सत्यमेव जयते

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.

(Friday the 22th day of October, 2021)

Appeal No.717/2019
(Old No. ATA 586(7) 2012)

Appellant : M/s. Prima Beverages (P) Limited
Door No. 35,
Industrial Development Area
Vazhakulam, Edathala , Alwaye
Erumathala P.O, Ernakulam
Cochin – 683 105.

M/s. Nagendran & Nagendran

Respondent : The Assistant PF Commissioner
EPFO, Kaloor
Kochi – 682 017

By Adv. Sajeev Kumar K. Gopal

This case coming up for final hearing on 08/04/2021 and this Tribunal-cum-Labour Court on 22/10/2021 passed the following:

O R D E R

Present appeal is filed from order No. KR/ KC/21201/Enf (5)/ 2012/ 2787 dt. 14.06.2012 issued U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') deciding the applicability of the provisions of the Act to the appellant establishment w.e.f 01/04/2001.

2. The appellant is a private limited company registered under the Company's Act 1956. The appellant has a factory wherein they manufacture packaged drinking water. The respondent on the basis of the franchisee agreement came to the conclusion that appellant is a "trading and commercial" establishment and is liable to pay provident fund contribution to its employees. The copy of the impugned order is produced and marked as Annexure 1. The appellant is a factory registered under the factories Act. A copy of the license issued under factories Act is produced and marked as Annexure 2. Appellant has also taken a license

under Bureau of Indian Standards for manufacturing packaged drinking water. A copy of the same is produced and marked as Annexure A3. The appellant is also registered under Central, Excise Act and Kerala Value added Tax which will show that they are manufacturing and selling packaged drinking water. The true copies of certificates of registration are produced as Annexure A4 & Annexure A5. The above annexures would clearly show that the appellant is a factory within the meaning of Sec 2(g) of the Act. The commodity, packaged drinking water is not one specified on Schedule-1 of the Act and it has not been notified by the government under Sec 4 of the Act. The trading activity envisages buying of goods and selling the same for profit. The only purchase the appellant makes is, materials used in the manufacture of packaged drinking water. Though there is a entry in schedule 1 for “aerated water industry, ie. to say any industry engaged in the manufacture of aerated water, soft drinks or carbonated water”, the appellant establishment will not come within the

Schedule head as appellant is manufacturing only packaged drinking water. Though the Act is social security legislation when there is clear provisions in the Act any benevolent construction cannot be resorted to .

3. The respondent filed counter denying the above allegations. The appellant is engaged in manufacturing packaged drinking water for M/s. Parle Agro Ltd under the brand name “Parle Bailey Mineral Water”. The appellant establishment was covered w.e.f 01/04/2001, under the Schedule head “manufacture of aerated water”, as the employment strength was more than 20 as per the returns filed by the appellant before the Employees State Insurance Corporation. A copy of the letter from the Regional Director, Employees State Insurance Corporation alongwith a copy of the returns filed by the appellant is produced and marked as Exbt R1. The appellant disputed coverage vide its letter dt. 21/06/2005 on the grounds that the appellant establishment is engaged in the manufacturing of “Packaged Drinking Water”

which does not fall under Schedule 1 of industries notified under the Act. An enquiry U/s 7A of the Act was initiated to decide the issue of applicability of the Act to the appellant establishment. The enquiry was scheduled on 31/08/2005. A representative of the appellant attended the hearing. The copies of the records were provided to the appellant and the Enforcement Officer was also directed to be present on the next date of proceedings. On the next date of posting, the respondent authority explained to the representative of the appellant that the coverage of the appellant establishment under the provisions of the Act was done on the basis of the Balance Sheet for 2001,2002 & 2003 and Memorandum of Articles of Association of the appellant. The appellant establishment was covered by the respondent authority on the basis of his own information and not on the basis of the report submitted by the Enforcement Officer. A copy of the letter submitted by the Enforcement Officer dt. 22/04/2004 and a copy of Exbt R1 dt. 23/06/2004 received from ESI

