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

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

(Tuesday the 08th day of March, 2022)

Appeal No.396/2019
(Old No.ATA-1109(7)2015)

Appellant	M/s. S D V English Medium Higher Secondary School, Sanathanam Ward, Alleppey – 688 001
	By M/s. B.S. Krishnan Associates
Respondent	The Assistant PF Commissioner EPFO, Sub Regional Office Kaloor, Kochi– 682017.
	By Adv. Sajeev Kumar K. Gopal

This case coming up for hearing on 13/10/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 08/03/2022.

O R D E R

Present appeal is filed from order No. KR/ KCH / 5825/ Enf -II(1)/2015/13266 dt. 10/02/2015 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') for the period from 06/2007 to 03/2014. Total dues assessed is Rs. 3,59,069/-.

2. Appellant is a school covered under the provisions of the Act with effect from 31/03/1982. An Enforcement Officer of the respondent organization visited the appellant establishment on 08/07/2014 and issued inspection part II report dt.11/07/2014 informing that three drivers engaged through M/s Kamalam Travels and one yoga teacher are to be enrolled to the fund. Copy of the inspection report is produced and marked as Annexure A1 series. The appellant send a reply dt. 29/08/2014 pointing out that drivers are engaged by the owner of M/s Kamalam Travels and they are not working under the control and supervision of the school management. It was also pointed out that the hire charges are paid on daily basis to M/s. Kamalam Travels. It was also pointed out that the drivers are covered under Motor Workers Act and Motor Transport Welfare Fund. With regard to the yoga teacher it was pointed out that he was only paid fees and no salary or wages are paid to him. A copy of the reply dt. 29/08/2014 is produced and marked as Annexure 2. The appellant produced a copy of the agreement between the appellant school and M/s. Kamalam Travels and also between the school and yoga teacher. The copies of the agreements are produced and marked as Annexure 3 and 4 respectively. Without considering the any of the contentions, the respondent issued the impugned order, a copy

of which is produced and marked as Annexure5. The demand as per the impugned order is barred by limitation. The respondent failed to consider the Annexure 3 & 4 agreements produced before him which would clearly establish the fact that these 4 persons against whom assessments were made are not employees of the appellant establishment. There is no whisper regarding Annexure 3 & 4 in the impugned order. The amounts paid as per Annexure 3 agreement cannot be considered as wages as there is no wage element in the same. The buses are run for school purposes only in the morning and evening and in between the buses ply for other purposes. Further the employees of tourist permit buses are covered under Motor Workers Act and Motor Transport Workers Welfare Fund Scheme. The yoga teacher is a freelancer and payment made to him is not wages but only fees. He worked only for 2 days and impart training to students. Hence there is no wage element in the payment made to yoga teacher also.

3. The respondent filed counter denying the above allegations. The appellant is a school covered under the provisions of the Act, during the inspection by an Enforcement Officer of the respondent organization, it was found that three contract drivers and one yoga teacher engaged by the establishment have not been

enrolled to the fund. The Enforcement Officer reported the dues in respect of these 4 employees vide his inspection report dt. 11/07/2014. A copy of the report was served on the appellant with a direction to remit the dues. Since the appellant failed to remit the amount, an enquiry U/s 7A of the Act was initiated. With regard to the contention that the three contract drivers are covered under Motor Transport Welfare Fund Scheme, the legal position is clarified by the Division Bench of the Hon'ble High Court of Kerala **Himavathy Vs Special Deputy Thahzildar,** 2008 (3) KLT 807 and **Unni Mammu Haji Vs State of Kerala,** 1989 (1) KLT 729. The Hon'ble High Court held that under no provisions of law the employees can be permitted to enjoy dual benefits of similar nature under the provisions of two different statutes and therefore permitted the employer to transfer the contributions made in respect of the workers whose names are given in Exbt.P5 towards welfare fund under the Welfare Fund Act to employees provident fund account under EPF and MP Act. The Hon'ble High Court further clarified that the employees shall be made a member of EPF before the transfer is effect. The drivers are engaged by C.C Shivaprasad of M/s. Kamalam Travels and the contract is to operate buses for transporting the students of the appellant. The time, amount and route are decided by the appellant

