibited prominently on the side label on such bottle (Clause (8) (1)(b)). Admittedly, the name of the first appellant is not mentioned as a manufacturer on the top cap of the bottle. It is not necessary to refer in detail to other requirements of the Fruit order and the consequences of infringement of the order and to the penalty to which the manufacturer would be exposed under the provisions of the Essential Commodities Act, 1955. We may, however, note that in Hamdard Dawakhana (WAKF), Delhi Vs. UOI, AIR 1965 SC 1167 : (1965) 2 SCR 192, an argument was raised that the Fruit order was invalid because its provision indicated that it was an order which could have been approximately issued under the Prevention of Food Adulteration Act, 1954. This Court negated this plea and said that the Fruit Order was validly issued under the Essential Commodities Act. What we find in the present case is that there was nothing on record to show if the appellants held the licence for the manufacture of the offending beverage and if, as noted above, the first appellant was the manufacturer thereof.

30. It is no comfortable thought for the appellants to be told that they could appear before the Court which is at a far off place in the Ghazipur in the State of Uttar Pradesh, seek their release on bail and then to either move an application under S.245(2) of the code or to face trial when the complaint and the preliminary evidence recorded makes out no case against them. It is certainly one of those cases where there is an abuse of the process of the law and the Courts and the High Court should not have shied away in exercising its jurisdiction. Provisions of Arts. 226 and 227 of the Constitution and S.482 of the Code are devised to advance justice and not to frustrate it. In our view High Court should not have adopted such a rigid approach which certainly has led to miscarriage of justice in the case. Power of judicial review is discretionary but this was a case where the High Court should have exercised it."

9. In the above mentioned case, the allegations merely show that the petitioner has given its brand name to 'Residency Foods and Beverages Ltd.' for bottling the beverage 'Lehar Pepsi'. The complaint does not show as to what is the role of the petitioner in the manufacturing of the beverage which is said to be adulterated. The only

allegation is that the petitioner is the manufacturer of the bottles. There is no averment as to how the complainant could say so and if the petitioner manufactured the alleged bottle or its contents, the preliminary evidence on which the respondent no.2 relied in issuing summons to the petitioner does not show as to how it could be said that they are the manufacturers of either the bottle or the beverages or both and also there is nothing on record to show that the appellants held the licence for manufacturing the offending beverage. The complaint and the evidence recorded did not make out any case against the appellants and therefore, it was observed by the Supreme Court that refusing the quashing of the complaint on account of sufficient ground for proceeding against the accused and that the alternate remedy was available under the Code was not proper.

10. The learned APP has also not been able to refute the submissions made by the learned senior counsel for the petitioner.

11. I have carefully considered the submissions made by the learned senior counsel.
12. I find force in the contention of the learned senior counsel that in the absence of any definite averment in the entire complaint with regard to the present petitioner manufacturing the article of food which happens to be 'Sweetened Carbonated Water' under the brand name of 'Pepsi Aha', it could not be said that the petitioner is liable to be prosecuted under Section 7 r/w Section 16 of the PFA Act for the alleged act of misbranding. On the contrary, the definite case of the respondent no.2/complainant is that on the date of the incident i.e. on 12.7.2002, the Food Inspector had visited the premises bearing no.B-42, Lawrence Road, Industrial Area, Delhi-35 which belongs to M/s Pearl Drinks Ltd. where they were found to be carrying on the business of the said article of food inasmuch as, the said drink was being manufactured and the Food Inspector had sealed 9 X 300 ml of glass bottles of 'Sweetened Carbonated

Water'. Therefore, there is a definite case that the manufacturing of the said article of food was being done by M/s Pearl Drinks Ltd. and no specific act with regard to the manufacturing of the same can be attributed to the present petitioners. It could be said that the petitioner company could not be prosecuted for an offence of adulteration punishable under Section 7 r/w Section 16 of the PFA Act merely, because it was the owner of the trade name or the trademark 'Pepsi Aha' as alleged in the complaint. If the petitioner company could not be arrayed as an accused on the basis of the said incident much less could be the officials who were the Officers of M/s Pepsico India Holdings Pvt. Ltd. which was the Indian subsidiary of the aforesaid company. Accordingly, on this very short ground, the entire proceedings which are pending against the petitioners and its officers in the competent court deserves to be quashed.

13. The contention of the learned senior counsel is that the sample of 'Sweetened Carbonated Water' could not be treated as misbranded as it gave pictures of lemon without lemon being used as an ingredient on account of the fact that it specifically bore prominent declaration that it contains 'added flavours' and contains 'no fruit juice'. It was therefore, contented that there was an endorsement or a writing on the bottle of article of the food itself, that it only had an 'added flavour' and did not contain any 'fruit juice' and this was a sufficient compliance with the provisions of law and therefore, the article of food cannot be treated as misbranded.
14. Another contention made by the learned senior counsel is to the effect that assuming though not admitting that the article of food was misbranded in terms of the report given by the Public Analyst still the present petitioner and its officers could not have been prosecuted inasmuch as, this was at best their first offence and at the time when the sample was taken by the Food Inspector there was a

policy of the Government of Delhi in operation to the effect that in case where the first violation of misbranding is detected, a notice of warning in writing is required to be given to the manufacturer intimating and warning them about the misbranding, so that an opportunity is given to them to rectify the misbranding of the article of food in future.

