सत्यमेव जयते

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TR0IBUNAL-CUM-LABOUR COURT, ERNAKULAM

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

(Monday the, 14th day of February 2022)

APPEAL No.450/2019
(Old No. ATA 185(7)2016)

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

By Adv. Prinsun Philip

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office,
Eranhipalam.P.O.
Calicut – 673 016

By Adv.(Dr)Abraham P Meachinkara

This case coming up for final hearing on 19.01.22 and this Tribunal-cum-Labour Court on 14.02.2022 passed the following:

ORDER

Present Appeal is filed from order No.KR/KK/23662/Enf. 3(4)/2016/9628 dated 14.01.2016 assessing dues under Sec 7A of EPF and MP Act (hereinafter referred to as 'the Act') for non-enrolled employees for the period from 07/2013 to 09/2015. The

total dues assessed is Rs. 23,56,698/- (Rupees twenty three lakh fifty six thousand six hundred and ninety eight only).

2. Appellant is a company registered under the Companies Act and having a unit at Kottakkal, apart from main hospital at Calicut. The Kottakkal unit of the appellant started in the year 2009 and is regular in compliance with respect to its eligible employees. The appellant has a certified standing order certified under the Industrial Employment (Standing Orders) Act 1946. The standing order specifically provides for apprentices. According to the definition, an apprentice is a learner who is paid an allowance during the period of his training. A true copy of the standing orders of the appellant is produced and marked as Annexure A1. The appellant engaged trainees by invoking their right under Annexure A1 and the engagement orders of trainees specifies that they are only trainees and the amount paid are only stipend. These trainees are not employees coming under the definition of employees under Sec 2(f) of the Act and these trainees are excluded. An Enforcement Officer of the respondent organisation conducted an inspection. The Enforcement Officer didn't give any inspection report. The respondent thereafter initiated an enquiry under Sec 7A of the Act vide its notice dated

01.12.2015. A representative of the appellant attended the hearing and pleaded that the trainees are not employees and amounts paid to them are only stipend. After hearing the parties, the respondent issued the impugned order dated 14.01.2016 holding that the 56 persons mentioned in Annexure 1 are employees coming within the ambit of definition of employees as provided under Sec 2(f) of the Act. A copy of the said order is produced and marked as Annexure A2. The true copies of the offer letters issued to 56 trainees are produced and marked as Annexure A3 to Annexure A58. The respondent authority has gone wrong in considering the validity of Annexure A1 certified standing order. The finding of the respondent authority that in view of judgement of the Hon'ble High Court of Kerala in WP(C) No. 53906/2005, the standing order is not applicable to hospitals is unsustainable. The Hon'ble High Court of Kerala in its judgement in WP(C) No.10644/2007 has held that the Act and the Schemes are not applicable to trainees. A true copy of the judgement of Hon'ble High Court of Kerala in WP(C) No.10644/2007 is produced and marked as Annexure A59. Even assuming that Annexure A1, standing order cannot be acted upon, still the Act is not applicable to trainees mentioned in

Annexure A2. The hospital of the appellant at Kottakkal is a commercial establishment registered under the Kerala Shops and Commercial Establishment Act 1960. The appellant establishment is also an establishments coming under the Payment of Wages Act. Government of Kerala as per notification dated 07.06.2013 has notified all commercial establishments coming under the Shops Act under the Payment of Wages Act 1936, by exercising its powers under Sec 2(ii)(h)of the Payment of Wages Act. A true copy of the notification dated 07.06.2013 issued by Government of Kerala is produced and marked as Annexure A60. A true copy of the certificate, registering the appellant unit as a commercial establishment under the Shops Act on 05.08.2009 is produced and marked as Annexure A61. The registration under Shops Act is renewed and a true copy of the latest registration certificate is produced and marked as Annexure A62. In view of Annexure A60 notification, appellant hospital at Kottakkal is an industrial establishment coming under sec 2(ii) of Payment of Wages Act and also an industrial establishment coming under 2(e) of Standing Orders Act. Therefore, in view of Sec 12(A) of the Standing Orders Act, model standing orders will be applicable to appellant hospital. The

