सत्यमेव जयते

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

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

(Friday the 25th day of February, 2022)

Appeal No. 27/2020

Appellant — M/s. The Kerala State Financial Enterprises Ltd, Bhadratha , Museum Road, Trichur – 680 020.

By M/s. Menon & Pai.

Respondent

1. The Regional PF Commissioner II EPFO, Regional Office Kaloor, Kochi– 682017.

   By Adv. Sajeev Kumar K. Gopal

2. The Kerala State Defence Co-operative Housing Society Ltd., No. 4343, Anjiparambil Buildings, Ananda Bazaar, Cochin -682016.

This case coming up for hearing on 13/10/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 25/02/2022.

ORDER

Present appeal is filed from order No KR/ KCH / 13896(7A)/Enf-1(3)/2019/Diary No.775/2019 dt. 26/11/2019 assessing dues U/s 7A of EPF & MP Act 1952 (hereinafter referred

to as 'the Act'.) for the period from 07/2012 to 01/2015. The total dues assessed is Rs. 5,81,167/-.

2. The appellant is Government of Kerala undertaking engaged in non-banking financial business. The appellant establishment is covered under the provisions of the Act and is regular in compliance. Kerala State Defense Service Co-operative Housing Society is a co-operative society registered under the Kerala Co-operative Societies Act 1969. The said society is engaged in the business of providing ex-service men to meet the manpower needs of difference firms, companies and establishments. Pursuant to an agreement executed by the appellant and 2nd respondent society, the society supplied manpower to various branches in Ernakulam District. The contract was initially for period of one year and subsequently it was renewed. When the requirement of manpower is over, the persons deployed by the society were disengaged. A true copy of the agreement dt.15/12/2012 between the appellant and the 2nd respondent is produced and marked as Annexure A1. The society is an establishment independently covered under the provisions of the Act. On an inspection of the society by the Enforcement Officer of the 1st respondent, on the basis of a complaint received

from the employees, it was found that the society, 2nd respondent defaulted in remittance of provident fund contribution. Based on the report of the Enforcement Officer the 1st respondent initiated an enquiry U/s 7A of the Act. During the course of enquiry summons was also issued to the appellant. The enquiry was conducted for determining the dues of the 2nd respondent for the period from 07/2012 to 01/2015. Admittedly there was a contract between the appellant and 2nd respondent during this period. On conclusion of the enquiry the 1st respondent quantified the dues and held that the appellant and the 2nd respondent and are jointly and severally liable for remitting the contribution. A copy of the order dt.26/11/2019 is produced and marked as Annexure A2. While issuing the impugned order, the 1st respondent ought to have noticed that the 2nd respondent is an establishment independently covered under the provisions of the Act. The 1st respondent cannot recover the provident fund dues from the principal employer in respect of employees engaged through contractors, when the contractor is independently covered under the provisions of the Act. The contractor who is independently covered is to be treated as an independent employer in view of Para 30 of EPF Scheme 1952. The wages of the employees of the 2nd respondent are paid by the 2nd respondent

only and therefore no liability can be fixed on the appellant regarding the provident fund liability of the 2nd respondent .Without identification of the employees no liability can be saddled on the appellant. The 1st respondent authority failed to exercise its powers U/s 7A of the Act to enforce the attendance of the employees and identify them before assessing the dues on the appellant.

3. The respondent filed counter denying the above allegations. The appellant is non-banking financial institution covered under the provisions of the Act. The appellant as the principal employer entered into a contract with the 2nd respondent, the later being covered under Code No.KR/13896. The 2nd respondent provides manpower to different branches of the appellant. Complaints were received from the employees of the 2nd respondent alleging that the 2nd respondent failed to comply with the provisions of the Act from 07/2012. It was noticed that the respondent was remitting only minimum administrative charges with effect from 03/2011 onwards. An Enforcement Officer was deputed to investigate the complaint. It was reported that the 2nd respondent remitted minimum administrative charges with effect from 07/2012 to 12/2014 and from 01/2015 the 2nd

respondent stopped remitting even the minimum administrative charges. Accordingly an enquiry was initiated to assess the dues. The Secretary of the 2nd respondent society attended the hearing and submitted that around 100 ex-service men were deployed in M/s KSFE Ltd, the appellant establishment at their branches in Kollam, Ernakulam and Calicut. Being the principal employer, the appellant was also made a party to the enquiry U/s 7A of the Act. The enquiry was adjourned to various dates. The representative of the appellant as well as the 2nd respondent attended the hearing. The representative of the appellant filed a written statement stating that the 2nd respondent is closed and they were providing manpower only to KSFE Ltd. The representative of the appellant produced a copy of the agreement with the 2nd respondent. The appellant as well as the 2nd respondent were offered 25 opportunities to produce record and clarify their position. As per the written statement filed by the 2nd respondent, they provided manpower to different branches of the principal employer who is the appellant in this case. As part of the agreement, 2nd respondent collected salary from the appellant for its members and distributed the amounts to the members after deducting service charges. It was also stated by the 2nd respondent that the contract agreement was not renewed from 01/04/2014. The appellant who is the

principal employer produced the copy of the agreement with the 2nd respondent. The agreement is valid till 01/07/2015. Therefore it is clear that the claim of the 2nd respondent that the contract is not renewed after 01/04/2014 is not correct. The appellant produced monthwise list and wages of employees engaged from 2nd respondent for the period from 07/2013 to 01/2015. No provident fund contribution is seen deducted from the salary of the employees. On the basis of the details furnished by the appellant, the 1st respondent issued the impugned order holding that the appellant as well as the 2nd respondent are liable for remitting the contribution. It is further reported that the second respondent stopped functioning since March 2011. However the 2nd respondent remitted minimum administrative charges, though the employees were deployed and working with the appellant establishment. The appellant being the principal employer cannot escape the liability to remit contribution in respect of contract employees engaged by them in the event of default by the contractor. As per Sec 2(f) of the Act any person employed directly or through a contractor is an employee as per Para 30(1) of EPF Scheme the principal employer shall pay both the contributions payable by himself and also on behalf of the member employed by him directly or through a contractor. As per

Sec 2(e) of the Act the employer is defined as a person having ultimate control over the affairs of the establishment. As per Para 30(3) of the EPF Scheme it shall be the responsibility of the principal employer to pay both the contribution in respect of himself and the employees employed directly by him and by or through a contractor. Both the appellant and second respondent failed in their duties in making remittance towards EPF contribution as laid down in the Act and schemes. Complaints were received from the employees regarding the non-remittance of contribution. The complaints were investigated through an Enforcement Officer. The investigation revealed that the second respondent remitted minimum administrative charges with effect from 03/2011 onwards and after 01/2015 the 2nd respondent failed to remit even the minimum administrative charges. As per the provisions of the Act and Scheme, the principal employer shall remit the dues. The contractor shall recover the contribution payable by the employees engaged through him and shall pay the same to the principal employer along with the administrative charges. The appellant being the principal employer cannot evade the responsibilities cast upon him by passing the liability to the 2nd respondent alone. It is the responsibility of the 1st respondent to ensure that the interest of the employees engaged directly or

through a contractor is protected as per the provisions of the Act and Schemes. The Hon'ble Supreme Court of India in **Maharashtra State Co-operative Bank Ltd Vs PF Commissioner,** 2009 10 SCC 123 held that " Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions".

4. Notice was issued to the 2nd respondent in this appeal notice remained unclaimed and the postal authorities returned the summons with an endorsement that '**Door locked. Notified**". Hence the 2nd respondent remained ex-parte in this proceedings.

5. The main issue to be decided in this appeal is with regard to the liability of the principal employer, the appellant to remit provident fund contribution in respect of contract employees engaged through a contractor covered independently under the provisions of the Act. According to the learned Counsel for the appellant when a contractor is covered independently the contractor is required to be treated as the employer and the liability to remit provident fund contribution in respect of its employees is with the contractor himself and the principal

employer cannot be held responsible for the default of the contractor in remitting the provident fund contribution in respect of the employees engaged by the contractor. According to the learned Counsel for the respondent, Paras 26, 26A, 30, 34, 36 B of EPF Scheme and also sections 2(f) and 8A of EPF and MP Act 1952 makes it abundantly clear that the principal employer is primarily responsible for remitting the contribution in respect of contract employees. In the event of any default by the contractor, the principal employer cannot escape the liability of remitting the contribution . According to Para 26, every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies other than excluded employees shall be entitled and required to become member of the fund from the day of this Para came into force in such factory or other establishments. Further as per Para 26A a member of the fund shall continue to be a member until he withdraws under Paragraph 69 the amounts standing to his credit in his fund. As per Para 30(1) the employer shall in the first instance pay both the contribution payable by himself and also on behalf of the member employed by him directly or by or through a contractor the contribution payable by such member. As per Sec 2(f) of the Act an employee means any person employed for wages in or in