15. It has been contended by the learned senior counsel that the learned Single Judges of this Court have already quashed the proceedings in similar circumstances on account of the violation being the first one. Reliance in this regard has been placed on the judgment of this Court in case titled **S.S.Gokul Krishnan & Ors. Vs. State Thr. Food Inspector Govt. of NCT of Delhi** 2009 II AD (Delhi) 365 and **Hindustan Unilever Ltd. (Formerly Known as Hindustan Lever Ltd.) & Ors. Vs. State (NCT of Delhi & Ors.** 2001 (1) JCC 689.
16. The learned APP has also not been able to refute this contention of the learned senior counsel.

17. I have carefully considered the submissions made by the respective sides and gone through the record.

18. So far as the misbranding is concerned, the same is defined in Rule 32(c), which reads as under:

"32(c)(i) the name and complete address of the manufacturer and the manufacturing unit, if these are located at different places and in case the manufacturer is not the packer or bottler, the name and complete address of the packing or bottling unit as the case may be:

(ii) where an article of food is manufactured or packed or bottle by a person or a company under the written authority of some other manufacturer or company, under his or its brand name, the label shall carry the name and complete address of the manufacturing or packing or bottling unit as the case may be, and also the name and complete address of the manufacturer or the company for and on whose behalf it is manufactured or packed or bottled;

(iii) where an article of food is imported into India, the package of food shall also carry the name and complete address of the importer in India."

19. It may be pertinent here to mention that this Court had already quashed two proceedings against the present

petitioners with regard to the allegations of misbranding in respect of different articles of food on the ground that it was their first offence.

20. So far as the article of food is concerned, the details are given in **Crl.M.C. No.2675/04 and Crl.M.C.2679/04.**

There is no dispute about the fact that in the year 1985, the Government of Delhi had floated a policy bearing No.F6(228)/85/ENF/PFA, which reads as under:-

"2. It would be noted from the perusal of the above Rule that an elaborate procedure has been prescribed for labeling sealed contents indicating therein the code number date of packing etc. however, it has been noticed that in quite a few cases contents of the sealed article of food was under the Rules, whereas the labeling done on the container or the packet was deficient in certain respect and was not in conformity with the provision contained in Rule 32 of the PFA Rules, 1955. After detailed discussion on the subject, it was appreciated that in case the contents of the sealed packets or container conform to the standard laid down under the PFA Rules, deficiency with regard to Rule 32 which pertains to the particulars of the labeling on the container or packet, was only a technical offence, though it attracted Rule 32 and there was breach of this Rule in

some respect in the course of packing the article of food. In such cases there was unanimous view during the course of discussion that the party effected may be given a written warning drawing his attention to Rule 32 which provides for labeling particulars to be exhibited on the sampled Tin or the packet and in case the practice is repeated after a written warning to the party concerned, the party committing the offence second time should be prosecuted. However, this could not apply in case where the contents of the sealed packed or container are not conforming to the prescribed standard and hence are adulterated. In such cases, prosecution would be launched both for adulteration and for breach of Rule 32. After the Secretary (Medical), as the consenting Authority, has approved the above proposal all the pending cases would be disposed of accordingly."

21. According to the said policy, it is clear that in case where the report of the public analyst is received with regard to the misbranding and a party did not challenge the same, the prosecution is not to be initiated automatically. Since the misbranding was not considered to be a serious offence and it being the first offence, the department

concerned must have given a written notice to the manufacturer, so that in future, it could rectify the said mistake of misbranding.

22. In the instant case, admittedly, this has not been refuted by the learned APP that at the time when the sample was taken, the said policy was in operation. Admittedly, the report of the public analyst showed that the article of food was misbranded, however, without going into the question as to whether it was being manufactured by the petitioner company or not as the said offence being the first offence, the respondents were under an obligation to have issued a written notice of warning to the manufacturer that these are the deficiencies, so far as the branding of the product is concerned.

23. This has admittedly, not been done. Therefore, on this short ground, the present petitions and the summoning order against the petitioners cannot be sustained. I feel that as the second ground is good enough resulting in quashing of the proceedings and the consequent

summoning order, it will not be worthwhile to examine the first ground on which the quashing has been prayed for.

24. Having regard to the aforesaid facts, I feel that this is a fit case where there is a gross abuse of the processes of law on account of the fact that the petitioners were the first offender with regard to the alleged offence of misbranding and therefore, the respondents were under an obligation to have given a notice in writing to them. Since no notice has been given to them, therefore, continuance of the proceedings is bad in law.
25. Accordingly, the complaint case no.59/04 titled 'Food Inspector Vs. Sh. N.K. Harihara Puthiran and Ors.' and the summoning order dated 3.3.2004, which has been stayed, deserves to be quashed. Ordered accordingly.
26. File be consigned to the Record Room.

V.K. SHALI, J

MARCH 29, 2012/RN