सत्यमेव जयते

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

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

( Tuesday the 15th day of March, 2022)

**Appeal No.755/2019**
(Old No.ATA-1013(7)2012)

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| Appellant | Sacred Heart Mission Hospital.<br>Pullur, Irinjalakuda,<br>Trissur – 680121 |
| | By Adv. K.K.Premlal |
| Respondent | The Assistant PF Commissioner<br>EPFO, Sub Regional Office<br>Kaloor, Kochi– 682017. |
| | By Adv. Sajeev Kumar K. Gopal |

This case coming up for hearing on 11/11/2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 15/03/2022.

## O R D E R

Present appeal is filed from order No. KR/ KC/ 13859/Enf-II(6)/2012/11877 dt. 3/12/2012 assessing dues U/s 7A of EPF & MP Act, 1952 ( hereinafter referred to as 'the Act') in respect of non-enrolled employees for the period 05/2012 to 06/2012 and mess allowance paid to the trainees for the period

04/2010 to 09/2012 and regular dues for the period 05/2012 to 06/2012. Total dues assessed is Rs. 5,61,494/-.

2. The appellant establishment is a hospital attached to the Sacred Heart Nursing School. The nursing students on completion of their course of General Nursing and Midwifery are permitted to undergo apprenticeship to gain practical training for one year in various departments and wards. The apprenticeship is part of their studies and is intended to develop their practical Skill. The nursing apprentices on completion of their period of apprenticeship leave the appellant establishment. The Model Standing Orders prescribed under the Kerala Industrial Employment (Standing Order Rules) 1958 is adopted in the establishment. Since these apprentices are governed by the Standing Orders they are specifically excluded from the definition of employees. The Enforcement Officer who conducted the inspection of the appellant establishment on 18/10/2012 reported that the appellant establishment failed to remit contribution in respect of "mess allowance" paid to the nursing apprentices for the period from 04/2010 to 09/2012. The true copy of the report is produced and marked as Annexure 1. The respondent authority initiated an enquiry U/s 7A of the Act vide

summons dt. 04/10/2012. The said notice is produced and marked as Annexure 2. A representative of the appellant attended the hearing and informed the respondent authority that the mess allowance will not fall under the category of basic wages. The respondent authority ignoring the contentions of the appellant issued the impugned order. The respondent authority failed to notice that the mess allowance being paid to the apprentice nurses will not come within the definition of wages and they are not employees' working in connection with the work of the establishment. The decision referred in the impugned order has no application to the facts of the present case. The respondent authority ought to have found that the certification of standing orders is not necessary to exclude a person from the definition of employees U/s 2 (f) of the Act. The respondent authority failed to consider the decisions of the Hon'ble High Court of Bombay in **The Tata Hydro Electric Power Vs RPFC,** Writ Petition No 2500/2005 following the decision of the Hon'ble Supreme Court in **Manganese Ore (India) Ltd Vs Chandi Lal Saha ,** AIR 1991 SC 520.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the

provisions of the Act with effect from 28/02/1977. It was reported by the Enforcement Officer that the appellant failed to enroll all eligible employees from their date of eligibility. Regular dues were also not paid from 05/2012 to 6/2012. Provident fund is not deducted and paid in respect of trainees on the mess allowance being paid to the so called trainees. The non-enrolled employees fall under the definition of employee U/s 2(f) of the Act. The appellant hospital does not fall within the definition of Industrial establishment under the Act of 1946. The mess allowance falls within the definition of basic wages under 2(b) of the Act. The appellant establishment is not an industrial establishment as defined under the Industrial establishment (Standing Orders) Act 1946 as per the decision of the Hon'ble High Court of Kerala in **Cosmopolitan Hospital (P) Ltd Vs RPFC** W.P.(C) No. 5301/2005. The trainees engaged by the appellant establishment are to be treated as employees U/s 2(f) of the Act, as there is no exclusion for trainees under the provisions of the Act. The employees who are termed as trainees are doing the work of the establishment and earning wages/mess allowance. The so called trainees are neither apprentice under the Apprentices Act or under the Standing Orders of the appellant establishment. As per Sec 2 (b) all emoluments earned by an employee other than

the allowance specifically excluded will form part of basic wages. The decision of the Hon'ble High Court of Bombay in **Tata Hydro Electric Company Vs RPFC** (supra) relied on by the appellant is not relevant to the facts of the present case. In that case the employer wanted to deduct cash value of various benefits, such as attendance bonus and concessional supply of food grains out of the wages paid to the employees.

4. The appellant establishment defaulted in respect of regular contribution for May and June 2012 and also dues in respect of non-enrolled employees for the same period. The Enforcement Officer who inspected the appellant establishment also found that the apprentice nurses engaged by the appellant establishment were not enrolled to the fund and the emoluments paid to the trainees are classified as, mess allowances. The respondent, therefore, initiated enquiry U/s 7A and assessed dues in respect of the mess allowance being paid to the nursing trainees, regular dues as well as the dues assessed the non enrolled employees.

5. In this appeal the appellant did not challenge the contribution on regular dues and also dues on non-enrolled employees for May and June 2012. The present appeal is confined

to the assessment of dues on apprentices/trainees engaged by the appellant in their hospital.

6. According to the learned Counsel for the appellant the appellant establishment is having a nursing school. The nursing students after completion of their course are taken as apprentices in the hospital on the basis of the Model Standing Orders applicable to the hospitals. Those nursing trainees are paid only mess allowance and the same cannot be treated as wages for the purpose of provident fund deduction.

7. According to the learned Counsel for the respondent Industrial Establishment (Standing Orders) Act is not applicable to hospitals and the trainees engaged by the appellant establishment will come within the definition of employee, U/s 2 (f) of the Act. He further pointed out that basic wages include all emoluments paid to the employees, by whatever nomenclature it is called and therefore those trainee nurses will have to be enrolled to the fund and contribution as per the impugned order is required to be paid by the appellant .

8. According to the learned Counsel for the respondent, the definition of 'employee' as per Sec 2(f) of the Act treats trainees also as employee, the specific exclusion being the

apprentices engaged under the Apprentices Act, 1961 or under the standing orders of the establishment. The Hon'ble High Court of Kerala in **Indo American Hospital Vs APFC**, W.P.(C) no.16329/2012vide its judgment dt.13.07.2017 in Para 7 held that

> " It is to be noted that an apprentice would come within the meaning of an employee unless he falls within the meaning of apprentice as referred under the Apprentices Act, 1961 or under the standing order of the establishment. If the trainees are apprentices and they can be treated as apprentices under the Apprentices Act or under the standing orders of the establishment, certainly, they could have been excluded but, nothing was placed before the authority to show that they could be treated as apprentices within the meaning of Apprentices Act or under the standing orders of the establishment. Therefore, I do not find any scope for interfering with the impugned order ".

Going by the observation of the Hon'ble High Court as reproduced above, the appellant herein also failed to substantiate their claim that the trainees are apprentices engaged under the certified

standing orders of the appellant establishment. The appellant ought to have produced the training scheme, the duration of training, the scope of training and also the evidence to show that they are appointed as apprentices under the standing orders, before the authority U/s 7A of the Act. As held by the Hon'ble High Court of Delhi in **Saraswathi Construction Co Vs CBT**, 2010 LLR 684 it is the responsibility of the employer being the custodian of records to disprove the claim of the department before the 7A authority.

9. The question whether a nurse who had undergone the prescribed course and had undergone the practical training during their course requires any further training in hospitals was considered by the Hon'ble High Court of Kerala in **Kerala Private Hospital Association Vs State of Kerala**, W.P.(C) no.2878/2012. The Hon'ble High Court vide its judgment dt.14.03.2019 held that " the decision taken by the private hospital managements to insist one year experience for appointment of staff nurses in private hospitals is against the provisions of the Nurses and Midwifes Act, 1953. " In the above case the Hon'ble High Court was examining whether the nurses who completed their course and had undergone training as part

of the course are required to be trained as trainee nurses for one year in private hospitals. The order issued by the Government of Kerala fixing one year training and also fixing the stipend was withdrawn by the Government and it was held to be valid by the Hon'ble High Court. The learned Counsel for the respondent relying on the decision of the High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S. Anilkumar**, WP(C) 53906/2005 argued that Industrial Employment (Standing Orders) Act is not applicable to hospitals. He also relied on the decision of the Delhi High Court in **Indraprastha Medical Corporation Ltd Vs NCT of Delhi and others**, LPA no.311/2011 to argue that industrial standing orders is not applicable to hospitals. However the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC**, 2018 4 KLT 352 took a contrary view stating that the Industrial Employment (Standing orders) Act is applicable to hospitals. The learned Counsel for the respondent also pointed out that in **Indo American Hospital** case (Supra) the Hon'ble High Court of Kerala refused to interfere with the orders issued by the respondent holding that the trainees will come within the definition of Sec 2(f) of the Act. According to him, the decision in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra), has not become final as the writ appeal

from the above decision is pending before the Division Bench of the Hon'ble High Court of Kerala. While holding that Industrial Employment (Standing Orders) Act is applicable to the hospitals, the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra) also anticipated the risk of allowing establishments and industries to engage apprentices on the basis of standing orders. Considering the possibility of misuse of the provisions the Hon'ble High Court held that

> " Of course, there would be many cases, where the employers for the sake of evading the liabilities under various labour welfare legislations, may allege a case which is masquerading as training or apprenticeship, but were infact it is extraction of work from the skilled or unskilled workers, of course the statutory authorities concerned and Courts will then have to lift the veil and examine the situation and find all whether it is a case of masquerading of training or apprentice or whether it is one in substance one of trainee and apprentice as envisage in the situation mentioned herein above and has dealt within the aforesaid judgment referred to herein above ".

Apart from the question whether Industrial Employment (Standing Orders) Act is applicable to hospitals, this is a fit case wherein the test given by the Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra) cited above is required to be applied in all fours. Though it is denied by the appellant, there is a clear finding by the respondent authority that the so called trainees are doing the work of regular employees. There is also a clear finding that the so called mess allowance paid to these trainees are emoluments coming U/s 2(b) of the Act. It was also held by the Hon'ble High Court of Kerala that nurses cannot be appointed as nursing trainees after completing their course and prescribed training during their course. As already pointed out it was upto the appellant to produce the documents to discredit the report of the Enforcement Officers that the trainees are not engaged in the regular work. The appellant also should have produced the training scheme/schedule and also the duration of training which will clearly indicate whether the trainees are engaged as regular employees. The Hon'ble High Court of Madras in **MRF Ltd Vs Presiding Officer, EPF Appellate Tribunal**, 2012 LLR 126 (Mad. HC) held that " the authority constituted under the 7A of EPF & MP Act has got power to go behind the terms of appointment and find out whether they were

really engaged as apprentices. The authority U/s 7A can go behind the term of appointment and come to a conclusion whether the workman are really workmen or apprentices. Merely because the petitioner had labelled them as apprentices and produces the orders of appointment that will not take away the jurisdiction of the authority from piercing the veil and see the true nature of such appointment". The Hon'ble High Court of Madras in the above case also held that though the apprentices appointed under the Apprentices Act or standing orders are excluded from the purview of the Act they cannot be construed as apprentices, if the major part of the workforce comprised of apprentices. In **Ramnarayan Mills Ltd Vs EPF Appellate Tribunal**, 2013 LLR 849 (Mad.DB) the Division Bench of the Hon'ble High Court of Madras held that if the apprentices are engaged for doing regular work or production, they will come within the definition of employee U/s 2(f) of the Act. In another case, the Division Bench of the Hon'ble High Court of Madras in **NEPC Textile Ltd Vs APFC**, 2007 LLR 535 (Mad) held that the person though engaged as apprentice but required to do the work of regular employees is to be treated as the employee of the mill. In this particular case the respondent authority has concluded that the so

called trainees were actually doing the work of regular employees and hence they cannot claim exclusion U/s 2(f) of the Act.

10. The Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC**, AIR 2006 SCC 971 held that the trainees engaged by the establishment are apprentices under the Act. In the above case, the establishment is an industry coming under the Industrial Employment (Standing Orders) Act and they were having a training scheme under which 40 trainees are taken every year after notifying in news papers and after conducting interview regarding suitability of trainees. In the present case as already pointed out the appellant failed to produce any training scheme and also prove that the trainees are actually apprentices and therefore the decision of the Hon'ble Supreme Court in the above case cannot be relied on by the appellant to support its case.

11. The Hon'ble High Court of Kerala in a recent decision dt.04/02/2021 in **Malabar Medical College Hospital & Research Centre Vs RPFC**, O.P. No.02/2021 considered the above issues in detail. In this case also the issue involved was whether the trainees engaged by a hospital can be treated as employees U/s

2(f) of the Act. After considering all the relevant provisions the Hon'ble High Court held that

> " Para 8. A bare perusal of the above definition makes it clear that apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment cannot be termed as 'employee' under EPF Act. It is also clear that in the absence of certified standing orders, model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946 hold the field and the model standing orders also contain the provision for engagement of probationer or trainee. However, the burden for establishing the fact that the persons stated to be employees by the Provident Fund organisation are in fact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons ".

The respondent authority proceeded on the presumption that Industrial Establishment (Standing Orders) Act is not applicable to the hospitals and therefore did not proceed to examine whether the so called nursing trainees can be treated as employees. The respondent authority shall consider whether the so called

apprentice/nurses are appointed after completion of their course. If that be so, the decision of the Hon'ble High Court of Kerala that no training is required to nurses after completion of their regular course will be relevant in this case. Further the respondent authority will have to examine the appointment orders to see whether the nursing trainees are appointed under the Model Standing Orders. If they are appointed as trainees it is to be examined whether they are attending to the work of the regular nurses. It is also required to be examined whether there is any training imparted by the appellant establishment to these trainees and there is any training schedule under which the training is imparted by the appellant establishment. The respondent authority also will have to examine whether there is any system of evaluating the performance of the trainees by the appellant establishment.

12. The respondent authority also will have to examine the number of trainee nurses engaged by the appellant establishment viz the number of regular nurses doing the regular work of the appellant hospital. If the appellant fails to satisfy the above requirements, the trainees cannot be taken as apprentices under Model Standing Order and they are required to be enrolled to the

fund. The respondent authority shall also examine whether the mess allowance being paid to the nursing trainees will come within the definition of basic wages U/s 2(b) of the Act.

13. Considering the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to sustain the impugned order assessing dues in respect of nursing trainees. However the assessment of dues in respect of non-enrolled employees and regular dues for the month of May and June 2012 is upheld.

Hence the appeal against the assessment of dues in respect of nursing trainees is allowed, the impugned order is set aside and the matter is remitted back to the respondent authority to re-decide the matter within 6 month after issuing notice to the appellant. However the assessment of regular dues and in respect of non-enrolled employees for May and June 2012 is upheld. If the appellant fails to appear or produce the records called for the respondent is at liberty to decide the matter according to law.

Sd/-

**(V. Vijaya Kumar)**
Presiding Officer