connection with the work of the establishment, who gets his 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 . As per Sec 8A, any dues payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contract either by deduction from the amount payable to the contractor under any contract or as a debt payable by the contractor. As per Para 36B of EPF Scheme, every contractor shall within 7 days the close of every month submit to the principal employer a statement showing the recoveries of contribution in respect of employees employed by or through him and also shall furnish such information as required by the principal employer. The above statutory provisions would clearly indicate the liability of the principal employer under the Act and Schemes in respect of the contract employees engaged by the principal employer. According to the learned Counsel for the appellant the above provisions will not be applicable when the contractor is independently covered under the provisions of the Act. According to him when an contractor is independently covered he should be treated as employer and the liability of the principal employer under the provisions of the Act and Schemes cannot be invoked. It

is difficult to agree with the contention of the learned Counsel for the appellant, as allotting a code number is not a statutory requirement under the Act or Schemes and is only an administrative function for monitoring compliance of the establishment. When the statute itself provides for the obligation of the principal employer, it is difficult to accept the plea of the learned Counsel for the appellant that his responsibility as a principal employer is taken away since an independent code number is allotted to the contractor. In this particular case it is seen that the 2nd respondent, contractor is supplying manpower only to appellant and is therefore an exclusive contractor to the appellant establishment. The law is very clear that it is the responsibility of the principal employer to confirm compliance with regard to the contract employees. It is particularly so when the contractor is an exclusive contractor for the principal employer. As already explained, it is a statutory obligation on the principal employer to ensure compliance under the Act with regard to the contract employees engaged by them, even if an independent code number is allotted to the contractor. Hence the appellant cannot plead that the appellant establishment is not responsible for the provident fund liability of the contract employees. Having violated or ignored the statutory liability, the

appellant establishment being the principal employer will have to take the responsibility for the default of the contractor. It is well settled principle of common law that wrong doer cannot take advantage of his own wrong. In **Eureka Forbes Ltd Vs Allahabad Bank,** 2010 (6) SCC 193 the Hon'ble Supreme Court held that the maxim **" nullus commondum capere protest de injuria sua propria"** has a clear mandate of law that, a person who by manipulations of a process frustrates the legal rights of others, should not be permitted to take advantage his wrong or manipulations. In the present case, the appellant, as the principal employer violated the provisions of the Act and Schemes thereunder and therefore cannot frustrate the implementation of social security benefit to the contract employees on the ground that an independent code number is allotted to the contractor. As per sec 2 (f) of the Act if a person is employed ' in connection with the work of an establishment' and gets his wages directly or indirectly from the employer he would fall within the ambit of the definition of the employee. The Hon'ble Supreme Court of India in **Royal Talkies, Hyderabd and others Vs Employees State Insurance Corporation,** 1978 (4) SCC 204 examined the words "in connection with the work of the establishment and held that

"Firstly he must be employed in or in connection with the work of the establishment "The expression " in connection with the work of an establishment" ropes in a wide variety of workmen 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 employee, but it may be a loose connection. "In connection with the work of the establishment" only postulates some connection between what the employee does and the work of the establishment. He may not do anything directly for the establishment; he may not do anything statutorily obligatory in the establishment; he may not even do anything which in primary or necessary for the survival or the smooth running of the establishment or integral to the adventure. It is enough if the employees does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.."

6. Hence it is clear that the principal employer cannot escape the liability of remitting provident fund contribution in respect of contract employees engaged in or in connection with the work of the principal employer. The Hon'ble High Court of Delhi in **MMTC Ltd Vs Regional PF Commissioner,** W.P.(C) No.2679/1997 examined the above issue. In this case the question was whether the principal employer was responsible for the provident fund liability of the transport contract employees engaged through contractors. After examining the statutory and legal provisions and also the related decisions of Hon'ble Supreme Court of India, the Hon'ble High Court held that the principal employer is bound to deposit the provident fund contribution in respect of the workers of the contractors.

7. Having stated the legal position as above, it is the primary responsibility of the 2nd respondent contractor to remit the contribution in respect of the employees engaged by them with the principal employer . However the principal employer cannot escape the liability in the event of default by the contactor, since the contractor was an exclusive contractor supplying manpower only to the appellant establishment. The 1st respondent shall take all possible action to recover the assessed dues as per

the impugned order from the 2nd respondent contract. The liability of the principal employer shall be invoked only if the 1st respondent failed to recover the amount from the 2nd respondent contractor.

8. Considering the facts, circumstances pleadings and evidence in this appeal , I am not inclined to interfere with the impugned order except holding that the primary responsibility of remitting the contribution is with the 2nd respondent contractor and the 1st respondent shall take all recovery action to recover the amount as per the impugned order from the 2nd respondent failing which the appellant will be responsible for remitting contribution in respect of the contract employees .

Hence the appeal is dismissed with the above modification in the impugned order.

Sd/-
(V. Vijaya Kumar)
Presiding Officer