सत्यमेव जयते

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

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

(Thursday the, 19th day of May 2022)

APPEAL No. 361/2019

Appellant : M/s Jos Electricals Trading Company,
No. 3541, Opposite YMCA,
Jos Trust Building
Cochin – 682 035

By M/s. Menon & Pai

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office,
Kaloor,
Kochi – 682 017

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 16.02.2022 and this Tribunal-cum-Labour Court on 19.05.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KC/1294726/E-Court 75/2018/COCKRKCH 1707/Enf 5(2)/2018/1692 dated 07.11.2018 assessing dues under Sec 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') for period from 04/2003 to

07/2016 and Order No. KR/KCH/1294726/E-Court 129/2019 COCKRKCH 22219/Enf 5(2) 2019/4557 dated 26.07.2019 issued under Sec 7B of the Act. The total dues assessed is Rs.90,66,148/- (Rupees Ninety lakh sixty six thousand one hundred and forty eight only)

2. The appellant is a partnership firm engaged in the wholesale and retail sale of various electrical goods. The appellant started business in the year 1999. During the course of time, the appellant opened two branches, one at Aluva and and another at Muvattupuzha in 2003. The Aluva branch was closed in the year 2003. The employee strength of the appellant establishment exceeded 20 in the year 2012. When the employee strength exceeded 20, the appellant started to comply with ESI Act and the appellant started compliance under the EPF Act from March 2015. Between 2012 and March 2015, all the employees were drawing wages more than Rs.6500/- and were therefore excluded. The statutory wage limit was enhanced to Rs.15,000/- w.e.f September 2014. Therefore the appellant started compliance from September 2014. The Enforcement Officer of the appellant inspected the appellant establishment and informed vide letter

dated 24.04.2015 that the employment strength of the appellant crossed 19 on 02.04.2003. A true copy of the provident fund code number intimation letter dated 24.04.2015 is produced and marked as Annexure A1. The Enforcement Officer did not disclose his source of information. The appellant therefore submitted a letter dated 22.06.2015 stating that the appellant has not made any declaration to the effect that the strength of the employees crossed 19 on 02.04.2003. The appellant further expressed his willingness to pay arrears of contribution from September 2014. A true copy of the said letter is produced and marked as Annexure A2. The appellant wrote two more letters dated 03.08.2015 and 04.09.2015. Copies of which are produced and marked as Annexure A3 and A4 respectively. Whileso, an inspection was conducted at the establishment on 04.04.2017. The appellant was directed to produce documents for the period from 04/2003 – 03/2015. A true copy of the said letter dated 04.04.2017 is produced and marked as Annexure A5. The Enforcement Officer submitted his report dated 04.04.2017 assessing the contribution on the wage limit of Rs.6500/- for the period from 04/2003 – 03/2015. A true copy of the inspection

report dated 04.04.2017 is produced and marked as Annexure A6. The respondent authority initiated an enquiry under Sec 7A of the Act. The appellant participated in the proceedings through his representatives. The appellant produced muster roll for the period from 2003–2004, 2008–2009, 2009–2016 and audited profit & loss A/c and balance sheet for the period 2003–2017. The appellant disputed the finding of the Enforcement Officer that the employment strength exceeded 19 on 02.04.2003. In spite of repeated requests the respondent did not disclose the source of information for covering the appellant establishment from 02.04.2003. Hence the appellant applied under Right to Information Act, 2005. Since the information furnished was found to be incomplete, a second application was filed. The respondent did not disclose the source of information for coverage from 02.04.2003, inspite of the best efforts. The respondent authority passed the impugned order dated 02.11.2018 assessing the dues for the period from 04/2003 – 07/2016. The amount remitted from 03/2015 to 07/2016 was accounted by the respondent in the impugned order. A true copy of the order is produced and marked as Annexure A7. For the period from 04/2003 to

