

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

Wednesday, the 15th day of December 2021 / 24th Agrahayana, 1943

WP(C) NO. 29911 OF 2019(L)

PETITIONERS:

1. KERALA PACKAGED DRINKING WATER MANUFACTURES ASSOCIATION (KPDA)
33/2159/A3, ISAAC TOWERS, VENNALA P.O., N.H.BYPASS, PALARIVATTOM,
KOCHI-682 026, REPRESENTED BY ITS SECRETARY, MR, VIBIN P.,
2. VIBIN .P., SECRETARY, KERALA PACKAGED DRINKING WATER MANUFACTURES
ASSOCIATION (KPDA), 33/2159/A3, ISAAC TOWERS, VENNALA P.O.,
N.H.BYPASS, PALARIVATTOM, KOCHI-682 026,

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY ITS SECRETARY TO GOVERNMENT, FOOD
AND CIVIL SUPPLIES (D) DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001
2. KERALA BOTTLED WATER MANUFACTURES ASSOCIATION, KARIPPASSERY, NORTH
KALAMASSERY, ERNAKULAM DISTRICT-683 503, REPRESENTED BY ITS
SECRETARY
3. UNION OF INDIA, MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC
DISTRIBUTION, KRISHI BHAVAN, RAFI MARG, CONNAUGHT PLACE, NEW
DELHI-110 001

Writ petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to stay the operation, implementation and all further proceedings pursuant to Exhibit P2 pending hearing and final disposal of the Writ Petition.

This petition again coming on for orders upon perusing the petition and the affidavit filed in support of WP(C) and this Court's order dated 16-11-2019 and upon hearing the arguments of SMT. MARY BENJEMIN, Advocate for the petitioners, SRI.SHRI.K.P.JAYACHANDRAN, ADDITIONAL ADVOCATE GENERAL for respondent 1, M/S.JOY THATTIL ITTOOP, BIJISH B.TOM, GENS GEORGE ELAVINAMANNIL, JACOB TOMLIN VARGHESE, BABY SONIA, AFITHA P BEERAN, PONNU TOM PADINJAREKARA & MATHEW JOSEPH BALUMMEL, Advocates for respondent 2, and of Assistant Solicitor General of India, the court passed the following:-

P.T.O.

**EXHIBIT P1:TRUE COPY OF THE BY-LAWS OF THE 1ST PETITIONER
ASSOCIATION**

**EXHIBIT P3:TRUE COPY OF THE KERALA ESSENTIAL ARTICLES CONTROL
ACT,1986(ACT 13 OF 1986)**



P.V.KUNHIKRISHNAN, J

W.P.(C) Nos.29911 of 2019,
11247 of 2021 & 20041 of 2021

Dated this the 15th day of December, 2021

O R D E R

These three writ petitions are filed challenging the same orders and therefore I am passing a common order in these three writ petitions. I will refer to the exhibits mentioned in WP(C) No.20041 of 2021 for convenience.

2. Kerala Bottled Water Manufacturers Association has made a representation before the Government for taking measures to control the selling price of bottled drinking water. According to them, it is being sold at exorbitant prices and different maximum retail prices within the State. The government considered the representation and originally issued Ext P1 notification on 14.6.2019 in the exercise of the powers conferred by Clause (a) of Section 2 of the Kerala Essential Articles Control Act 1986 (for short Act 1986) declaring bottled drinking water as an essential article for

the purpose of the Act. Ext P1 was challenged before this Court by filing WP(C) No.29911 of 2019. The petitioner, in that case, prayed for an interim order, and the same was rejected as per the order dated 16.11.2019 which is extracted hereunder.

" Admit.

2. Heard the learned Senior Counsel appearing for the petitioners and the learned Additional Advocate General.

3. The learned Senior Counsel contends that Exhibit P2, in so far as it declares bottled drinking water as an essential article for the purpose of the Kerala Essential Articles Control Act, 1986, is completely unsustainable, in view of the fact that drinking water is a food stuff and that as such, the regulatory measures of the State Government under the Kerala Act would not be applicable to the same.

4. The learned Additional Advocate General on the other hand contends that what is being controlled is not drinking water, which is admittedly beyond the powers of the State Government under the Act, but the composite product of bottled drinking water, which is amenable to such regulatory measures.

In the above view of the matter, I am of the opinion that the interim order, as sought for, cannot be granted.

The respondents shall place further pleadings on record, if required. Further steps pursuant to Exhibit P2 shall be subject to the result of the writ petition."

3. The above order was challenged by the petitioner in WP(C) No.29911 of 2019 by filing WA No.2497 of 2019. A Division Bench of this Court refused to entertain the writ appeal. The Division Bench of this Court also observed that it is trite law that

presumption is in favour of the statute or the notification issued. The petitioner in that writ petition was allowed to make a request to this Court for earlier disposal of the writ petition. Subsequently, based on Ext P1 order, Ext P3 order was passed by the first respondent fixing the price of packaged drinking water as Rs.13/-. Aggrieved by Exts P1 and P3, WP(C) Nos.20041 of 2021 and 11247 of 2021 were filed. The counsel for the petitioner prays for an early hearing of the writ petition or to stay Ext P3 order pending disposal of the writ petition.

4. Heard senior counsel Sri.G.Sreekumar as instructed by his retaining counsel in WP(C) No.20041 of 2021. Heard senior counsel Sri.S.Sreekumar as instructed by his retaining counsel in WP(C)No.11247 of 2021. I also heard Adv.Smt.Mary Benjamin for the petitioner in WP(C) No.29911 of 2019. I heard the Government Pleader for the respondents also.

5. The counsel argued the writ petition itself in detail and submitted that Exts P1 and P3 orders are unsustainable and they are liable to be interfered with by this Court invoking the powers

under Article 226 of the Constitution.

6. After hearing both sides, I think the writ petitions itself need not be disposed of at this stage and an interim order can be passed with certain directions to the State and Union Governments.

7. I perused Exts P1 and P3 orders. The intention behind the Government to issue Exts P1 and P3 orders is genuine and perfectly laudable. But whether Exts P1 and P3 will legally sustainable is the question. Ext P1 is a notification issued in exercise of the powers conferred by clause (a) of Section (2) of the Kerala Essential Articles Control Act 1986 declaring bottled drinking water as an essential article for the purpose of the said Act 1986. It will be better to extract Section 3(1) of the Act, 1986.

" 3. Power to control production, supply, distribution, etc., of essential articles.

(1) If the Government are of opinion that it is necessary or expedient so to do for maintaining or increasing the supplies of any essential article or for securing their equitable distribution and availability at fair prices, they may, by notified order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein."

8. The Government can by notification regulate or prohibit the

production, supply, and distribution thereof and trade and commerce therein of any essential articles as per the above provision. The essential article is defined in Section 2(a) of the Act, which is extracted hereunder:

Definitions.- In this Act, unless the context otherwise requires, (a) "essential article" means any article, not being an essential commodity as defined in the Essential Commodities Act, 1955 (Central Act 10 of 1955), which may be declared by the Government by notified order to be an essential article;

9. As per the definition of Kerala Essential Articles Control Act 1986, the essential article means any article, not being an essential commodity as defined in the Essential Commodities Act, 1955 which may be declared by the Government by notified as an essential article. Therefore, it is clear that the essential articles as per the Act 1986 shall not be an essential commodity as defined in the Essential Commodities Act. The object and reason of the Essential Commodities Act 1955 (for short Act 1955) is mainly to check black-marketing, check inflationary trends in price and commodities, and to ensure equitable distribution of essential

commodities. Various orders are issued under the Act, 1955. As per Section 2(A) of the Act, 1955 essential commodity means the commodity specified in the schedule. As per Section 3 of the Act, 1955, the power to control production, supply, distribution of essential commodities are vested with the Central Government and Government to issue orders to provide for regulating or prohibiting the production, supply, and distribution thereof and trade and commerce therein. Even according to the respondent which is clear from paragraph 4 of the order dated 16.11.2019 in WP(C) No.29911 of 2019 (extracted in the earlier paragraph), the State Government has no power to control the price of drinking water. Entry No.3 of the schedule to Essential Commodities Act says "**food stuffs, including edible oilseeds and oils**" as an essential commodity. Therefore the State Government has admittedly no power to regulate the price of drinking water. But the Government says that it is not the drinking water that is regulated but the composite product of bottled drinking water and therefore there is the power to the Government to regulate the price rate of bottled

drinking water as per Act 1986. I cannot agree with the same also for the reasons mentioned in the following paragraphs.

10. Standing Committee of Parliament on Agriculture in its 12th report submitted in April 2005 highlighted the need for legislation on integrated food laws. It was suggested that all Acts and other orders relating to food be subsumed within the proposed integrated food law as multiplicity of food laws, standard setting and enforcement agencies pervading different sectors of food, create confusion in the minds of consumers, traders, manufactures and investors. The Parliament also want to eliminate multilevel and multi-departmental control and consequently the Food Safety Act 2006 came into force (For short Act 2006). The preamble of the Food Safety Act itself says that, it is an Act to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for article of food and to **regulate their manufacture, storage, distribution, sale and import** to ensure availability of safe and wholesome food for human consumption and for matters connected

therewith or incidental thereto. The food is defined under Section 3 (j) of the Act, 2006 which is extracted hereunder.

3. Definitions-

XXX

XXX

XXX

(j) "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 (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;

Section 3(zh) defines package and section 3(zh) is also extracted hereunder:

XXX

XXX

XXX

"package" means a pre-packed box, bottle, casket, tin, barrel, case, pouch, receptacle, sack, bag, wrapper or such other things in which an article of food is packed;"

11. A reading of Section 18 of the Act, 2006 will show the

General principles to be followed in the administration of the Act 2006. Section 97 of the Food Safety Act, 2006 deals with the repeal and savings. Section 97(1) repeals all enactments and orders specified in the Second Schedule of the Act. Serial No.8 of the 2nd Schedule reads as follows:

"8 Any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food."

It will be better to extract Section 97 as such.

" 97. Repeal and savings.-(1) With effect from such date as the Central Government may appoint in this behalf , the enactment and orders specified in the Second Schedule shall stand repealed:

Provided that such repeal shall not affect:-

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or Orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal;

or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and Orders, the licences issued under any such enactment or Order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act. "

12. Section 89 of the Food Safety Act, 2006 deals the overriding effect of this Act over all other food-related law and Section 89 is extracted hereunder.

"89. Overriding effect of this Act over all other food related laws.—The provisions of this Act shall have effect

notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. "

13. Food Safety and Standards Authority of India has issued Food Safety and Standards (Food Products, Standard and Food Additives) Regulations 2011 bringing in various food products under the purview of the aforesaid regulation. "Packaged drinking water" comes under Article 2.10.8 of the said regulation and the copy of the same is produced as Ext P4 in the writ petition. Article 254 of the Constitution of India says that if any provision of a law made by the legislature of a State is repugnant to any provisions of law made by Parliament, which Parliament is competent to enact or to any provisions of an existing law with respect to one of the matters enumerated in the concurrent list, subject to the provisions of clause 2 of the said article, the law made by the Parliament whether passed before or after the law made by the legislature of such State or as the case may be, the existing law shall prevail and the law made by the legislature of the State shall to the extent of repugnancy, be void.

14. From the above discussion it is clear that respondent No.1 lacks jurisdiction in declaring "packaged drinking water" as an essential article under the Kerala Essential Articles Control Act, 1986 in the light of the Food Safety Act 2006. Moreover "food stuff" being scheduled as commodity under the Essential Commodity Act 1955, it is beyond the scope of 'essential articles' as defined under the Kerala Essential Articles Control Act 1986 and therefore Ext P1 notification is also beyond the power of the 1st respondent. In such circumstances, I am of the prima facie opinion that respondent No.1 lacks jurisdiction in declaring packaged drinking water as an essential article based on Ext P1 notification, and consequently, Ext P3 order regulating the price of the packaged drinking water is legally unsustainable.

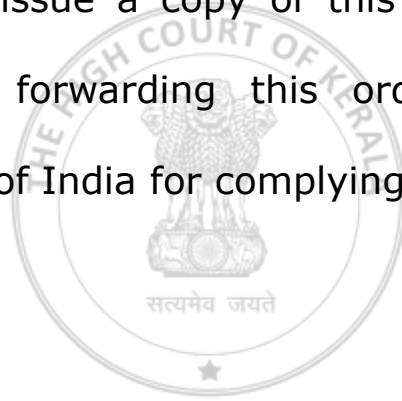
15. While rejecting the interim prayer in WP(C) No.29911 of 2019 on 16.11.2019, this Court specifically stated that Ext P1 shall be subject to the result of the writ petition. After the above order, Ext P3 order came into force. In such circumstances, the counsel for the petitioners insisted for an early hearing of these writ

petitions. I can allow these writ petitions in the light of the above discussion. But I don't want to leave it there. The grievance raised by the Kerala Bottled Water Manufacturing Association is genuine. The packaged drinking water is now sold at different prices at different places. According to me, the State Government should come with a proposal to regulate the same in consultation with the Union of India, the 2nd respondent in WP(C) No.20041 of 2021. According to me, the 2nd respondent should file an affidavit before this Court about the manner in which price of packaged drinking water can be regulated. There can be a direction to the 2nd respondent to file an affidavit within a time frame. Since Exts P1 and P3 are beyond the jurisdiction of the State Government, that is to be stayed. Therefore, the following orders are passed subject to the result of these writ petitions.

1. All further proceedings consequent to Exts P1 and P3 in WP(C) No.20041 of 2021, which is produced in the other writ petitions also are stayed until further orders.

2. The 2nd respondent in WP(C) No.20041 of 2021 (3rd respondent in WP(C) No.29911 of 2019) is directed to file an affidavit in these writ petitions about the manner in which the price of packaged drinking water can be regulated. The above affidavit shall be filed within two months from today.

The registry will issue a copy of this order to the Assistant Solicitor General for forwarding this order to the competent authority of the Union of India for complying the directions.



Sd/-

P.V.KUNHIKRISHNAN, JUDGE

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