



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

सत्यमेव जयते

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

(Friday the 22nd day of April, 2022)

Appeal No. 22/2018
(Old No. KL-06/2016)

Appellant

A. Mohammed Rafi
Kalluvila Veedu,
Ayathil P.O
Kollam -691 001

By Adv. Pallichal S.K. Pramod

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kollam -691 001

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

This case coming up for hearing on 14/09/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 22/04/2022.

ORDER

Present appeal is filed from order No. KR/KLM/3296/Enf-1(3)/2009/24401C dt. 12/3/2009 assessing dues in respect of the appellant U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages for the

period from 03/2006 to 11/2006. The total dues assessed is Rs. 3,14,735/-.

2. Present appeal is filed from order dt. 12/03/2009 issued by the respondent authority U/s 7A of the Act, a copy of which is produced and marked as Annexure A1. The appellant establishment is covered under the provisions of the Act. The enquiry proceedings were initiated alleging that there are difference in EPF contribution and ESI contribution during the period from March 2006 to November 2006. The appellant was running the factory during the relevant point of time. The appellant produced all the relevant documents before the respondent authority. The true copies of the challans for having remitted the contribution for the relevant period is produced and marked as Annexure A2 series for the period 03/2006 to 11/2006. The appellant establishment paid wages and DA amounting to Rs.7,71,853/- and a corresponding contribution of Rs.1,89,999/- was also paid. As per the impugned order the total wages paid for the period from 03/2006 to 11/2006 is Rs.12,28,953/- and the corresponding contribution payable is Rs.3,14,735/-. The allegations in the impugned order is with regard to splitting up of minimum

wages for the purpose of provident fund contribution. The appellant approached the Hon'ble High Court of Kerala against the impugned order in W.P.(C) No.24916/2009. A true copy of the Writ Petition is produced and marked as Annexure A3. The Hon'ble High Court vide judgment dt.08/09/2009 gave three months time to the appellant for filing appeal before EPF Appellate Tribunal, New Delhi and the recovery proceedings were stayed during the period. A true copy of the judgment of Hon'ble High Court is produced and marked as Annexure A4. The appellant entrusted the matter to a counsel to file an appeal before EPF Appellate Tribunal. The appellant received a recovery notice dt. 01/01/2013 from the respondent directing the appellant to remit an amount of Rs.1,25,736/-towards the outstanding arrears. The true copy of the notice is produced and marked as Annexure A5. The appellant came to know that the appeal was not filed before the EPF Appellate Tribunal on 14/12/2015. The respondent sent another recovery notice. A copy of the recovery notice is produced and marked as Annexure A6. The respondent issued a show cause notice for warrant of arrest on 25/06/2016, a copy of the same is produced and marked as Annexure A7. The appellant approached in Hon'ble High Court in W.P.(C) No. 595/2016

against the show cause notice. The Hon'ble High Court directed the appellant to file an IA seeking extension of time for filing appeal before the EPF Appellate Tribunal. A copy of the said order is produced and marked as Annexure A8. The appellant preferred IA No. 2957/2016 in Writ Petition No.24916/2009 seeking extension of time. A copy of the IA filed is produced and marked as Annexure A9. The Hon'ble High Court of Kerala vide order dt. 22/03/2016 extended the period for filing the appeal. A copy of the order is produced and marked as Annexure A10. The head office of the respondent organization issued a Circular No.CO ORD/4(6)/2003/clarification/ VOL II / 7394 dt. 23/05/2011 insisting for EPF contribution on minimum wages payable to the employees. Due to the SLP pending before the Hon'ble Supreme Court of India, the circular was withdrawn vide CO ORD /4/6/2003 /clarification/ VOL III / 3776 dt. 02/12/2011. A copy of the circular dt. 02/12/2011 is produced and marked as Annexure A11. The allowances being paid to three supervisory staff are excluded under the provisions of the Act whereas they are included in ESIC contribution. A true copy of the statement showing the details of the basic wages, DA and exempted wages etc of three supervisory staff are produced and marked as Annexure A12.

3. The respondent filed counter denying the above allegations. The appellant establishment defaulting in remitting regular dues for the period 03/2006 to 11/2006. The appellant establishment is covered under the provisions of the Act with effect from 01/03/1973. The factory was taken on lease by M/s. Carmel Cashew. Shri. M. Salim was the proprietor for the period 04/2005 to 02/2006. Prior to 12/2006 the factory was run by various proprietors. The appellant Shri. Muhammed Rafi was the proprietor for the period from 03/2006 to 11/2006. On the basis of the information that the appellant defaulted for the period from 04/2006 to 06/2008, an Enforcement Officer was deputed for the inspection. The Enforcement Officer inspected the establishment on 21/07/2008 and directed the employer to produce the records. The employer failed to produce any records called for by the Enforcement Officer. The Enforcement Officer thereafter collected the details of wages reported as per the ESIC returns from the ESIC local office and the monthly wages from 04/2005 to 11/2006 was taken on the basis of the wages reported in ESIC return. The respondent therefore initiated an enquiry U/s 7A of the Act by fixing the enquiry on 21/10/2008. All the three employers, including the appellant

acknowledged the receipt of the notice. The copy of the summons dt.13/10/2008 and the acknowledgement card signed by the appellant is produced and marked as Exbt R1. The appellant did not attend the hearing nor produced any records for the period 03/2006 to 11/2006, when he was running the factory. The inquiry was adjourned to 25/11/2008 and on that date a request was received from the appellant seeking adjournment. Hence the enquiry was adjourned to 30/12/2008. None attended the enquiry on 30/12/2008 and the enquiry was adjourned to 23/01/2009 and then to 13/02/2009. On 13/02/2009 the representative of M/s. Carmal Cashew attended the hearing but none attended on behalf of proprietor Shri.M. Salim and the appellant. The copy of the adjournment notice dt. 30/01/2009 and its acknowledgement card signed by the appellant are produced and marked as Exbt R2. On the basis of the documents produced by M/s. Carmel cashew and the report of the Enforcement Officer the respondent issued the impugned order. The claim that the appellant produced all the documents and various challans before the respondent authority is totally false. The appellant was given adequate opportunity but he failed to appear before the respondent authority or produce any records

called for. When recovery action was taken against the appellant, the appellant produced challans for having made part payment against the assessed dues. Hence the recovery action was taken for recovery of the balance amount. The appellant had further remitted an amount of Rs. 31,585/- as per the direction of this Tribunal. Nowhere in the impugned order proceedings the respondent stated anything regarding the splitting up of minimum wages or the allowances paid to the employees. The appellant is trying to divert the core issue by making such allegations. All the recent decision by the Supreme Court as well as the Hon'ble High Court of Kerala support the fact that all the allowances excluding those allowances specifically mentioned in Sec 2(b)2 of the Act will attract provident fund deduction.

5. An Enforcement Officer was deputed to the appellant establishment to verify the compliance status for 04/2006 to 6/2008. The Enforcement Officer reported that for the period 04/2005 to 02/2006 the establishment was run by Shri. Salim and for the period from 03/2006 to 11/2006 the establishment was occupied by a Muhammed Rafi, the appellant. From 12/2006 onwards the establishment is run by

Shri. C.Yohannan in the name of M/s. Carmal cashews. Though the establishment agreed to produce all the relevant records for inspection, they failed to do so. The Enforcement Officer therefore approached the ESIC Office collected the wages reported in their return and submitted his report dt. 04/08/2008, copy of which is produced and marked as Document No.1. As per the report of the Area Enforcement Officer, the establishment was run in the name of Ajmir Cashews by the appellant for the period from 03/2006 to 11/2006. Hence summons was issued to all the concerned parties directing them to produce necessary records. The enquiry was adjourned to 25/11/2008. A letter dt. 25/11/2008 was received from the appellant seeking adjournment. True copy of the letter is produced and marked as Document No. 2. The enquiry was thereafter adjourned to 30/12/2008, 23/01/2009 and 13/02/2009. A letter dt. 10/02/2009 was received from the appellant requesting to drop the proceedings. The true copy of the letter is produced and marked as Document no. 3. In the letter, he admitted that he was the employer for the period from 03/2006 to 11/2006. There was no representation for the appellant on 13/02/2009. As per sec 7A (3A) “ Where an employer, employee or any

other person required to attend enquiry under sub Sec 1 fails to attend such enquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the enquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such enquiry and the other documents available on record". In this case the appellant was given more than adequate opportunity to appear and produce the records. However he failed to attend the enquiry or produce the records called for. In view of Sec 7A (3A) of the Act, the appellant cannot dispute the assessment as per the impugned order.

6. In this appeal, the appellant raised 2 contentions. The first one is alleging that the assessment is done on splitting up of minimum wages. Nowhere in the impugned order, the respondent has raised any such issue. Further the appellant also contended that the assessment includes various excluded allowances. This is also is not part of the impugned order. The impugned order is based on the difference in wages reported in the ESIC return and provident fund return filed by the appellant. Since the assessment is based on a statutory return

filed by the appellant the burden of proving otherwise, shift to the appellant and it was upto the appellant to produce the records before the respondent authority to prove his contentions. Having failed to do so, inspite of more than adequate opportunities, the appellant cannot plead that the assessment is not based on relevant records.

7. The learned Counsel for the appellant pleaded that no copy of the inspection report was provided to the appellant. It was also argued that there is no independent evidence to show that the establishment was run by the appellant for the period March 2006 to November 2006. On a perusal of the impugned order it is specifically stated that “A notice in this regard has been issued to employer **along with copy of the inspection report** and it was clearly stated in the notice that if the employer or his representative failed to attend the hearing on 13/02/2009, the enquiry will be concluded based on the records available before me”. It is seen from Exbt R1 notice dt. 30/01/2009 addressed to all the parties, including the appellant that a copy of the inspection report was enclosed with the notice for their comments. Hence the appellant cannot plead that he was not provided with a copy of the inspection report of

the Enforcement Officer. Further in Document No. 3 dt.10/02/2009 filed by the appellant before the respondent authority, it is clearly admitted by the appellant that “ I was a cashew processor on commission basis during the period March 2006 to November 2006” while referring to the notice issued U/s 7A of the Act . Hence there is no reason to hold that there is no independent evidence that the appellant was running the factory during the relevant period.

8. 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