



सत्यमेव जयते

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

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

(Tuesday the 31st day of August, 2021)

APPEAL No.18/2019

(Old No.27(7) 2011)

Appellant : M/s. Anitha Cashew Factory,
Mynagappally,
Kollam - 691 519.

By Adv. Anil Narayan

Respondent : The Assistant PF Commissioner
EPFO, Regional Office
Parameswar Nagar
Kollam – 691 001

By Adv. Pirappancode V.S Sudheer
Adv. Megha A

This case coming up for final hearing on 07/04/2021
and this Tribunal-cum-Labour Court on 31/08/2021 passed the following:

ORDER

Present appeal is filed from Order No. KR/ 16178 / Enf-1(3)/2010/3369 dt. 02/01/2010 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') for the period 06/2008 to 07/2009 .The total damages assessed is Rs. 1,36,567/-.

2. The appellant is an establishment engaged in procuring and process raw cashew nuts and selling cashew kernels and related products. The appellant received a summons dt.18/09/2009 alleging that there was evasion in membership and contribution by the appellant establishment. The appellant was also given an opportunity for personal hearing on 30/09/2009. On the request of the appellant the respondent provided a copy of the

inspection report. The appellant filed written objections on 17/12/2009. Enquiry was adjourned on various dates and on 19/07/2010 the appellant filed proof affidavit in lieu of the examination in chief. The appellant also produced 8 documents including wage registers. The appellant requested for cross examining the Enforcement Officer who submitted the report. The appellant seriously contested the non-enrolment of employees. The respondent issued summons to union for attending the hearing and adduce evidence regarding alleged non-enrolment. Though notices were served on the convenors of the union none of them turned up for the enquiry. The first respondent also found that the report of the Enforcement Officer was based on approximate wages and therefore ordered a re-inspection of the appellant establishment. On the basis of the 2nd report of the Enforcement Officer, the respondent issued the impugned order. The impugned order is based on surmises and conjectures and not based on the actual wages paid. The assessment of dues on the basis of wages shown in the ESI returns and report of the Enforcement Officer is illegal and unfair. The first respondent has all powers for enforcing attendance of any person and require production of any documents. The first respondent ought to have exercised the said powers to collect the relevant evidence regarding the current actual wages of the employees instead of relying on the report of the Enforcement Officer. The evidence adduced by the appellant was not considered by the first respondent. The claim of the appellant that wages shown in the wage register is inclusive of holiday wages is not considered by the first respondent. The assessment of dues made by the respondent under “ the dues in respect of difference in wages between EPF and ESIC ” is also not sustainable in the eye of law. The alleged omitted wages arrived at by the first respondent is not based on actual wages. The respondent has taken 130% of the actual wages for arriving at the wages for a particular month and the contribution is calculated on the basis for the same. The calculation is not based on any documents.

3. Respondent filed counter denying the above allegations. An Enforcement Officer of the respondent organization conducted an inspection of the appellant establishment and submitted a report dt. 30/08/2009. According to the report :

1. Dues in respect of 27 non enrolled employees for the period from 06/2008 to 07/2009 is not remitted.
2. Dues on holiday wages for 12/2008, 02/2009, 04/2009 and 05/2009 were not paid.
3. Dues in respect of omitted wages from 6/2008 to 07/2009 is required to be paid.
4. Dues in respect of difference of wages between EPF and ESIC for the period of 06/2008 to 06/2009 is required to be paid.

4. On the basis of the report, the respondent authority initiated an enquiry U/s 7A of the Act by issuing a notice dt.18/09/2009. The appellant was also given an opportunity for personal hearing on 30/09/2009. A copy of the report of the Enforcement Officer was handed over to the Advocate representing the appellant on 30/09/2009. The hearing was further adjourned on the request of the appellant to 27/10/2009, 18/11/2009, 25/11/2009, 10/12/2009 and 17/12/2009. On 17/12/2009 the Advocate representing the appellant filed a written statement along with 7 wage registers. Again the matter was adjourned on the request of the appellant to 20/01/2010 and on various other dates. On 19/07/2010 the appellant filed an affidavit stating that the appellant never employed any temporary employees and the complaint is filed because of the enmity and conflict of the union leaders towards the appellant establishment. Since the appellant disputed the non-enrolment of employees summons was issued to convenors of all trade unions to attend the hearing on 27/07/2010. Even though the summons were send by name to convenors in the factory address, none attended the hearing. Later it was

noticed that all the summons were received by the Manager of the establishment as is evident from the signature obtained in the acknowledgement cards which is produced and marked as Exbt. R2. Hence the possibility of the summons reaching the convenors was very remote and the appellant ensured that the summons did not reach the convenors. The mahazer prepared by the Enforcement Officer clearly shows the name address and date of joining of the non-enrolled employees, at the time of his visit on 13/08/2009 and the list of employees is seen countersigned by the manager of the appellant establishment. As there was a dispute regarding non-enrolled employees, the Enforcement Officer re-inspected the appellant establishment on 28/10/2010 and submitted a report furnishing the details of 8 non-enrolled employees, As per the temporary employees wage register produced by the appellant the details of wage in respect of them were taken for assessment. The Enforcement Officer report dt.28/10/2010 is produced and marked as Exbt.R3. The respondent was forced to take 130% of the wages mentioned in the registers, as the wage registers produced by the appellant were not genuine and the wages mentioned in the wage register were very low. The mahazer, the extract of wage register etc submitted along with the report of the Enforcement Officer was countersigned by the manager of the appellant establishment. Hence it is the responsibility of the appellant to produce the original documents such as wage register, service register muster roll, ledger, balance sheet and cash book. The burden of proof is on the appellant to disprove the report of the Enforcement Officer. In ***JK College of Nursing and Paramedical Vs Union of India & Others***, W. P. (C) No. 8195/2010 and CM No. 21123/2010 the Hon'ble High Court of Delhi held that “ The strength of employees can be within the exclusive knowledge of the establishment only and it is the duty of the establishment to satisfy the EPF authorities of the strength of the employees”.

5. An Enforcement Officer of the respondent authority who conducted the inspection of the appellant establishment noticed that there

were non-enrolled temporary employees working in the appellant establishment, holiday wages for few month were not accounted for assessing provident fund contribution, there is difference in wages reported in ESIC and EPF and there is huge under reporting of wages by the appellant establishment. According to the Enforcement Officer there were 27 employees who were not enrolled to provident fund. He has also prepared the list of employees in the presence of the trade union leaders and also in the presence of the manager of the appellant establishment. The list was countersigned by trade union leaders as well as the manager of the appellant establishment. The non-enrolment was seriously disputed by the appellant and therefore the respondent deputed the Enforcement Officer for a further verification of the appellant establishment on 28/10/2010. The Enforcement Officer found that there were only 8 employees working in the appellant establishment as on that date who were not enrolled to the fund. The Enforcement Officer also assessed the dues on the basis of the temporary employees register and wage register produced by the manager of the appellant. The assessment of dues in respect of non-enrolled employees is based on Exbt R3 report of the Enforcement Officer. The learned Counsel for the respondent also pointed out that the respondent authority, during the course of 7A enquiry, summoned the trade union leaders who signed the mahazer during the inspection by the Enforcement Officer. The learned Counsel for the respondent pointed out that as per Exbt R2, all the summons issued to the trade union leaders were received by the manager of the appellant and was not probably served on them and therefore they did not attend the enquiry to confirm the no enrolment of 27 employees reported through Exbt R1. It is further seen that there is no serious dispute regarding assessment on holiday wages and difference on wages between EPF and ESI wages reported in their returns. However there is a serious dispute regarding the way the contribution is assessed on omitted wages. According to the statutory return in Form 12A filed by the appellant, the wages reported were

substantially low and the appellant failed to produce any documents to prove the actual wages paid to the employees. According to the report of the Enforcement Officer who conducted the first inspection, the wages shown in the provident fund returns is only 50% of the actual wages paid to the employees. For example for the month of June 2008 the actual wages paid as per the salary register was Rs. 1,44,510/-where as the wages as per the provident fund return is only Rs.72,375/-. It is seen that for all these months there is a huge variation in the salary actually paid. It is seen that the statement in Exbt R1 is countersigned by the manager of the appellant establishment. Hence there is no reason to disbelieve the report of the Enforcement Officer regarding wages in Exbt R1. However when the Enforcement Officer inspected the appellant establishment for the 2nd time he found that the salary register produced for inspection was not the original salary register. The respondent authority therefore in all fairness took 130% of the reported wages for assessing the dues. When the establishment adopts this kind of tactics to evade the provisions of law, the respondent authority cannot but take the dues on the basis of the wages reported by the Enforcement Officer. Further, in the first inspection report, the Enforcement Officer has extracted the actual difference is paid to the employees and reported in the Provident Fund returns. He was lenient enough to exclude a major part of the wages paid probably taking into account the components of various allowances.

6. Considering all the facts, pleadings and circumstances in this case, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer