



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

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

(Tuesday the, 19th day of April 2022)

APPEAL No. 523/2019

(Old No. ATA.604(7)2009)

Appellant : M/s. Sree Parvathy Cashew Company
Cherupoika.P.O.,
Pavithreswaram
Kollam – 691 507

By Adv. K.Y.Johnson

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office,
Ponnamma Chambers
Kollam – 691 001

By Adv. Pirappancode V S Sudheer

This case coming up for final hearing on 18.01.2022 and this Tribunal-cum-Labour Court on 19.04.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/16715/Enf (1)(1)/2007/13890 dated 10.11.2007 assessing dues under Section 7A of EPF and MP Act 1952 (hereinafter referred to as 'the Act') on evaded wages and also non-enrolled employees for the wage month 03/2003 and 06/2003 to 07/2007. The total dues

assessed is Rs. 20,11,133/- (Rupees twenty lakh eleven thousand one hundred and thirty three only)

2. Appellant is operating a cashew factory engaging around 75 to 80 workers. When the neighbouring factories were closed, the employees covered under the Act and Schemes working in those factories used to come and work in the appellant's factory. One Sri. Ramankutty Nair filed a complaint with the respondent authority that the appellant has not enrolled all the eligible members to provident fund membership and also that provident fund contribution is not paid on full wages. An Enforcement Officer of the respondent visited the appellant establishment on 21.08.2007 and after verification of the records found that there is variation in wages as per returns filed in ESI and EPF accounts for the wage months 03/2003, 03/2004, 03/2005, 08/2005, and 09/2005. The Enforcement Officer directed the appellant to pay a further amount of Rs.70,859/- for the above period. It was also directed that the appellant shall enrol four non-enrolled employees w.e.f. 01.07.2007. On the basis of the report of the Enforcement Officer, the respondent authority initiated an enquiry under Sec 7A of the Act vide notice dated 03.10.2007. The appellant was directed to appear before

the respondent on 11.10.2007. The appellant personally appeared and sought time to trace out and produce the records. However the respondent authority without giving any further opportunity issued the impugned order. The appellant was denied an effective and meaningful opportunity of being heard. Though the respondent authority agreed to give a further opportunity on 11.10.2007, issued the impugned order without providing a further opportunity for producing the records called for. This is a clear denial of natural justice. The respondent authority relied on the report of the Enforcement Officer while issuing the impugned order. However a copy of the report of the Enforcement Officer was not provided to the appellant. The calculation of dues is patently wrong as the same is based on the minimum wages notified by the Government. Re-opening of an assessment completed about five years back is an abuse of process and no valid reason is given for the same.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act. The respondent received information that the appellant establishment has not complied with the provisions of the Act and Scheme in full and that the wages submitted by

the employer for the year 2002 – 2003 to 2005 – 2006 is less than that as per ESI returns for the relevant period. A squad of Enforcement Officers were constituted to conduct the inspections of the appellant establishment. After conducting inspections of the establishments the squad of Enforcement Officers reported that there are variations in wages furnished in EPF and ESI returns. The squad of officers also reported that the wages furnished are not on the basis of minimum wages applicable to the establishment. The squad also reported that four employees are not enrolled to the fund. The report of the squad along with the details in Proforma A are produced and marked as Exhibit R1. From the report, it is evident that the establishment had not remitted EPF dues on actual wages. The appellant therefore violated Para's 30 & 38 of EPF Scheme. The respondent authority therefore initiated action under Sec 7A vide summons dated 03.10.2007. The appellant was directed to produce the relevant records on 11.10.2007. The proprietor of the appellant establishment attended the hearing. He admitted that the copy of the report was received and assured that he would remit the EPF dues on difference of wages. He further stated that the non-enrolled employees were already enrolled to the fund w.e.f.

08/2007 onwards. The proprietor however did not produce any records called for in the enquiry. The Enforcement Officers also reported that the appellant had not produced any records and therefore the provisional assessment is made on the basis of the minimum wages applicable to the workers of the establishment. Since the appellant admitted the liability and failed to produce any documents, the respondent authority issued the impugned order. The appellant never sought time to produce records or to make any further submissions. Hence the respondent authority issued the impugned order on the basis of the report of the Enforcement Officer and also the admissions made by the appellant before the respondent authority.

4. The respondent received a complaint alleging that the appellant establishment has not enrolled all the employees to provident fund membership and also there is huge variation between the returns filed under ESIC and PF Act. The respondent authority therefore deputed a squad of Enforcement Officers to investigate. During the investigation, the Enforcement Officers found that four employees were not enrolled to the fund and there is variation between the wages furnished in the EPF returns as well as ESI returns and therefore quantified the dues.

The appellant failed to produce the records called for by the squad of Enforcement Officers, specifically Profit & Loss A/c and Balance Sheet. From the documents produced before the squad, they found that the appellant establishment is not paying salary on minimum wages and therefore quantified the dues on the basis of the minimum wages for the period from 06/2003 – 07/2007. The respondent authority initiated an enquiry under Sec 7A of the Act on the basis of the report of the Enforcement Officers. The proprietor of the appellant establishment attended the hearing. It is seen from the impugned order that the appellant admitted the liability as per the difference in wages and also enrolled the four non-enrolled employees. However the appellant did not produce any records before the respondent authorities. On the basis of the admission by the appellant and also the report of the Enforcement Officers, the respondent authority issued the impugned order.

5. In this appeal, the learned Counsel for the appellant submitted that the burden of proof with regard to the minimum wages notification, the salary of the employees, date of joining of the employees etc. are on the respondent as the respondent is alleging non-enrolment as well as non-remittance. The

Enforcement Officers also failed to produce any records. The learned Counsel also submitted that the appellant was not provided adequate opportunity for producing the records called for, as the matter is decided on the first day of posting of the enquiry. According to the learned Counsel for the respondent, the appellant appeared before the respondent, admitted the liability and never sought any further opportunity for producing the records. The appellant also admitted that he has already received the copy of the inspection report. Hence there was no requirement of a further opportunity and the respondent authority issued the impugned order.

5. It is a settled legal position that a burden of proving a case is with the person who alleges the fact. In this particular case, the squad of Enforcement Officers visited the appellant establishment and the appellant failed to produce the complete records required for inspection. Thereafter the appellant was summoned under Sec 7A by the respondent authority with a specific direction to produce the records called for. Though the appellant attended the hearing, he failed to produce any records called for. The Division Bench of the Hon'ble High Court of **Gujarat in K S Engineers & Contractors Vs Assistant PF**

Commissioner and another, 2012 LLR 809 (Guj.DB) held that in similar circumstances the burden of proof shifts to the employer to produce the records called for as the employer is the custodian of the records. In **Bright Export Ltd. Vs Central Board of Trustees**, 2016 2 LLJ 504, the Hon'ble High Court of Delhi held that where the employer fail to contribute towards 27 employees, the determination made under Sec 7A cannot be faulted as the employer did not dislodge the findings by means of rebuttal though all the records such as date of employment, attendance register, wage register, cash book, ledgers/vouchers etc. were in the exclusive knowledge and custody of the employer. In **Khanna Poultry Farm Vs Regional Provident Fund Commissioner**, 2013 LLR 773 (P&H HC) the Hon'ble High Court of Punjab and Haryana held that the burden to prove that the number of employees in an establishment is less than the statutory limit, is on the employer. In this case, the employer steadfastly refuses to co-operate with the enquiry. In view of the above legal position and since the appellant is the custodian of the records, the burden is on him to prove that the proposed assessment on minimum wages is not according to the records maintained by him. The appellant also pleaded that he was not given adequate

opportunity for producing the records called for. It is seen that the enquiry was posted on 11/10/2007. The appellant attended the enquiry and admitted the liability. Therefore the respondent authority felt that there was no need for a further opportunity as the appellant failed to seek any further adjournment for production of records.

6. On a perusal of the report of the Enforcement Officers, Exhibit R1, it is seen that the assessment on evaded wages is done on the basis of the minimum wages and not on the actual wages paid to the employees, as the appellant failed to produce the records called for by them. It is specifically stated that the quantification of dues is done on approximate wages and therefore the dues furnished in the report is also approximate. It is felt that the appellant can, therefore, be given an opportunity to adduce evidence before the respondent authority to substantiate his claim that the assessment in the report of the Enforcement Officers and therefore in the impugned order is not correct. However his liability to remit contribution on difference in wages reported in ESI returns and PF return for the months of 03/2003, 03/2004, 03/2005, 08/2005 and 09/2005 and also the

assessment of dues on 4 non-enrolled employees are legally sustainable.

7. Considering the facts, circumstances and pleadings in this appeal, I am not inclined to accept the assessment of dues on minimum wages for the period from 06/2003 – 07/2007.

Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent to reassess the dues after providing an opportunity to the appellant, within a period of six months from the date of receipt of this order. If the appellant fails to appear or fails to produce the records called for, the respondent may decide the matter according to law. The pre-deposit made by the appellant under Sec 7(O) of the Act as per the direction of Hon'ble High Court of Kerala shall be adjusted or refunded after conclusion of the enquiry.

Sd/-
(V.Vijaya Kumar)
Presiding Officer