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

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

(Monday the, 28th day of March 2022)

**APPEAL No. 657/2019**
(Old No. ATA.218(7)2013)

Appellant : M/s Lakeshore Hospital & Research Centre Ltd.
Maradu, Nettoor.P.O.
Kochi – 682 040

By M/s. Menon & Pai

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office,
Bhavishya nidhi Bhavan
Kaloor, Kochi – 682 017.

By Adv.Sajeev Kumar K Gopal

This case coming up for final hearing on 18.11.2021 and this Tribunal-cum-Labour Court on 28.03.2022 passed the following:

**ORDER**

Present Appeal is filed from order No. KR/KC/19536/Enf.III (2)/2012/11901 dated 03.12.2012 assessing dues under Section 7A of EPF and MP Act (hereinafter referred to as 'the Act') on non-enrolled employees and evaded wages for the period from

04/2010–12/2011. The total dues assessed is Rs. 1,16,10,738/- (Rupees One crore sixteen lakh ten thousand seven hundred and thirty eight only)

2. The appellant is a company owning a 330 bedded hospital. The hospital is covered under the provisions of the Act. The contributions in respect of all eligible employees are being paid regularly. During the month of February 2012, a squad of Enforcement Officers conducted inspection of the appellant establishment and directed that all the trainees have to be covered under the provisions of the Act. It was explained to the Enforcement Officers that trainees are not employees and they are not paid any wages. The trainees include students who are undergoing different training programmes as part of their curriculum. The training is important for a period of six months to one year and they are given certificate at the end of the training. The respondent initiated an enquiry under Sec 7A of the Act alleging non payment of contribution in respect of trainees. It was also alleged that the entire salary including allowances are not considered for the purpose of payment of provident fund contribution. A true copy of the notice dated 07.02.2012 is

produced and marked as Annexure A1. A representative of the appellant attended the hearing and explained that the trainees are not employed for wages and they are only learners. It was also pointed out that the trainees are only students who are undergoing training as part of curriculum. The students who passed out of nursing school and not registered with Nursing Counsel of Kerala are also given facility for training. A true copy of one of the letter issued for trainee for undergoing training is produced and marked as Annexure 2. Similar letters had been issued to all the trainees. The respondent authority ignored the contention of the appellant that trainees are not employees as defined under Sec 2(f) of the Act and issued the impugned order, a copy of which is produced and marked as Annexure A3. The respondent authority ought to have conducted an enquiry under Para 26B of EPF Scheme before proceeding to assess the dues under the Act. The respondent found that the payments made to the trainees to meet the expenses of travel and food are wages paid to the trainees. The finding of the respondent that the training is not meant in a hospital goes against the principle and spirit of medical education. Annexure A3 order is not at all clear

about the identity of persons and the respondent has not given any details regarding the trainees. Several of the trainees are students undergoing various courses conducted by "Bharat Sevak Samaj" which has authorised the appellant hospital as a training centre of Vocational Training Programme. A copy of the certificate issued by "Bharat Sevak Samaj" dated 04.06.2010 for conducting various courses is produced and marked as Annexure A4. For the dues assessed for the period from 04/2010 – 12/2011, there is a huge difference between the actual stipend paid and contribution shown in Annexure 3 order. For example, the stipend in Annexure 3 Order paid during the month of 04/2010 is Rs. 3,16,129/- but for the same month the respondent has taken the contribution on stipend as Rs. 3,49,326/-. In December 2011, the total stipend paid to the trainees is Rs.4,22,891/- but the contribution on the said amount is calculated as Rs.8,57,476/- in Annexure A3. The respondent authority directed the appellant to pay an amount of Rs.1,16,10,738/- towards contribution on the stipend paid to the trainees where as the total stipend paid during the entire period works out to Rs. 89,02,260/-. A statement showing the details of stipend paid to the trainees

