



सत्यमेव जयते

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

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

(Wednesday the 19th day of January, 2022)

APPEAL No.197/2018
(Old No. A/KL-120/2016)

Appellant

M/S K.V. Samuel
Door No. 15/1575A, Graceland,
Janatha Road, Nazereth
Mattancherry P.O
Kochi -682 002.

By Adv. S. Ganesh

Respondent

The Assistant PF Commissioner
EPFO, Sub Regional Office
Kaloor,
Kochi -682017

By Adv. S. Prasanth

This case coming up for final hearing on
27/08/2021 and this Tribunal-cum-Labour Court on
19/01/2022 passed the following:

ORDER

Present appeal is filed from order No KR / KC /
24629/Enf-1 (1)/2016/ 5972 dt.14/07/2016 assessing dues of
regular employees U/s 7A of EPF & MP Act, 1952 (hereinafter

referred to as 'the Act') for the period from 07/2010 to 01/2015. The total dues assessed is Rs.18,73,555/-.

2. The appellant is proprietorship firm involved in civil and mechanical work related to ship building and other civil construction in Shipyards. The appellant started its work as a contractor in Cochin Shipyard Ltd, hereinafter referred to CSL. The appellant is covered under the provisions of the Act with effect from 15/11/2008. CSL is maintaining a separate provident fund code number for workers employed by its contractors. CSL follows all the statutory requirements attached to workers deputed by their contractors. M/s CSL awards contract for ship and civil works through tender. Once a contract is awarded by CSL, the responsibility for selecting workers is with the appellant. Wages are also paid by the appellant. A daily attendance register is maintained at shipyard. Monthly statement regarding the number of labours engaged, wages paid etc. are entered in the register. After entering the details, the signatures of the workers are obtained against their respective names. The Register is maintained and submitted to the concerned officer of M/s CSL for their verification and endorsement. The said officer, in turn, submits the verified register to the HR Department of CSL. After verification of HR Department, the records

are transferred to Accounts department of CSL for their approval and sanctioning of payments. The accounts department releases the payment to the appellant after deducting the EPF, ESI and other statutory dues. CSL is maintaining a separate PF account for the workers engaged through contractors. Prior to the release to the payment to contractors, CSL deposits the provident fund of contract workers directly in this account on or before the due date. While releasing the payment to contractors CSL deducts the said amount from the bills of the contractor. This method is adopted by CSL to ensure that no default is committed in paying statutory benefits to the workers. After deducting and paying the statutory dues, CSL issues a certificate to the contractors showing all the statutory deduction including EPF. CSL directly submit the statement and returns to the EPF department. CSL therefore ensures that there is no default with regard to the employees engaged by contractors. A tripartite agreement is signed between representatives of the workers union, management of CSL and representatives of the contractors federation in the presence of Regional Labour Commissioner (Central) to ensure that the contract workers are not denied any benefit due to them.

3. The appellant received a summons dt. 10/04/2015 issued by the respondent U/s 7A of the Act directing to appear before the respondent. It was alleged that the appellant failed to remit the contribution for the period from 07/2010 to 02/2012 and did not upload ECR for the period from 03/2012 to 01/2015. A copy of the notice is produced and marked as Annexure A1. The appellant requested for an adjournment. A copy of the request dt. 20/04/2015 is produced and marked as Annexure A2. On 18/04/2016 the appellant appeared with all relevant records including the certificates issued from CSL regarding the payment of EPF contribution. The appellants effort to convince the respondent that provident fund contribution has already been remitted by the principal employer ended in failure. The true copies of the certificates issued by Cochin Shipyard Ltd for the relevant periods are produced and marked as Annexure A3. The appellant did not undertake any new contract from 2011 as he entered into an agreement dt. 14/6/2011 with M/s. Millenium Aero Dynamics Pvt. Ltd. As per clause (j) & (k) of the said agreement, the appellant is restrained from doing any kind of activity undertaken by M/s C/4 Fabricators Pvt. Ltd for the next 4 years. However since the appellant was permitted to complete the existing work he worked till 07/2012. A true copy of the agreement dt. 14/06/2011 is