02/2015, the contribution has been determined in respect of 31 employees and their salary was uniformly taken as Rs.6500/- for the entire period. The appellant filed a review application under Sec 7B of the Act. A copy of the review application is produced and marked as Annexure A8. During the hearing of the review petition, the appellant produced the register of wages for the period from 2003 to 2016 which was redeemed from the computer. While going through the wage register, it is clear that the employment strength exceeded 20 only during 2012 and all the employees were drawing a salary exceeding Rs.6500/- and therefore excluded under the provisions of the Scheme. They were covered under the provisions of Act and Scheme from September 2014 when the wage ceiling was enhanced to Rs.15,000/-. A true copy of the extract of the wages and employment strength is produced and marked as Annexure A9. The appellant also filed written statement dated 09.05.2019, a copy of which is produced and marked as Annexure A10. After filing the written submission, the respondent furnished the information sought by the appellant for treating the establishment covered from 04/2003. A true copy of the

information submitted by the respondent is produced and marked as Annexure A11. The source of information was an application submitted by the appellant for allotment of code number on 20.03.2015. The entries in the portal were made by one staff, Sri.Jomon Sebastian. Based on the above information, the appellant filed additional written submission on 18.07.2019. A true copy of the additional written submission is produced and marked as Annexure A12. The appellant contacted Sri.Jomon Sebastian who had already left the service of the appellant establishment and he explained that it was a clerical mistake. The respondent by order dated 25.07.2019 rejected the review application; a copy of the said order is produced and marked as Annexure A13. The respondent failed to consider the various contentions raised by the appellant in the impugned order. The contribution is demanded for 13 years. A claim for contribution dating back to 13 years is state and the respondent should not have proceeded to determine the contribution for such bck period. The 7A order was based on the report of the Enforcement Officer. The report of the Enforcement Officer was relied on without examining him in the enquiry and without giving an opportunity

to the appellant to cross examine him. The list of employees prepared by the Enforcement Officer contained only the name of some employees without relevant details of the employees. The report of the Enforcement Officer ought not have been acted upon for treating the establishment as covered from 04/2003. It cannot be believed that 31 employees continued in the employment of the appellant for the period from 04/2003 to 03/2016 on a fixed salary of Rs.6500/- month. Contributions are payable only on employees who are identifiable. No opportunity was given to the appellant to adduce evidence to show that the strength of employees did not exceed 20 till 2012. From 2012 to September 2014, all the employees were in receipt of salary exceeding Rs.6500/-. In the coverage intimation letter it is stated that the strength of employees crossed 19 on 02.04.2003. It was a mistake that crept in while filling the Form. No prudent employer will give such a declaration knowing fully valid the liability from 02.04.2003 onwards. The calculation of dues is made by the Enforcement Officer based on imaginary figures. No law make it obligatory for the employer to maintain records for 13 long years. The appellant with all bonafides produced the

available records during the 7A and 7B enquiries. If the determination was made based on the actual salary reflected from the audited profit & loss A/c and balance sheet, the amount payable would not have come to the extend demanded. According to the respondent, the proceedings were initiated on a complaint by the employees. He ought to have examined some employees in the enquiry. The respondent ought to have noticed that the appellant started compliance with ESIC Act from 2012 when the employment strength crossed 20.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered w.e.f. 02.04.2003. An enquiry was initiated regarding non enrolment of 22 employees from the date of joining the establishment on the basis of a complaint received from the employees. The appellant is registered under ESIC Act w.e.f. 11.10.2012. The Enforcement Officer visited the establishment to verify the details in respect of 22 employees. In his report dated 22.02.2005, the Enforcement Officer recommended coverage w.e.f. 01.04.2003. On verification of the remittance details, it was seen that the appellant establishment complied for the period 04/2015 to 08/2015. The

appellant vide letter dated 22.06.2015 disputed the applicability w.e.f. 02.04.2003. The Enforcement Officer was further directed to investigate, verify the records and examine the date of applicability of the Act to the appellant. The Enforcement Officer visited the appellant establishment on 26.08.2016 and reported on 31.3.2017 that inspite of repeated reminders the appellant have not submitted the records for inspection. Hence the Enforcement Officer submitted a report taking the maximum wages and on the basis of the available records. An enquiry under Sec 7A was initiated and the appellant was given an opportunity for hearing on 11.04.2018. The matter was heard on 11.04.2018, 07.06.2018, 26.07.2018, 30.08.2018, 27.09.2018, and 25.10.2018. EPF and MP Act applies to every establishment employing 20 or more persons. The claim of the appellant that for the period between 2012 to 2015, all the employees were drawing wages more than Rs.6500/- is not correct. There is no wage criteria for application of the Act to an establishment. The appellant establishment was covered from 02.04.2003 as the employment strength of the appellant establishment crossed 19 as on 02.04.2003. The date of coverage was decided based on the

wage register and attendance register collected from the establishment at the time of inspection. In the second inspection on 26.08.2016, the appellant did not produce any records. Hence the dues were calculated on a statutory limit of Rs.6500/-. Even during the enquiry, the appellant failed to produce any wage register or other records called for. The provisions of the Act comes into operation on its own, when the conditions required for coverage are satisfied by an establishment. The Hon'ble High Court of Kerala in ***Kunhipaly Vs Regional Provident Fund Commissioner,*** 1966 (1) LLJ 642, and in ***Mohanraj Vs Regional Provident Fund Commissioner***, 1987 II LLJ 177 confirmed the same. The appellant establishment started compliance only from 03/2015. During the enquiry the appellant was directed to produce Wage register, Bank statement, Balance sheet, Profit & loss A/c, ledger A/c relating to payment of salary and details of payment of contract staff. None of the above records were submitted by the appellant. The appellant sought details of assessment under RTI Act while filing the appeal before this Tribunal. The written submissions and oral arguments do not substantiate the claim of the appellant. The 7A order is issued on

the basis of the available informations. The list of 31 employees were prepared by the Enforcement Officer from the wage register obtained from the appellant. Since the appellant failed to produce the records, the respondent has no other way to assess the dues than to rely on the report of the Enforcement Officer. The appellant failed to produce any records even during the Sec 7B review though adequate opportunity was given to the appellant establishment. The list of 31 eligible employees is available in the impugned order under Sec 7A of the Act marked as Annexure A1.

4. The appellant filed a rejoinder denying the claims of the respondent. The appellant reiterated its position that all the employees of the appellant were drawing more than Rs.6500/- as wages for the period from 2012 – 2015. The respondent claimed that a complaint was received from 22 employees regarding non-compliance with the provisions of the Act by the appellant. The details of these 22 employees were not mentioned anywhere by the respondent. In reply to Para 5 of the memorandum of appeal, the respondent stated that the coverage was decided based on the wage registers and attendance register collected from the

appellant establishment at the time of inspection which is contradicted by the appellant. According to the respondent, the complaint was from 22 employees but the contribution is demanded for 31 employees. The appellant produced the available records during the review application filed under Sec 7B of the Act which was not considered by the respondent authority. It is clear from the impugned order itself that the quantification of dues is done without proper assessment of dues and on the basis of the report of the Enforcement Officer. At no point of time 31 employees were employed by the appellant. The documents produced in support of the review petition would show that the appellant never employed 20 or more employees during the period from 2003 – 2012. The salary particulars shown in the audited profit & loss A/c would match the salary particulars mentioned in the wage register. The documents produced before the respondent authority during the 7B review hearing would clearly show that the employment strength of the appellant never crossed 20 before 2012 and wage particulars of the employees would show that all the employees were drawing salary beyond Rs.6500/-. The date of applicability was fixed capitalising on the

clerical mistake committed by one of its ex-employees. However the documents produced during the review petition would clearly establish the fact of employment strength and wages paid to the employees. Upto September 2014, all the employees were receiving salary exceeding Rs.6500/-.

5. During the course of hearing, the learned Counsel for the appellant produced three additional documents. The 1st document is a copy of the information dated 20.02.2018 furnished by the respondent organisation to Sri. Tony Thomas in response to RTI application. Another document pertains to an information dated 01.06.2018 furnished by the respondent organisation in response to an application filed under RTI Act. 3rd document is a copy of the order dated 03.07.2019 passed by the appellant authority under RTI Act.

6. The respondent authority covered the appellant establishment on the basis of the data furnished by the appellant on the online portal regarding the employee's details of the appellant that 'the date on which the employment strength of the appellant crossed 19 was 02.04.2003'. According to the learned Counsel for the respondent, they received a complaint from 22

employees of the appellant establishment alleging non-compliance with regard to the extension of social security benefits from due date of eligibility. The respondent got the matter investigated through an Enforcement Officer. In the complaint received, there were list of 23 employees who were not extended the benefits of the Act and Schemes from the date of eligibility. The wages of the employees were also made available along with the complaint. The appellant failed to produce the required information before the Enforcement Officer and the Enforcement Officer proposed the coverage as per the data furnished by the appellant online w.e.f. 02.04.2003 and also gave a provisional assessment taking the statutory limit of Rs.6500/- as salary for all the employees, in the absence of any evidence produced by the appellant. In the enquiry under Sec 7A, the appellant took a stand that the employment strength of the appellant crossed 19 only in 2012 and from 2012 – September 2014 all the employees engaged by the appellant were drawing a salary beyond the statutory limit of Rs.6500/- and therefore all the employees were excluded. The appellant however admitted their liability from September 2014 when the statutory wage limit was enhanced to Rs.15000/-. On a

perusal of the enquiry proceedings under Sec 7A, it is seen that on 07.06.2018 the Advocate appearing for the appellant, before the respondent authority under Sec 7A submitted that the payment to the employees were paid through bank. Therefore, the appellant was directed to produce wage registers, bank statement, balance sheet and profit & loss A/c and details of payment to contract staff on the next date of hearing. On 27.09.2018, the appellant submitted copies of profit & loss A/c and the muster roll and sought time to submit copies of bank statement and details of contract staff and the enquiry was adjourned to 25.10.2018. On 25.10.2018, the Advocate and the Manager who attended the 7A enquiry stated that the wages of the enquiry period were never paid through the bank and the bank statement could not be produced and no further documents were produced in the enquiry. Hence the respondent authority proceeded to assess the dues on the basis of the report of the Enforcement Officer. In the review under Sec 7B of the Act, it is seen that the appellant produced a list of documents along with its enclosures which were taken on record. However the respondent authority found that the date of coverage was decided

on the basis of the information furnished by the appellant. One of the document is the list of 26 employees furnished by the employer in which the date of joining is also mentioned and in the 2nd document, five more employees are shown in the attendance register as on 02.04.2003. However the respondent authority failed to discuss any of the additional documents produced by the appellant during the course of the hearing of the 7B review.

7. In this appeal, learned Senior Counsel Sri.E.K.Nandakumar argued that the proceedings under Sec 7A were conducted in clear violation of the principles of natural justice. He contended that the documents relied on by the respondent authority for covering the appellant establishment from 02/04/2003 was not disclosed to him, in spite of the request made by the appellant during the course of hearing. However the data was subsequently furnished under Right to Information Act. He further argued that the respondent authority relied on report of the Enforcement Officer without examining the Enforcement Officer in the enquiry. He pointed out that he lost the chance of cross examining the Enforcement Officer as to how the Enforcement Officer arrived at the conclusion that the

appellant establishment is coverable w.e.f. 02.04.2003 and also regarding the quantification of dues. The learned Senior Counsel relied on the decision of Hon'ble High Court of Kerala in ***S.A.Cashew Factory Vs EPF Appellate Tribunal and Others,*** W.P.(C)No.5857/2011 wherein the Hon'ble High Court held that the appellant should be afforded an opportunity to cross examine the Enforcement Officer who prepared and submitted the report. He also relied on the decision of Hon'ble High Court of Kerala in ***Jose Mathew Vs Employees Provident Fund Organisation and Another***, W.P.(C)No.32586/2009 wherein the Hon'ble High Court held that the principles of natural justice would necessarily include the right to fair hearing, coupled with the opportunity to confront any official witness with materials which would disprove the conclusion arrived at by such witness. He also relied on the decision of the Hon'ble High Court of Madhya Pradesh in ***Prem Motors Pvt. Ltd Vs Employees Provident Fund Organisation*** in W.P.(C)No.8923/2012 and also the judgment of Hon'ble High Court of Madras in ***Hatsun Agro Products Ltd. Vs. Assistant Provident Fund Commissioner***, 2021 (3) LLJ 495, to drive home his point that the respondent ought to have given the appellant

an opportunity for cross examining the Enforcement Officer. The learned Counsel for the respondent pointed out that the proceedings as reflected under Sec 7A would clearly indicate that the appellant never requested for examining the Enforcement Officer during the course of the proceeding. He further pointed out that in all the decisions cited by the learned Senior Counsel for the appellant, there was a specific request by the employer for examining the Enforcement Officer which was denied by the 7A authority.

8. The learned Senior Counsel for the appellant also pointed out that the assessment of dues is made in respect of the 31 employees whereas the complaint is from 22 employees and one of the list of employees relied on by the respondent authority contains only 26 names and therefore it is clear that there is no proper identification of the employees by the respondent authority. According to the learned Counsel for the respondent, though the names are not included in the impugned order, the 31 employees are clearly identified in view of the documents provided along with the complaints by the employees of the appellant. However it is seen that there is no consistency in the number of

employees taken by the respondent authority. The learned senior Counsel for the appellant relied on the decision of the Hon'ble High Court of Calcutta in ***Solar Paints Pvt. Ltd. and another Vs Regional Provident Fund Commissioner and Other***, 2021 LLR 1022, to argue that the identification of persons means the actual identification of persons with their names, period of engagement and wages they have drawn.