during the relevant period is produced and marked as Annexure A5. The appellant was not given adequate opportunity to explain the above facts and the respondent authority issued the impugned order on the basis of the report of the squad of Enforcement Officers. According to the respondent, the impugned order is not final. The appellant filed writ petition WP(C) No.31039/2012 before the Hon'ble High Court challenging the impugned order and the Hon'ble High Court after considering the case on merit disposed off the same giving liberty to the appellant to approach this Hon'ble Tribunal to decide the issue. The Hon'ble High Court also gave liberty to the appellant to seek waiver of pre-deposit in terms of Sec 7(O) of the Act in view of the peculiar circumstance of the case. A true copy of the judgement dated 13.02.2013 is produced and marked as Annexure A6. The respondent authority relied on the report of the Enforcement Officers but they were not examined before the respondent and there is no evidence available before the respondent for arriving at the conclusion in Annexure A3. The respondent authority misinterpreted the clauses in the letters of engagement given to the trainees to undergo training instead of taking the letters in its

true spirit. The number of trainees/students in the hospital undergoing various training programme never exceeded 10% of the total number of employees. The appellant was not given an opportunity to file a statement or to furnish evidence or to cross examine the reports of Enforcement Officers on the report submitted by them. An apprentice engaged under Apprentice Act or on Standing Orders does not come within the definition of employees as defined under Sec 2(f) of the Act. In ***Regional Provident Fund Commissioner Vs Central Arecanut and Cocoa Marketing and Processing Co-Operative Limited, Mangalore***, 2006 (1) CLR 861, the Hon'ble Supreme Court held that under Model Standing Orders, an apprentice is described as a learner who is paid allowance during the period of training. After training of 6 months, some of the trainees are given opportunity in the appellant hospital depending upon their suitability. The respondent passed an interim order for which there is no provision in the Act.

3. The respondent filed counter denying the above allegations. The appellant is covered under the provisions of the Act w.e.f. 31.12.2001. During the inspection conducted by the

Enforcement Officers on 22.05.2003 and 23.05.2003 it was reported that 283 employees were not enrolled to provident fund membership and they were extended the benefits after inspection of the Enforcement Officer of the respondent. During the inspection by a squad of officers on 02.02.2012, it was found that 140 on the job 'trainees' were not enrolled to the fund. It was also reported that Sri. Rama Chandran Pillai, Fire and Safety Officer was also not enrolled to the fund. The squad also reported that there was evasion in wages and there is subterfuge in EPF liability. The squad further reported that the compliance in respect of covered employees was also not satisfactory. During the inspection by an Enforcement Officer on 29.05.2009, it was reported that out of 1221 employees, 174 personnel's are doctors and executives, so excluded from the provident fund benefits. Provident fund is being provided only to 912 employees. It was also noticed that lot of contract employees were engaged for housekeeping, security etc. Further the Enforcement Officer reported that the contributions of the employees are restricted to 50% of the total wages. There was a strike in the appellant hospital which was widely reported in the media. One of the

reason for the agitation was the appellant establishment was reporting less wages to provident fund department. Therefore a squad of Enforcement Officers were deputed to conduct an investigation. The squad reported that around 140 employees are not enrolled to provident fund and there is subterfuge in remittance of contribution by splitting up wages into various allowances. It is found that the excluded employees are paid Basic and DA whereas the employees enrolled to the fund are paid various allowances such as HRA, conveyance allowance and special allowance. The contribution is restricted on basic and DA which accounts for 50% of the total wages paid. In order to verify whether the bifurcation of wages is genuine, the respondent verified some personnel files and offer of appointments and found that offer of appointments provides only consolidated salary. Therefore it was clear that the bifurcation made in the pay structure is not genuine and only a subterfuge to avoid provident fund liability. The respondent therefore initiated an enquiry under Sec 7A of the Act. The appellant was given opportunity on various dates between 20.03.2012 to 10.07.2012. A representative of the appellant attended and produced the details

called for. The appellant contended that the Basic and DA are considered for provident fund contribution and HRA, Conveyance and special allowance are not considered as they are excluded allowances. With regard to the trainees, the appellant took a contention that there is no employer/employee relationship between the appellant and the trainees and the payments made to the trainees are towards conveyance and food reimbursement. Based on the report of the Enforcement Officers and also the informations placed by the appellant before the respondent authority, the respondent authority issued the impugned order assessing an amount of Rs.1,16,10,738/-. The above amount was subsequently modified vide order dated 03.10.2013 to Rs.1,15,70,761/-. As per sec 2(f) of the Act an employee includes even apprentices except those engaged under the Apprentices Act 1961 or the Standing Orders of the establishment. These, so called trainees are also in receipt of emoluments though designated as stipend. As per Para 26 of EPF Scheme, every employee employed in connection with the work of a factory or an establishment to which the Scheme applies other than excluded employees shall be entitled and required to become member of

