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

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.
(Thursday the 17th day of March, 2022)

APPEAL Nos. 269/2018 (Old No. A/KL-46/2017) &
709/2019 (Old No. 111(7)/2012

Appellant	:	The Kerala State Beverages (Manufacturing & Marketing) Corporation, BEVCO Bhavan, Vikas Bhavan P.O, Palayam, Thiruvananthapuram – 695 033.
		By Adv. Ajith S . Nair
Respondent-1	:	The Regional PF Commissioner EPFO, Regional Officer, Pattom Thiruvananthapuram – 695 004.
		By Adv. Nitha N.S
Respondent-2 (Impleaded)	:	Mrs. Molamma Thomas Puluvicheril Veedu Valanjavattom P.O Thiruvalla.
		By Adv. Jeevan. J. Mathew & Adv. Paulson David Kannampuzha

This case coming up for final hearing on 17/03/2022 and this Tribunal-cum-Labour Court on the same day, passed the following.

O R D E R

This Tribunal vide order dt. 04/10/2021 disposed off the above appeals by a common order. After the receipt of the order the learned Counsel for the respondent brought to the notice of

this Tribunal that there is an error apparent on the face of the record in the order dt. 04/10/2021. It is seen that the dispute involved in the above appeals are regarding the eligibility of the labeling workers and Abkari workers to be enrolled to provident fund. This Tribunal after hearing the Counsels came to the conclusion that the labeling workers are eligible and therefore required to be enrolled to the fund. It was also found that the Abkari workers are also required to be enrolled to the fund but due to the decision of the Hon'ble High Court of Kerala in another matter, it is held that the enrolment of Abkari workers to provident fund can be upheld only after seeking clarification from the Hon'ble High Court of Kerala.

2. In the order dt 04/10/2021 issued by this Tribunal an inadvertent mistake occurred. It is mentioned in the order that "Hence Appeal No 709/2019 is allowed" instead of "Hence appeal No.709/2019 is dismissed." Since it is a genuine mistake that crept into the order, it was decided to issue notice to all the concerned parties U/s 7L (2) of the Act. As per Sec 7L (2) "A Tribunal may at any time within 5 years from the date of its order, with a view to rectify any mistake apparent from the records, amend any order pass by under sub Sec (1) and shall

make such amendment in the order if the mistake is brought to its notice by the parties to the appeal.

Provided that an amendment which has the effect off enhancing the amount from, or otherwise increasing the liability of, the employer shall not be made under the sub section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

Accordingly notices were issued and all the parties entered appearance, heard them and it was decided to correct the error in the operative part of the order.

3. **Appeal No. 269/2018** is filed from order No. KR/10416/Enf-II(2)/2017/40 dt. 04/04/2017 assessing dues U/s 7A of the EPF & MP Act, in respect of contract workers for the period from 04/2011 to 04/2014 and in respect of Abkari workers for the period from 01/2007 to 04/2014. The total dues assessed is Rs.20,26,60,330/-.

4. **Appeal No. 709/2019** is filed from order No. KR/10416/Enf-1(4)/2011/11731 dt. 08/12/2011 assessing dues U/s 7A of the EPF & MP Act (hereinafter referred to as ' the Act') in respect of contract employees for the period from 03/2005 to 03/2011. The total dues assessed is Rs.1,55,56,717/-.

5. Since common issues are raised, both these appeals are heard and disposed of by a common order. In Appeal No. 269/2018 and Appeal No. 709/2019 there is a common issue regarding enrolment of labelling workers. In Appeal No. 269/2018 there is an additional issue regarding the enrolment of Abkari workers to the fund.

6. The appellant is a fully owned government company incorporated under the provisions of Company's Act 1956. The company is engaged in the business of purchase, storage and sale of Indian Made Foreign Liquor (IMFL) in the state of Kerala. The appellant is the only authorized entity to purchase, store and sell IMFL in the state of Kerala as per the Abkari policy of government of Kerala. The appellant is an establishment covered under the provisions of the Act. The appellant is having permanent staff members and employees engaged on deputation from various government departments. As per the provisions of Abkari Act, liquor bottle have to be affixed with security labels. The said labelling work is outsourced to various women associations based on specific agreement. They are being paid compensation on a piece rate basis depending on the total number of bottles labelled by them. The said work is being done within the warehouses of the appellant. An Enforcement Officer of the respondent

conducted an inspection and made a report to the effect that there is a non-enrolment of more than 1000 employees of the company. On the basis of the report, the respondent initiated enquiry U/s 7A of the Act, which culminated in finding that the labelling workers are employees. The respondent also quantified the dues. The respondent again initiated action for assessment of dues for labelling workers and issued an order quantifying the dues. Both these orders were challenged before the EPF Appellate Tribunal, New Delhi and the Tribunal dismissed both the appeals by a common order dt.28.03.2011. The appellant challenged the order passed by the Hon'ble Tribunal before the Hon'ble High Court of Kerala in Writ Petition number 20211/2011 and same is pending consideration of the Hon'ble High Court. While so the Enforcement Officers from the respondent organization conducted inspection of various warehouses of the appellant and filed separate reports with the respondent authority regarding the non-enrolment of contract employees. The respondent authority initiated an enquiry U/s 7A of the Act. According to the respondent the appellant is liable to pay contribution to the labelling workers of the agencies who were undertaking labelling work in the warehouses of the appellant establishment. The appellant requested the respondent to summon those agencies in

the enquiry, on the ground that the records of the employees of the agencies are not maintained by the appellant. The appellant filed a detailed written statement contending that the labelling charges does not constitute wages and that labelling workers are not employees as defined under the provisions of the Act. It was also contended that whether the labelling workers are employees under the Act is required to be decided under Para 26(B) of the EPF Scheme. The appellant also requested the respondent to plead the contractors as party to the proceedings. The respondent issued summons to agencies directing them to produce records and some of the agencies appeared and produced the records. One of the Enforcement Officer who conducted the inspection was examined and an affidavit of the Company Secretary of the appellant was also filed in the enquiry. The Company Secretary was not cross examined by the organization. Without considering the pleadings of the appellant the respondent issued an order dt. 28/10/2011 which is challenged before the EPF Appellate Tribunal in ATA No. 117(7)/2012. The said appeal is now numbered as Appeal No 709/2019 by this Tribunal. The Enforcement Officers of the respondent organization again conducted inspection and reported that the labelling workers were not extended the benefit of provident fund for the period from 04/2011 to 04/2014 and

Abkari workers for the period from 01/2007 to 04/2014. The Enforcement Officer issued a notice to the appellant directing to remit the dues stated in the notice. A copy of the said notice is produced as Annexure A2. The appellant gave a detailed objection. A copy of the reply dt.13/02/2015 is produced and marked as Annexure A3. The respondent authority initiated an enquiry U/s 7A. A copy of the notice dt. 18/02/2015 is produced and marked as Annexure A4. The appellant gave a detailed reply dt. 23/04/2015. A copy of the said reply is produced and marked as Annexure A5. In the enquiry U/s 7A the Enforcement Officer who conducted the inspection along with the Assistant PF Commissioner represented the respondent organization. A copy of the proceedings dt. 29/05/2015 is produced and marked as Annexure A6. The Enforcement Officer filed his reply on Annexure A3 and A5 objections filed by the appellant. A copy of the said objection dt. 20/07/2015 is produced and marked as Annexure A7. The appellant requested for cross examining the Enforcement Officer. The copy of the application dt. 13/08/2015 is produced and marked as Annexure A8. The respondent did not allow cross examination but on the other hand directed the Counsel to file interrogatories. A copy of the proceedings dt.13/08/2015 is produced and marked as Annexure A9. The

appellant filed a statement along with the interrogatories and same is marked as Annexure A10 and Annexure A11. The Enforcement Officer filed his reply which is marked as Annexure A12. The appellant filed proof affidavit before the respondent authority. A copy of the proof affidavit is produced and marked as Annexure A13. The appellant was not cross examined by the representative of the respondent organization. The Assistant PF Commissioner filed a reply to Annexure A13 affidavit which is produced and marked as Annexure A14. The appellant thereafter filed a counter affidavit repudiating the contentions of the Assistant Commissioner. A copy of the counter affidavit is produced and marked as Annexure A15. The respondent authority without considering any of the contentions taken by the appellant issued the impugned order which is produced and marked as Annexure A1. The respondent authority ought to have decided the issue regarding the eligibility of the labelling workers to be enrolled to the fund under Para 26B of the EPF Scheme. He bypassed the legal requirement and directly assessed the dues which is patently illegal. In the Annexure A4 notice itself the respondent has indicated the quantum of dues and he has assessed the same dues in the final order clearly proving non application of mind. The respondent ought to have seen that the agreement

between the appellant and that of the agencies which undertook the labelling work is for doing the work and not for supply of labour. A sample copy of the agreement is produced and marked as Annexure A16. The employees engaged by the agencies cannot be termed as employees of the appellant as defined U/s 2(f) of the Act. The Assistant PF Commissioner, representing the department in the previous enquiry held that the agencies which took the contract work are engaging their own workers and the amount received by the agency is shared by them based on the work done . This is quoted in the order dt. 08/01/2011. A copy of the said order is produced and marked as Annexure A17. Hence there is no employer-employee relationship between the agencies and the persons doing the work for agencies. There is no finding by the respondent authority that the work for agencies are being supervised and controlled by the appellant. The supervision and control is a must to decide the relationship of employer and employee. The decision of the Hon'ble Supreme Court in this regard relied on by the appellant was not at all consider by the respondent authority. The Hon'ble High Court of Kerala in 2015 (1) KLT-SN-44 held that there can be no clubbing of establishments merely because one establishment has been granted a contract by another. The personnel deployed by the

agencies cannot be termed as contract labour so as to come under Sec 2(f). The labelling charges are expenses incurred by the appellant for carrying out the labelling of liquor bottles. The said work is entrusted to various agencies through an agreement on piece rate basis. The said arrangement cannot be termed as engagement of contract labour. The labelling work cannot be termed as the activity of appellant company. In the impugned order it is stated that the Assistant PF Commissioner representing the organization has admitted that the contractors undertaking labelling workers are association of workers and they are working as employees and amount paid by the appellant is being shared among them. Since there is no wage, no contribution can be assessed. However the respondent, in the impugned order assessed contribution on the entire charges paid to the agencies. Even if an assessment is required the same can be done excluding the commission received by the agencies. Even if the liability is to be fastened on the appellant the same can be made only with respect to persons identifiable and those who are employees under the Act. The law in this regard has been settle by the apex court in **Himachal Pradesh State Forest case,** 2000 (2) SCC (L&S) 158.