9. The learned senior Counsel for the appellant further argued that the Enforcement Officer and the respondent authority has taken the wages of employees as Rs.6500/- for 13 years while assessing the dues which is unrealistic and is not at all possible. He further pointed out that the wages shown in the Profit & loss A/c tallies with the wage register produced before the Sec 7B authority which ought to have been considered while quantifying the dues and deciding the eligibility of employees to be enrolled. The learned Counsel for the respondent pointed out that the respondent authority was forced to rely on the report of the Enforcement Officer, as the appellant failed to produce any documents before the Sec 7A authority.

10. From the available documents, it is seen that the impugned assessment order under Sec 7A is issued on a presumptive basis assuming that the appellant establishment was employing more than 20 employees as on 02.04.2003 and all the employees were drawing a salary of Rs.6500/- from 02/04/2003 to September 2014. The learned Senior Counsel for the appellant has taken a consistent view that the appellant establishment never employed more than 19 persons till 2012 and from 2012 – 9/2014 all the employees were drawing salary beyond the statutory limit of Rs.6500/-. The impugned order under Sec 7A has not considered the issue and the reasons for accepting 02.04.2003 as a cut-off date for coverage, inspite of the specific objection taken by the appellant establishment is not disclosed. It is true that the appellant furnished the date on which the employment strength crossed 19 as 02.04.2003 in their application for coverage on 24.04.2015. However they disputed the said date vide Annexure A4 representation and the respondent authority ought to have examined the same in the impugned order and arrived at a specific conclusion regarding the date of coverage on the basis of available evidence. As already

pointed out, the appellant failed to produce any document during the course of the 7A enquiry. However the documents produced by the appellant during the course of Sec 7B review is not discussed by the respondent authority in his order. The respondent authority cannot be blamed for not allowing the cross examination of the Enforcement Officer during the course of 7A enquiry, as there was no request from the appellant as it is clear from the proceedings of the enquiry. It is not practically possible to examine the Enforcement Officer in all 7A enquiries when hundreds of Sec 7A enquiries are initiated everyday for default. However if the appellant requests for cross examining the Enforcement Officer, the respondent authority shall provide an opportunity for cross examining the Enforcement Officer. The employees of the appellant establishment are generally identified on the basis of the available records. However the impugned order is completely non-speaking on that issue. The respondent authority shall specify the details in a speaking order as to how the employees are identified for the purpose of enrolment. It is seen that the wage register for the employees for the relevant period was not produced during the enquiry under Sec 7A of the

Act. It is specifically mentioned in the proceedings dated 7.06.2018. The appellant took a plea that the payment of wages of the employees were made through their bank accounts and therefore the appellant was directed to produce the bank statement. However on 25.10.2018, the appellant submitted in the enquiry that wages were not paid through the bank and the bank statement was not produced. Hence it is clear that the wage particulars of the employees for the relevant period was neither produced before the Enforcement Officer nor produced before the respondent authority under Sec 7A. The respondent authority therefore proceeded to assess the dues on the basis of the report of the Enforcement Officer.

11. In view of the above observations, I am of the considered view that the appellant shall be given one more opportunity to produce the relevant records before the respondent authority to finalise the date of coverage as well as the quantification of dues. The appellant shall produce all the relevant records before the respondent authority. The appellant shall be given an opportunity to cross examine the Enforcement Officer if he submits a request for the same. The date of coverage

shall be finalised on the basis of the records produced and available before the respondent authority and the assessment of dues shall be done on the basis of the actual wages paid to the employees during the relevant point of time.

12. Considering the facts, circumstances and pleadings in this appeal, I am not inclined to uphold the impugned order.

Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent authority to re-decide the whole issue after providing an opportunity to the appellant. If the appellant fails to appear or fails to produce the records called for, the respondent is at liberty to decide the matter according to law. The pre-deposit made by the appellant under Sec 7O of the Act as per the direction of this Tribunal shall be adjusted or refunded after finalisation of the enquiry.

Sd/-
(V.Vijaya Kumar)
Presiding Officer