Corporation was also handed over to the representative. The enquiry was further adjourned to 11/11/2005 to facilitate the appellant to file written statement if any, and the documents if any, to support their claim. The appellant through their Advocate filed a written statement on the next date of posting. The Enforcement Officer of the respondent organization was directed to inspect the appellant establishment to confirm whether they are manufacturing only packaged drinking water and not carbonated water and soft drinks. The Enforcement Officer reported that though the appellant is manufacturing only packaged drinking water at present, the appellant was trading in aerated water as per their books of accounts. The appellant used to supply raw materials for aerated water and the aerated water was prepared by another establishment and purchased by the appellant establishment. It was also reported that the appellant establishment was trading aerated water and packaged drinking water. Hence as per the proceedings the

appellant establishment was covered under the schedule head under ‘trading and commercial’. The appellant disputed even the coverage under the trading and commercial schedule head. Hence an enquiry U/s 7A of the Act was initiated. A representative of the appellant attended the hearing and submitted that the appellant establishment is engaged in the manufacturing and bottling of packaged drinking water only. The dispute was only on the scheduled head and not on the date of coverage. The appellant also did not dispute the employment strength. The appellant is manufacturing and selling mineral water and purchasing club soda and selling the same along with mineral water. In the agreement executed on 20/10/2000 between M/s. Parle Agro Ltd and the appellant, it is clearly specified that the appellant establishment is exclusively licensed to fill, pack, sell, and distribute the product mineral water under the trade mark “Parle Bailey Mineral Water”. The respondent authority on the basis of the available documents concluded that the

appellant establishment is required to be covered under the Schedule head “Trading and Commercial” w.e.f 01/04/2001. An establishment engaged in purchase and sale or storage of goods are notified under the Schedule head “Trading and Commercial” as per notification GSR No. 346 dt. 07/03/1962. The law is now settled that an establishment manufacturing and selling products also can be covered under “trading and commercial” as per GSR No. 346 dt. 07/03/1962. The contention of the appellant that the factories engaged in the schedule industry U/s 1(3)(a) alone are covered and factories engaged in the non schedule industry are totally excluded from the purview of the Act is inconsistent with the statutory provisions and legal position confirmed by various High Courts. As per the golden rule of interpretation, when there can be two reasonable interpretations the one which promoted the object of the statute is to be relied upon, In **Provident Fund Commissioner, Quilon Vs Kerala Janatha Printers and**

Publishers Ltd, AIR 1965 Kerala 130, the Hon'ble High Court of Kerala considered whether newspaper establishment are factories or not and whether they are covered under the provisions of the Act. The Hon'ble High Court has taken the view that whether factories or not and whether those factories are engaged in industries or not, Sec 1(3) (b) of the Act applies to all establishment except factories engaged in industries specified in Schedule 1. The Hon'ble High Court of Bombay agreed with the above decision in **Central Hindustan Orange and Cold Storage Co. Ltd. Vs. Prabhulla Chandra Ramachandra Oza,** AIR 1967 Bombay 126. The Hon'ble High Court of Bombay further held that all establishments have been divided into 2 categories : 1) Factories engaged in a schedule industry and 2) Factories and non-factories included in the notification issued by the Central Government. The Hon'ble Supreme Court of India in **Muhammadalli and Others Vs Union of India and Another**, 1963 (1) LLJ 536 held that the

underlying idea behind the provisions of the Act is to bring all kinds of employees within the fold of the Act .

4. The appellant filed a rejoinder denying the allegations in written statement filed by the respondent. The appellant disputed the coverage on the following grounds.

1) Packaged drinking water units are not included in Schedule -1 of the Act.

2) Packaged drinking water producing establishments are not included in Clause 3 (6) of EPF and MP Act.

3) The unit never employed 20 or more persons at any time for its regular operations.