7. The determination of contribution in respect of Abkari workers is also not legally correct. The Abkari workers are an

imposition on the appellant company based on the directives of the government of Kerala. Hence the terms and conditions of absorption ought to have been examined by the respondent authority. The contribution in respect of Abkari workers are being regularly remitted with Abkari Workers Welfare Fund Board established by government of Kerala as per the provisions of Kerala Abkari Workers Welfare Fund Act. Extending provident fund benefits to these employees will amount to double benefits. The respondent ought to have impleaded Abkari Welfare Fund Board as party to the proceedings. Since the respondent authority has taken a view that the Abkari workers are entitled for provident fund benefits, the contribution so far paid to the welfare fund will have to be directed to be transferred to the respondent organization. The respondent authority cannot compare the benefits under EPF Act and Kerala State Abkari Workers Welfare Fund Act to decide with regard to the applicability of EPF Act. The finding of the respondent with regard to the applicability of Sec 16(1) of the Act is also not correct. Abkari workers are employees engaged in private sector retail liquor shops and they were enjoying the benefits of Abkari Workers Welfare Fund at the time of taking over of the establishments by the appellant. In such circumstances Sec 16 is applicable in view of Sec 16 (1)(c) since

the liquor shops can be established and set up under the provisions of a State Act and whose employees are entitle to the benefit of contributory provident fund in accordance with scheme framed under the Abkari Act. The finding of the respondent regarding the constitutional provision regarding the applicability of State and Central Act are also not correct. The crucial test to be decided is whether the Abkari Act prevails in the state over the Central Act or not. The law made by the Parliament may be having overriding effect subject to the provisions of the Article 254 (2) of the Constitution. The decision relied on by the respondent is with respect to the matters coming under union list. In matters coming under concurrent list, the state is competent to make enactments which will prevail in the state on getting the assent of President of India. The decision relied on by the respondent in arriving at the conclusion with respect of the Abkari workers is not applicable to the facts of the present case. The law has been laid down by the Hon'ble High Court of Kerala in 2016 (4) KHC 412 (DB). The issue decided in this case was with regard to headload workers covered under Headload Workers Welfare Fund Act and it has been held that EPF Act is not applicable to them.

8. The respondent filed counter denying the above allegations. On an inspection by the Enforcement Officer of the respondent it was noticed that the appellant establishment is engaging employees for labelling liquor bottles. The Enforcement Officer also reported that the Abkari workers were also not enrolled for the period from 1/2007 to 4/2014. The Managing Director of the appellant establishment vide his letter dt. 13/02/2015 informed that the appellant establishment is not liable to pay contribution on the expenditure incurred under the head 'labelling charges'. The respondent therefore initiated an enquiry under Section 7A to decide whether the labelling employees are entitled to be enrolled to the fund and if so to assess the dues. The appellant was provided more than adequate opportunities to produce records and make submissions and taking into account all the representation filed by the appellant as well as the respondent organization, the respondent authority issued the impugned order. The appellant has also filed writ petition No. 14248/2017 before the Hon'ble High Court of Kerala. The Hon'ble High Court passed final order dt. 02/05/2017 staying the impugned order subject to deposit of Rs. One Crore. The appellant did not remit the amount as directed by the Hon'ble High Court of Kerala. The work of affixing labels on

the liquor bottles is an integral part of the activity of the establishment and is closely monitored by the appellant. The contention of the appellant that there is no supervision over the activity cannot be accepted since the specification of the labels and their security are ensured by the appellants. The self help groups engaged for this work are only contractors and the persons engaged are contract employees. These contract employees work inside the warehouses of the appellant corporation. The payment made to these workers are only wages and the appellant being the principal employer is required to deduct the provident fund contribution from the payment made to the contractor U/s 8A of the Act. Among the independent agencies, those who are engaged at Kozhikode and Kappinissery warehouses are covered under the Act and their employees are getting the benefits provided under the Schemes. The labelling work is carried out in the excise impound warehouses of the appellant. The labels and liquor bottles are exclusively owned by the appellant and the hologram embossed labels are affixed by the contract employees. It is also an admitted fact that the bottles can be taken out for sale only after affixing the holograms. The appellant also admitted that the labelling charges are paid on piece rate basis. As already stated the labelling work is carried out

in bonded warehouses of the appellant. Only after affixing the stamp of holograms, the liquor bottles can take out for sale, would clearly show that the appellant establishment has control and supervision over the work of the contract employees. One of the Enforcement Officer who conducted the inspection was cross examined by the Company Secretary of the appellant along with his Advocate. All the legal and factual issues raised by the appellant were considered by the respondent authority while issuing the impugned order. Term "employee" defined in sec 2 (f) of the Act does not distinguish between regularly engaged employees or casual employees or even those engaged through a contractor. The labelling workers are working on piece rate basis in connection with the work of the establishment and therefore will fall within the definition of employee. The appellant is keeping separate attendance registers for monitoring the work of employees engaged through contractors. The labelling charges paid are nothing but piece rate wages and workers are the contract workers of the appellant who is liable to pay provident fund contribution as per Sec 8A of the Act. The essential condition for a person to be an employee within the term of Sec 2(f) is that he should be employed for wages in or in connection with the establishment. All the contract workers engaged for labelling of

bottles sold by the appellant corporation fulfil the requirement to be termed as "employee". It is not correct to say that the workers are not identifiable.

