सत्यमेव जयते

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

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

(Monday the, 14th day of February 2022)

APPEAL No. 242/2019
(Old No. ATA. 1285(7)2015)

Appellant : M/s. Malabar Institute of Medical Sciences Ltd.,
Mini Byepass Road,
Govindapuram.P.O.
Kozhikode – 673 016

By Adv. V.K.Krishna Menon &
Adv. Prinsun Philip

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office,
Eranhipalam.P.O.
Kozhikode – 673 006

By Adv. Abraham P Meachinkara

This case coming up for final hearing on 19.01.2022 and this Tribunal-cum-Labour Court on 14.02.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KK/17623/ENF 1(4)/2015/6880 dated 21.09.2015 assessing dues on non-

enrolled employees under Section 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') for the period from 02/2014 – 06/2015. The total dues assessed is Rs. 29,87,293/-(Rupees Twenty nine lakh eighty seven thousand two hundred and ninety three only)

2. Appellant is a company registered under the companies Act and is running a hospital at Calicut. The appellant is covered under the provisions of the Act. The appellant is paying Provident Fund contribution in respect of all its eligible employees. The appellant has a certified standing orders certified under Industrial Employment (Standing Orders) Act 1946. The standing order provides for apprentices. A true copy of the standing order is produced and marked as Annexure A1. The appellant had engaged trainees by invoking their right under Annexure A1. The remuneration paid to the trainees are only stipend. These trainees are engaged only for one year. Majority of them are Nursing trainees. The provisions of the Act and Schemes are not applicable to trainees. The trainees are not employees as defined under Sec 2(f) of the Act. An Enforcement Officer of the respondent

inspected the appellant establishment and send a copy of the inspection report, a copy of the same is produced and marked as Annexure A2. On the basis of the report of inspection, the respondent initiated an enquiry under Sec 7A of the Act vide notice dated 21.07.2015. A representative of the appellant attended the hearing and submitted that the 314 trainees mentioned in the inspection report are not employees coming under the purview of the Act. The representative also filed a written statement dated 17.08.2015, a copy of which is produced and marked as Annexure A3. After hearing the parties, the respondent issued the impugned order dated 18.09.2015, a copy of which is produced and marked as Annexure A4. The respondent authority is not competent to consider the validity of Annexure A1, standing order. As long as there is a certified standing order the same is binding on the respondent authority. The Hon'ble High Court of Kerala in WP(C) No.10644/2007 held that EPF Act and Schemes are not applicable to trainees. A true copy of the judgement is produced and marked as Annexure A5. Even assuming that Annexure A1, standing order cannot be acted upon, the EPF

Act is not applicable to 340 trainees mentioned in the impugned order. Appellant is a commercial establishment registered under Kerala Shops and Commercial Establishment Act 1960. The appellant is also an establishment coming under payment of Wages Act, 1936. Government of Kerala as per notification dated 07.06.2013 has notified all commercial establishments coming under the Shops Act as establishment under Payment of Wages Act by exercising its powers under Sec 2(ii)(h) of Payment of Wages Act. A copy of the notification dated 07.06.2013 is produced and marked as Annexure A6. A true copy of the registration of the appellant under Shops Act is produced as Annexure A7. The registration is renewed from time to time and the last renewal is produced and marked as Annexure A8. In view of Annexure A6, the appellant is an industrial establishment coming under Sec 2(ii) of Payment of Wages Act and it is also an industrial establishment coming under sec 2(e) of Standing Orders Act. The inclusion of commercial establishments coming under the Shops Act in Sec 2(ii) of the Payment of Wages Act as per Annexure A6 notification will relate back to the date of registration of the

commercial establishment. The finding of the respondent that Annexure A6 notification has not specifically included hospital establishments under the Payment of Wages Act and therefore even after Annexure A6 notification, hospital establishments are not covered under the Standing Orders Act is not legally sustainable. From the explanatory note in Annexure A6 notification, it is clear that the Government of Kerala has decided to include all commercial establishments coming under the Kerala Shops and Commercial Establishment Act 1960 under the Industrial Employee (Standing Orders) Act 1946. The payment given to 314 trainees mentioned in Annexure A4 order is only stipend. Stipend paid is not Basic Wages or Dearness Allowance. Hence the appellant is not liable to pay provident fund contribution on the stipend paid to 314 trainees. The finding of the respondent that the 314 trainees were assigned with specific task and were employed for regular work is unsustainable. They were only given practical training. Therefore merely because the trainees were doing some work and their work was under the supervision will not make them regular employees. The finding of the respondent that there is

no Scheme for the training of trainees is contrary to facts. No trainee out of the 314 trainees were engaged for more than one year as a trainee. Even Government of Kerala accepted the necessity of giving practical training in hospitals and providing stipend during the training period. A true copy of the order dated 04.08.2012 issued by Government of Kerala is produced and marked as Annexure A9. A true copy of the order dated 23.05.2013 issued by Government of Kerala is produced and marked as Annexure A10. The appointment letters issued to some of the trainees are produced and marked as Annexure A11, A12, A13 and A14. The voluntary coverage of trainees under the ESI Act by the appellant will not constitute the employer-employee relationship under the Act. The finding of the respondent that the stipend paid to trainees are wages coming under EPF Act and will attract provident fund is not sustainable in law. The Government has prescribed minimum stipend for trainees in hospitals and also fixed the trainees ratio and the training period. The appellant has engaged trainees only within the ratio fixed by the Government.

3. The respondent filed counter denying the above allegations. During the course of inspection by Enforcement Officer of the respondent, it was found that the appellant establishment was not extending provident fund benefits to large number of employees by labelling them as trainees for the period 02/2014 – 06/2015. An enquiry under Sec 7A of the Act was initiated. The appellant was represented in the enquiry. The representative was heard in detail. The respondent authority after perusing the written statement and also the records, came to the conclusion that all the 314 employees are required to be enrolled to provident fund from the date of eligibility. The appellant is not a training institute. The dominant object of the appellant is not imparting training. All the 314 employees fall within the definition of employees under Sec 2(f) of the Act and are required to be enrolled to the fund. The apprentices or trainees engaged under the certified standing orders are required to be placed under a valid and clear training Scheme. There is no such Scheme in the establishment, the appellant failed to produce the training Schemes inspite of specific directions. The appellant somehow

wanted to deny the legitimate right to the employees for its own advantage. 314 persons employed in the establishment are not trainees or apprentices and they are employed for wages. There is no difference between the trainees and regular employees employed in the establishment. Both are attending regular work in the establishment. Government of Kerala having regard to the nature of establishment and the need for protection of persons employed therein has specified all commercial establishments coming under the Kerala Shops and Commercial Establishments Act as establishments under Payment of Wages Act. Government of Kerala has not specifically included hospitals under the schedule of Payment of Wages Act. The government issued the said notification only to protect the employees employed in such establishments. There is no Scheme framed by the appellant for providing training. The trainees are assigned with specific task and they are working under the supervision. It is very clear that there is no difference between the employees labelled as trainees and regular employees. Both are attending the regular works except that the remuneration of the former is categorised as stipend.

In ***NEPC Textile Ltd Vs RPFC***, 2007 LLR 535, the Hon'ble High Court of Madras held that "person though engaged as apprentice but required to do the regular work of the employees have been rightly held as employee of the mill."

4. The issue involved in this appeal is whether the 314 trainees engaged by the appellant establishment will come within the definition of employees under Sec 2(f) of the Act and whether the appellant is liable to remit contribution in respect of those trainees from their date of eligibility.

5. According to the learned Counsel for the appellant, the appellant establishment is having a certified Standing Order and all these 314 trainees are engaged under the Standing Order and therefore they are excluded from the provisions of the Act. The learned Counsel also pointed out that the Government of Kerala recognised the need for training and therefore issued orders as per Annexure A9 dated 04.08.2012 and 23.05.2013. Further it was pointed out that they engaged trainees only as per the above orders and the number of trainees are restricted to 25% of the total nursing staff.

6. The learned Counsel for the representative pointed out that the standing orders is misutilised by the appellant establishment to engage 314 employees as trainees. According to him, all the so called trainees are being engaged on a regular basis and they are doing the regular work of the establishment. It is also pointed out that the appellant failed to produce any training Scheme or evaluation report of the trainees inspite of specific direction by the respondent authority during the enquiry. He further pointed out that the impugned order would clearly establish the fact that the stipend paid to the employees are not uniform. It varies from Rs.2,516 to Rs.11,630. He further pointed out that the so called trainees in the list from Sl.No. 1 – 35 had already completed one year and still continue to be trainees, denying the claim of the appellant that none of the trainees are retained as trainees beyond one year. The learned Counsel for the respondent further pointed out that on a perusal of the appointment letters produced as Annexure A11 to A14 will clearly show that the trainees are appointed on regular basis. The appointment order clearly indicates that the trainees will have to give one month notice or one month

stipend in lieu of notice if they wish to discontinue the training. It also specifies that the trainees are not allowed to work for any other employer or engage directly or indirectly in any profession or occupation. According to him these are the normal terms of regular appointment and not for trainees. He also pointed out that the stipend as per the appointment order and the stipend actually paid substantially varies, citing the examples at Annexure A11, A12 and A14.

7. According to the learned Counsel for the respondent, the definition of 'employee' as per Sec 2(f) of the Act treats apprentices also as employee, the specific exclusion being the apprentices engaged under the Apprentices Act, 1961 or under the standing orders of the establishment. The Hon'ble High Court of Kerala in ***Indo American Hospital Vs APFC***, W.P.(C) no.16329/2012 vide its judgment dated 13.07.2017 in Para 7 held that

> "It is to be noted that an apprentice would come within the meaning of an employee unless he falls within the meaning of apprentice as referred under the Apprentices Act, 1961 or under the standing order of

> the establishment. If the trainees are apprentices and they can be treated as apprentices under the Apprentices Act or under the standing orders of the establishment, certainly, they could have been excluded but, nothing was placed before the authority to show that they could be treated as apprentices within the meaning of Apprentices Act or under the standing orders of the establishment. Therefore, I do not find any scope for interfering with the impugned order".

Going by the observation of the Hon'ble High Court as reproduced above, the appellant herein also failed to substantiate their claim that the trainees are apprentices engaged under the certified standing orders of the appellant establishment. The appellant only produced a copy of the standing order. The appellant ought to have produced the training scheme, the duration of training, the scope of training, the evaluation of trainees and also the evidence to show that they are appointed as apprentices under the standing orders, before the authority under Sec 7A of the Act. This is

particularly relevant in the facts of the case as the appellant establishment is engaging almost 1/4th of the total employment strength as trainees. As held by the Hon'ble High Court of Delhi in ***Saraswathi Construction Co. Vs CBT***, 2010 LLR 684 it is the responsibility of the employer, being the custodian of records to disprove the claim of the department before the 7A authority.

8. The question whether a nurse who had undergone the prescribed course and had undergone the practical training during their course requires any further training in hospitals was considered by the Hon'ble High Court of Kerala in ***Kerala Private Hospital Association Vs State of Kerala***, W.P.(C) No.2878/2012. The Hon'ble High Court vide its judgment dt.14.03.2019 held that "the decision taken by the private hospital managements to insist one year experience for appointment of staff nurses in private hospitals is against the provisions of the Nurses and Midwifes Act, 1953". In the above case the Hon'ble High Court was examining whether the nurses who completed their course and had undergone training as part of the course are required to be trained as trainee

nurses for one year in private hospitals. The order issued by the Government of Kerala fixing one year training and also fixing the stipend was withdrawn by the Government and it was held to be valid by the Hon'ble High Court. The learned Counsel for the respondent relying on the decision of the High Court of Kerala in ***Cosmopolitan Hospital Pvt. Ltd. Vs T.S. Anilkumar***, WP(C) No. 53906/2005 argued that Industrial Employment (Standing Orders) Act is not applicable to hospitals. He also relied on the decision of the Delhi High Court in ***Indraprastha Medical Corporation Ltd Vs NCT of Delhi and others***, LPA No.311/2011 to argue that industrial standing orders is not applicable to hospitals. However the Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC***, 2018 4 KLT 352 took a contrary view stating that the Industrial Employment (Standing orders) Act is applicable to hospitals. The learned Counsel for the respondent also pointed out that in **Indo American Hospital** case (Supra) the Hon'ble High Court of Kerala refused to interfere with the orders issued by the respondent holding that the trainees will come within the

definition of Sec 2(f) of the Act. According to him, the decision in ***Sivagiri Sree Narayana Medical Mission Hospital*** **(Supra),** has not become final as the writ appeal from the above decision is pending before the Division Bench of the Hon'ble High Court of Kerala. While holding that Industrial Employment (Standing Orders) Act is applicable to the hospitals, the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital (Supra)** also anticipated the risk of allowing establishments and industries to engage apprentices on the basis of standing orders. Considering the possibility of misuse of the provisions the Hon'ble High Court held that

> "of course, there would be many cases, where the employers for the sake of evading the liabilities under various labour welfare legislations, may allege a case which is masquerading as training or apprenticeship, but were infact it is extraction of work from the skilled or unskilled workers, of course the statutory authorities concerned and Courts will then have to lift the veil and examine the situation and find all whether it is a case of

masquerading of training or apprentice or whether it is one in substance one of trainee and apprentice as envisage in the situation mentioned herein above and has dealt within the aforesaid judgment referred to hereinabove".

Apart from the question whether Industrial Employment (Standing Orders) Act is applicable to hospitals, this is a fit case wherein the test given by the Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital (Supra)*** cited above is required to be applied in all fours. Though it is denied by the appellant, there is a clear finding by the respondent authority that the so called trainees are doing the work of regular employees and also they are engaged in night shift also. There is also a clear finding that the so called stipend paid to these trainees are almost same as wages paid to the regular employees. It was also held by the Hon'ble High Court of Kerala that nurses cannot be appointed as nursing trainees after completing their course and prescribed training during their course. As already pointed out it was upto the appellant to produce the documents to

discredit the report of the Enforcement Officers that the trainees are not engaged in the regular work and also that they are only paid stipend and not wages as reported by the squad of Enforcement Officers. The appellant also should have produced the training scheme/schedule, evaluation of trainees and also the duration of training which will clearly indicate whether the trainees are engaged as regular employees. The Hon'ble High Court of Madras in ***MRF Ltd Vs Presiding Officer, EPF Appellate Tribunal***, 2012 LLR 126 (Mad.HC) held that "the authority constituted under the 7A of EPF & MP Act has got power to go behind the terms of appointment and find out whether they were really engaged as apprentices. The authority Under Sec 7A can go behind the term of appointment and come to a conclusion whether the workman are really workmen or apprentices. Merely because the petitioner had labelled them as apprentices and produces the orders of appointment that will not take away the jurisdiction of the authority from piercing the veil and see the true nature of such appointment". The Hon'ble High Court of Madras in the above case also held that though the apprentices appointed under the

Apprentices Act or standing orders are excluded from the purview of the Act they cannot be construed as apprentices, if the major part of the workforce comprised of apprentices. In ***Ramnarayan Mills Ltd Vs EPF Appellate Tribunal***, 2013 LLR 849 (Mad.DB) the Division Bench of the Hon'ble High Court of Madras held that if the apprentices are engaged for doing regular work or production, they will come within the definition of employee under Sec 2(f) of the Act. In another case, the Division Bench of the Hon'ble High Court of Madras in ***NEPC Textile Ltd Vs APFC***, 2007 LLR 535 (Mad) held that the person, though engaged as apprentice but required to do the work of regular employees is to be treated as the employee of the mill. In this particular case the respondent authority has concluded that the so called trainees were actually doing the work of regular employees and hence they cannot claim exclusion under Sec 2(f) of the Act.

9. The appellant relied on the decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC**, AIR 2006 SCC 971to argue that the trainees engaged by the hospital are apprentices

under the Act. In the above case, the establishment is an industry coming under the Industrial Employment (Standing Orders) Act and they were having a training scheme under which 40 trainees are taken every year after notifying in newspapers and after conducting interview regarding suitability of trainees. In the present case as already pointed out the appellant failed to produce any training scheme and also prove that the trainees are actually apprentices and therefore the decision of the Hon'ble Supreme Court in the above case cannot be relied on by the appellant to support its case.