provident fund from the date of joining with the establishment. As per Para 2(f) of the Scheme, an excluded employee means an employee who have been a member of the fund, withdrew the full amount of his accumulation or an employee whose pay at the time he is otherwise entitled to become a member of the fund exceeds Rs.6500/15000 per month. The contention that the non-enrolled persons are students of "Bharat Sevak Samaj" who selected Lake Shore Hospital as authorised centre for conducting courses and the payment made to those students cannot be treated as wages is inconsistent with the statutory provision. The Hon'ble High Court of Kerala in ***Sree Rajesh Krishnan, Secretary Vs Assistant Provident Fund Commissioner***, 2009 (4) LLJ 720, held that for excluding an apprentice from the purview of the term employee as defined under Sec 2(f) of the Act, they should have been engaged under the Apprentices Act 1961 or under the Standing Orders Act as provided in the Industrial Employment (Standing Orders) Act. Under Sec 2(b) of the Act, basic wages means all emoluments earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of contract of employment or which

are paid or payable in cash to him. Therefore it is clear that any payment made to an employee as remuneration for the services rendered is to be treated as basic wages. The report of the Enforcement Officers included the dues in respect of non-enrolled employees along with the list of non enrolled employees for the period from 04/2010 – 12/2011 prepared month wise and account wise. The house rent allowances paid by the hospital to its employees is 100% of the basic. The appellant is liable to remit contribution on conveyance and special allowance. The splitting of wages is done only in respect of enrolled employees and the excluded employees are paid a consolidated salary which will clearly establish the fact that there is subterfuge in the wage structure by the appellant. The respondent authority determined the dues in respect of non-enrolled employees and evasion of wages for the period 04/2010 to 12/2011. The special allowance at the rate of 20% being paid to all employees will also attract provident fund deduction. The appellant was provided adequate opportunity by the respondent authority to produce any additional documents that they would like to produce. All the documents produced by the appellant including the salary

statement was taken into account by the respondent authority. The appellant never requested for examining the Enforcement Officer in the enquiry. The statute contemplates an enquiry under Sec 7A of the Act to deal with the present situation. Para 26B is for resolving any doubt and in this case there was no such dispute raised by the respondent. The jurisdiction for making a finding under Para 26B is vested with Regional Provident Fund Commissioner and in the present case the enquiry is conducted by the same authority. A dispute contemplated under Para 26B is a dispute between the employer and the employee and not any objection raised by the employer alone. In this case, there is no dispute between the employer and the employees and the only question is with regard to the coverage of "on job trainees". Such an issue cannot be subject matter of an enquiry under Para 26B of the EPF Scheme.

4. The learned Counsel for the appellant raised certain preliminary issue which is required to be considered before the matter is taken up on merit. The 1st issue taken up by the learned Counsel is that the impugned order is an Interim Order for which there is no provision under the Act and therefore the same is not

maintainable. I am unable to agree with the learned Senior Counsel on this issue. There is no prohibition under the Act and Scheme for issuing interim direction to safeguard the interest of the employees. This is particularly so, when many issues are involved in a proceedings under Sec 7A and some of the issues will take longer time for adjudication and final decision. Hence it is always advisable that interim directions are issued to ensure that the benefits due to the employees are decided on priority, so that the benefits will ultimately reach the beneficiaries in time.

5. Another issue raised by the learned Counsel for the appellant is with regard to an enquiry under Para 26B of the Act. According to the learned Senior Counsel for the appellant, the respondent authority ought to have decided the eligibility of the trainees to be enrolled to the fund under Para 26B of the EPF Scheme before assessing the dues under Sec 7A of the Act.