9. The Kerala Abkari Workers Welfare Fund Act 1989 is not a substitute for EPF and MP Act which is a Central Legislation. EPF and MP Act extend the benefit of provident fund, pension and insurance which is more beneficial than benefits available under Kerala Abkari Workers Welfare Fund Act. Article 254 of the Constitution of India provides for solving the inconsistency between laws made by Parliament and laws made by the Legislatures of the States. The appellant has no case that Kerala Abkari Workers Welfare Fund Act enacted by the State Legislature has received Presidential assent. It cannot prevail over EPF & MP Act. The appellant has created two categories of the employees one covered under the EPF Act and another one covered under Kerala Abkari Workers Welfare Fund Act. No exemption U/s 17 of the Act has been granted to the appellant establishment allowing them not to enrol the Abkari workers under the provisions of the Act. All the employees of the appellant including casual, contract, regular and Abkari workers are covered under the provisions of the Act and therefore the appellant is liable to remit the contribution in respect of all categories of employees.

10. One of the employees, Smt. Molamma Thomas working with one of the contractors of the appellant filed IA 135/2021 requesting to implead her as a party to the proceedings. After hearing the appellant and the respondent, the impleading petition of Smt. Molamma Thomas was allowed and she was impleaded as 2nd respondent in this proceedings. She filed a statement through affidavit. According to her she was working as a labelling worker in the appellant's warehouse FL No.9, Valanjavattom, Thiruvalla. She was working from 2009 under a contractor namely M/s. Kripa Kudumbashree. She was regularized in the service of the appellant, ie the Kerala State Beverages Corporation along with 36 labelling workers working in FL No.9 warehouse w.e.f 06/07/2018. The appellant Beverages Corporation has regularized the services of labelling workers throughout the State of Kerala. Though she was entitled and eligible to be enrolled to provident fund benefits from February 2009, she was enrolled to EPF Scheme only w.e.f 06/07/2018. The 2nd respondent along with 13 other labelling workers similarly situated approached the Hon'ble High Court of Kerala in W.P(C) No 21817/2017 seeking to enrol to provident fund membership from the first day of their engagement through contractor namely M/s. Kripa Kudumbasree. The Hon'ble High Court of Kerala vide its judgment dt.

03/07/2017 directed the Regional PF Commissioner, the 1st respondent to take a decision in her request within a period of 3 weeks from the date of receipt of a copy of the judgment. In compliance with the directions of the Hon'ble High Court, the 2nd respondent appeared before the 1st respondent, Regional PF Commissioner in the hearing held on 09/08/2017. The 1st respondent informed the 2nd respondent that the 1st respondent has already issued orders directing the appellant to extend benefit of provident fund from the date of their eligibility. The order issued by the 1st respondent is under challenge. The employees or atleast some of them, in a representative capacity or through their trade union ought to have been made a party to the proceedings. In a similar situation the Hon'ble Supreme Court of India in **Fertilizers and Chemical Travancore Ltd Vs Regional Director ESIC**, 2000 (9) SCC 485 held that when an order determining contribution is challenged, principles of natural justice requires that the workman or atleast some of them in a representative capacity or their trade union is required to be necessarily made a party, because the Act is labour legislation made for the benefit of workman. The appellant is the principal employer in respect of employees whose claim is assessed in the order impugned. The appellant has challenged the impugned order as an attempt to

evade the liability cast on the appellant by the impugned order and the appeal is therefore liable to be dismissed.

11. As already pointed out there are two issues involved in these appeals.

1. Whether the labeling workers engaged by the appellant through contractors are entitled to be enrolled to provident fund.

2. Whether the Abkari workers in the roles of the appellant establishment are eligible and required to be enrolled to provident fund.

In Appeal No.709/2019 only the 1st issue regarding the enrollment of the labeling workers are involved whereas in Appeal No. 269/2018 both the above issues are involved.

12. The appellant establishment is engaged in the business of stocking and selling of Indian Made Foreign Liquor. It is a mandatory requirement under the Kerala Abkari Act that the liquor bottles can be taken out and sold only after affixing security hologram stickers on the bottles. Instead of doing the work on their own the appellant outsourced the above work. The Enforcement Officer who conducted inspection of the appellant establishment reported that the labelling workers are not enrolled

to the fund, though they are doing work which is integral to the work of the appellant establishment. If the work is not outsourced the appellant will have to engage its own workers to do the same, as the liquor bottles cannot be taken out of the warehouses unless it is labelled with hologram labelling stickers. The respondent authority therefore directed all the provident fund offices in Kerala to verify the details of the labelling workers engaged by the appellant in the excise bonded warehouses. During the investigation by the Enforcement Officer of the respondent organization it has come out that the appellant establishment is having warehousing units at 20 places all over Kerala. It is further reported that in 19 warehousing units the labelling is going on. It was also reported that in some of these warehouses permanent employees are engaged and therefore they are already enrolled to the fund. In Karikode warehouse, the permanent employees of the appellant are deployed and therefore they are already extended the benefit of provident fund. In Kottarakkara warehouse, the labelling workers are engaged on deputation and they are enrolled to the fund. In Petta, Tripunithura permanent employees are engaged and they were also extended the benefit of provident fund. In Palakkad all the employees were enrolled to provident fund and the employees engaged by M/s A.V Kuttimaluamma

Mahila Samajam Society Kozhikode are also enrolled to provident fund. Hence it is clear from the above that in some of the warehouses, the permanent employees or employees on deputation are doing the work of labelling and they are all enrolled to the benefit of provident fund. However majority of the employees who are doing the labelling work are not extended the benefit of provident fund. The appellant during the course of hearing filed a written statement to the effect that there are 18 warehouses of which labelling is done on contract basis in 13 warehouses. The appellant also provided the list of 13 warehouses. The appellant however took a stand that the details of the wages paid to the employees by the contractors are not available with them. They also produced the labelling agreement with various contractors. Since the appellant failed to produce the details of wages paid to the employees and also the details of employees engaged by the appellant, it was decided to issue notices to 27 contractors of the appellant establishment on the basis of the information furnished by the appellant establishment. Though notice were issued to 27 contractors, only 2 contractors namely M/s. Keerthi Welfare Association, Chirayinkeezhu and M/s. Deenadayal Social Development Society, Thodupuzha entered appearance before the respondent authority. M/s. Keerthy

Welfare Association furnished the details of employees engaged for labelling and also monthwise wages paid to the employees from 04/2005 to 07/2011. They also filed a statement indicating that the entire amount received from the appellant by way of remuneration for labelling work has been distributed among employees as wages. M/s Deenadayal Social Development Society also produced a list of employees and furnished the details of wages paid to them for December 2009 onwards. They also submitted that the employees were also paid bonus @ Rs.12000/- . Since eight notices issued to the contractors were returned "undelivered", the respondent authority decided to give one more opportunity to the contractors and the appellant Corporation was directed to furnish correct address of the contractors and the enquiry was posted on subsequent dates. On the next date of posting M/s Priyanka Women Welfare Society, Alappuzha, M/s Ashritha Mahila Samajam Charitable Society, Nedumangad also attended the hearing. The representative of M/s Priyanka Women Welfare Society submitted that they are engaging 17 employees and they take 3% of the amount received from the appellant Corporation as commission and the rest of the amount is being distributed as wages to the employees, The representative of M/s. Ashritha Mahila Samajam and Charitable Society submitted that

they are engaging 27 employees and the entire payment received from the appellant Corporation is distributed as wages to its employees. Both the representative submitted that they are getting DA and festival allowance during Onam. The details of the proceedings of the respondent authority was discussed in detail only to pointed out that he has issued notice to all the contractors working with the appellant, heard the contractors who entered appearance and took a decision regarding the eligibility. It is also seen that the respondent authority has given copies of the report of Enforcement Officers to the appellant to file their objections. In the subsequent proceedings on the request of the appellant, the appellant was allowed to raise interrogatories to one of the Enforcement Officers. The appellant was, thereafter, given a chance to file his objection on the interrogatories given by the Enforcement Officer. After elaborate proceedings and after giving adequate opportunity to the appellant, the respondent authority in both the proceedings came to the conclusion that the labelling workers are employees as per Sec 2(f) of the Act and the appellant is liable to remit contribution in respect of them and also therefore quantifying the dues in respect of the labelling workers.

As per Sec 2(f) of EPF and MP Act an "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 the establishment and who gets his wages directly or indirectly from the employer and includes any person :

1) Employed by or through a contractor in or in connection with the establishment

2) Engaged as an apprentice, not being an apprentice engaged under the Apprentice Act 1961 (52 of 1961) or under the standing orders of the establishments".

It is clear from the above definition that employee means any person;

a) Employed by a contractor in the establishment;

b) Employed by a contractor in connection with the work of the establishment;

c) Employed through a contractor in the establishment ;

d) Employed through a contractor in connection with the establishment .

If a person falls in any one of the above categories he is treated as an employee in relation to the establishment or in or in connection with work of which he has been employee and any responsible person on the management side such as manager, Managing Director or Managing Agent is treated as his employer. It is clear from the facts as discussed above that the appellant was getting services of more than 1000 persons in their warehouses and were engaged though contractors to gives such services. The warehouses are the work place of the appellant. The appellant cannot claim that he is not in ultimate control of the warehouses. Hence all those persons employed by contractors who worked in various godowns of the appellant are engaged though contractors to render their services in the establishment of the appellant and they are engaged in connection with the work relating to selling of liquor which is its regular course of business. The Hon'ble Supreme Court of India considered the question of contract employees in **M/s P.M Patel and Sons and others Vs Union of India,** 1986 (1) LLJ 88 (SC) and held that not only persons employed directly by the employer but also persons employed through a contractor will come under the definition of the employee under the Act. In the above case, the Hon'ble Supreme Court considered all kinds of contract including the

home workers engaged through contractors and came to the conclusion that they will come within the definition of employees under the Act. The learned Counsel for the appellant argued that the crucial test for deciding whether the contract given by the appellant is contract of service or contract for service can be decided only by applying the test of supervision and control. In this particular case, and from the facts of present appeal, it is clear that the contract labelling workers work from the premises of the appellant establishment. The hologram labels are supplied by the appellant and same is also accounted by the appellant and it is not correct on the part of the appellant to argue that there is no supervision or control by the appellant establishment over the work of the labelling workers. The Hon'ble Supreme Court in **PM Patel's case (supra)** held that "during the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control." In a recent judgment, **The Officer-in-Charge, Sub-Regional Provident Fund Office and Others Vs Godavari Garments Ltd,** Civil Appeal No. 5821/2019 the Hon'ble Supreme Court examined the implication of supervision and held that "However, the term "supervision" is nowhere used in the definition of "**employee"** U/s 2(f) of the EPF Act . The decision in **PM Patel & Sons** (Supra) could not be

used to interpret the word supervision under the Employees State Insurance Corporation Act 1948, because the said word has not been used in Sec 2(f) of the Act". The Hon'ble Supreme Court in **PM Patel and Sons** (supra) also considered the implication of supervision by observing that

> " It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases of the topic. Clearly, not all these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the court can only perform the balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction".

From the above discussions it is clear that the element of supervision and control as claimed by the learned Counsel for the appellant has no much relevance while coming to the definition of

employee U/s 2(f) of the Act. The Hon'ble High Court of Gujarat considered the issue regarding the enrollment of employees engaged by a contractor to provident fund in **Gujarat Civil Supplies Corporation Vs RPFC,** 1999(2) LLJ 844 (Guj). In the above case the facts are almost similar to the present case. Gujarat Civil Supplies Corporation engaged private agents on contract basis at their various godowns in the state for loading and stacking the goods meant for public distribution. The Regional PF Commissioner held that the employees engaged by private agents will also will come within the definition of employee under the Act and therefore the Corporation is liable to pay the contribution in respect of all these employees. The Hon'ble High Court held that " Whatever may have been the doubts about the persons employment through a contractor prior to its amendment by inserting, the words "and includes any person employed by or through contractor in or in connection with the work of the establishment" about the status of a person employed through a contractor and getting his wages directly from him, there cannot be any ambiguity, in the face of Clause (1) of Sec 2 (f) about the status of a person employed by or through a contractor in or in connection with the work of the establishment ". From the above it is very clear that the amendment in the definition of employee

in Sec 2 (f) of the Act by Act 33 of 1988 w.e.f 01/08/1988 has made sea change with regard to the eligibility of contract employees to claim provident fund benefits. Till 1988, ie before the amendment, there were a lot of confusion with regard to a contract employee as to whether the contract is " for service or of service". The above amendment has brought an end to all such confusion making it very clear that any employee working in or in connection with the work of the establishment whether employed by or though a contractor will come within the definition of employee under the provisions of the Act . The expression " in or in connection with the work of the establishment" now in the definition of "employee" under Sec 2 (f) is elaborately explained by the Hon'ble Supreme Court of India in **Royal Talkies and another Vs Employees State Insurance Corporation.** (1978) 4 SCC 204. The Hon'ble Supreme 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. Some nexus must exist between the establishment and the work of the employee, but it may be a loose connection. " In connection with the work of

> the establishment" only postulates some connection between what the employee does and the work of the establishment. He may not do anything directly for the establishment; he may not do anything statutorily obligatory in the establishment; he may not even do anything which in primary or necessary for the survival or the smooth running of the establishment or integral to the adventure. It is enough if the employees does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.

The above law laid down by the Hon'ble Supreme Court is used by the Hon'ble High Court of Delhi in **MMTC Ltd Vs Regional PF Commissioner,** WP(C) No. 2679/1997. In this case the petitioner Corporation is engaged in the business of importing and exporting of metals and minerals and has engaged a transport contractor. The agreement executed between the petitioner and the transporter is on the basis of rates per metric ton and not in terms of manpower used. The Hon'ble High Court of Delhi after considering various judgments of the High Courts and Hon'ble Supreme Court and after applying the test in **Royal Talkies** (supra) held that the petitioner, Corporation is liable to pay provident fund contribution in respect

of the employees engaged by the contractor. The facts of this case are similar to that of the present case. The learned Counsel for the respondent also pointed out that in ID 6/2005, the Court of Industrial Tribunal, Kozhikode has passed an award holding that the labelling agreement between the Contractors and the appellant is sham and the labelling employees are workmen of the appellant and are required to be regularised in the service of the appellant.

13. The learned Counsel for the appellant has taken this Tribunal through number of judgments of various High Courts. In view of the above discussion and the authoritative decision of the Hon'ble Supreme Court, it is clear that all those judgments are distinguishable in the facts and circumstances of this case.

14. The learned Counsel for the appellant also argued that the details of the contract employees and the wages paid to them are not available with them for proper assessment. As already pointed out the respondent authority has done all the possible exercise to ensure that all the contractors submit the details regarding the contract employees. Some of the contractors attended the hearing and submitted the details. It is also seen from the evidence that in many cases the payments received from the appellant establishment is divided among the workers and in some cases the agencies or contractors has taken 3% Commission

from the amount received from the appellant establishment. The respondent authority has based his assessment on the payments released by the appellant to the agencies. Even assuming that a small percentage of the payments received are taken by the agencies as commission, it is not going to make any substantial difference to the assessment and to that extend the respondent organization will be in a position to adjust receipt of contribution from, the appellant establishment. With regard to the identification of the employees it is pointed out by the 2nd respondent, the impleaded party, that all these contract employees were regularized by the appellant with effect from 06/07/2018 and provident fund benefit is being given to them from that date. Hence the issue is only with regard to the retrospective implementation of the provisions of the Act and Schemes from the due date of eligibility of the employees. There is no issue regarding the identification of employees, as claimed by the learned Counsel for the appellant.

15. Before the issue is concluded it is relevant to quote the observation of Hon'ble Supreme Court of India in **Hussainbhai Vs Alath Factory Thozhilali Union** , 1978 KHC 625.

> " Para 5. The true test may, with brevity, be indicated once again. Where a worker or group of workers

labours to produce goods and services and these goods or services are for the business of another, the other is, in fact the employer. He has economic control over the workers subsistence, skill and continued employment. If he, for any reason chokes off, the worker is, virtually laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex-contractu is of no consequence when, on lifting the vail or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in a different perfect paper arrangement, that the real employer is the Management , not the immediate contractor. Myraid devices, half hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislations casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 & 43 A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law " and not to be misled by the maya of legal appearance".

Similar sentiments were expressed by the Hon'ble Supreme Court of India in **Bhilwara Dugdh Utpadak Sahakari S. Ltd Vs Vinod Kumar Sharma,** 2011 KHC 4769 while dealing with contract employees that "globalisation/liberalisation in the name of growth cannot be at the human cost of exploitation of workers."

The law laid down by the Hon'ble Supreme Court of India is squarely applicable to this case. In this case, a profit making public sector undertaking is attempting to deny hundreds of employees engaged by them the minimum social security benefits, in the name of contractulization which cannot be legally permitted.

16. Hence the appellant is liable to enrol the labelling workers to provident fund membership from their date of eligibility.

17. **Issue No. 2**: The appellant establishment is having different categories of employees who were enrolled to the Abkari Workers Welfare Fund. There were around 1072 employees who joined the appellant establishment consequent on abolition of private liquor shops in the state of Kerala. There were another 288 employees who joined the appellant

establishment against the employees who committed suicide due to closure of arrack shops. A third category of employees include 878 temporary employees taken on daily wages before the year 2003. All these employees were members of Abkari Welfare Fund constituted under Abkari Workers Welfare Fund Act 1989. The issue in this appeal is whether these employees are required to be enrolled to the benefits under the PF Act. The learned Counsel for the appellant argued that when these category of employees are getting benefits under a State Act, the respondent cannot insist that they shall be extended the benefits under a central legislation. Extending benefits under the Act would amount to granting double benefits to this category of employees. The learned Counsel for the respondent pointed out that all this category of employees are required to be enrolled under the provisions of EPF & MP Act, since the provisions of the Central Act will prevail in the event of any inconsistency. According to the Counsel for the appellant Abkari Welfare Fund Board is constituted under Kerala Abkari Workers Welfare Fund Act, 1989 and since the Abkari Workers Welfare Fund Act is a State Act it will override the provisions of EPF Act which is a central legislation. Article 254 of the Constitution of India deals with inconsistency

between laws made by Parliament and also laws made by Legislatures of States. " As per Article 254

" If any provisions of law made by the legislature of a State is repugnant to any provisions of law made by the Parliament, which Parliament is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the concurrent list, then, subject to provision to clause 2 , 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 law made by the Legislature of the State shall, to the extent of repugnancy, be void.

2. Where a law made by the Legislature to the State with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect of that matter, then, the law made by the Legislature of such State shall, if it has been reserved for consideration the President and has received his ascend, prevail in that state.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending varying or repeating the law so made by the Legislature of the State. ".

18. The implication of the above provisions were considered by the Hon'ble Supreme Court in **M.P Shikshak Congress and other Vs RPFC,** (1999) 1 SCC 396 and held that "The ordinary rule, therefore, is that when both the State legislature as well as Parliament are competent to enact a law on a given subject, it is a law made by the Parliament which will prevail. The exception which is carved out is under clause (2) of Article 254. Under this Clause(2) where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, then the law so made by the legislature of such State shall, if it has been reserved for consideration of the President or received his assent, prevail in the State". Kerala Abkari Workers Welfare Fund Act 1989, Act 19 of 1989 was passed by the State Legislature in the year 1989. Hence in the event any repugnancy between the Abkari Workers Welfare Fund Act and EPF Act the Abkari Workers Welfare Fund Act shall prevail provided the said

Act is reserved for consideration of President and received his assent. The appellant has no case that the 1989 State Act has received the assent of the President of India and therefore the provisions of the EPF and MP Act will prevail in case of any inconsistency. The respondent authority has elaborately discussed in the impugned order why there is an inconsistency between the Central Act and State Act of 1989. Since the State Act of 1989 has not received the assent of the President of India the provisions of EPF & MP Act 1952 shall prevail. That being so, the claim of the appellant that the provisions of Abkari Workers Welfare Fund Act will prevail over the EPF and MP Act , which is a central legislation is not supported by the constitutional provisions.

In this connection, it is also relevant to examine Sec 16 of EPF and MP Act 1952. As per sec 16 (1), This Act shall not apply

" a).....

b) To any other establishment belonging to or under the control of Central government or a State government and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the central or the state government governing such benefits or

c) To any other establishment set up under any Central, Provincial or State Act whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any Scheme or Rule framed under the Act governing such benefits".

19. "The learned Counsel for the appellant contented that the appellant establishment is entitled to exemption U/s 16 of the Act. The learned Counsel for the respondent pointed out that Sec 16 specifically talk about establishments and not a specific group of employees in an establishment covered under the provisions of the Act. It is seen that Sec 16 enumerates "Acts not to apply to certain **establishments"** . Further in Sec 16 (1)(b) and Sec 16 (1)(c), the provisions are very clear regarding certain **establishments** which are excluded from the provisions of the Act. Hence claim of the Counsel of the appellant that a class of employees can also be consider U/s 16 cannot be accepted. If the appellant wants to claim any exemption for a class of employees the appropriate course open to the appellant is to apply for exemption for a class of employees under Para 27A and 27AA of the EPF Scheme 1952.

20. Hence the Abkari Workers are also entitled to be enrolled to PF membership from their date of entitlement .

21. Having laid down the legal position on the above issue it is relevant to examine certain decisions of the Hon'ble High Court of Kerala pointed out by the learned Counsel for the appellant regarding the extension of the benefits under EPF & MP Act. Government of Kerala vide GO No. (MS) 24 / 2006 / TD dt. 01/03/2006 issued an order allowing the appellant establishment to enroll all the Abkari workers under Kerala Abkari Workers Welfare Fund Scheme and dispensing with contribution to Employees Provident Fund Scheme. This order of government was challenged by certain persons before the Hon'ble High Court of Kerala in W.P.C No. 2887/2007. Some of the employees also approached the Hon'ble High Court of Kerala in W.P.(C) No.21026/2006 for implementation of the government order. A Division Bench of Hon'ble High Court of Kerala considered the above issue and vide its judgment dt. 31/08/2006 upheld the decision of the government to enroll all the Abkari workers under Kerala Abkari Workers Welfare Fund Scheme. After the judgment of the Division Bench, government of Kerala issued a GO (Ms) No. 137/2006 dt. 26/12/2006, withdrawing the earlier instruction issued to enroll all the Abkari workers under the Abkari Workers Welfare Fund Scheme. This government order dt. 26/12/2006 was also challenged before the Hon'ble High Court of Kerala in W.P.C No. 27944/2006, 2887& 318 of 2007. Though the

government and also the Welfare Board took a stand that the earlier decision of government directing the appellant establishment to enroll all the Abkari workers under the Abkari Workers Welfare Fund Board is not correct, the Hon'ble High Court of Kerala held that the Division Bench of the Kerala High Court in earlier Writ Petitions directed the government to implement the first order of the government to enroll the Abkari workers to the Abkari Workers Welfare Fund Board and it amounts to a direction issued under judicial side in the nature of a writ of mandamus and is binding on the authorities to whom such directions are issued. The Hon'ble High Court therefore directed the government to implement the directions in W.P.C No..21026/200 according to which the government and the appellant establishment were forced to enroll all the Abkari workers under the Abkari Workers Welfare Fund Board. This decisions of the Single Bench was challenged before the Division Bench in Writ Appeal No. 2031/2008. The Division Bench dismissed the appeal. The learned Counsel for the appellant further submitted that the affected parties approached the Hon'ble Supreme Court in SLP (civil) 10923/ 2009 and same was also dismissed by the Hon'ble Supreme Court. Hence the direction issued by the Hon'ble High Court of Kerala to enroll all the Abkari workers to Abkari Workers Welfare Fund Board has become final.

22. It is also relevant to point out that EPFO was not a party to the above proceedings and therefore the arguments on the side of the respondent authority was not heard by the Hon'ble High Court before passing the above judgments. However the Hon'ble High Court was aware of the implication of such a decision and therefore held that "the government could issue a statutory notification in terms of Sec 17 of EPF Act exempting Abkari workers from the purview of Employees Provident Fund Scheme to effectively implement the direction to enrol the workers under the Abkari Workers Welfare Fund Act". It is clear from the impugned order that the government nor the appellant has taken any action in the above directions issued by the Hon'ble High Court of Kerala. As rightly pointed out by the respondent authority in the impugned order, the appellant establishment ought to have approached the respondent organization seeking exemption, if they wanted to retain the membership of the Abkari workers with the Abkari Workers Welfare Fund Board. The respondent authority may also approach the Hon'ble High Court of Kerala seeking a clarification regarding the implementation of the provisions of the Act to the Abkari workers in view of the legal provisions explained above. Pending such decision it is not correct on the part of the respondent authority to direct the

appellant to contribute under the EPF & MP Act with regard to the Abkari workers working with the appellant.

23. Considering the facts, Circumstances and pleadings I am inclined to hold that all the labelling workers are required to be enrolled to provident fund and the assessment to that extend is upheld. The assessment of dues in respect of Abkari workers shall be withheld pending any clarification obtained from the Hon'ble High Court of Kerala as directed above.

Hence Appeal No.709/2019 is dismissed. Appeal No.269/2018 is partially allowed. The decision of the respondent authority with regard to the assessment of dues in respect of labelling workers is upheld. The decision in Appeal No. 269/2018 regarding the Abkari workers is modified withholding the assessment pending a final clarification from the Hon'ble High Court of Kerala.

Sd/-
(V. Vijaya Kumar)
Presiding Officer