



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

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

(Thursday the 13th day of January, 2022)

APPEAL No.749/2019
(Old No. ATA-141(7)2012)

Appellant : M/s. Future Foundations (P) Ltd
C-2, Future House, Temple Road
Sasthamangalam
Trivandrum – 695 011

By Adv. Anil Narayan

Respondent : The Assistant PF Commissioner
EPFO, Pattom
Trivandrum – 695 004.

By Adv. Ajoy. P.B

This case coming up for final hearing on
08/09/2021 and this Tribunal-cum-Labour Court on
13/01/2022 passed the following:

ORDER

Present appeal is filed from order No. KR/ 26007/Enf-
1(4)/2011/10928 dt.17/11/2011 issued U/s 7A of EPF & MP
Act, 1952 (hereinafter referred to as 'the Act'.) finalizing the

date of coverage and also assessing dues on evaded wages and non-enrolled employees for the period 04/2005 to 02/2011. Total dues assessed is Rs. 4,62,896/-.

2. The appellant establishment is engaged in building and construction industry. The employee's strength of the appellant crossed 20 on 11/03/2009 and the performa information was also submitted accordingly. However the respondent covered the appellant establishment with effect from 01/04/2005. Copy of the coverage notice dt. 15/06/2009 is produced and marked as Exbt A2. An Enforcement Officer inspected the appellant establishment on 24/03/2011 and noticed that the appellant establishment was engaging only 10 employees as on 01/04/2005. Copy of the inspection report dt. 24/03/2011 is produced and marked as Exbt A3. The respondent authority initiated an enquiry U/s 7A. On 14/06/2011 the appellant filed a written statement stating that the appellant may be provided with the details of employment strength based on which the appellant establishment is covered with effect from 01/04/2005. No reply is given by the respondent. The appellant started remitting contribution with effect from 11/03/2009 as the employment strength crossed 20 as on that date. The appellant produced the

attendance register, wage register and balance sheet before the respondent authority and all these documents will disclose that the appellant never engaged 20 employees during 01/04/2005. The appellant also requested the coverage proposal submitted by the Enforcement Officer. The true copy of the letter dt.14/06/2011 is produced and marked as Exbt A4. The appellant filed an objection dt.17/05/2011 stating that the employment strength was only 10 as noted in the inspection report and the burden of proof is with the respondent to prove the employment strength beyond 10. Even when the enquiry was in progress the respondent deputed an Enforcement Officer to conduct inspection to find out the employment strength. Copy of the letter dt.17/05/2011 given to the Enforcement Officer by the appellant is produced as Exbt A5. The appellant vide letter dt. 31/10/2011 requested the respondent to decide the issue of coverage as a preliminary issue before assessing the dues. Copy of the letter dt.31/10/21011 is produced and marked as Exbt A6. The documents, on the basis of which the appellant is covered with effect from 01/04/2005 is not provided to the appellant. The respondent authority assumed that the appellant employed 20 persons as on 01/04/2005 without even referring the report of the Enforcement Officer.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f 01/4/2005 under the schedule head “building and construction”. The Enforcement Officer inspected the appellant establishment and found that the appellant has not started compliance with effect 01/04/2005. But made partial compliance for the period 03/2009 to 02/2011. He also found that certain employees are not enrolled to the fund and in respect of enrolled employees also dues were remitted for a portion of wages. It was also noticed that allowances which were not excluded and found part of basic wages have not been considered for payment of provident fund. The respondent authority therefore initiated an enquiry U/s 7A of the Act. During the enquiry the appellant contested the date of coverage on the ground that the appellant did not employ 20 persons as on 01/04/2005. The employment strength reached 20 on 11/03/2009 and the appellant started compliance from that date. According to the appellant, he directly employed less than 20 persons as on 01/04/2005 and direct employment strength reached 20 on 11/03/2009 and therefore started compliance from that date. As per the report of the Enforcement Officer the appellant engaged 12 employees as on 04/2005. The

Enforcement Officer also submitted the Balance Sheet and Profit and Loss account of the appellant for the period 2004-2005, 2005-2006, 2006-2007 and 2007-2008. It was evident from the Balance Sheet that the appellant establishment, who is engaged in construction activity has paid huge amounts as labour charges. During 2004-2005 itself the appellant was carrying out 4 projects involving engagement of large number of employees. According to the report of the Enforcement Officer, after analyzing the Balance Sheet and Profit and Loss account, an amount of Rs.18,21,804 was paid as wages and salary during the year. The appellant is engaging 2 categories of employees, direct employees of the appellant and the employees engaged in the work site through contractors. The entire work is carried out by contract employees which is being managed and supervised by direct employees. The Balance Sheet and Profit and Loss Account for 2004-2005 shows that an amount of Rs. 1,10.050/- has been paid as wages to the contract employees in a month on an average, which is not considered by the appellant to count the employment strength as on 01/04/2005. The appellant refused to provide the details of payment to contractors including the name of contractors on the ground that he is not liable to maintain any such records pertaining to the contract employees. Since the appellant failed to