inclusion of commercial establishments coming under the Shops Act in Sec 2(ii) of Payment of Wages Act as per Annexure A60 notification will relate back to the date of registration of the commercial establishment and those commercial establishment will become industrial establishment under the standing orders Act from the date of its registration under the Shops Act. The finding of the respondent authority that Annexure A60 notification has not specifically included hospital establishment under the payment of wages Act and therefore even after Annexure A60 notification, hospital establishments are not covered under standing orders Act is not legally sustainable. It is not necessary to specifically mention hospital establishment in Annexure A60 notification as held by the respondent. From the explanatory note to Annexure A60 notification, it is clear that Government of Kerala has decided to include all commercial establishments coming under Kerala Shops and Commercial Establishments Act 1960 under the Industrial Employees (Standing Orders) Act 1946. The payments made to the trainees are only stipend and therefore it will not come within the definition of basic wages and therefore will not attract provident fund deduction. The finding of the respondent that the trainees

are assigned specific task and are employed for regular work and treated at par with the regular employees is not correct. The finding of the respondent that there is no scheme of training is also contrary to facts. None of the trainees are engaged for more than one year. Even the Government of Kerala has accepted the necessity of giving practical training in hospitals and providing stipend to the trainees 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 A63. A true copy of the order dated 23.05.2013 issued by Government of Kerala is produced and marked as Annexure A64. The trainees work in the hospital as part of their training. A perusal of their offer letter shows that they were appointed as trainees only for a period of one year/six months. The finding of the respondent that there is no difference between the trainees and regular employees and both are attending the regular works except that remuneration of the former is nomenclatured as stipend in respect of the non-enrolled employees, is not correct. The voluntary coverage of the trainees under the ESI Act by the appellant will not constitute employer/employee relationship under the EPF Act. Stipend is not Basic wages or Dearness Allowance as required under

paragraph 26 of EPF Scheme for remitting contribution. The appellant has engaged trainees only within the ratio fixed by the Government. Only an employee employed by an employer under a contract of employment for wages is entitled to be covered under the provisions of the Act. The appellant filed WP(C)No. 2806/2014 before the Hon'ble High Court of Kerala since the respondent took coercive action for recover of the amount ordered in Sec 7A of the Act relating to the period from 01/2009 to 06/2013. The Hon'ble High Court admitted the above writ petition and granted interim stay. Since the EPF Appellate Tribunal admitted the appeal and granted stay, the appellant withdrew the WP(C) No. 2806/2014.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act. The appellant failed to enrol 56 employees for various spells for the period from 07/2013 to 09/2015. The respondent therefore initiated an enquiry under Sec 7A of the Act. The appellant was represented in the enquiry. After elaborate enquiry the respondent found that the appellant establishment failed to enrol 56 eligible employees from their date of employment and therefore quantified the dues. The appellant

establishment is not a training institute. The dominant object of the appellant is also not imparting training. It is therefore very clear that the 56 non-enrolled employees cannot be treated as trainees. They are regular employees doing regular work. The remuneration paid to these trainees are nothing but wages disguised as stipend. As per sec 2(f) of the Act, even trainees are employees with specific exemption of trainees engaged under the standing orders or under the Apprentices Act, 1961. Apprentices or trainees engaged as per certified Standing Orders should have a clear training scheme approved by the competent authority. The appellant failed to produce any training scheme for the so called trainees. The appellant establishment designated certain employees as trainees only to deny the legitimate rights of the employees. It is already a settled law that Industrial Employment (Standing Orders) Act is not applicable to hospitals. Since hospital is not an industry, Annexure 60 notification is not relevant in this case. The notification dated 07.06.2013 clearly states that having regard to the nature of establishments and the need for protection of persons employed therein, it is decided to specify all commercial establishments coming under Kerala Shops and Commercial Establishments Act, 1960 as establishments

under Payment of Wages Act, 1936. The said notification, as is clear from the explanatory note is issued to protect the persons employed in commercial establishments. The 56 persons employed in the appellant establishment are not trainees or apprentices. They are employees, employed for wages. The amount paid is wages as provided under the Act. It is very clear from the records that there is no difference between the employees labelled as trainees and regular employees. Both are attending regular works except that the remuneration paid to the trainees are accounted 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 employees have been rightly held as employee of mill." Inspite of specific direction to the appellant, the appellant establishment failed to produce any training Scheme for the trainees.

4. The issue involved in this appeal is whether the 56 non-enrolled persons can be treated as excluded employees for the purpose of the provisions of the Act, in view of Sec 2(f).

5. The respondent authority found that the appellant establishment is engaging employees in the name of trainees who were not extended the benefits of provident fund from the date of eligibility. The respondent therefore initiated an enquiry under Sec 7A of the Act. A representative of the appellant attended the hearing and took a view that these trainees are engaged under certified standing orders of the appellant establishment as trainees and therefore they are excluded from the provisions of the Act. The respondent authority found that the Industrial Establishment (Standing Orders) Act is not applicable to the hospitals. The so called trainees are doing the regular work of the appellant establishment and there is no training Scheme as claimed by the appellant establishment. The respondent authority therefore concluded that all the 56 employees will have to be enrolled to the fund from their due date of eligibility as specified in Annexure 1 of the impugned order.

6. In this appeal, the appellant has taken a similar stand and according to the learned Counsel for the appellant, in view of Annexure A1 approved standing orders, all the trainees are required to be excluded from the provisions of the Act. The learned Counsel for the appellant also pleaded that Government

of Kerala vide Annexure A63 order dated 04.08.2012 and Annexure A64 order dated 23.05.2013 recognised the engagement of trainees and therefore the so called trainees engaged by the appellant cannot be treated as employees under Sec 2(f) of the Act. The learned Counsel for the appellant also pointed out that the Government of Kerala vide Annexure A60 notification dated 07.06.2013 included all commercial establishments coming under shops and commercial establishment Act 1960 as establishment under Payment of Wages Act and therefore the appellant establishment for having been registered under Kerala Shops and Commercial Establishment Act will be treated as an industrial establishment for the purpose of Industrial Establishment (Standing Orders) Act. According to the learned Counsel for the appellant, in view of the above provisions, the certified standing order is applicable to the appellant establishment and therefore the trainees engaged by the appellant cannot be treated as employees and the assessment of dues made by the respondent authority cannot be sustained. The learned Counsel for the respondent pointed out that this is not a case where the appellant is claiming exclusion for nursing training in view of Annexure A63 and A64

Government notification. It is a case where the appellant establishment engaged all kind of employees as trainees from nursing assistants to attendants. He pointed out that Annexure A10, A11, A18 and A20 are offer letters as attendant trainees and Annexure A38 is Telephone operator trainee and Annexure A37 is Observer trainee. Annexure A31 dated 18.05.2015 and A40 dated 15.06.2015 are offer letters for Receptionist-Cum-Telephone Operator Trainee. He also pointed out that a perusal of offer letter would clearly show that the terms of appointment are same as that of the regular appointment. It contains terms such as right to terminate without notice or assigning any reason, not to train for any other employer or engaged directly or indirectly or in any other profession or occupation inside or outside the hospital, etc. The trainee will have to give one month notice or one month stipend in lieu of notice, before leaving training, the management reserves right to change or modify the designation and finally the trainee can be posted to any existing/to be starting institution of MIMS group. According to the learned Counsel, the offer letter by itself will clearly indicate that the claim of the appellant that these employees are engaged as trainees cannot be legally sustained. He also pointed out that the so called stipend being