establishment. Hence the drivers are working in connection with the work of the establishment. The contention of the appellant that yoga teacher is not paid wages but only fees is also factually incorrect. Copy of the agreement and monthly payment made to the yoga teacher is produced and marked as Exbt.R1 and Exbt.R2 respectively. It may be noted that payment made is not in consonance with the agreement. As per Para 26 of EPF Scheme every employee employed in connection with factory or establishment to which EPF Scheme applies other than an excluded employee shall be entitled and required to become a member of provident fund from the date of joining the said establishment. In the instant case, the yoga teacher worked in the capacity as a teacher imparting yoga in connection with the work of the establishment and was also being paid an amount for the services rendered. Hence the yoga teacher will definitely come under the definition of employees as per the Act. There is no dispute regarding the fact that the non-enrolled employees were engaged in connection with the work of the establishment. In **M/s P.M. Patel and Sons and others Vs Union of India and others,** 1986 (1) LLJ 88 (SC) the Hon'ble Supreme Court of India held that the definition of employee is vide enough to include persons employed through a contractor. The Hon'ble Supreme Court of

India in **Royal Talkies Hyderabad and others Vs Employees State Insurance Corporation,** 1978 SCC (4) 204 examined the implication of the words "in connection with the work of the establishment." The Hon'ble Supreme Court held that the term "in connection with the work of an establishment" includes not only employees employed in the establishment but also employed in connection with the work of the establishment. Some nexus must exist between the establishment and work of the employee but it may be a loose connection. A Division Bench of the Hon'ble High Court of Mumbai in **NJ Naidu and Company Vs RPFC,** 2005 (2) BOM .CR 716 considered whether the decision of the Hon'ble Supreme Court of India in **Royal Talkies Hyderabad** (supra) can be adopted to constitute the scope of the term 'employee' as defined under sec 2 (f) of EPF and MP Act. Hon'ble Division Bench after detailed analysis of the relevant provision held that "Hon'ble Supreme Court of India has interpreted only the phrase 'in connection with the work of the establishment' and said phrase is also used in the definition of employee in Sec 2 (f) of EPF and MP Act and therefore, the discussion by the Hon'ble Apex Court is directly on the point and clinches the issue." Further the above proposition of law is covered by the decision of the Hon'ble High Court of Kerala in **Dr. A.V. Joseph, Director, Medical Trust**

Hospital Vs Assistant PF Commissioner, 2009 (4) LLJ 564. The agreement entered into between the appellant and the contractors reveal that the appellant is having absolute control on the functioning and the amount payable. The employees of the contractor are bound to abide by the rules and regulations of the appellant establishment. The contractor deploys buses as per the programme schedule given by the appellant establishment. Hence it is clear that the non-enrolled employees are liable to be enrolled to the fund from the date of their eligibility.

4. The main issue involved in this appeal, is whether three contract drivers engaged through M/s. Kamalam Travels and the yoga teacher who conducts yoga classes on a fee can be treated as employees of the appellant establishment. According to the learned Counsel for the appellant, the appellant establishment has entered into Annexure 3 agreement with one Shri. C.C. Sivaprasad for transporting the students to and fro from this school. The rates for providing the bus along with the driver and conductor is provided in the agreement itself. The contractor pays his drivers the salary and the appellant has nothing to do with the wages paid by the contractor to its employees. The rates as per Annexure 3 agreement are fixed on the basis of the distance covered by the

buses and hence it cannot be treated as wages paid to the employees. According to him from the terms of agreement, it is very clear that the agreement is only to provide services and not for deploying drivers to the appellant establishment. Similarly he also argued the yoga trainer is not an employee of the school and he is training students on Tuesdays and Thursdays every week on fees of Rs. 1250/- per class. Hence the payment made to the yoga trainer also cannot be treated as wages for the purpose of provident fund deduction.