produced and marked as Annexure A4. Later on M/s Millenium Aero Dynamics Pvt. Ltd completely took over the shareholding of the appellant and the appellant resigned from the Board of Directors, with effect from 31/08/2014. Thereafter on 01/09/2014 M/s Millenium Aero Dynamic Pvt. Ltd issued a letter declaring that the appellant and his associate firms are free to take up sub contract work in the shipyard. A copy of the said letter dt. 01/09/2014 is produced and marked as Annexure A5. As already pointed out from 08/2012 to 11/2014 the appellant did not execute any new work. During this period the appellant remitted the minimum administrative charges. The appellant also filed nil return during the above period. Ignoring all the above contentions the respondent authority issued the impugned order, a copy of which is produced as Annexure A6. On a perusal of Annexure A6 order, it is seen that none of the above issues discussed during the enquiry find a place in the order. There is no whisper regarding the contentions raised by the appellant. The respondent authority violated the instructions issued by the headquarters of the respondent organization, vide Circular No. C-III / 10001 / 4 / 3 (71) MIS.C / 2013 / D1 / Vol- II / 22-47 dt.08/02/2016, that the principle of natural justice must be followed during the course of 7A proceedings and Assessing Officer must pass a speaking order so that the orders do not suffer

from any procedural infirmity. The respondent authority failed to note that the contribution in respect of the contract employees is deducted and remitted by M/s. CSL itself, in a separate account maintained by them. The respondent authority failed to appreciate that from 2011 to 2014 the appellant was barred from taking any contract.

4. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act. The appellant establishment defaulted in remittances of provident fund contribution. The respondent therefore initiated an enquiry U/s 7A of the Act vide summons dt. 10/04/2015 directing the appellant to attend the hearing on 24/04/2015. The appellant appeared before the respondent and produced documents which were taken into account by the respondent authority. The appellant produced the wage register stating that a separate provident fund account is maintained by CSL in respect of contract employees. The respondent found that the attendance of the employees in the wage register varied from 2 days to 18 days only. All the employees were given overtime allowance. Overtime allowance is given for extra duty done by the employee thereby not reflecting the same in the attendance register and

depriving the employees of their retiral benefits. It is clear that bifurcation of overtime allowance given to the employees is only a subterfuge and not actual overtime wages to escape the liability of provident fund contribution. The respondent therefore concluded the appellant is liable to pay contribution on complete wages including overtime. Though the appellant was given more than adequate opportunity, the appellant failed to disclose the grounds pleaded in this appeal before the respondent authority. The impugned order is issued strictly following the guidelines issued by the head office of the respondent organization and also following the principles of natural justice. The appellant never submitted any proof regarding the agreement signed between the appellant firm and M/s. Millennium Aero Dynamics Pvt. Ltd during the course of the enquiry. The appellant is liable to remit contribution as per Sec 6 and 2(b) of the Act. Reducing the number of working days and uniformly paying overtime allowance to all its employees is a subterfuge to avoid remitting contribution on the actual wages paid to the employees.

5. During the course of hearing of this appeal, the learned Counsel for the respondent filed an additional statement. In the additional statement the respondent has taken a stand that the

appellant establishment was remitting contribution on a small portion of the actual wages paid to the employees and therefore the respondent initiated an enquiry U/s 7A for the period 07/2010 to 01/2015. It is further stated that, the fact that Cochin Shipyard Ltd was deducting and paying contribution in respect of the contract employees of the appellant was never raised before the respondent authority at the time of hearing. The appellant may not be allowed to raise issues in the appeal which is not raised before the respondent authority in the 7A. It is further pointed out that the amount remitted by Cochin Shipyard Ltd are different compared with the amounts reflected in the impugned assessment order and the respondent is unable to verify and confirm the same. The determination of dues was made on the basis of original wage register produced by the appellant during the enquiry and the same were returned on this request. A copy of the request letter is produced and marked as Exbt R1.

6. The appeal is filed before EPF Appellate Tribunal, Bangalore Bench as Appeal No. AKL/120/2016. EPF appellate Tribunal vide order dt. 04/01/2017 admitted the appeal on the condition of the deposit of 20% of the assessed dues U/s 7(O) of the Act. After transfer of the files from EPF Appellate Tribunal,

Bangalore to this Tribunal, the learned Counsel for the appellant submitted that almost full assessed amount has already been remitted by the principal employer, with respect to the contract employees of the appellant. Taking into account the submission and the certificates issued by the Cochin Shipyard, the earlier order admitting the appeal on deposit of 20% of the assessed dues is reviewed and the appeal is admitted waving pre-deposit U/s 7(O) of the Act.