5. The returns filed with ESI Authorities from 2001 are produced and marked as Annexure 6. Annexure 6 will show that the appellant company has not engaged more than 20 persons at any point of time. The appellant contented before the respondent that the “employee” defined under ESI Act and under EPF and MP Act are different and the ESI

coverage or their number cannot be taken as a basis to impose EPF and MP Act to the appellant unit. The purchase and sale of aerated water was only to augment and boost the marketing of packaged drinking water for a short period and was not a regular business. Trading was never a prominent part of appellant's business. It is true that for few years the appellant was called upon to supply aerated water. When a consignment of packaged drinking water was sent under the contract, the vehicle would pick up some aerated water and deliver the same to the consignee. The appellant is producing the balance sheet for the last 3 years which will show that appellant is engaged in manufacture and sale of packaged drinking water only. The balance sheets are produced as Annexure 7. The franchise agreement with M/s. Parle Agro Ltd would clearly show that the appellant is engaged to produce packaged drinking water to their specification, fill them in bottles pack and sell the same in market for a royalty. The Memorandum of Association of any company will cover

various activities under the heads, main business, ancillary and incidental business. Hence the Memorandum of Association cannot be relied on to sustain the coverage under "Trading and Commercial".

6. The appellant establishment is covered under provisions of the Act w.e.f 01/04/2001 under the Schedule head "Manufacture of aerated water". The appellant disputed the coverage and the respondent authority accepted the contention of the appellant. However according to the respondent, the appellant establishment is coverable under the Schedule head "Trading and Commerce". It may be relevant to examine the statutory provisions in this regard as per Sec 1(3)(b) of the Act. Subject to the provisions contained in Sec 16, it applies

a) " To every establishment which is a factory engaged in any industry specified in Schedule 1 and in which 20 or more persons are employed and

b) To any other establishment employing 20 or more persons or class of such establishment which the Central Government may, by notification in the official gazette specify in this behalf." As per Sec 2(g) " Factory means any premises, including the precincts there of, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with aid of power or without the aid of power.". As per Sec 2(i) Industry, means any industry specified in Schedule 1 and includes any other industry added to this schedule by notification U/s 4". According to the learned Counsel for the appellant the appellant establishment is an industry where in packaged drinking water is manufactured and marketed and since manufacturing of packaged drinking water is not a notified activity under schedule 1, the appellant establishment cannot be covered under the provisions of the Act. The learned Counsel for the appellant also argued that from the documents produced by the appellant, it is clear that the

appellant establishment never employed 20 persons and therefore the appellant establishment is not coverable under the provisions of the Act, on that account also. The learned Counsel for the appellant relied on Annexure 2 certificate issued by Government of Kerala, Department of Factories and Boilers to support his claim that the appellant establishment is registered under the Factories Act. The learned Counsel for the appellant also relied on the license issued by Bureau of Indian Standards and Annexure 4 & Annexure 5 issued by the Central Excise Department and also Kerala Value Added Tax registration to argue that the appellant establishment is a factory which is engaged in the production and marketing of packaged drinking water. According to the learned Counsel for the respondent the appellant establishment at the time of coverage w.e.f 01/04/2001 was also engaged in the trading of aerated water. According to him the manufacturing of aerated water is outsourced by the appellant and it was traded by the

appellant establishment. With regard to the employment strength of the appellant, the respondent relied on Exbt.R1 from the Regional Director Employees State Insurance Corporation, enclosing therewith the statutory returns filed by the appellant establishment from 01/04/2001 to 30/09/2001 wherein it is clearly show that the appellant establishment was engaging 22 employees during the relevant point of time.

7. In the rejoinder filed by the appellant establishment it conceded that as on 01/04/2001 the appellant establishment was engaged in trading of aerated water. It used to get aerated water manufactured by another plant and used to sell it through its net work along with the packaged drinking water. The respondent while deciding the issue relied on the Balance Sheet for the year 2001, 2002 and 2003. However the appellant failed to produce the Balance Sheet for that relevant period which will decide whether the appellant establishment was engaged in any trading activity

during the relevant point of time ie., on 01/04/2001 when the appellant establishment was covered under the provisions of the Act. Now the appellant produced the balance sheet for the year 2010-2011,2011-2012 & 2012-2013. These documents, now produced, will not help of the appellant in deciding the question whether the appellant establishment was engaged in trading activity as on 01/04/2001. As per GSR 346 " In exercise of powers confirmed by Clause(b) of Sub Sec(3) Sec (1) of Employees Provident Fund Act 1952. (19 of 1952) the Central Government hereby applies the said Act w.e.f 30/4/1962 to every trading and commercial establishment employing 20 or more persons each and engaged in the purchase, sale or storage of any goods, including establishments of exporters, importers, advertisers commission agents and brokers and commodity and stock exchanges, but not including banks or warehouses established under any Central or State Act". According to the learned Counsel for the respondent the

