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

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

(Friday the 19th day of March, 2021)

Appeal Nos.78/2019(Old No. ATA 101(7)2013)
& 669/2019(Old No. ATA 54 (7) 2014)

Appellant	M/s. Preethy Bharath Gas Agency Kuthiathode, Cherthala, Alappuzha – 688533.
	By M/s. Ashok B Shenoy & P.R Nayak
Respondent	The Assistant PF Commissioner EPFO, Sub Regional Office Kaloor, Kochi – 682017
	By Adv. Sajeev Kumar K.Gopal

This case coming up for hearing on 31/12/2020 and this Industrial Tribunal-cum-Labour Court issued the following order on 19/03/2021.

O R D E R

Appeal No.669/2019 **:** is filed against Order No.KR / KC / 27448 / ENF-2 (1)/ 2012 / 11298 dt. 07/12/2012. 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.

2. ***Appeal No. 78/2019*** **:** is filed against order No. KR/KC/27448/Enf-2 (1) 2013/13273 dt. 25/11/2013 assessing dues U/s 7A of the EPF & MP Act for the period from 02/2010 to 04/2013. Total dues assessed is Rs.7,28,915/-.

3. The appellant is engaged in the business of retail sale of liquified Petroleum Gas to retail consumers, being appointed the Distributor of Bharat Petroleum Corporation Limited. The appellant carries on the business under the name and style of "Preethi Bharat Gas Agency". The appellant does not employ 20 or more employees and has never employed 20 or more employees in any day ever since it started its business. It employs only 15 employees excluding 2 trainees and one Manager who draws monthly wages to the tune of Rs. 10,000/- Even if the 2 trainees and manger are reckoned for the purpose of coverage under the Act, the total number of employees would reach only 18. While so the respondent issued a coverage memo dt.10/05/2011 extending the provisions of the Act to the appellant establishment w.e.f 01/02/2010, on the premise that it employed 22 or more persons on 01/02/2010. A true copy of the communication is produced and marked as Annexure A1.

The respondent erroneously included four head load workers who are being engaged by the transporting contractor under Bharat Petroleum Corporation Ltd, who delivers filled LPG cylinders and take back the empty cylinders from the appellants' godown. These four head load workers are in no way engaged or employed by the appellant. They are not paid any wages or remuneration by the appellant. They are engaged by transporting contractors under BPCL, to deliver the cylinders and take away empty cylinders. It is the responsibility of Bharat Petroleum Corporation as per the Distributorship Agreement signed with the appellant to deliver and take away the cylinder from the appellant's godown. The head load workers are paid by the aforesaid transporting contractors. They are engaged by the aforesaid transporting contractors at their risk and responsibility for discharging contractual obligations, pursuant to the contract they have entered with Bharat Petroleum Corporation Ltd. The transporting contractors are not contractors of the appellant. The appellant on receipt of Annexure A1 coverage memo, sent a detailed representation dt. 25/05/2011 informing the respondent of the legal status of the appellant and the factual status with regard to the number of employees. In response to the communication the respondent

informed that the appellant stood covered w.e.f 01/02/2010, a copy of which is produced and marked as Annexure A3. The appellant again reiterated his stand that the head load workers referred to as handling staff are not working for the appellant and therefore cannot be treated as the employees of the appellant. The reply letter dt. 11/08/2011 is produced and marked as Annexure A4. The respondent issued a notice U/s 7A of the Act for determination of dues for the period from 02/2010. The appellant appeared before the respondent and submitted before the respondent authority that the three head load workers one being security guard, cannot be treated as employees of the appellant for the purpose of coverage under the Act. Ignoring the above contentions the respondent issued the impugned order holding that the appellant is coverable w.e.f 01/02/2010. The engagement of transporting contractor has nothing to do with the appellant establishment which is clear from Annexure A6, appointment letter issued by Bharat Petroleum Corporation. The letter of intend dt. 30/11/2009 issued by Bharat Petroleum Corporation Ltd., to one of their transporting contractors namely M/s. P.R Gas Agencies would also reveal that loading and unloading, as also stacking and destacking at distributor's end is to be done by the transporting

contractor. The true copy of said letter of intent is produced and marked as Annexure A7.

4. The respondent filed counter denying the above allegations. The appellant is a distribution agency which commenced its activities on 01/04/2005. The establishment is covered under the provision of Act w.e.f 01/02/2010. The Enforcement Officer who visited the appellant establishment for the coverage under the provision of the Act, recommended coverage of the appellant on the ground that the appellant engaged 22 persons w.e.f 01/02/2010. The appellant disputed the coverage vide Annexure A2. The Annexure A2 letter was considered by the respondent authority and a reply was given vide Annexure A3. It was clarified to the appellant that one security staff and three handling staff engaged by the appellant in connection with the work of the establishment will also fall within the definition "employee" under EPF and MP Act. However the appellant gave Annexure A4 letter dt. 11/08/2011 stating that the headload workers are not working for the appellant or his distributorship business and they are arranged by the transport contractors of M/s. BPCL. Since the appellant disputed coverage an enquiry U/s 7A of the Act was initiated. A authorized representative of the appellant attended the hearing.

The representative produced a copy of agreement with BPCL, copy of contract (letter of intent) of BPCL issued to P.R Gas Agency as a transport contractor, copies of invoices issued by BPCL, Copy of Income Tax Return, Audited Balance Sheet and Profit and Loss Account and copy of wage register from March 2010 onwards. The authorized representative also pointed out that the three handling staffs namely Shri.Abhilash, Shri.Jayaraj and Shri.Kaviraj are engaged by the BPCL contractor and not part of the business of the appellant. Notice was issued to the Deputy Manager, BPCL to confirm whether the handling staffs are engaged by them and if so, whether they are enrolled to provident fund. The Deputy Manager, BPCL informed that they are not the responsible persons and therefore notice was issued to Deputy General Manager, BPCL to appear as a witness and provide required details. A representative of BPCL attended the enquiry and filed a statement. BPCL was directed to produce a copy of the agreement between BPCL and transport contractor. Notice was also issued to Shri.Sasidharan, Shri. Abhilash, Shri. Jayaraj and Shri. Kaviraj to appear as witness in the enquiry U/s 7A on 07/08/2012. The BPCL produced a copy of agreement executed between BPCL and transport contractor. The representative of the BPCL also

submitted that the three headload workers are engaged by the transport contractor. The headload workers appeared along with a representative of All Kerala Gas Agencies Union and submitted that they were working in the premises of appellant establishment from year 2006 onwards and 2009 onwards they are attending the work of loading and unloading. The headload workers appeared and produced documents in proof of their employment. The representative of the appellant also submitted that even as per the statement they are not employees of the appellant establishment. The respondent authority on the basis of the records documents submitted by the parties during the enquiry came to the conclusion that the handling staffs are engaged by the establishment and they are working in connection with the work of the establishment and therefore, falls under the definition of "employee" as defined U/s 2(f) of the Act. Hence the coverage of the appellant establishment is confirmed as on 01/02/2010. The main contention of the appellant is that the three handling staffs are not engaged by appellant in connection with the work of the appellant establishment. By virtue of Sec 1(3) of EPF and MP Act the Act applies to every factory and establishment employing 20 or more persons. It is not disputed that the appellant is a Trading and

Commercial establishment. As per Sec 2(f) of the Act, an employee is a person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of the establishment, and who gets his wages directly or indirectly from the employer. The legislature used the word "persons", instead of employees in the statute anticipating that an establishment may engage different category of persons and in some cases some persons may not come under the purview of the definition of employee. In the instant case it can be seen that the persons are engaged for handling cylinders in connection with the establishment and therefore considered as part and parcel of the appellant establishment. In ***Royal Talkies, Hyderabad and other Vs Employees State Insurance, (***1978 SCC (4) 204) the Hon'ble High Court held that " the expression "in connection with the work of an establishment" ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of the establishment. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment. The requirement is employment of 20 or more persons irrespective of their wages and therefore even excluded employees are liable to be

considered for reckoning the employment strength of the establishment for coverage under the Act.

5. The respondent issued coverage memo intimating the coverage of the appellant establishment w.e.f 01/02/2010. The appellant disputed the coverage on the ground that the appellant never employed 20 or more person which is a mandatory requirement for coverage under the provision of the Act. In view of the dispute raised by the appellant regarding coverage, the respondent initiated an enquiry U/s 7A of the Act which culminated in the impugned order deciding the applicability. There is no dispute regarding the fact that the appellant is engaging 15 regular employees 2 trainees and one manager who is an excluded employee. Even if all these category of employees also included, the employment strength was only 18. According to the respondent the appellant engaged 3 handling employees who are in fact headload workers and those employees also will have to be considered for the purpose of coverage under the Act. According to the appellant these 3 headload workers cannot be treated as employees of the appellant as they were not engaged by them and they are not working in connection with the appellant establishment. On perusal of the impugned order it is seen that the respondent

authority has exercised all its powers summoned the BPCL, the 3 headload workers and took evidence. The respondent after all the exercise came to the conclusion that the Act stipulates only persons for the purpose of coverage and not employees as defined U/s 2(f) and there all the 3 headload workers are required to be taken as employees and the appellant establishment can be statutorily covered under the provisions of the Act w.e.f 01/02/2010.

6. The facts as set out in the impugned order and also in the pleadings show that the appellant is engaging only 18 employees. These are 3 head load workers. They do loading/ unloading and stacking work in the godown of the appellant. According to BPCL, it is the responsibility of the transport contractor to engage workers to do the loading work and pay them the wages. According to Annexure A6 agreement of distributorship between the appellant and BPCL, BPCL will be arranging deliveries of Bharat Gas at the godown of the appellant by their transport contractors and according to Annexure A7 letter of intent between the transport agency and BPCL the loading/unloading and stacking/de-stacking charges at BPCL plant and at distributors end are included in the rates quoted by the transport contractor. From the above documents

it is clear that the responsibility of delivering, loading and unloading of gas cylinders at the godown of the appellant establishment is responsibility of M/s Bharat Petroleum Corporation and the same is done through the transport contractors and the transport contractors quote the rates of transportation including loading, unloading, stacking and de-stacking charges. The transport contractors engaged headload workers to do the loading and unloading work at the godown of the appellant establishment, and they paid the wages as and when the head load workers are engaged for this work.

7. In the above factual background let us examine the legal position as presented by the learned Counsels for the appellant as well as the respondent. According to the learned Counsel for the appellant as per Sec 1(3) of the Act, the Act applies to an establishment employing 20 or more **persons** and As per Sec 2 (f) of the Act, " Employee" means any person who is employed for wages in any kind of work manual or otherwise in or in connection with the work of an establishment and who get its wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment. According to the learned Counsel, the above statutory provision will

unambuously show that the legislative intention was that if an establishment employs 20 persons in or in connection with the establishment including those persons employed by or through a contractor can be considered for the purpose of coverage under the provision of the Act. The excluded employees can also be considered for the purpose of arriving at the employment strength of 20. The learned Counsel for the appellant on the other hand argued that the 3 headload workers are not engaged by the appellant establishment and they are not working in connection with work of the establishment and their wages are being paid by the transport contractors and therefore the headload workers cannot be treated as employees of the appellant for the purpose of coverage under the provisions of the Act. The learned Counsel for the appellant relied on the decision of the Hon'ble High Court of Kerala in ***Indian Oil Corporation Ltd Vs EPF Appellate Tribunal and Others,*** 2015 KHC 2380. In this case the respondent organization assessed dues in respect of certain employees engaged in the LPG bottling plant for statutory testing of LPG cylinders. The contract was for statutory testing of LPG cylinders and it has got nothing to do with engagement of any workman or employees. The Hon'ble High Court found that the contract between the Indian Oil

Corporation and the third party is not a contract of employment of persons and the contract is for specific statutory testing of LPG cylinders and therefore assessing dues in respect of employees by the contractor will amount to clubbing of the principal employer with the contractor and therefore quashed the assessment made by the respondent organization. In this particular case the factual position is slightly different. There is an agreement for distributorship between the appellant and BPCL and according to the terms of agreement it is the responsibility of M/s. BPCL to deliver the LPG cylinders to the godown of the appellant and take away the empty cylinder. M/s. BPCL in turn engaged a transport contractor. They ensure the delivery and pick up of LPG Cylinders from the godown of the appellant establishment and workers are engaged by the transport contractor and wages are also paid by the transport contractor only. The respondent organization contended that the principal employer will have to ensure contribution under welfare legislation to be paid to the authorities under such legislations. It is argued that the employees of third party doing contractual work cannot be treated as employees of the principal employer and Sec 2 (f) specifically includes only persons employed by or through a contractor. A lot of emphasis

was placed by the learned Counsel for the respondent on the definition of employees under Sec 2(f) of the Act. According to him any person who is employed for wages in any kind of work manual or otherwise in or in connection with the work of an establishment can be treated as an employee even if they are employed through contractor.

8. The learned Counsel for the respondent put lot of emphasis on the phrase "employing 20 or more persons" appearing in Sec 1(3)(b) of the Act to argue that the legislature intended only 20 "persons" working in or in connection with the work of the establishment. Since the legislature refrained from using the word "employee" in Section 1(3)(b), any person who is employed for wages in any kind of work manual or other in or in connection with establishment and who gets its wages directly or directly from the employer shall be considered for the purpose of coverage. In the facts of this case it is to be noted that the transport contractor is not engaged by the appellant and the headload workers are not getting their wages directly or indirectly from the appellant. Hence looked at from any angle it is not legally possible to include the headload workers engaged by the transport contractor engaged by M/s BPCL for the

purpose of coverage of the appellant under the provisions of the Act. Hence appeal No. 669/2019 is allowed.

9. Appeal No. 78/2019 is filed against assessment of dues in respect of the appellant establishment for the period from 02/2010 to 04/2013. It is seen that the respondent during the pendency of appeal No. 669/2019, challenging the coverage of the appellant under the provision of the Act initiated the process for assessing the dues and issued the impugned orders. Since it has already been held that the order confirming the coverage of the appellant w.e.f 01/02/2010 cannot be sustained, the order assessing the dues also cannot be upheld. Hence the assessment of dues for the period from 02/2010 to 04/2013 is also quashed.

10. Hence Appeal No. 669/2019 and appeal 78/2019 are allowed and the impugned orders covering the appellant under the provisions of the Act and the assessment of dues respectively are allowed and the impugned orders are set aside.

11. The respondent is however at liberty to examine whether the appellant establishment is coverable from a subsequent date, if the conditions stipulated as per the provisions of the act are satisfied. The appellant has remitted 40% of the assessed

dues U/s 7(O) as per the direction of EPF Appellate Tribunal. If the respondent finds that the appellant is not coverable from a subsequent date also, the deposit made as per the direction of EPF Appellate Tribunal U/s 7(O) of the Act shall be refunded to the appellant.

Sd/-

(V. Vijaya Kumar)
Presiding Officer