produce the required information and the available information clearly established the fact that the appellant was engaging more than 20 employees as on 01/04/2005. The appellant establishment is covered from the said date. The definition of employee U/s 2(f) of the Act clearly establish the fact that the contract employees engaged by the appellant are also employees of the appellant for the purpose of extension of social security under the provisions of the Act. In **JK college of Nursing and Paramedical Vs Union of India**, W.P.(C). No.8195/2010, 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 responsibility of the establishment to satisfy the EPF authorities of the strength of its employees. The Division Bench of the Patna High Court in **Bakim Chandra Chakravorthy Vs RPFC**, held that once the authorities under the Act have held the number of employees in the establishment to be more than required to bring the establishment within the purview of the Act, it is up to the persons challenging the said finding to establish that the number of employees is less than what is pointed out by the respondent .

4. The appellant establishment is engaged in construction industry and is covered with effect from 01/04/2005 under the provisions of the Act. According to the learned Counsel for the respondent the employment strength of the appellant establishment reached 20 as on 01/04/2005 and therefore the appellant establishment is coverable under the provisions of the Act with effect from that date. According to the learned Counsel for the appellant, the employment strength reached 20 only during 11/03/2009 and therefore the appellant establishment started compliance from the said date. Hence there is a dispute regarding the date of coverage of the appellant establishment under the provisions of the Act . The other two issues considered by the respondent authority in the proceedings U/s 7A are that of 21 non-enrolled employees from April 2009 and evasion of wages in payment of contribution as the appellant establishment failed to remit contribution on allowances paid to the employees. It is seen that the appellant has not challenged the 2nd and 3rd issues in this appeal. Hence the only issue to be consider is whether the appellant establishment is rightly covered with effect from 01/04/2005.

5. The respondent authority covered the appellant establishment with effect from 01/04/2005. The appellant did not start compliance. The respondent therefore initiated an enquiry U/s 7A of the Act. In the 7A the appellant took a stand that the appellant never directly employed 20 employees as on 01/04/2005 and the employment strength reached 20 as on 11/03/2009 and therefore the appellant establishment started compliance from the said date. The Enforcement Officer who conducted the inspection of the appellant establishment found that the appellant was engaging 12 employees directly as on 01/04/2005. Further being a construction industry the appellant establishment has paid huge labour charges to contract employees as per Balance Sheet and Profit and Loss account for the year 2004-2005 and subsequently also. After a detailed analysis the Enforcement Officer who represented the respondent organization, pointed out that the appellant establishment has paid an amount of Rs.18,21,804/- being wages to the contract employees and the average month by wages to contract employees come to Rs.1,51,817/- On the basis of the above data the Enforcement Officer argued that the employment strength of the appellant establishment crossed 20 on 01/04/2005. The appellant on the other hand pointed out that the appellant

establishment engaged only 12 employees directly as on 04/2005. According to the appellant the appellant has engaged contractors on rate contract basis and the labour charges shown in the Balance Sheet is the amount paid to the contractors. The appellant also took a stand that appellant is not the employer and not even the principal employer as the relationship between the contractor and the appellant is that of principal to principal. The respondent directed the appellant to furnish the details of the contract employees engaged through contractor or atleast the names of contractors engaged by him. But the appellant failed to produce any details in the enquiry on the ground that the burden of proving the employment strength is with the respondent authority and therefore the appellant cannot be directed to produce negative evidence against him. After considering all the contentions by the appellant as well as the Enforcement Officer the respondent authority confirmed the coverage of the appellant establishment with effect from 01/04/2005 and assessed the dues with effect from the said date.

6 In this appeal also the learned Counsel for the appellant took a view that burden of proving the employment strength as on the date of coverage is with the respondent and the

appellant cannot be directed to produce negative evidence against himself. The learned Counsel for the respondent on the other hand argued that it is the responsibility of the appellant to produce records and disprove the claim of the respondent regarding employment strength as they are the custodians of the details of the employees. He relied on the decision of the Hon'ble Supreme Court of the India in **Employees State Insurance Corporation Vs Harrison Malayalam Pvt Ltd**, 1993 KHC 405. The Hon'ble Supreme Court was considering the responsibility of payment of contribution under ESI Act by the Principal employer in respect of contract employees engaged by them. The Hon'ble Supreme Court held that “ we are afraid that the ground given by both the Courts is not justifiable. Under the Act, it was the duty of the appellant company to get necessary details of the workman employed by the contractor at the commencement of the contract since the primary responsibility of the payment of contribution is on the principal employer”. As per Para 30 of EPF Scheme it is the responsibility of the principal employer to pay both the contribution with regard to the employees directly employed by him or through a contractor. As per Para 32, in respect of employees employed by or through a contractor the contractor shall recover the contribution payable by such employee and shall

pay to the principal employer the amount of members contribution so deducted together with an equal amount of contribution and also the administrative charges. As per Para 33, it is the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of employees employed by or through a contractor. As per Sec 36B, every contractor shall within 7 days of close of every month submit to the principal employer, a statement showing the recoveries of contribution, in respect of employees employed by him. Hence it can be seen that the provisions of the Scheme makes it mandatory on the principal employer to ensure the remittance of provident fund contribution and also to collect and retain the details of employees engaged through a contractor. When the appellant failed to comply with the mandatory provisions of the Act and Schemes, the appellant cannot plead that the burden of proof lies on the respondent to prove that the employment strength of the appellant during the relevant point of time. It is a well settled principle of common law that wrong doer cannot take advantage of his own wrong. The appellant having violated the provisions of the Act and Schemes as discussed above cannot take advantage of the same and argue that the respondent will have to establish the

employment strength as on 01/04/2005. The learned Counsel for the respondent also relied that the decision of the Hon'ble High Court of Delhi in **JK College of Nursing and Paramedical Vs Union of India and Others**, 2012 132 FLR 46 and **Saraswathi Construction Company Vs Central Board of Trustees**, 2010 127 FLR 116 (Delhi) to argue that the burden is on the appellant to prove the employment strength being the custodian of the records regarding employment strength. Further looking at the definition of the employer as per Sec 2 (e) (2) “ In relation to any other establishment , the person who or the authority which has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a Manager, Managing Director or Managing agent, such Manager, Managing Director or Managing agent, is the employer”. From a perusal of the definition it is abundantly clear that what is required to be considered for a person to be employer is the ultimate control over the affairs of the establishment” in which or in respect of which any person is employed and not direct or indirect control over the functioning of employees by such person. The control of affairs of the establishment in which or in respect of which a person is employed has different connotation than control or supervision over the employees concerned in the context in which the term

has been used for the purpose of giving effect to the provisions of the Act. U/s 2(f) of the Act, an 'employee' means any person who is employed for wages in any kind of work manual or otherwise in or in connection with the work of the establishment and who gets its wages directly 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. The expression "in connection with the work of an establishment" was examined by the Hon'ble Supreme Court in **Royal Talkies, Hyderabad and Others Vs ESIC**, 1978 4 SCC 204 and held that the expression ropes in a wide variety of workman who may not be employed in the establishment but may be engaged only in connection with the work of the establishment. Some nexus must exist between the establishment and the work of the employees. "In connection with the work of an establishment" only postulates some connection between what the employee does and the work of the establishment. In this case the appellant cannot take a stand that the employees engaged by the contractors are not doing any work in connection with the work of the establishment. Therefore the contract employees engaged by the appellant will come within the definition of employee under the Act .

7. It is seen that the appellant has taken a stand that they are not liable to maintain any records in respect of the contract employees engaged by them and therefore they are not maintaining any such records. As already stated, the EPF Act and Scheme mandates such responsibility on the principal employer and therefore the appellant cannot escape such responsibility. It is responsibility of the appellant to prove the details the labour charges and contract payments made to various contractors. It is felt that the appellant can be given an opportunity to produce the details regarding the contract employees before the respondent to decide the date of applicability of the provisions of the Act to the appellant establishment. In case the appellant fails to produce the necessary records to finally decide the date of coverage the respondent is at liberty to rely on the decision of the Hon'ble Supreme Court in Panther Security Services Vs Employees PF Organisation and another, Civil Appeal Nos. 4434-4435 of 2010 that the balance sheet showing payment of wages running into lacs, necessarily leads to the irresistible conclusion that the appellant has more than 20 employees on the rolls.

8. Considering the facts, circumstances and pleadings the finding of the respondent authority regarding the date of coverage

and assessment of dues from that date coverage to 02/2009 cannot be upheld. Since there is no dispute regarding the assessment with regard to evaded wages and non-enrollment from 03/2009 that part of the assessment is upheld.

Hence the appeal is partially allowed the impugned order confirming the coverage with effect from 01/04/2005 and assessment of dues from 01/04/2005 to 02/2009 is set aside. The assessment of dues from 03/2009, assessment of dues in respect of non-enrolled employees and on evaded wages are upheld. The matter is remitted back to the respondent to examine the coverage of appellant establishment with effect from 01/04/2005 in view of the above directions within a period of 6 months after issuing notice to the appellant. If the appellant fails to appear or produce the records called for, the respondent is at liberty to decide the matter according to law. The pre-deposit made U/s 7(O) of the Act as per direction of this Tribunal shall be adjusted or refunded after conclusion of the enquiry.

Sd/~
(V. Vijaya Kumar)
Presiding Officer