सत्यमेव जयते

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

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

(Tuesday the 12th day of November 2021)

APPEAL No.421/2018
(Old No. ATA 774 (7) 2011)

Appellant : M/s. Sree Gokulam Public School
Parayattukonam P.O.,
Mamom, Attingal
Thiruvananthapuram – 695 104

By Adv. K. Yesodharan

Respondent : The Assistant PF Commissioner
EPFO, Regional Office
Pattom, Trivandrum – 695 004

This case coming up for final hearing on 03.08.2021 and this Tribunal-cum-Labour Court on 12.11.2021 passed the following:

ORDER

Present appeal is filed from order No.KR/16793/ENF.1(4)/ 2011/100 dated 04/04/2011 under Section 7A of EPF and MP Act (hereinafter referred to as 'the Act') assessing dues in respect of non-enrolled employees. Total dues assessed is

Rs. 22,49,852/-(Rupees twenty two lakh forty nine thousand eight hundred and fifty two only).

2. The appellant is a Trust running Educational Institutions. It is covered under the provisions of the Act. On the basis of an inspection conducted by the Enforcement Officer of the respondent organisation on 19.11.2010, it was alleged that 228 employees have been found to be working in the appellant establishment of which 119 were not enrolled to the fund. Accordingly the respondent authority initiated an enquiry under Section 7A of the Act. It was pointed out to the respondent that two of the employees left service, six are excluded employees and three security guards are deployed from Sree Gokulam Security Services and out of the remaining 108, 56 employees were covered under the provisions of the Act from 11/2010. The enrolment of 52 employees were disputed by the appellant. It was pointed out to the respondent authority that these employees were not identified. The respondent authority ought to have conducted an enquiry under Para 26B to decide the eligibility of these employees to be enrolled to the fund. In the 7A order, the dues in respect of 144 employees

have been wrongly assessed. The Enforcement Officer also alleged evasion of wages to avoid provident fund contribution. According to him, the salary is split into various allowances and provident fund is being paid only on Basic pay and DA. It was brought to the notice of the respondent authority that there are three components which constitute the wage structure of the appellant establishment. Provident fund contribution is being paid on Basic + DA which constitute more than 70% of the total wages. The appellant is paying HRA and washing allowance. Washing allowance is Rs. 50/- to 100/- for wearing the overcoat in the school. There was a shift of columns of HRA and washing allowance which is taken as evasion of wages. HRA does not come under the purview of basic wages as the same is specifically excluded. During the course of 7A, the respondent authority directed the appellant to file an affidavit to the effect that there is a shiftof column between HRA and washing allowance. The affidavit was rejected on the plea that this was not signed by the Chairman of the trust. In fact the affidavit was signed by the authorised representative of the Chairman. A copy of the inspection report, the list of employees not

enrolled and other documents based on which the assessment was proposed to be made was not furnished to the appellant. The appellant filed an application for review under Section 7B of the Act. Only a single issue of splitting of wages was taken up in the review application. The appellant produced an affidavit signed by the Chairman along with the application for review. This was accepted on 05.07.2011 and the appellant was advised to file any trust resolution on the wage structure of the employees of the school. On 25.07.2011, the minutes of the trust meeting held on 29.06.2007 was also filed. But the respondent authority did not consider the new documents produced by the appellant while rejecting the Sec 7B review application. As already pointed out, the question of eligibility of the employees to be enrolled ought to have been decided under Para 26B of the Act. None of the alleged employees were heard under Para 26B inspite of specific request by the appellant. The Enforcement Officer who conducted the inspection of the appellant establishment ought to have been made available for cross examination by the appellant.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act. An Enforcement Officer who inspected the appellant establishment reported that the appellant establishment has not enrolled 144 employees and the appellant is also resorting to splitting up of wages, thereby denying the statutory benefits to the appellant establishment. The respondent therefore initiated an enquiry under Section 7A of the Act, by issuing notice dated 26.11.2010 and fixing the enquiry on 21.12.2010. The enquiry was held on 21.12.2010, 19.01.2011 and on 17.02.2011. The appellant was represented in the proceedings. A copy of the report of the Enforcement Officer was made available to the appellant with a direction to file objection, if any. As per the report of the Enforcement Officer there were 144 employees who were not enrolled to provident fund but salary was duly paid by the appellant. This was evident from the salary statement for the period from 12/2008 – 10/2010the appellant did not dispute the correctness of the salary statement. All categories of employees working directly or indirectly with the appellant establishment

including contract employees come under the definition of employees under Sec 2(f) of the Act. In this case, all the 144 non-enrolled employees received their wages/salaries directly from the appellant. This fact was not disputed by the appellant during the course of hearing. The respondent assessed the statutory dues purely based on the salary record of the establishment for the period from 12/2008 – 10/2010. The Enforcement Officer also reported that there is evasion of dues by excluding certain allowances. The appellant had taken only the basic for calculation of whereas basic wages includes all emoluments and all allowances, except HRA. During the course of enquiry, the appellant was provided a copy of the report of the Enforcement Officer along with a list of non-enrolled employees. As per 2(f) of the Act, the term "employee" includes all the employees engaged in or in connection with the work of the establishment. Since the names of all the non-enrolled employees were reflected in the salary records submitted by the appellants and since there was no denial by the appellant, there is no basis in the claim of the appellant that the employees are not identified and no enquiry is

conducted under Para 26B of EPF Scheme. With regard to three security guards, the appellant was directed to produce evidence to show that the Provident Fund contribution in respect of them had already been remitted by M/s.Sree Gokulam Security Service. It is seen from the records that the salary of the security guards were paid directly by the appellant and the appellant is liable to remit the contribution. However as per the impugned order, it is made clear that if the appellant is able to produce evidence of remittance of provident fund in respect of these security personnel's they will be exempted from remittance of contribution. All the points raised by the appellant before the respondent authority were considered in the impugned order itself. The appellant was given adequate opportunity at the time of hearing of review petition under Sec 7B of the Act. The order issued under Sec 7B is also a speaking order considering all the relevant issues raised by the appellant. In ***Regional Provident Fund Commissioner (II), West Bengal Vs Vivekananda Vidyamandir and others*** 2019 LLR 339, the Hon'ble Supreme Court held that all allowances

will form part of basic wages for EPF contributionsby applying the test of universality of allowances paid to its employees.

4. The learned Counsel for the respondent raised a preliminary issue of limitation. According to the learned Counsel for the respondent, as per Rule 10 of Employees Provident Fund Appellate Tribunal (Procedure) Rules 1997, an appeal shall be based on a single cause of action and appellant may seek one or more relief provided they are consequential to one another. According to him, orders issued under Sec 7A and 7B are distinct, independent and cannot be challenged in one appeal. The respondent also pointed out that the order issued under Sec 7A cannot be appealed since it is filed after a limitation period of 120 days. After elaborate hearing, vide order dated 28.04.2021, this Tribunal held that a combined reading of Sec 7I and Sec 7B(5) it is clear that no appeal can be preferred against an order dismissing a review application under Sec 7B. However for the purpose of limitation, the date of rejection of 7B review will be considered. If we don't consider the merger of the order under Sec 7B with the order of Sec 7A, the delay in disposing a review application under Sec 7B of the

Act will deny an opportunity to the appellant to file an appeal under Sec 7I of the Act. Even otherwise it will lead to multiplicity of proceedings. The learned Counsel for the appellant also pointed out that the Hon'ble EPF Appellate Tribunal, New Delhi considered the issue of limitation while admitting the appeal vide order dated 06.01.2012. After hearing both the sides, EPF Appellate Tribunal, New Delhi condoned the delay and admitted the appeal subject to a pre-deposit of 50% of the assessed dues. Taking into account all the legal and factual position, this Tribunal decided the preliminary objection in favour of the appellant.

5. The learned Counsel for the appellant argued that the report of the Enforcement Officer pointed out non-enrolment of 119 employees only however the respondent authority assessed dues in respect of 144 non-enrolled employees. According to him, there is inconsistency in the number of employees to be enrolled to the fund. On a perusal of the impugned order, it is seen that the respondent authority has relied on the salary statements of the appellant for the period from 12/2008 – 10/2010 to arrive at the number

of non-enrolled employees. The impugned order contains the details of all those category of employees who were not enrolled to the fund. As per the order, there were 149 employees who were not enrolled to the fund. Five are excluded employees because their salary was beyond Rs.6500/- and therefore he arrived at 144 employees as non-enrolled from the record of the appellant itself. The fact that there is variation in the number of employees could clearly show that the respondent authority has applied his mind, verified the records available before him and came to the conclusion that 144 employees were not enrolled to the fund. The appellant never disputed the correctness of the salary statement available to the respondent authority. Therefore the variation in numbers of non-enrolled employees as reported by the Enforcement Officer and in the impugned order cannot be taken as a ground for challenging the correctness of the impugned order. The learned Counsel for the appellant also pointed out that the eligibility of the non-enrolled employees to be enrolled to the fund ought to have been decided in an enquiry under Para 26B of EPF Scheme. It is pointed out that Para 26B does not contemplate an enquiry