As per Para 26B

> *Resolution of doubts : If any question arises whether an employee is entitled or required to become or continue as a member or as regards the date from which he is so entitled*

*or required to become a member, the decision thereon of the Regional Provident Fund Commissioner shall be final.*

*Provided that no decision shall be given unless both the employer and employee had been heard.*

According to the learned Counsel for the respondent, Para 26B of EPF Scheme is meant for resolution of doubts when there is a dispute regarding eligibility of provident fund membership or the date of membership between the employer and the employees. It is not meant for resolving a dispute raised between the respondent organisation and the employers. Further he also pointed out that even assuming that an enquiry under Para 26B is contemplated in the present situation, the same is to be conducted by the Regional Provident Fund Commissioner and the present enquiry is also conducted by the Regional Provident Fund Commissioner only. In this context it may be relevant to point out the appellant challenged the impugned order before the Hon'ble High Court of Kerala in WP(C) No. 31039/2012. The Hon'ble High Court in its judgement observed that "a composite order passed by the respondent in terms of Para 26B of the employees Provident Fund Scheme 1952 and Sec 7A of the

Employees Provident Fund and Miscellaneous Provisions Act is under challenge". The Hon'ble High Court further observed that "needless to say that the grounds available in the enquiry under Para 26B of the Scheme can also be incorporated in the appeal under Sec 7(I) of the EPF and MP Act 1952 against the **composite order**". The learned Counsel for the appellant relied on the decision of the Hon'ble High Court of Kerala in ***Sasidharan Vs Regional Provident Fund Commissioner,*** 1982 KLT 946. In the above case the issue involved is whether in an enquiry under Para 26B, the employees are required to be summoned particularly when the employer remained ex parte. In the above context, the Hon'ble High Court held that whether an employee is eligible for membership or not is a matter which has to be decided after hearing the employee and his employer. In this case, the facts are entirely different. Here the issue is whether the trainees engaged by the appellant will come within the definition of the employee. Even if an enquiry under 26B is conducted and the employees are summoned in the enquiry, they will not be in a position to take a different stand from that of the appellant. If the trainees are required to be enrolled as per the statutory provisions, even after

such an exercise, the respondent authority will not be in a position to take a decision against the statutory provisions. I am of the considered view that such an exercise under Para 26B summoning the employer and employees are not contemplated in the circumstances of the present case. The Hon'ble High Court of Delhi considered the above issue in ***Glamour Vs Regional Provident Fund Commissioner***, 1975 (1) LLJ 514, the Hon'ble High Court held that

> *Para 9 : I have taken the 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 advised 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 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 find 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 employee). 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 the employee's. The Act further accords finality to the decision under Sec 7A of the Act, but no such express permission is found in Paragraph 26B.*

The logic in the above finding by the Hon'ble High Court is very clear and I am of the considered view that an enquiry under Para 26B is contemplated by the statute only in the event of a dispute between the employer and employees regarding eligibility to be enrolled to the fund. In the normal course of non-enrolment, there is no point in summoning the employees in an enquiry as the employees will not be in a position to give evidence against his employer and if the employee is eligible to be enrolled to the fund,

the exercise of summoning the employees in the enquiry will be futile exercise, not contemplated under the Act and Schemes.

6. The learned Senior Counsel for the appellant also pointed out that he was not provided an opportunity for cross examining the Enforcement Officers who conducted the inspection and submitted the reports. The learned Counsel relied on the decision of the Hon'ble High Court of Madhya Pradesh in ***Prem Motors Private Ltd. Vs Employees Provident Fund Organisation and Others***, 2016, LLR 968. In the above case, the request of the employer for a copy of the report and also cross examining the Enforcement Officer who conducted the inspection was rejected by the respondent authority. The Hon'ble High Court in such circumstances held that non providing of material documents to the employers despite moving an application is not in conformity with the concept of cardinal principle of rules of natural justice. The learned Counsel also relied on the decision of the Hon'ble High Court of Kerala in ***SA Cashew Factory Vs EPF Appellate Tribunal and Others***, WP(C) No. 5857/2011. In the above case, the Enforcement Officer gave a report during the course of the enquiry to the effect that the records produced by

