सत्यमेव जयते

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

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

(Thursday the 25th day of November, 2021)

APPEAL No.278/2019

Appellant : M/s.Aswini Hospital Pvt Ltd
Karunakaran Nambiar Road
Thrissur - 680020

By Adv.K.K.Premalal

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office, Kaloor
Kochi - 682017

By Adv.Thomas Mathew Nellimoottil

This case coming up for final hearing on 13.09.2021 and this Industrial Tribunal-cum-Labour Court on 25.11.2021 passed the following:

O R D E R

Present appeal is filed against order no.KR/KC/13309/NF-IV(1)/2019/979 dt.27.03.2019 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non-enrolled employees for the period from 04/2016 to 09/2017. The total dues assessed is Rs.47,40,501/-.

2. The appellant establishment is covered under the provisions of the Act. An Enforcement Officer of the respondent office inspected the appellant establishment on the basis of a complaint from a group of employees. On the basis of the report of the Enforcement Officer, the respondent authority initiated an enquiry U/s 7A of the Act. Govt of Kerala, Labour Department has recognized the need for training nurses through various circulars issued from time to time. These trainees are apprentices in the respective departments and is covered under Model Standing Orders applicable to the establishment by virtue of Sec 12A of Industrial Employment (Standing Orders) Act 1946. Govt of Kerala in exercise of powers conferred U/s 2 of Payment of Wages Act, 1936 has by notification dt.18.06.2013 included all commercial establishments coming under Kerala Shops & Commercial Establishments Act as establishment under the Payment of Wages Act, 1936. A copy of the notification dt.08.06.2013 is produced and marked as **Annexure 1**. It is mandatory on the part of the respondent authority to identify and assess the dues against the identified employees. The appellant hospital is registered under Kerala Shops Act, 1960 and a true copy of the registration certificate issued to the appellant hospital under Kerala Shops & Commercial Establishments Act is produced and marked as **Annexure 2**. The appellant explained the above provisions and also the decisions rendered by the Hon'ble High Court of Kerala in **Sivagiri Sree**

Narayana Medical Mission Hospital Vs RPFC, W.P.(C) no.14751/2017 to the respondent authority. The appellant has already enrolled all the employees from the date of their actual employment. The respondent has considered the period of training as employment and advanced the date of enrollment to an earlier date and assessed the contribution. In addition to the stipend paid to the trainees, the contribution is assessed for the employees employed by an independent contractor of the canteen and the persons employed in the nursing college which is admittedly an educational institution. The Hon'ble Supreme Court in **ESIC Vs Tata Engineering and Locomotive Company Ltd**, AIR 1976 SC 66 held that the heart of the matter in apprenticeship is the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. After examining the provisions of the agreement the Hon'ble Supreme Court concluded that the principal object with which the parties enter into an agreement of apprenticeship was offering by the employer an opportunity to learn the trade or craft and the other person to acquire such theoretical or practical knowledge that may be obtained in the course of the training. This is the primary feature that is obvious in the agreement. In **Bharat Hotel Vs Regional Director, ESI Corporation and another**, 2014 LAB IC 3862 the Hon'ble High Court of Kerala held that the legislature has in its wisdom decided that an

apprentice cannot be employed whereas an apprentice can only be engaged. The Hon'ble Supreme Court of India **RPFC Vs Central Arecanut and Coco Marketing and Processing Company Ltd, Mangalore**, 2006 2 SCC 381 held that trainees/apprentices will not come under the definition of employee U/s 2(f) of EPF & MP Act and no contribution is payable in respect of such apprentices. The contribution calculated in respect of employees under Employees Enrollment Campaign 2017 (EEC 2017) scheme is also not correct as the respondent included the training period for assessment of dues. The determination of contribution in respect of the employees of nursing college along with the hospital is also wrong. The nursing college being an educational institution is treated as a separate class of institution. The assessment of dues in respect of M/s.Veekay Caterers is also not correct as the Caterers, as a contractor, is independently coverable under the provisions of the Act.

3. The respondent filed counter denying the above allegations. The appellant is covered under the provisions of the Act w.e.f. 30.11.1990. The appellant establishment failed to cover all the employees to provident fund membership. A complaint is received from United Nurses Association stating that the appellant failed to extend social security benefits to large number of employees employed by the appellant. An Enforcement Officer was deputed to investigate into the complaint. The Enforcement Officer reported that

i. there were 143 employees who are not enrolled to provident fund by the employer from the due date of eligibility.

ii. 135 employees who were declared under EEC 2017 were enrolled belatedly

iii. 9 nursing college employees are not enrolled.

iv. 22 employees of the canteen functioning in the hospital are not extended the benefit.

The respondent authority initiated an enquiry U/s 7A. A representative of the appellant attended the hearing on 30.01.2019. The representative of the appellant admitted that the appellant establishment has no objection regarding the dues statement provided to them by the Enforcement Officer. Accordingly the respondent authority closed the enquiry and issued the impugned order. None of the issues raised in this appeal were raised before the respondent authority and the appellant expressly admitted their liability to remit the contribution. Hence the appellant cannot plead anything which they failed to raise before the respondent authority. The Hon'ble High Court of Rajasthan in **Ess Dee Carpet Enterprises Vs UOI**, 1985 LIC 1116 held that a question of fact not raised before the Regional Provident Fund Commissioner in the inquiry U/s 7A cannot be raised in the writ petition.

4. There were 143 employees who were not enrolled to provident fund from the due date of joining. The list of employees is produced and marked as Exbt A. 135 employees were declared under EEC 2017, but were enrolled belatedly. The list of the employees with their actual date of joining is produced and marked as Exbt.B. The appellant never raised the issue that the employees were trainees prior to their date of enrolment. The question that the employees of nursing college cannot be taken for the purpose of assessment was never raised by the appellant before the respondent authority. With regard to the employees engaged for running the canteen, it is pointed out that the canteen is run in connection with the work of the establishment and all the employees working in the canteen are required to be enrolled to the fund. The date of joining of the employees as per EEC 2017 match with the report of the Enforcement Officer. The EEC declarations are marked as Exbt.C. The dues in respect of canteen employees were assessed on the basis of the wage register and attendance register maintained by the canteen and is marked as Exbt.D. The dues of the employees of nursing college were arrived at from the wage register of Aswini Hospital and is produced and marked as Exbt.E. The appellant never submitted any written statement before the respondent authority. A copy of the daily order sheet dt.30.01.2019 is produced and marked as Exbt.F. It can be seen that the enquiry U/s 7A was

closed on 30.01.2019 and the order was issued on 27.03.2019. So the claim of the appellant that the written statement was submitted on 27.03.2019 is patently false. A copy of the report of the Enforcement Officer was sent along with the summons and the same was acknowledged by the appellant. The appellant never wanted to cross examine the Enforcement Officer during the course of the proceedings. The appellant failed to produce any additional documents during the course of 7A enquiry and admitted the assessment provided by the Enforcement Officer. The Enforcement Officer assessed the dues on the basis of the soft copy of the salary and wages register submitted by the appellant in the CD. They appellant has also submitted a sample copy of the wage register which is produced and marked as Exbt.H.

5. The appellant is a hospital and is also running a nursing college. The appellant failed to enrol all the employees to provident fund benefits from their due date of eligibility. The respondent's office received a complaint from United Nurses Association stating that the appellant failed to enroll all the employees to provident fund benefit. The respondent office therefore deputed an Enforcement Officer to investigate into the complaint. He investigated the matter and reported that there are massive nonenrollment and even the employees enrolled as per EEC 2017 were also not enrolled from the due date of eligibility. The Enforcement Officer also found that 9 nursing

college employees and 22 canteen employees were also not enrolled to the fund. The respondent initiated an enquiry U/s 7A of the Act. A copy of the report of the Enforcement Officer was also sent along with the summons. A representative of the appellant attended the hearings on various dates and finally on 30.01.2019 he admitted that the assessment given by the Enforcement Officer regarding the non enrolled employees is correct. It is clear from Exbt.F daily order sheet of proceedings of 7A enquiry dt.30.01.2014 which is signed by the appellant also. The respondent authority therefore issued the impugned order on the basis of the information placed before him at the time of the 7A enquiry and also on the basis of admission by the appellant establishment.

6. In this appeal the learned Counsel for the appellant justified non enrollment by claiming that all the non enrolled employees except nursing college and the canteen employees are trainees appointed under the Model Standing Orders as Industrial Employment (Standing Orders) Act is applicable to the appellant hospital. He also took a contention that the nursing college is an independent educational institution and hence the employees of the nursing college cannot be assessed against the appellant establishment. The learned Counsel for the appellant also contended that the canteen is run by an

independent contractor who is required to be covered independently and compliance secured separately.

7. With regard to the issue regarding trainees and applicability of Model Standing Orders is covered by various decisions of the Hon'ble Supreme Court and High Courts. 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 dt.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 Model Standing Orders. 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 almost 1/4th of the total employment strength as 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.

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 dt.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. 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 ". 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 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.

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 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. The application of Model Standing Orders as per Sec 12A of Standing Orders Act was considered by Hon'ble High Court of Madras in **Cheslind Textiles Ltd Vs Registrar, EPF Appellate Tribunal**, 2020 (2) LLJ 326. The Hon'ble High Court held that

> " In the case on hand, when the petitioner who has not complied with the statutory requirements for certification of draft Standing Orders as prescribed U/s 3 of the Industrial Employment Standing Orders Act, 1946, they are legally barred from taking protection U/s 12A of the Industrial Employment Standing Orders Act for adoption of Model Standing Orders to circumvent the payment of EPF contribution to their employees ".

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 dt.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 ".

11. In this case the appellant infact admitted their liability before the respondent authority to remit contribution in respect of all these non enrolled employees from their due date of eligibility including the employees who were enrolled to the fund under EEC 2017 scheme from a subsequent date. The appellant failed to produce any documents to substantiate their claim that these employees are appointed as trainees under Model Standing Orders. The appellant also failed to produce any scheme of training or the length of training

to prove that these employees were appointed as trainees under the Standing Orders of the appellant establishment. As already pointed out, the trainees are also employees as per the definition of employee U/s 2(f) of the Act, the specific exclusion being the trainees or apprentices appointed under Standing Orders of the establishment or Apprentices Act, 1961. The appellant having failed to establish and satisfy the minimum check points evolved through various decisions of Courts cannot claim that the non enrolled employees are appointed or engaged under the Model Standing Orders. Hence the claim of the appellant has no basis and can only be rejected.

12. The learned Counsel for the appellant contended that the employees of nursing college cannot be assessed against the appellant as the nursing college is an educational institution. According to the learned Counsel for the respondent the appellant never objected to assessment of dues in respect of employees of the nursing college and their names are reflected in the attendance and wage register of the appellant establishment itself. The question whether the employees of the nursing college can be assessed against the appellant is a question of fact which is required to be proved before the respondent authority at the time of Sec 7A enquiry. The appellant did not raise any objection or dispute regarding the assessment before the respondent authority and never produced any documents to substantiate the

claim. Further the appellant admitted the liability before the respondent authority. Hence the claim of the appellant is only an after thought and cannot be sustained.

13. The learned Counsel for the appellant contended that the canteen is run by an independent contractor by name M/s.Veekay Caterers which is independently coverable. According to him the respondent authority ought to have taken action to cover the contractor to secure compliance under the Act. The learned Counsel for the respondent pointed out that the appellant never took a stand that the Aswini Hospital Canteen is run by a contractor before the respondent authority. Even if it is run by a contractor, it is an exclusive contractor working for the appellant establishment and therefore the appellant establishment cannot escape the liability to remit the contribution in respect of the contract employees, particularly when the contractor is not independently covered under the provisions of the Act. The definition of 'employee' under 2(f) of the Act is wide enough to accommodate such contingencies. According to the definition, employee means any person who is employed for wages in any kind of work in or in connection with the work of the establishment and who gets his wages direly or indirectly from the employer and includes any person employed by or through a contractor in or

in connection with the work of the establishment. After amendment of the definition in 1988, incorporating the words "employed by or through a contactor in or in connection with the work of the establishment" an employer becomes liable for any contract worker working in or in connection with the work of the establishment. The words "in connection with the work of the establishment" was elaborately explained by the decision of the Hon'ble Supreme Court of India in **Royal Talkies and others Vs ESIC,** 1978 (4) SCC 204 and also by Hon'ble High Court of Kerala in various decisions. The Hon'ble Supreme Court of India held that " It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment. Surely, an amenity or facility for the customers who frequent the establishment has connection with the work of the establishment ". The Hon'ble Supreme Court in the above case conceded that employees working in a canteen attached to a Cinema theatre is working in connection with the work of the establishment and is required to be extended the benefit of social security by the establishment. In view of the above legal positions the appellant establishment cannot escape the liability of remitting contribution in respect of the canteen employees engaged through an exclusive contractor.

14. 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