



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

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

(Thursday the 18th day of March, 2021)

Appeal No. 532/2019

(Old No.ATA-421(7)2009)

Appellant

M/s. Vishnu Cashew Company,
Mylom,
Kottarakkara
Kollam -691 011

By Adv. K.Y.Johnson

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 18/02/2021
and this Industrial Tribunal-cum-Labour Court issued
the following order on 18/03/2021.

ORDER

Present appeal is filed from order No. KR/KLM/
16491/ ENF-1(3)/2009/3493 dt. 03/06/2009 assessing dues
on evaded wages of non-enrolled employees and holiday wages
U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the

Act') for the period from 01/2002 to 06/2008. The total dues assessed is Rs. 10,69,382.90/-.

2. Appellant is a cashew factory in the business of processing raw cashew. The appellant is regular in compliance. The respondent initiated an enquiry U/s 7A of the Act alleging evasion of wages and non-enrollment U/s 7A of the Act. The appellant participated in the enquiry effectively. However, the respondent conducted proceedings in clear violation of the principles of natural justice. When the Enforcement Officer who conducted the investigation of appellant establishment was to be examined before the authority, the appellant requested for adjournment since his counsel was not well. The appellant was denied the opportunity to cross examine the Enforcement Officer and the respondent authority recorded the testimony of the Enforcement Officer in the absence of appellant's Counsel. There was no independent enquiry by the respondent. The respondent has adopted a strange formula in arriving at the dues position. It is an arithmetical acrobatics and is purely on hypothetical modes of calculation. The respondent failed to look into the registers and documents produced by the appellant at the time of the hearing. The contribution arrived

at for temporary employees also has basis. The number of employees and their identity, are not looked into by the respondent. The contribution assessed on holiday wages also is without any basis.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f 02/06/1999. The appellant defaulted in payment of contribution from the date of coverage. The respondent initiated action U/s 7A for assessing dues for the defaulted period. Accordingly the appellant was summoned to attend the enquiry U/s 7A on 11/09/2008 and none attended the enquiry on 11/09/2008 . The enquiry was adjourned to 21/10/2008 and again on 16/01/2008. On 16/12/2008 an authorized representative of the appellant attended the enquiry. A copy of the report of the enquiry officer on the basis of which enquiry was initiated was handed over to the representative of the appellant on 16/12/2008. On the request of the appellant, the Enforcement Officer who submitted the report, was summoned from Sub-Regional Office, Kottayam on 12/02/2009. There was no representation on the side of the appellant. However the appellant vide letter dt.12/02/2009 intimated his inability to attend the enquiry

and cross examine the Enforcement Officer. The appellant again requested for adjournment. It was felt that the appellant was only trying to prolong the enquiry. The inspection report of the Enforcement Officer extracted the wages paid to the employees for the months 4/2008 and 5/2008. On scrutiny of the said wage extract as well as the statutory return in Form 12A it is clear that the appellant was not paying provident fund contribution on the wages shown in the wage register. The wages reflected is 34% less than what was actually paid to the employees. Since the appellant failed to produce original wage register during enquiry, the 7A authority assessed dues for the period from 01/2002 to 06/2008 on the basis of the report of the Enforcement Officer. It is not correct to say that the assessment of dues for the non-enrolled employees is without any basis. The Enforcement Officer has submitted a list of employees along with the wages, the date of joining and their signature along with the report. The copy of mahazer is produced and marked as Exbt R1. The respondent has complied with all the requirements of natural justice while assessing the dues in respect of evaded wages and non-enrolled employees. The appellant failed to produce any document to discredit the evidence available on record and

also cross examine the Enforcement Officer who was summoned exclusively for cross examination by the appellant. Having failed to do their work, the appellant cannot claim that there was violation of principles of natural justice.

