

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP (C) No.6791/2008 & WP(Crl.) No.244/2010**

% Date of Hearing: 09.12.2011
Date of Decision: 28.02.2012

1) **WP(C) No.6791/2008**

PEPSICO INDIA HOLDINGS PVT. LTD. Petitioner
Through: Mr. Maninder Singh,
Senior Advocate with Mr. Dheeraj
Nair and Mr. Divyam Agarwal

Versus

UNION OF INDIA Respondent
Through Mr.Ravinder Agarwal

2) **WP (Crl.) No.244/2010**

B.C. SHARMA & ANOTHER Petitioner
Through: Sudhir Chandra,
Senior Advocate with
Mr. Rajesh Batra

Versus

UNION OF INDIA & ORS. Respondent
Through Mr. B.V. Niren for
respondent No.1
Mr. M.Y. Khan for respondent
No.4

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE

1. In both these writ petitions challenge laid is to the same provision, namely, definition of ‘Food’ contained in Section 2 (v) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as ‘the PFA Act’). This Section reads as under:-

“(v) “food” means any article used as food or drink for human consumption other than drugs and water and includes-

- (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,
- (b) any flavouring matter or condiments, and
- (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purpose of this Act;”

2. As is clear from the above, in clause (a) and (b) specific nature of articles which can be treated as ‘Food’ are mentioned. At the same time, clause (c) empowers the Central Government to issue notification in the Official Gazette declaring any other article as ‘Food’ for the purposes of this Act, having regard to its use, nature, substance or quality. Further, though the definition is inclusive in nature, it specifically excludes drugs and water. Thus, water is not treated as food by the legislature in the aforesaid definition. Vide notification dated 29.9.2000 issued under

Section 2(v)(c), the Central Government has included 'packaged drinking water' within the definition of 'Food'. According to the petitioners, though drinking water even if packaged form remains water only and therefore, the Central Government could not include item of water as food in exercise of its power under clause (c) of sub-section 2(v), since water is specifically excluded by the legislature. According to the respondents, however, the expression water contained in Section 2(v) of the PFA Act covers within its sweep only plain water or ordinary water and as packaged drinking water is not ordinary water per se, it can be treated as a food item. This in sum and substance is the bone of contention.

3. To take of the legislative history behind the aforesaid provision leading to issuance of notification, it may be mentioned that sub-section (c) of Section 2(v) was inserted vide an amendment carried out by Act 34 of 1976 whereby the Central Government was conferred the power to declare, by Notification in the Official Gazette, any other article as 'Food' which it may consider including within the definition of 'Food.' Section 2(v) as it stood prior to and after the amendment, specifically excluded 'drugs and water'. The legislature in its own wisdom, while conferring the power on the Central Government to include other articles

within the definition of 'Food' retained the exclusion of 'drugs and water'. The Central Government issued Notification No.GSR 760(E) dated 29.9.2000 and Notification No.GSR 202(E) dated 21.3.2001 wherein initially sub-rule 28 of Rule 49 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as 'the PFA Rules') was inserted restricting manufacture, sale or exhibition for sale of packaged drinking water except under the Bureau of Indian Standard Certification mark. Sub-rule 28 to Rule 49 is extracted herein below for ease of reference:-

“49. Conditions for sale (1)

(28) No person shall manufacture, sell or exhibit for sale packaged drinking water except under the Bureau of Indian Standards Certification Mark.”

4. Simultaneously, the Central Government also inserted Entry A-33 to Appendix B of the Rules specifying the standards for packaged drinking water. Packaged drinking water was defined by the respondent under the impugned standards as under:-

“Packaged Drinking Water’ means water derived from any source of potable water or sea water or underground water or surface water which may be subjected to the treatments, namely, decantation, filtration, combination of filtration, aerations, filtration with membrane filter, depth filter, cartridge filter, activated carbon filter, demineralization, remineralization, reverse osmosis and packed. It may

be disinfected to a level that will not lead to harmful contamination in the drinking water. It may be disinfected by means of chemical agents and/or physical method to reduce the number of micro-organism to a level and does not compromise food safety or suitability.

Provided that sea water, before being subjected to the above treatments, would be subjected to desalination and related processes.....”

5. The Bureau of Indian Standards (BIS) in purported exercise of its power and in pursuance of the impugned notifications framed IS 14543 : 2004 Specifications for packaged drinking water (other than packaged mineral water) prescribing, inter alia, labeling prohibitions which were identical in material particulars to the labeling prohibitions contained in the impugned standards. BIS further directed the petitioner to modify its label ostensibly on the ground that the label used by the petitioner misled the public about the nature, origin, composition and properties of its packaged drinking water and was thus, violative of clause 7.2 of IS 14543 : 2004.

6. The petitioner in WP(C) No.6791/2008 filed Writ Petition bearing No.20909/2005 on 28.10.2005 challenging the directions issued by BIS to remove various phrases and the Mountain Device used by the petitioner on its labels of packaged drinking water bottles. The learned

Single Judge vide his final judgment and order passed in WP(C) No.20909 of 2005 quashed the directions issued by BIS and allowed the said writ petition filed by the petitioner. The BIS filed Letters Patent Appeal being No. LPA No.1649 of 2006 impugning order dated 8.5.2006 passed in the aforesaid writ petition. The said LPA is pending in this Court.

7. The petitioner-PEPSICO in the aforesaid backdrop filed the present writ petition impugning the circulars including packaged drinking water within the definition of food as *ultra vires*, unconstitutional and illegal. Likewise, the petitioner in WP(Crl.) No.244/2010 has prayed for similar reliefs. In respect of this petitioner, it may be added that the Food Inspector has even filed Criminal Complaint No.14/2003 titled *Food Inspector v. Prem Pal* and others under Section 16 of the PFA Act for alleged violation of Rule 49(28) of the PFA Rules, which is pending before the court of Additional Chief Metropolitan Magistrate II, New Delhi. Additional prayer is made for quashing of the said complaint. Mr. Maninder Singh and Mr. Sudhir Chandra, learned Senior Advocates, argued for the two petitioners respectively. It was their submission that water for human consumption has been excluded from the definition of 'Food' by the Legislature itself

and in view thereof the Central Government cannot include, by passing notification, water as food item for the purposes of this Act. It was argued that the expression “any other article” appearing in clause (c) has to be an article other than water and therefore, these notifications dated 29.9.2000 and 21.3.2001 were violative of Section 2(v) of the PFA Act. Otherwise, it amounts to bringing back within the provisions of the Act an item of food by subordinate legislation, which is specifically excluded by the Parliament in the enactment. Reliance in this behalf is placed on the judgment in *Kunj Behari Lal Butail & Ors. v. State of H.P. & Ors.*, (2000) 3 SCC 40 and *Krishna Mohan (P) Ltd. v. Municipal Corporation of Delhi & Ors.*, (2003) 7 SCC 151.

8. Mr. Ravinder Agarwal and Mr. Niren, learned counsel appearing for the Union of India in the two writ petitions, per contra, argued that it is only plain or ordinary water, which is excluded from the purview of definition of ‘Food’ in Section 2(v) of the Act. Once water is treated and then packed it does not remain plain water per se and assumes different character which can be treated as ‘Food’ item. For this purpose definition of packaged drinking water inserted at Item A.33 in Appendix was highlighted as this definition clearly mentions that such potable water which is subjected to treatment, namely, decantation, filtration,

combination of filtration, aerations, filtration with membrane filter, depth filter, cartridge filter, activated carbon filtration, demineralization, remineralisation reverse osmosis and packed. Such a water can be disinfected also to a level which does not lead to harmful contamination in the drinking water and it may be disinfected by means of chemical agents and/or physical method of the number of micro-organism to a level that does not compromise food safety or suitability. Learned counsel also pointed out that identical issue had already been decided by Andhra Pradesh High Court in the case of ***Krishna Foods and Acqua Minerals v. Government of India, Ministry of Health and Family Welfare, Dept. of Health and Anr.***, 2004(2) FAC 334. In that case the Court had held that a plain reading of Section 2(v)(c) makes it abundantly clear that the Parliament had itself authorized the Central Government to include and declare by notification in Official Gazette any article which is not otherwise defined in the Act as ‘food’ for the purpose of PFA Act. It was submitted that packaged drinking water is not an ordinary water as it is subjected to various treatments and the end product is produced/manufactured. It was also highlighted that the consumer is charged for such processing of water besides the cost of water bottling, packaging etc. Therefore, laying of standards for

packaged drinking water/mineral water was necessary to safeguard the larger interest of the consumer and their health. It was argued that if packaged drinking water cannot be included in the definition of water then even carbonated water (soft drinks) will have to be excluded from the definition of water as this carbonated water is nothing but water with carbon dioxide gas. Highlighting the importance of such an inclusion it was argued that the Constitution of India places onus upon the Central Government to ensure health of its citizen and keeping in view this liability, the matter was taken up for consideration by the Central Committee for Food Standard (CCFS), a Statutory Committee constituted under Section 3 of the PFA Act. The Committee examined the issue in depth and made specific recommendations for review of the quality standards of 'mineral water' and 'packaged drinking water' laid down under the Prevention of Food Adulteration Rules, 1955. It is argued that the respondent in exercise of its power under Section 23 of the PFA Act gave its intent to lay down specifications for 'packaged drinking water' by issuing draft rules vide GSR No.85(E) dated 3.2.2000 inviting comments from the public, trade and industry. Further, a press note was also issued on 17.10.2000 so that the industries may themselves obtain the BIS certification. It was further submitted that even

Karnataka High Court in *Cauvery Mineral Waters Pvt. Limited v. Bureau of Indian Standards and Anr.*, 2002 CrI. LJ 4779 has taken the same view.

9. We have considered the respective submissions of counsel for both the parties.

10. As noted above, both Karnataka High Court and Andhra Pradesh High Court have repelled similar contentions advanced by the petitioners herein holding that packaged drinking water can be included as item of 'Food' by way of notification under clause (c) of Section 2(v) of the PFA Act. Challenge before the Andhra Pradesh High Court was to the same notification and the amended Rules which prohibit manufacture, sale or exhibit for sale 'packaged drinking water' except under the BIS certification mark. This challenge was on the basis of identical contention, namely, when water was specifically excluded from the definition of 'Food' unless necessary amendment is made under clause (c) of Section 2(v) itself, rule making authority could not include water as an item of food. Though the Notification issued under clause (c) of Section 2(v) of the Act was not challenged, the Court still made categorical observations that such a notification, in any case, could not

be challenged on any ground. Para 17 of the judgment to this effect reads as under:-

“17. The Ministry of Health and Family Welfare (Department of Health) vide notification dated 12-3-2001 in exercise of the powers conferred by Sub-clause (c) of Clause (v) of Section 2 of the PFA Act, having regard to its use, nature, substance and quality, declared 'packaged drinking water' as 'food' for the purposes of the said Act. The said notification so issued by the Central Government is not challenged, and, in our considered opinion, cannot be challenged on whatever grounds. The same has obviously been issued by the Central Government in public interest and to ensure 'packaged drinking water' to be in conformity with the standards fixed by the Food and Agricultural Organisation and World Health Organisation of the United Nations.”

11. Holding that packaged drinking water did not remain ordinary water any longer, the Court made following pertinent observations:-

“26. It is thus clear that water, which is excluded from the definition of 'food' in Section 2(v) of the PFA Act, is ordinary water, which is clearly distinguishable from all kinds of 'mineral water' or 'natural water' and 'packaged drinking water' which may derive from any source of potable water subjected to treatments etc. Therefore, the notification issued by the Central Government dated 29-3-2001 declaring 'packaged drinking water' as 'food' for the purposes of provisions of the PFA Act, in no manner amounts to amending the provisions of the PFA Act as contended by the learned Counsel for the petitioners. The article of 'packaged drinking water' is added as an additional

item as 'food' for the purposes of the PFA Act in view of its nature and substance etc. The 'packaged drinking water' as defined hereinabove is comprehensive in its term, which takes into account the water that, is being manufactured and processed by the petitioners' companies. The impugned amendments, in our considered opinion, cannot be characterised as arbitrary, capricious, unreasonable and unjust as complained by the petitioners.”

12. The Court also took note of the provisions of Bureau of Standards Act, 1986, which provides for establishment of a Bureau for the harmonious development of the activities of standardization, marking, quality certification of goods and for matters connected therewith or incidental thereto. Taking note of certain provisions of the Act and the Rules framed the Court held that the Indian Standards which are otherwise voluntary and available to public can be made as a binding requirement by any Legislation or by specific orders of the Government making it a mandatory requirement and sub-Rules 28 and 29 of Rule 49 of the PFA Rules had made them mandatory. We would like to reproduce paras 43 and 44 of the judgment as well, in this behalf, which read as under:-

“43. Sub-rules (28) and (29) of Rule 49 of the PFA Rules which are couched in mandatory form prohibit manufacture, sale or exhibition for sale of 'packaged drinking water' and 'mineral water' except under the

Bureau of Indian Standard certification mark. Thus, there is a clear legal requirement making the Bureau of Indian Standard certification mark compulsory for manufacture, sale or exhibition for sale of 'packaged drinking water' and 'mineral water'. Even an order of the Central Government could have been enough for making the Indian Standard as a binding requirement.

44. The expression "in a Legislation" employed in Sub-rule (7)(b) of Rule 7 of the BIS Rules obviously means "any Legislation"; it is not confined to the provisions of the BIS Act and the Rules made thereunder. It only means that it may be made compulsory by any Legislation validity enacted or Rules made under such Legislation. Sub-rules (28) and (29) of Rule 49 of PFA Rules are validly made which prohibit manufacture, sale or exhibition for sale of 'packaged drinking water' without Bureau of Indian Standards certification mark. Rules make obtaining of the certification mark as mandatory requirement.”

13. In *Cauvery Mineral Waters (P) Ltd.* (supra) taking same view the Court held that “all water available on earth is not excluded from the definition of the word ‘food’. The rationale given by the High Court was that the packaged water is specially meant for human consumption and it is also used in composition and preparation of food. Therefore, whatever article is used as food or drink for human consumption is a ‘food’ as defined under the Act. The Court also highlighted the object of regulating the sale of packaged drinking water, namely, to prevent sale of contaminated/polluted water, which is primarily responsible for damaging the health of the human being. Therefore, any potable water,

which is meant to be used for human consumption, must conform to the standard on the basis of scientific data and if that is so, it was in the interest of general public that the quality of water sold in packaged bottle is regulated. Following discussion from the said judgment is also worth noting:-

“6. From the reading of the definition of the word 'food' under the Act no doubt, drugs and water are excluded. But, at the same time, any article used as food or drink for human consumption is a food. Further, any article which ordinarily enters into or used in composition or preparation of human food is also a food. In 'The World Book Encyclopedia' it is stated that water is the most common substance on earth. It covers more than 70% of the earth's surface. It fills the oceans, rivers and lakes, and is in the ground and in the air we breathe. Water is everywhere. Out of total available 'water' on earth, only about 3% is fresh. About 3/4th of the fresh water is frozen in glaciers and icecaps. Glaciers and icecaps contain as much water as flows in all the earth's rivers in about 1,000 years. From this it is clear that, water pollution is one of our most serious environmental problems. Polluted water may look clean or dirty, but it contains germs, chemicals or other materials that can cause inconvenience, illness or death. Impurities must be removed before such water can be used safely for drinking, cooking, washing or laundering. Water pollution is a serious problem in these days. Therefore, keeping in view the present situation, it is just and necessary to understand the word 'food' as defined under the Act 1954.

7. The object of bringing the enactment i.e., the Act 1954 is to make provision for prevention of

adulteration of food. As seen from the state ment of objection on behalf of the Union of India there were lot of complaints regarding the purity of water sold in the market which is meant for human consumption. As per the definition 'food' means any article used as food or drink for human consumption and any article which ordinarily enters into, or is used in the composition or preparation of, human food is also a 'food'. Keeping this in view can it be said that all water that is available on earth is excluded from the definition of the word 'food'? All water available on earth cannot be used for human consumption or it can't be used for preparation of human food. Whenever there is a doubt as to the meaning of a provision, it is just and necessary to look into the preamble in order to ascertain the intention of the Legislature. From the well-established rules of legislation of the statute, the preamble and title may legitimately be consulted to solve any ambiguity, or to fix the meaning of the word which may have more than one or to keep the effect of the Act within the real scope whenever the enacting part is in any of these respects open to doubt. If literal construction would defeat the obvious intention of the Legislature and produce a wholly unreasonable result, the Court must "do some violence to the words" and so achieve that obvious intention and produce a rational construction as held by the Court in the case of *Ajit Investment Company Private Limited, Jamnagar, Gujarat and Anr. v. K.G. Malvadkar and Ors.*, AIR 1973 Bom. 285 Lord Denning in his book 'The Discipline of law' has stated that "whenever there is a choice, choose the meaning which accords with reasons and justice". It is further stated in the said book that whenever strict interpretation of statute gives rise to absurd and unjust situation, the Judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind. Keeping this in view the definition

of the word 'food' defined under the Act is to be understood.

The Supreme Court in the case of *Girdhari Lal and Sons v. Balbir Nath Mathur and Ors.*, [1986]1SCR383 has held as follows.--

"Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. . A Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a construction of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word, so as to give force and life to the intention of the Legislature. Put into homely metaphor, it is this: A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the contexture of it they would have straightened it out? He must then do what they would have done. A Judge should not alter the material of which the Act is woven, but he can and should iron out the creases".

14. We are entirely in agreement with the aforesaid approach taken by the two High Courts in the aforesaid judgments. The reasons given therein provide answer of all the arguments raised by the counsel for the

petitioners and therefore, we need not repeat the same. Apart from what is stated by the respondents about the processing that is required to be undertaken before making it packaged drinking water, which substantiates their case, we would like to refer to 'Code of Hygienic Practice for Bottled/Packaged Drinking Waters (Other Than Natural Mineral Water) CAC/RCP 48-2001. Introduction to this Code points out that international trade in bottled water has increased in recent years, both in quantity and diversity. Aside from water shortages, need to improve health also have contributed to an escalating trade in bottled water. Increasingly, it has been recognized that traditional suppliers of drinking water such as public and private water works may not always be able to guarantee micro-biological, mechanical and chemical safety of their product to the extent previously thought possible. Thus, what is highlighted is that people are becoming health conscious in so far as consumption of water is concerned and do not want to depend upon public or private water works which may be contaminated with virus and parasite protozoa. For this reason, they want to consume treated water packaged in bottles. Such treated water, therefore, does not remain ordinary drinking water per se, which the Legislature intended to exclude from the definition of 'food' under Section 2(v) of the PFA Act. In the

aforesaid Code the need to regulate such bottled water from health and hygiene point of view is emphasized. The Code recognizes general technique for collecting, processing, packaging, storing, transporting, distributing and offering for sale a variety of drinking waters other than other mineral waters for direct consumption. This Code contains various definitions. For our purposes definitions of ‘bottled/packageg drinking water’ and ‘food’ are material and are reproduced below:-

“Bottled/packageg drinking water – Water filled into hermetically sealed containers of various compositions, forms, and capacities that is safe and suitable for direct consumption without necessary further treatment. Bottled drinking water is considered as food. The terms “drinking” and “potable” are used interchangeably in relation to water.

XXXXX

Food – For the purposes of this Code, the term includes bottled/packageg drinking water.”

15. Thus, even this Code recognizes bottled/packageg drinking water as ‘food’ item, the quality of which needs to be regulated. We, thus, find no merit in so far as challenge to various Notifications and amendment to Rules in these two writ petition is concerned. This leaves us with one prayer in WP(Crl.) No.244/2010, namely, quashing of 21.1.2003 passed

by the learned ACMM II, New Delhi, issuing process against the petitioner and the consequent proceedings in CrI. Complaint No.14/2003. It was argued that the standards which were prescribed for packaged drinking water as per Item A.33 in Appendix B are duly met by the petitioner and there was no dispute about the same. The violation alleged in the complaint was that label on the bottles was not put as per the prescription contained. Our attention was drawn to the report of the Public Analyst in this behalf as per which the result of the analysis was declared and at the end it was observed:-

“.....and I am of the opinion that the sample is being sold without ISI certification (violation of Rule 29(48). However, Packaged Drinking Water complies to standard.”

15. Mr. Sudhir Chandra, learned senior counsel, also referred to letter dated 2.7.2001 addressed by BIS to the petitioner as per which the petitioner was permitted to consume old stock of labels with stickers specimen bearing BIS mark and licence numbers. His argument was that on some bottles these old labels were used with the permission so that the petitioner is able to consume the said stock of labels and this was hyper technical violation on the basis of which criminal complaint was filed, more so when the authorities were satisfied about the standards of

the product sold. It was argued that penal statute had to be construed strictly as held in *The Workmen of M/s. Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. v. The Management and Others*, 1973(1) SCC 813 (Pr.35), *G. Giriappa and Others v. Anantharai L. Parekh and Others*, (1994) 3 SCC 489 (Pr.9). It was further submitted that for this kind of violation it is only the BIS which could prosecute. Attention was drawn to two judgments of the Supreme Court in *Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd. and Another*, 2003(11) SCC 405 (Pr.5) and *Mansukhlal Vithaldas Chauhan v. State of Gujarat* (1997) 7 SCC 622 (Pr.18 & 19).

16. Learned counsel for the respondent, on the other hand, argued that the petition for quashing of the complaint at this stage was not maintainable. More so when it was found that sample was in violation of Rule 49(28) of PFA Act as same was being sold without ISI certification. He submitted that while issuing the process the learned ACMM had taken note of the necessary facts in his orders dated 5.3.2009 and dealt with the same contention of the petitioner finding *prima facie* violation of the said provision as well as violation of Section 2(ix)(k) of the PFA Act, which is punishable under Section 16(1)(9) of the PFA Act read with Section 7 thereof. He also relied upon the

judgment of this Court in *Bureau of Indian Standards v. Pepsico India Holdings P. Ltd. & Anr.*, 155 (2008) DLT 588 (DB).

17. After going through the order of the Ld. ACMM, we find that there were justifiable reasons for taking cognizance of the matter more so when *prima facie* violation of Rule 49 (28) of the PFA Act was found that the water bottles in question were being sold without ISI certification. May be, when the authorities were satisfied about the standards of the product sold which was as per specification, the alleged violation becomes a trivial issue. However, fact remains that as the specifications contained in the PFA Act or the Rules are to be strictly complied with and, even when there is a technical violation, this may give cause to the Food Adulteration authorities to initiate action. In this backdrop if the Ld. ACMM ultimately finds that the violation was not so serious and, it was bona fide as well, as contended by the petitioners, the Ld. ACMM can take a lenient view of the matter. However, that does not make out a case for quashing of the proceedings under Section 482 Cr.P.C. The other argument of the learned Senior Counsel for the petitioners relates to petitioners defence which in the first instance are to be put before the Ld. ACMM and duly proved including the defence that there was permission given to the petitioner to use old labels.

18. As a result, both these petitions are bereft of any merits and the same are accordingly dismissed.

ACTING CHIEF JUSTICE

February 28, 2012
hp/skb

**(RAJIV SAHAI ENDLAW)
JUDGE**