10. The Hon'ble High Court of Kerala in a recent decision dated 04.02.2021 in ***Malabar Medical College Hospital & Research Centre Vs RPFC***, O.P. No.2/2021 considered the above issues in detail. In this case also the issue involved was whether the trainees engaged by a hospital can be treated as employees under Sec 2(f) of the Act. After considering all the relevant provisions the Hon'ble High Court held that

"Para 8. A bare perusal of the above definition makes it clear that apprentice engaged under the

Apprentices Act, 1961 or under the standing orders of the establishment cannot be termed as 'employee' under EPF Act. It is also clear that in the absence of certified standing orders, model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946 hold the field and the model standing orders also contain the provision for engagement of probationer or trainee. However, the burden for establishing the fact that the persons stated to be employees by the Provident Fund organization are infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons".

11. The learned Counsel for the appellant relied on the Annexure A1 standing orders to argue that all the 314 so called trainees are engaged as per the standing orders of the appellant establishment. The question whether Industrial Establishment (Standing Order) Act is applicable to the hospitals is pending adjudication before the Division Bench of the Hon'ble High Court of Kerala. However while deciding that, the Industrial

Establishment (Standing Orders) Act is applicable to hospitals, the Single Bench of the Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC***, 2018 (4) KLT 352, also anticipated the risk of allowing establishments and industries to engage apprentices and evolve the test as discussed above. By applying the above tests to the facts of the present case, it is seen that the number of trainees engaged by the appellant establishment is very high. As pointed out by the learned Counsel for the respondent, the appellant failed to produce any documents to substantiate their claim of the training Scheme or evaluation chart of the trainees. It is also seen that the so called stipend paid to these trainees varies considerably. The appellant could not explain such huge variation in stipend as pointed out by the learned Counsel for the respondent. Though the learned Counsel for the appellant claimed that the trainee nurses are engaged at the ratio indicated in the Government Orders, no such evidence is produced during the proceedings under Sec 7A and also in this appeal. Having taken the stand, it is the responsibility of the appellant to establish beyond any reasonable doubt that the

314 employees engaged by the appellant are trainees and the remuneration paid to them is only stipend. By designating huge number of persons as trainees and their payments as stipends, the appellant cannot escape the liability under the Act as the appellant failed to establish the claim that the so called 314 trainees are engaged under the standing orders of the appellant establishment and they are only undergoing training. This is particularly relevant in view of the clear finding by the respondent authority that the so called trainees are doing the regular work being done by the regular employees and there is no evidence to substantiate any element of training.

12. The learned Counsel for the appellant relied on the Annexure A9 and A10 circulars issued by the Government of Kerala. It is pointed out by the learned Counsel for the respondent that the above circulars were withdrawn by Government of Kerala and the same was challenged before the Hon'ble High Court of Kerala by Kerala Private Hospital Association. In ***Kerala Private Hospital Association Vs State of Kerala***, WP(C) No.2878/2012 the Hon'ble High Court of Kerala while upholding the decision of Government of Kerala

in withdrawing the training Scheme held that "the decision taken by the Private Hospital Managements to insist one year experience for appointment of staff Nurses in Private Hospital is against the provisions of the Nurses and Midwifes Act, 1953". The Hon'ble High Court also found that a trained nurse is undergoing internship during their course itself and there is no need for further training in hospitals. Hence the claim of the learned Counsel for the appellant that these trainee nurses are engaged as per the orders of Government of Kerala cannot be factually sustained.

13. It is a clear case where the benevolent provisions of a statute like Industrial Employment (Standing Orders) Act is being misused by the appellant establishment to the detriment of the employees. The Industrial Establishment (Standing Orders) Act requires the establishment to formally define condition of employment of the employees working under them. The preamble of the Industrial Establishment (Standing Orders) Act makes it clear that it is incumbent upon every employer to define with sufficient precision the conditions of the employment of their workers and make those conditions known

to the workmen employed by them. Only with that object in mind, the legislature thought it fit to enact the Act of 1946. It is only to protect and safeguard the interest of the workers. The appellant establishment is trying to use the provisions of the said Act to claim that substantial number of employees employed by them can be treated as trainees to deny them the minimum social security benefits available to these employees.

14. 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