5. The learned Counsel for the respondent on the other side argued that all these 4 employees are working in connection with the work of the establishment and therefore the appellant cannot escape the liability of remitting contribution in respect of these employees. He also pointed out that the appellant establishment has complete control on these employees as contractor is required to comply as per the requirement of the appellant establishment. He relied on the decision of the Hon'ble Supreme Court in **Royal Talkies, Hyderabad and Others Vs ESIC** (supra) and also that of the Division Bench of the Hon'ble High Court of Mumbai in **N.J. Naidu and Company Vs RPFC** (supra) to drive home his argument that all the 4 contractor employees

are working in connection with the work of the establishment and therefore the appellant cannot escape the liability to remit the contribution in respect of those employees .

6. The Hon'ble Supreme Court of India and High Court of Kerala in the above cited cases discussed the implication of the words "in connection with the work of the establishment" appearing in the definition of employee U/s 2 (f) of the Act . It is true that the principal employer is held responsible for the liability of remitting provident fund contribution in respect of employees engaged by the contactors. In the present case the difference is that the agreement speaks about the rates of providing buses to transport the students to and fro from the school. The respondent authority in the impugned order failed to examine the terms of agreement before assessing the dues in respect of the drivers engaged by the transport contractor. The respondent authority in the impugned order stated that the appellant establishment produce the copy of the agreement. However the same was not examined and no decision is arrived at before the assessment of dues is done by the respondent authority. In a similar situation the Hon'ble High Court of Delhi in **Spring Dale School and another Vs Regional PF Commissioner and another,** 2006 LLR 47 (Delhi.HC)

held that such employees cannot be treated as employees of the school. In the above case, the education society entered into an agreement with a transport for providing contract carriage buses and staff for running the buses such drivers, conductor and cleaner and there is no stipulation in the agreement about the payment of wages by the transport to his staff. After examining the terms of agreement, the Hon'ble High Court of Delhi held that the education society is simply giving hire charges for buses (contract carriage) which has no casual connection nor even remote connection with the payment of wages by the transporter to his employees. Hence the Hon'ble High Court concluded that the said employees cannot be treated employees of the school U/s 2 (f) of the Act. In the above context it is relevant for the respondent to examine the terms of contract of agreement before arriving at the conclusion whether the employees engaged by the transport contractor can be treated as the employees of the appellant establishment .

7. The other non-enrolled employee in respect of whom the assessment is made is with regard to the yoga trainer. According to the learned Counsel for the appellant the yoga trainer is not a regular employee of the appellant establishment and he is

conducting yoga training for two days in a week on the basis of Annexure 4 agreement. It is very clear from the agreement that the yoga trainer is taking classes on Tuesdays and Thursdays for some students in the school. He is being paid a training fee for the programme at the rate of Rs.1250/- per class. As per the authorities discussed above it is clear that the yoga trainer is working in and in connection with the work of the establishment. The only difference is that the payment made to him is called training fee instead of wages. The nomenclature of the payments made will not in any way affect the liability under the Act. The yoga trainer will definitely come within the definition of employee under the Act and therefore the appellant is liable to remit contribution in respect of the payments made to him.

8. Considering the facts, circumstances, pleadings and evidence in this appeal, I am inclined to hold that the yoga trainer is an employee under the provisions of the Act and the payments made to him will come within the definition of basic wages and therefore will attract provident fund deduction. However the question whether the drivers engaged by the transport contractor for transporting the students can be treated as an employee of the appellant establishment is to be examined afresh in the light of

the observations made above and also the authorities discussed there.

Hence the appeal is partially allowed the assessment of dues in respect of yoga trainer is upheld the assessment of dues in respect of drivers engaged by the transport contractor is set aside and the matter is remitted back to the respondent to re-decide the matter within a period of 6 months after issuing notice to the appellant. If the appellant fail to attend the enquiry or fail to produce documents called for, the respondent is at liberty to assess the dues according to law. The pre- deposit made by the appellant U/s sec 7O of the Act as per the direction of this Tribunal shall be adjusted or refunded after completing the enquiry.

Sd/-
(V. Vijaya Kumar)
Presiding Officer