7. According to the learned Counsel for the respondent, the appellant failed to remit EPF contribution for the period 07/2010 to 01/2015. The respondent therefore initiated an enquiry U/s 7A of the Act for quantifying the dues. During the course of the enquiry, the respondent authority found that the appellant deducted the contribution from employees salary but the same was not remitted to the respective provident fund accounts of the members. The respondent authority also found that the attendance of the employees as per wage register produced, varied from 2 days to 18 days per month. He also found that the appellant establishment was following a subterfuge by paying overtime allowance uniformly to all employees which is not actual overtime wages. Taking into

account all the facts the respondent authority issued the impugned order.

8. In this appeal the appellant has taken basically 3 grounds challenging the impugned order.

9. The first ground taken by the appellant is that the appellant establishment is having contract only with Cochin Shipyard and as per the system followed by M/s Cochin Shipyard Ltd, all the contractors are required to maintain the wage register of the contract employees deployed by them signed by the employees and authenticated by the responsible person by the Cochin Shipyard. The wage registers are submitted to the accounts department and the Cochin Shipyard Ltd deducts the provident fund contribution and remit the same in their separate provident fund account maintained for the contract employees. This is done to ensure that there is no violation of labour laws by any contractors. Cochin Shipyard Ltd, the principal employer, has given Exbt A3 series of certificates to the appellant showing that EPF contribution in respect of the contract employees employed by the appellant were remitted for the period from April 2009 to July 2012. According to the learned Counsel for the respondent they never produced these information before the respondent authority at the time of the enquiry U/s 7A of the Act.

However the respondent was given an opportunity to verify the same at the time of hearing the review application filed by the appellant. However the respondent could not confirm the remittance as the amounts varied in the certificate and in the assessment order issued by the respondent authority. In view of the specific stand taken by the appellant that the principle employer, Cochin Shipyard Ltd has already deducted and paid the contribution in respect of the contract employees deployed by the appellant, it is appropriate that the principal employer is also heard on the correctness of the certificates issued by them regarding the provident fund deduction and remittance.

10. Another ground raised by the learned Counsel for the appellant is with regard to the transfer of the share holding of the appellant to M/s. Millennium Aero Dynamics Pvt. Ltd with effect from 14/06/2011. According to the learned Counsel for the appellant, as per the agreement between the appellant and M/s. Millenium Aero Dynamics Pvt Ltd, the appellant establishment is restrained from undertaking any new work from 2011 onwards. However the appellant was permitted to complete the work already undertaken by him and he continued the work up to 07/2012. The contribution till 07/2012 in respect of the employees deployed by

the appellant was also deducted and paid by the principle employer, M/s. Cochin Shipyard Ltd. Later M/s Millenium Aero Dynamics Pvt Ltd completely took over the entire share holdings of the appellant and he resigned from Board of Directors with effect from 31/08/2014. According to the learned Counsel, for the appellant did not execute any new work upto 11/2014. According to the learned Counsel for the respondent this issue was never raised by the appellant before the respondent authority at the time of the enquiry U/s 7A of the Act. However this is a relevant factor which is required to be looked into by the respondent authority while finalizing the liability of the appellant establishment for the relevant period .

11. The 3rd ground raised by the learned Counsel for the appellant is with regard to assessment of dues against overtime allowance. According to the learned Counsel for the appellant, he was not given adequate opportunity to explain the payment of overtime allowance as the same was not at all discussed during the course of 7A enquiry. The learned Counsel for the respondent pointed out that the appellant establishment is restricting the attendance of its employees between two to 18 days and for the rest of the working days appellant is paying compensation as overtime

allowance. Hence it is not the overtime allowance as understood in legal parlance and is only a subterfuge to avoid remittance of contribution. If the principle employer was deducting and remitting the contribution on actual wages paid to its employees, it is possible that such issues may not be there in the actual remittances made by the principle employer M/s Cochin Shipyard Ltd. However it is up to the respondent authority to examine the issue in detail while finalizing the enquiry.

12. Considering the facts, circumstances pleadings in this appeal I am not inclined to uphold the impugned order.

Hence the appeal is allowed, the impugned order is set aside and the matter is remitted back to the respondent authority to re-assess the dues within a period of six months after issuing notice to the appellant as well as the principal employer M/s. Cochin Shipyard Ltd. If the appellant fails to attend the enquiry or fails to produce the records called for, the respondent is at liberty to decide the matter according to law.

Sd/-

(V. Vijaya Kumar)
Presiding Officer