when there is a dispute of non-enrolment between the employer and the respondent organisations. Para 26B enquiry is required to be conducted when there is a disputed regarding the eligibility to be enrolled between the employer and the employees and the decision of the Regional Provident Fund Commissioner is final. The Hon'ble High Court of Delhi in ***Glamour Vs RPFC, 1975 1 LLJ 514 (Del)*** held that "I have taken a view that the contention of the petitioner raises a controversy which constitute a jurisdictional fact for determining the amount due from the employer and so it falls within the ambit of Sec 7A of the Act. In this view of the matter, it is not necessary to determine the scope of paragraph 26B of the Scheme finally. As at present adviced, it appears to me that the controversy envisaged by this paragraph relates to a dispute between the employer and employee and in respect of particular employees to an establishment, which is admittedly governed by the Scheme or the Act. This paragraph has no reference to dispute arising between the Provident Fund Commissioner and the employer with regard to the direction of the Commissioner to the employer to pay the amount due

under the Act. This view also finds support from the fact that under Sec 7A there is no express provision for hearing an employee, (although there is no bar to the authorities hearing the employees) still an express provision is only for affording an opportunity to the employer. On the other hand in Para 26B, the dispute is to be resolved after hearing both the employer and employees. The Act further records finality to the decision under Sec 7A of the Act but no such provision is found under Sec 26B". The appellant is the custodian of all the records. If he is serious about the numbers, the appellant ought to have produced the records before the respondent authority and challenged the number of employees non-enrolled by him during the course of Sec 7A or 7B enquiry. Having failed to do so, the appellant cannot dispute the same in this appeal. Further it is seen that in the review petition filed under Sec 7B of the Act, the appellant not at all challenged the non-enrolment of the employees and specifically the number of non-enrolled employees. As per the impugned order, the respondent is having the details of non-enrolled employees such as their names, date of joining, wages paid etc and the appellant can

dispute the number of non- enrolled employees only with documents maintained by them. The challenge with regard to the non-enrolled employees on the basis of the report of the Enforcement Officer and the impugned order cannot be sustained.

6. The learned Counsel for the appellant also raised a dispute regarding the assessment of dues on evaded wages. According to him, contribution is being paid on 70% of the total wages paid to the employees. The rest of the wages include washing allowance and house rent allowance. The learned Counsel for the appellant pointed out that there was a mistake in columns while entering these allowances. The appellant is paying an amount of Rs. 50 – 100 to the teaching staff as washing allowance as the teachers are required to wear an overcoat as part of their dress code. The learned Counsel also pointed out that the column “allowance” is actually HRA and this shift of column of washing allowance and HRA has lead to a wrong assessment of dues on evaded wages. According to the learned Counsel for the respondent, if change of column is a mistake, the same cannot happen for all the months. It is seen

that the appellant during the course of enquiry, produced an affidavit clarifying the shift in columns and also confirming that the amount ofRs.100/- shown as HRA is in fact washing allowance which was inadvertently mentioned as HRA due to shift of columns. Further the appellant also produced a copy of the Board meetingresolutions dated 29.06.2007 wherein the wage structure of the employees of the school was decided. The respondent authority ought to have considered those evidences while assessing the quantum of dues on evaded wages. The learned Counsel for the respondent pointed out that there was some further change in the structure of wages paid to its employees' w.e.f. 10/2010. However it is seen that the present assessment is only upto the period of 10/2010. If there is any further change in the wage structure, the respondent authority may examine the same and decide whether there is any subterfuge to avoid Provident Fund contribution after 10/2010. However the present assessment of dues on evaded wages cannot be sustained.

7. Considering the facts, circumstances, pleadings and evidences in this appeal, the assessment with regard to 144

non-enrolled employees is legally and factually correct. The assessment of dues in respect of evaded wages cannot be sustained in view of the above observations.

8. Hence the appeal is partially allowed. The assessment of dues in respect of 144 non-enrolled employees is upheld. The assessment of dues in respect of evaded wages is not correct and therefore disallowed.

Sd/-
(V. Vijaya Kumar)
Presiding Officer