the employer during the enquiry did not tally with the records verified by the Enforcement Officer at the time of his inspection. The employer therefore filed a review application on the ground that he did not get a copy of the report of the Enforcement Officer and further requesting an opportunity to cross examine the Enforcement Officer. The review was rejected by the Assistant Commissioner and in the appeal also the EPF Appellate Tribunal took a view that the employer did not ask for a copy of the report or an opportunity to cross examine the Enforcement Officer in the first instance. In the above circumstances, the Hon'ble High Court held that a copy of the report of the Enforcement Officer shall be given to the employer and he should be given an opportunity to cross examine the Enforcement Officer. In the present case, copies of the inspection report was already provided to the appellant and if the appellant was of view that the report is not correct in some respects, it was upto them to request for examining/cross examining the Enforcement Officer. According to the learned Counsel for the respondent, the appellant did not raise any serious objection regarding the report of the Enforcement Officer as the same was based on the records

produced by the appellant for inspection. Further the issue to be decided is purely a legal question whether the trainees engaged by the appellant establishment can be treated as employees under the Act.

7. The appellant establishment has not enrolled all the employees to provident fund membership from the date of coverage. During the inspection conducted on 22.05.2003, the Enforcement Officers reported that 283 employees of the appellant establishment were not enrolled to the fund. The appellant extended the benefit of social security as per the direction of the respondent during the inspection on 29.05.2009. During February 2012, there was a strike in the appellant establishment by its employees. One of the demands made by the employees was with regard to compliance under the Act and Scheme. The respondent organisation therefore send a squad of Enforcement Officers to investigate the allegations. The Enforcement Officers reported that 140 persons were not enrolled to provident fund and the appellant claimed them as trainees. The squad also reported that the wages of the employees is split up into various allowances and provident fund is paid only on

Basic and DA which amounts to 50% of the salary paid to the employees. The squad also reported that the compliance of the contract employees engaged through contractors are not satisfactory and requires further investigations. The respondent authority therefore initiated an enquiry under sec 7A of the Act. After verification of the records, found that

1. All the trainees will come within the definition of employee and therefore eligible to be enrolled to the fund.
2. The enquiry authority concluded that conveyance allowance and special allowance form part of basic wages and is to be considered for EPF deduction.
3. The compliance in respect of contract employees requires further investigation and therefore the appellant is therefore directed to furnish the details.

The appellant challenged the above said order in WP(C) No. 31039/2012. The Hon'ble High Court vide judgement dated 13.02.2013 held that the disputed questions of fact can be better adjudicated in an appeal under Sec 7(I) of the Act. The appellant filed appeal No. ATA 218(7)2013 before EPF Appellate Tribunal and the EPF Appellate Tribunal admitted the appeal and stayed

the operation of the impugned order subject to deposit of 50% of the determined amount within 8 weeks. From the contentions it can be seen that the appellant challenged only the assessment of dues in so far as it relates to the dues in respect of non-enrolled employees only as is evident from the contention raised before the Hon'ble High Court in this appeal. The appellant challenged the interim direction to deposit 50% of the assessed dues as a pre-condition for admitting the appeal in WP(C) No. 13476/2013 before the Hon'ble High Court of Kerala. In the writ petition also the appellant challenged only assessment of dues in respect of non-enrolled employees. The writ petition was dismissed by the Hon'ble High Court vide judgement dated 06.06.2013.

8. As rightly pointed out by the learned Counsel for the respondent it is seen that though the respondent authority decided the issue of non-enrolment as well as evaded wages through the impugned order, the appellant challenged only the assessment with regard to the non-enrolled employees in this appeal. With regard to non-enrolment also, it is seen that there are two separate issues. One is with regard to non enrolment of trainees and the other one is with regard to the non enrolment of

Sri.C.J. Ramachandran Pillai, Fire and Safety Officer who is appointed on a consolidated salary of Rs. 6000/-.

9. The first question that is required to be decided in this case is with regard to the eligibility of trainees to be enrolled to the fund. According to the learned Counsel for the appellant, the trainees cannot be treated as employees as they are learners appointed on a stipend. He further pointed out that the appellant establishment is an authorised Training Centre of the Vocational Training Program of "Bharat Sevak Samaj" and the students attending the above training program are also considered by the respondent authority as employees for the purpose of assessment of dues in respect of non-enrolled employees. According to the learned Counsel the appellant, the hospital is having 25 super specialty departments and 8 Intensive Care Units and therefore the nursing students are required to be trained. According to the learned Counsel for the respondent, the question is not whether the nursing staff of the appellant requires training or not. According to him, the question is whether the trainees will come within the definition of employees and therefore will attract provident fund membership. The learned Counsel for the

appellant also argued that there was no proper identification of the employees to be enrolled to the fund. The learned Counsel for the respondent pointed out that the report of Enforcement Officers were handed over to the appellant during the course of hearing along with a list of non-enrolled employees with a specific direction that objection if any shall be filed on or before the next date of posting. However the appellant did not file any objection confirming the identity of non-enrolled employees. He further pointed out that the vocational training program of "Bharat Sevak Samaj" is not recognised by Government of India and therefore the training program was stopped. The learned Counsel for the respondent also pointed out that all these trainees are subsequently enrolled to the fund.

10. 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 standing orders of the appellant establishment. The appellant ought to have produced the training scheme, the duration of training, the

scope of training and also the evidence to show that they are appointed as apprentices under the standing orders, before the authority U/s 7A of the Act. This is particularly relevant in the facts of the case as the appellant establishment is engaging large number of 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. The same view was taken in **C. Engineering Works Vs RPFC**, 1986(1) LLN 242 wherein the Hon'ble High Court held that the documents to prove the employment strength is available with the establishment to discredit the report of the Enforcement Officer and if the employer fails to produce the documents, the authority U/s 7A can take an adverse inference. A similar view was taken by the Hon'ble Delhi High Court in **H.C Narula Vs RPFC**, 2003 (2) LLJ 1131.

11. 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 Govt. of Kerala fixing one year training and also fixing the stipend was withdrawn by the Govt. 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) 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 herein above".

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 U/s 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". 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 U/s 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 U/s 2(f) of the Act.

12. 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 971 to 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.

13. 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 U/s 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 organisation are infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons ".

In this case, the learned Counsel for the respondent pointed out that the offer letter for trainees is designed in such a way to show that they are only trainees and they are only being paid stipend of Rs.2000/- to Rs.4500/- as a reimbursement of food and accommodation. He further pointed out that though the remuneration paid to the trainees are stated to be stipend, the same is classified as salary in the books of accounts of the establishment. The learned Counsel for the respondent also pointed out that these so called trainees are designated as Marketing Executive, CSSD Assistant, Anaesthesia Technician, Dietician, Nurse, Blood Bank Technician, Hospital Assistant,

Telephone Operator, Pharmacist, Ward Secretary, PRA, Data Entry Operator etc and none of them are designated as trainees. He further pointed out that there are trainees who are working for more than one year.

14. According to the learned Counsel for the appellant, some students who were undergoing training were also taken as employees for the purpose of assessment of provident fund contribution. It is seen that the respondent authority has given adequate opportunity before issuing the impugned order. The appellant is the custodian of the records and it is upto him to produce the relevant records before the respondent authority if their claim in this regard is correct. Having failed to do so, it is not possible to accept the contention of the Senior Counsel for the appellant that some of the trainees are actually students taking training for the purpose of awarding the diploma by "Bharat Sevak Samaj".

15. Another issue raised in this appeal is regarding the non-enrolment of Sri.C.J.Ramachandran Pillai, Fire and Safety Officer. According to the appellant, he is an excluded employee as

he retired from Government service. As per sec 2(f)(i) of EPF Scheme,

> "*Excluded employee means an employee who having been a member of the fund withdrew the full amount office accumulations in the fund under clause (a) or (c) of sub-paragraph 1 of Paragraph 69".*
>
> *(ii) .....*

As per Para 69(1)(a), a member may withdraw the full amount standing to his credit in the fund on retirement from service after attaining the age of 55 years. As per Para 69 (1)(e) a member can withdrew full amount immediately before migrating from India. From the above provisions, it is clear that an employee who was a member of provident fund and withdrew the full amount of his accumulation from the fund only will be treated as an excluded employee. In this case the appellant has no case that Sri.C.J Ramachandran Pillai was member of EPF and withdrew the accumulation to claim the status of an excluded employee.

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

Hence the appeal is dismissed

Sd/-
**(V.Vijaya Kumar)**
Presiding Officer