paid to the same category of trainees varies from employee to employee. He pointed out one example in the case of a staff nurse trainee. As per Annexure A3 the so called trainee is offered a stipend of Rs. 6500/-. This is a trainee appointed on 21.08.2014. As per Annexure A12, a trainee appointed on 1st January 2015 as staff nurse trainee, is offered a stipend of Rs.6000/-. As per Annexure A14 dated 11.02.2015, a staff nurse trainee is offered a stipend of Rs. 6000/- whereas as per Annexure A35 a staff nurse trainee appointed on 01.06.2015 is offered Rs.6500/-. According to the learned Counsel for the respondent, it clearly establishes the fact that there is no uniformity in the so called stipend being paid to the trainees. The learned Counsel for the respondent further pointed out that the stipend also varies for the same category of trainees. He pointed out the example of Annexure A23 dated 09.04.2015, offer letter to Bibin Thomas as an Observer Trainee wherein he is offered a stipend of Rs.7000/- and Annexure A28 dated 04.05.2015 offer letter to M/s. Sruthi P as Observer Trainee offering a stipend of Rs.5,000/-. He also pointed out that the training period varies from 6 months to one year within the same category of so called trainees. The learned Counsel for the respondent pointed out

that all the so called trainees whether it is staff nurse, receptionist, telephone operators or attenders they are doing the regular work and are being paid regular salary, in the nomenclature of stipend.

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, 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 large number of trainees in all categories of employment. 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 dated 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 Establishment (Standing Orders) Act 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. 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 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 news papers 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 case of the learned Counsel for the appellant is that the trainees are engaged as per the standing orders of the appellant establishment. As per the Standing Order, Clause 2(vi), employee means any person who is employed by MIMS and Clause 3 is classification of employees. One of the classification

of employees at clause 3 (1)(g) is apprentices and an apprentice is defined as a learner who is paid allowances during the period of training. The appellant establishment is using this clause in the standing orders to claim that the employees engaged as trainees will be treated as trainees under the standing order of the appellant establishment. The respondent authority under Sec 7A of the Act explored and examined whether the claim of the appellant is a subterfuge to escape the provident fund liability. As pointed out by the Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC***, 2018 (4) KLT 352, the respondent authority found that the so called trainees are doing the regular work of the employees and no training Scheme is produced by the appellant inspite of specific direction to that effect. The learned Counsel for the respondent in this appeal pointed out many infirmities in the claim of the appellant establishment. According to him, the appellant establishment is engaging all categories of employees as trainees including attenders, telephone operators, receptionist and observers. He also pointed out that the terms of offer for trainees in the offer of training would clearly indicate that it is an offer of appointment camouflaged as an offer for training. He also pointed

out that the stipend within the same category varies from employee to employee. Hence by applying the test given by the Hon'ble High Court of Kerala in ***Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC (Supra)***, it is a clear case where the appellant establishment appoints employees as trainees to evade the provident fund liability. As already pointed out the appellant establishment is engaging all categories of employees as trainees. The appellant also fails to produce any training scheme in any of the categories of trainees before the respondent authority inspite of specific directions and also in this appeal. As already pointed out, qualified nurses cannot be kept as trainees as decided by the Hon'ble High Court of Kerala. Hence it is clear that the claim of the appellant that these trainees are apprentices under Standing Order cannot be accepted.

12. The learned Counsel for the appellant also relied on Annexures A63 and A64, the orders issued by Government of Kerala regarding the engagement of nursing trainees. As already pointed out Government of Kerala withdrew the circular, the validity of which was challenged before the Hon'ble High Court of Kerala in ***Kerala Private Hospital Association Vs State of***

Kerala, WP(C) No. 2878/2012. The Hon'ble High Court specifically held that the decision taken by the Private Hospital Management to insist one year experience for appointment of staff nurses in Private Hospital is against the provisions of the Nurses and Midwives Act 1953. It is required to be seen that the Annexure A63 and A64, even otherwise is confined to nurses training and the appellant cannot take any protection under the above circulars to engage trainees in all categories of employers.

13. Considering the facts, circumstances, pleadings and arguments in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed

Sd/-
(V.Vijaya Kumar)
Presiding Officer