appellant establishment was engaged in the purchase and sale of aerated water as on 1/4/2001 and therefore will come squarely within the above notification. According to the learned Counsel for the appellant the trading in aerated water was not the main activity of the appellant and therefore the appellant establishment cannot be covered as per the above notification. In **Basant Lal Jain Vs Regional Provident Fund Commissioner,** Writ Petition No. 86 of 1962 the Hon'ble Supreme Court considered the above issue. In that case, the petitioner establishment was engaged in the manufacture of indian sweets and employed 18 persons in the above activity. Manufacturing of indian sweets is not a notified activity under Schedule 1. The petitioner sold the manufactured indian sweets through a separate outlet and employed 16 persons in the sales outlet. The respondent organization covered the establishment under “trading and commercial” establishment by virtue of GSR No. 346. The Hon'ble Supreme Court after examining all the aspects came

to the conclusion that the finished products sold by the petitioner will come within the GSR 346 notification and therefore the petitioners business of manufacturing and sale of sweet come within the purview of above notification. The Hon'ble High Court of Bombay followed the above decision of Hon'ble Supreme Court in **Varjivandas Hirji & Company Vs RPFC and Another,** AIR 1969 Bombay 95. The Hon'ble High Court held that " **In view of the Hon'ble Supreme Court judgment even if the business of petitioners in this case was exclusively to sell goods manufactured by themselves, they would still be trading and commercial establishment. Also in view of the same judgment the contention that their dominant activity was manufacture and that dealing in asafetida was a minor activity, even if factually correct, would not survive".** The above decisions of the Hon'ble Supreme Court and Hon'ble High Court of Mumbai are squarely applicable to the facts of the present case. In the present case the contentions of the

appellant is that the main activity of the appellant establishment is manufacturing of packaged drinking water and sale of the same. Further it is also accepted that they were also engaged in the activity of trading in aerated water supply at the relevant point of time as on 01/04/2001.

8. Hence the decisions of the respondent authority that the appellant establishment is coverable under "trading and commerce" U/s 1(3) (b) of the Act is legally correct and is upheld.

9. Another contention of the learned Counsel for the appellant is that they never engaged more than 20 persons at any point of time. The learned Counsel for the respondent relied on Exbt R1. Exbt R1 is a letter dt. 23/06/2004 issued by the Regional Director ESIC to the respondent authority. As per Exbt R1 "Subsequently the Insurance Inspector vide his inspection report dt. 06/03/1998 reported that this employer had employed 26 employees w.e.f 12/1997.

However, they have only be submitting return of contribution showing that they have employed less than 20 employees upto 01/04/2001. From 01/04/2001 onwards they have reported employing more than 20 employees as is evident from return of contribution for the period from 01/04/2001 to 30/09/2001 (copy enclosed) wherein they have informed that they have employed 22 employees. “Return of contribution filed by the appellant establishment during the relevant period was also enclosed alongwith Exbt R1 which would clearly show the employment strength of the appellant establishment as on 01/04/2001 was above 20. The appellant has taken a stand that the appellant establishment never engaged 20 or more persons at any point of time. When the appellant was confronted with Exbt.R1, they changed their stand to argue that the definition of employees in ESI Act and EPF Act varies and therefore the employment strength reported under ESI Act is not relevant for the purpose of coverage under the Act. Having taken such a stand it is for

the appellant to explain why the 22 employees reported under the ESI Act is not coverable under EPF Act. In the absence of any explanation it is not possible to accept the contention of the learned Counsel for the appellant that they never employed 20 persons and therefore the provisions of the Act is not applicable to them.

10. Considering the facts, circumstance pleadings and evidence in this appeal I am inclined to hold that the appellant establishment is coverable under the provisions of the Act w.e.f 01/04/2001 under the Schedule head "Trading and Commercial", U/s 1(3)(b) of the Act as they employed more than 20 employees as on that date.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer