



सत्यमेव जयते

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

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

(Thursday, the 28th day of October 2021)

APPEAL No. 217/2018

Appellant

M/s. Hindustan Petroleum
Corporation Ltd.
Elathur
Kozhikode - 673001

By Adv. C B Mukundan

Respondent No.1

The Assistant PF Commissioner
EPFO, Sub Regional Office
Eranhipalam,
Kozhikode – 673 006

Respondent No.2

M/s. P.Achuthan Nair & Company
Adhoc Dealer for HPCL, Puthanathala
P.O.Puthanathala
District – Malappuram – 676505

Respondent No. 3

Sri. Subair, S/o. Mr. Kunhammed
Handling Contractor of
Hindustan Petroleum Autocare Centre
Mavveri House, Paravoor
Kalpakanchery – 676551

By Dr. Abraham P Meachinkara

This case coming up for final hearing on 10/03/2021 and this Tribunal-cum-Labour Court on 28/10/2021 passed the following:

ORDER

Present appeal is filed from order No.KR/KK/17678/Enf.3(2)2016-17/4786 dated 10/11/2016 assessing dues under Section 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') for the period from 10/2003 to 03/2007. Total dues assessed is Rs.83,951/-(Rupees eighty three thousand nine hundred and fifty one only)

2. The appellant is a company registered under Companies Act 1956. The appellant is a Government of India undertaking. The appellant is engaged in refining of imported and indigenous crude oil, storage and marketing petrol, diesel, HSD, LPG, ATF etc. The appellant is providing dealership for marketing their products. Such dealers are independent establishments and they engage their own employees to operate their outlet. The appellant has no control over the affairs of such dealers and employees

engaged by them. There is no master and servant relationship between the appellant and employees engaged by them. The respondent passed an order dated 20.04.2007 under Sec 7A of the Act by determining the provident fund contribution for the period from 10/2003 to 03/2007. The Sec 7A order was sent to Hindustan Petroleum Autocare Centre as well as Hindustan Petroleum Company limited. A copy of the said order is produced and marked as Annexure A2. Sri. Subair who was the first dealer, had taken a Provident Fund number for Hindustan Petroleum Auto Care Centre. Sri. Subair during the 7A enquiry, informed the respondent authority that he remitted contribution from the date of coverage till his contract period, ie; from 29/10/2000 – 10/2003. M/s P. Achuthan Nair and company who is the second respondent, submitted during the course of the enquiry that his establishment is a new one and is not continuation of the erstwhile M/s. Hindustan Petroleum Autocare Centre. The 2nd respondent took over the establishment and started functioning only from 01.05.2003. The 2nd respondent claimed that he is not a successor

or transferee of the said Subair, respondent No 3. M/s P Achuthan Nair and company being aggrieved by the said order preferred an appeal before EPF Appellate Tribunal bearing appeal No. ATA 415(7)2007. The appeal was allowed by the EPF Appellate Tribunal vide order dated 18.01.2011. A copy of the above said order is produced and marked as Annexure A3. The first respondent challenged the order of EPF Appellate Tribunal before the Hon'ble High Court of Kerala in WP(C) No 20501 of 2011. The Hon'ble High Court of Kerala vide its judgement dated 11.02.2016 dismissed the appeal upholding the final order dated 18.01.2011 of the EPF Appellate Tribunal. A true copy of the aforesaid judgement dated 11.02.2016 is produced and marked as Annexure A4. The respondent authority initiated an enquiry under Sec 7A ignoring the earlier decisions of EPF Appellate Tribunal and the Hon'ble High Court of Kerala. A copy of the notice issued under Sec 7A is produced and marked as Annexure A5. A representative of the appellant attended the hearing and submitted a written statement dated 30.08.2016 and 02.09.2016. Copies of the above written statements are

produced and marked as Annexure A6 (colly). The appellant has taken a specific contention in the written statement that the earlier order dated 10.04.2007 by the respondent authority is rejected by the EPF Appellate Tribunal as well as the Hon'ble High Court of Kerala and since the judgement dated 11.02.2016 was not challenged, the order issued by the EPF Appellate Tribunal has attained finality and the same cannot be re-agitated in accordance with the principles of "Res-judicata". It was also contented by the appellant that the appellant is not the principle employer in respect of persons engaged by Adhoc Dealer. The present respondent authority committed contempt of court as well as committed gross mistake for not adhering to the final orders of the Tribunal. The appeal is required to be allowed on the ground of Res-judicata alone. Once a final order has been issued in the appeal for the same establishment and for the same kind of issue a subsequent authority who is confronted with a same or similar issue cannot adjudicate that issue as barred by the principles of Res-judicata. If the respondent was aggrieved with the judgement dated 11.02.2016 passed by the Hon'ble

Single Bench, the appropriate remedy available to him was to challenge the said order before the Division Bench. A PF code number was allotted to M/s. Hindustan Petroleum Auto care Centre. Hence the employer of the said establishment is liable to remit the provident fund contribution. In the impugned order, the respondent authority is trying to fasten the liability on the appellant contenting that the appellant is the principle employer. The appellant is not the principle employer as the dealership agreement was entered between the appellant and concerned dealers on principal to principal basis in accordance with the provisions of the Indian Contract Act 1872. Therefore the Adhoc dealer cannot be treated as a contractor as the appellant has not taken any registration certificate under the provisions of the Contract Labour (R & A) Act 1970. Hence dealers or Adhoc dealers are independent establishments and the employees engaged by the dealers or Adhoc dealers are not the employees of the appellant. The Hon'ble High Court of Punjab and Haryana in **Calcutta Construction Company Vs RPF**, 2015 LLR 1023 held that when a code number is allotted to a contractor of independent

establishment it becomes an establishment under the Act and principle employer is not liable to pay provident fund contribution of his contractor. The respondent authority also wrongly interpreted the Sec 2A of the Act to hold that respondent No. 2 & 3 were departments of the appellant to be covered under Sec 2A of the Act. The impugned order is a non-speaking order since it failed to consider the written statements filed by the appellant at the time of enquiry under Sec 7A.

3. The respondent filed counter denying the above allegations. The appeal is preferred after the expiry of the statutory period of limitation prescribed under Sec (2) of EPF Appellate Tribunal Procedures Rule 1997. The impugned order is issued on 10.11.2016 and the appeal has been filed on 13.01.2017. The appellant commissioned a retail outlet namely Hindustan Petroleum Autocare owned by the company and operated by the contractor. The company entered into an agreement with Sri. M Subair, the 3rd respondent herein for assisting the officials in performing various jobs pending appointment of a regular dealer.

Hindustan Petroleum Autocare is a “company owned and company operated (COCO)” retail outlet. The appellant requested by its letter dated 03.12.2001 to allot a separate code number to the 3rd respondent. The respondent authority therefore allotted code No.KR/KK/17678 w.e.f. 29.10.2000 and intimated to the contractor and Manager (Finance) of the appellant. The 3rd respondent complied with the provision by remitting contribution as well as submitting returns upto 09/2003. The establishment defaulted in payment of contribution from 10/2003 to 03/2007. The appellant vide its letter dated 01.05.2003 intimated that from 05/2003 onwards the retail outlet was handed over to an adhoc dealer M/s P Achuthan Nair and Company, the 2nd respondent. Once the Act is applied to an establishment, it shall continue to apply even if the employment strength goes below 20. The respondent authority therefore assessed the dues as per Annexure A2 order. Though M/s. P Achuthan Nair and company, the 2nd respondent acknowledged the order, he failed to comply with the orders. When recovery steps were taken against the 2nd respondent, he filed appeal

before EPF Appellate Tribunal, New Delhi. The EPF Appellate Tribunal allowed the appeal. The writ petition filed before the Hon'ble High Court of Kerala was also dismissed. Hence a fresh enquiry was initiated against the 3rd respondent and the appellant. The representative of the appellant attended the hearing and filed detailed written statement. The basic contention of the appellant was that the contract between the appellant and M/s Achuthan Nair and company is on a principle to principle basis between the parties to the contract and a dealer cannot be termed as a contractor. The appellant also took a contention that the present proceedings are barred by the principles of "res-judicata" as per Sec 11 of Code of Civil Procedure, 1908. The Hindustan Petroleum Autocare is owned by the company and operated by the contractor. Hence the appellant is the principle employer for all the purposes under the provision of the Act and Schemes. Therefore the claim of the appellant that Hindustan Petroleum Autocare is without any control of the appellant is not correct. As per the terms of agreement signed between the appellant and contractor, it is specifically agreed that in

case the labour contractor fails to submit and or pay full details of his labours employed and contributions payable, the Corporation shall recover from the monthly bills of the labour contractor the amount so short for contribution assessed by the concerned authorities. The amount so recovered shall be paid to the concerned authorities against the actual contributions payable for Employee's State Insurance, Employees Provident Fund etc. Therefore, it is the statutory duty of the appellant to ensure that the contractor is complying with the provisions of the Act and remitting the dues and submitting the returns and in the event of any failure, the appellant shall pay the amounts and recover the amount from the contractor's account. As per Para 30(2) of EPF Scheme, in respect of employees employed by or through a contractor, the employer shall recover the contribution payable by such employees, in this Scheme referred to as the members contribution and shall pay to the principle employer the amount of members contribution so deducted together with an equal contribution and also administrative charges. As per Para 30(3) of EPF Scheme, it shall be the responsibility

of the principle employer to pay both the contribution payable by him and also in respect of the employees directly employed by him and also in respect of employees employed by or through a contractor and also administrative charges. Hence the contention of the appellant that they don't have any control over the affairs of the contractor is not correct. A code number is allotted to the contractor on the request of the appellant vide its letter dated 03.12.2001. The appellant entered into an agreement with the 3rd respondent as labour contractor for assisting the officials in performing various jobs pending solutions and appointment of a regular dealer of the company owned (COCO), company operated retail outlet. The appellant establishment is covered under the provisions of the Act and a code number is allotted to the contractor under Sec 2A on a specific request from the appellant. A copy of the request dated 03.12.2001 is produced and marked as Exbt R1. The provisions of the Act is applied to an establishment and not to the employer or contractor. Change of management or reduction in number of employee or change in the status of employment shall not affect the

continuity of the application of the provisions of the Act and the Schemes framed thereunder. The new contractor or the appellant shall comply with the provisions of the Act. Any person who is responsible for supervision and control of the establishment is the principle employer as per the provisions of the Contract Labour Abolition Act 1970.

4. The appellant herein has challenged the impugned order on various grounds. The first ground pleaded by the appellant is with regard to the principles of res-judicata under Sec 11 of Civil Procedure Code, 1908. According to the learned Counsel for the appellant, the respondent organisation initiated an enquiry under Sec 7A of the Act against the 2nd respondent and issued an order assessing the dues. The 2nd respondent challenged the same before the EPF Appellate Tribunal and the EPF Appellate Tribunal allowed the appeal and set aside the order. The first respondent challenged the said order before the Hon'ble High Court of Kerala and the Hon'ble High Court of Kerala dismissed the writ petition vide judgement dated 11.02.2016. According to the learned Counsel for the appellant, since the 1st

respondent failed to challenge the said order before the Division Bench, the order of the EPF Appellate Tribunal has become final. The present proceedings according to him will operate as res-judicata as the issue in the 2nd round of proceeding has already become final. I am not in a position to agree with the pleadings of the learned Counsel of the appellant. It is seen that Annexure 2 order was issued against M/s. Hindustan Petroleum Autocare Centre deciding the liability of the contractors Sri. Subair and M/s P Achuthan Nair and company. The present proceedings are initiated against the appellant to decide the liability of the appellant to remit the contribution in respect of the employees engaged by the contractors, as the principle employer. Hence the claim of the learned Counsel for the appellant that the present proceedings are barred by the res-judicata under Sec 11 of CPC cannot be accepted.

5. On a perusal of Annexure A2, A3 and A4 orders and judgement pertaining to the first round of litigation, it is seen that the first respondent failed to notice an important factor which decided the liability of parties in the above

proceedings. In Annexure A2 proceedings, the 1st respondent summoned two contractors respondent 2 & 3 in this appeal. In the said order by the 1st respondent that there is a clear finding that Sri. Subair who was the first contractor remitted the contribution fully during his period of contract. The subsequent contract was allotted to the 2nd respondent herein, ie, M/s. Achuthan Nair P and he is liable to remit the contribution from 10/2003 onwards. In spite of this clear finding, the EPF Appellate Tribunal in ATA 415 (7) 2007 in its order dated 18.01.2011, Annexure A3, found that “in this case the claim relates to the period when the unit is under possession of Mr. Subair. The appellant had not taken the unit from him but he had taken the same on lease from Hindustan Petroleum Corporation Ltd. Since the appellant is not the successor of Mr. Subair and as he has not taken the unit from him, he cannot be made liable for the default of Mr. Subair”. This finding of the EPF appellate tribunal goes against the clear finding by the respondent authority in that case, that Mr. Subair remitted the contribution during his contract period. The default was in fact, of that of the 2nd

respondent herein ie, P. Achuthan Nair and Company. The 1st respondent further failed to point out this anomaly in Annexure A2 order of EPF Appellate Tribunal to the Hon'ble High Court of Kerala and the Hon'ble High Court also in the writ petition observed that therefore "the first respondent is not jointly and separately liable for the previous liability of the 2nd respondent". The 1st respondent in the above case being M/s. Achuthan Nair and Company and 2nd respondent being Mr. Subair handling contractor of Hindustan Petroleum Autocare Centre. As rightly pointed out by the learned Counsel for the appellant, since the 1st respondent failed to approach the Division Bench and clarify the above position, the decision of the Hon'ble High Court in W.P.(C)No. 2050/2011 has become final. Hence the first respondent cannot take action against the 2nd respondent herein for the default committed by him during the period of his contract.

6. The 1st respondent therefore initiated the next round of litigation against the appellant holding that the appellant is responsible under the provisions of the Act and Schemes for the default of the contractor engaged by him. The learned

Counsel for the appellant argued that the appellant establishment is not the principle employer of the contractor engaged by them for running the dealership. According to him, the relationship between the appellant and the 2nd respondent is that of principle to principle basis and therefore the appellant establishment cannot be held liable as a principle employer for the provident fund liabilities of the contractor. According to the learned Counsel for the first respondent, the appellant establishment is an establishment covered under the provisions of the Act and exempted under Sec 17 of the Act. The appellant vide Exbt R1 dated 01.12.2001 requested for allotment of EPF number to the contractor. The request of the appellant to the first respondent reads as follows: “this is to inform you that we have commissioned a retail outlet at Puthenathany namely Hindustan Petroleum Autocare Centre, owned by the company and operated by the contractor. All the formalities in connection with EPF are being fulfilled by the contractor **on behalf of the company**. For your ready reference copy of the agreement is enclosed. Kindly allot an account number for

them to effect the contribution for their employees working under the said outlet at Puthenathany". On the basis of the above request, the first respondent allotted a code number to the contractor. Further according to the terms of contract signed between the appellant and the contractor, "In case the labour contractor fails to submit and/or pay full details of his labour employed and the contributions payable, the Corporation shall recover from the monthly bills of the labour contractor the amount of short fall in contribution assessed by the concerned authorities. The amount so recovered shall be paid to the concerned authorities against the actual contribution payable for Employees' State Insurance, Employees Provident Fund etc". Further it is seen that the so called dealership with respondent number 2 and 3 by the appellant is not like ordinary dealership allotted to third parties by the appellant. The dealership involved in this case is a Company Owned Company Operated (COCO) retail outlet. The difference between ordinary dealership and COCO retail outlet is that the complete investment involved in such dealerships are made by the appellant. The property wherein

the establishment is situated is owned by the appellant or leased by the appellant. The equipment's for delivering petrol and diesel and other products are installed by the appellant at their cost and the licence of such dealership is also in the name of the appellant establishment. Considering all the above facts, the appellant cannot disown the liability of the provident fund contribution in case the contractors fail to remit the contribution. In view of the above, the appellant cannot plead that he is not the principle employer in respect of the contract employees engaged by the contractor. Sec 8A of the Act and Para 30 (3) of EPF scheme mandates that the contribution in respect of contract employees engaged by the principle employers can be recovered from the principle employer. The principle employer in turn can recover the amount from the contract amount or from the contractor according to law. The learned Counsel for the appellant also relied on the decision of Hon'ble High Court of Delhi in **All India Petroleum Dealers Association Vs Union of India** W.P.(C) No. 10334/2017 and C.M.No. 27853/2018 to argue that the appellant has no liability to remit the contribution in

respect of the employees engaged by the dealers. The above said writ petitions were filed challenging the Market Discipline Guidelines (MDG) 2012 as amended on 02.10.2017 issued by Oil Marketing Companies. The MDG included various clauses such as hike in wages structure, extension of statutory benefits such as EPF etc. After elaborately considering the various clauses, among other things, the Hon'ble High Court held that retail outlet dealers will not be called upon to pay other benefits like provident fund contribution, ESIC, bonus, earned leave, annual leave and gratuity unless they are required to extend these benefits under relevant statutes. It is pointed out that the above decision only states that the retail outlet dealers cannot be compelled to provide the benefits such as provident fund unless they are required to extend those benefits under the relevant statutes. In this appeal, the issue involve is whether provident fund benefit is required to be extended to the employees engaged by COCO dealers and the liability of the principle employer to remit the same under the provisions of the Act. As already pointed out, the contractor/dealer involved in this case is not a dealer as

involved in the above writ petition, since the sales outlet is owned and operated by the appellant oil company and the responsibility of the contractor is only to purchase and sell the products of the appellant company by engaging their own employees. Hence the above decision is not relevant to the facts and circumstance of this case. In view of the above, I don't find any infirmity in the impugned order issued by the first respondent authority.

7. Considering the facts, circumstances, pleadings and evidences in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-
(V. Vijaya Kumar)
Presiding Officer