4. On a perusal of the impugned order it is seen that the assessment is made in respect of evaded wages, non-enrolled employees and also in respect of holiday wages paid on 01/2008. According to the learned Counsel for the appellant there was clear violation of principles of natural justice. The enquiry U/s 7A was initiated on the basis of the report filed by an Enforcement Officer. The appellant requested that the Enforcement Office who conducted the inspection be examined in the enquiry. Accordingly the Enforcement officer who was working in some other office was summoned to give evidence before the 7A authority. The appellant did not attend the hearing and gave a request of adjournment as the appellant's Counsel was not well. The respondent declined the request and proceeded with the enquiry and issued the impugned order. According to the learned Counsel, there is a clear violation of principals of natural justice since the appellant was not allowed to cross examine the Enforcement Officer in the 7A enquiry. According to the learned Counsel for the

respondent, it is not that the request of the appellant to cross examine the Enforcement Officer was declined. The request for cross examination of the Enforcement Officer was allowed and the Enforcement Officer was summoned to attend the enquiry to facilitate cross examination. However the appellant failed to attend and cross examine the Enforcement Officer. Hence it is not correct on the part of the appellant to say that he was not provided an opportunity to cross examine the witness. The case of the appellant is that the dues on evaded wages was not assessed based on any records. The Enforcement Officer and the 7A authority assessed dues on a formula which cannot be accepted as correct procedure for assessing the dues. The respondent has prima facia proved that there is evasion of wages while calculating the contribution of provident fund. It is upto the appellant to produce the records and substantiate his claim that the assessment of the Enforcement Officer was not proper and is not based on any records. It is seen that the respondent based his assessment, on the report of the Enforcement Officer. The Enforcement Officer reported that monthly wages for the period 01/2002 to 05/2004 and 06/2005 to 06/2008 are 34% less on the basis of Form 12 A than the actual monthly wages based on the average difference

of wages noticed for the month of 04/2008 and 05/2008. The respondent accepted the report of the Enforcement Officer because the appellant failed to produce any records before the 7A authority. However, according to the appellant they produced the records but the same not considered by the respondent.

5. Another issue araised is the assessment of dues with regard to non-enrolled employees. According to the learned Counsel for the appellant the assessment is made without any basis. According to the learned Counsel for the respondent the Enforcement Officer has produced a mahazer wherein all the non-enrolled employees signed with their names, date of joining and wages. The assessment is based on the mahazer which is produced and marked as Exbt R1. The appellant ought to have produced the records if they were seriously contesting the non-enrollment. Having failed to disprove the mahazer, I don't find any reason to interfere with the assessment in respect of the non-enrolled employees.

6. The respondent also assessed the dues on holiday wages for 01/2008 the respondent may examine whether the holiday wages can be equated to leave encashment and whether the dues can be assessed in view of the decision of

the Hon'ble Supreme Court in ***Manipal Academy of Higher Education Vs PF Commissioner***, 2008 AIR (SC) 1951 that leave encashment is not be taken as part of basic wages for calculation of provident fund contribution.

7. Considering the facts, pleadings and evidence in this appeal I am inclined to partially allow the appeal. The respondent shall re-assess the dues on evaded wages after providing an opportunity to the appellant to produce the records. The respondent shall also examine whether holiday wages will attract provident fund deduction in view of the decision of the Hon'ble Supreme Court referred to above. The assessment of dues in respect of non-enrolled employees is in order and calls for no interference.

Hence the appeal is partially allowed setting aside the assessment of provident fund dues on evaded wages and holiday wages and upholding the assessment of non-enrolled employees. It may be noticed that the assessment is for the period 1/2002 to 6/2008 and any further delay in assessing the dues and recovering the same and accounting it to the members account will be doing injustice to the employees who are eligible to get the benefits. The assessment shall be done within a period of 6 months after issuing notice to the

appellant. If the appellant fails to produce the required documents the respondent is at liberty to take adverse presumption. The pre- deposit made by the appellant U/s 7(O) as per the direction of the EPF Appellate Tribunal shall be adjusted/refunded after finalization of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer