सत्यमेव जयते

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

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

(Friday the 5th day of November, 2021)

Appeal No. 326/2018

Appellant : M/s. Highrange Super Speciality Co-operative Hospital Society Ltd., Thankamony P.O Idukki – 685 609

By Adv. Ashok B Shenoy

Respondent : The Assistant PF Commissioner EPFO, Thirunakkara, Kottayam -686 001

By Adv. Joy Thattil Ittoop

This case coming up for hearing on 07.07.2021 and this Industrial Tribunal-cum-Labour Court issued the following order on 05/11/2021.

O R D E R

Present appeal is filed from order No. KR/ KTM / 20640/ Enf- 1(4) 2016/2296 dt. 03/10/2016 issued U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') and order No. KR / KTM / 20640 / Enf -1 (1) / 2018 /1379 dt. 09/08/2018 issued U/s 7B of the Act assessing the dues in respect of non-enrolled employees for the period from 10/2013 to 03/2016. Total dues assessed as per Sec 7B order is Rs. 21,49,320/-.

2. The appellant is a co-operative society registered under the provisions of Kerala Co-operative Societies Act 1969. The main objective of the appellant society is to provide advanced medical service to the economically weaker sections of the community. One of the objectives of the appellant society is to "train nurses, compounders technicians, opticians, physiotherapist, etc, and to conduct institutions to impart the required training". The respondent authority initiated action

U/s 7A of the Act for determination of amounts due from the appellant for the period from 10/2013 to 03/2016. The enquiry initiated was decided ex-parte since the appellant did not attend the hearing fixed on 23/09/2016. The copy of the order dt. 30/10/2016 is produced and marked as Annexure 1. The appellant therefore filed a review application on 05/11/2016 U/s 7B of the Act. A true copy of the application is produced and marked as Annexure A2. Since there was delay, the appellant approached the Hon'ble High Court of Kerala in W.P.(C) No. 36258/2011 and the Hon'ble High Court directed the respondent authority to issue orders on the review application within a period of 2 months. A true copy of the said judgment is produced and marked as Annexure A3. During the course of hearing, the appellant produced all the relevant documents including wage registers and attendance registers. The respondent authority issued an order dt. 09/08/2018 revising the Annexure A1 Order and re-assessing the dues from October 2013 to March 2016. True copies of the

said order is produced and marked as Annexure A4. Annexure A1 and A4 orders are without authority and jurisdiction as appellant is not governed by the Act. The said Act does not apply to the appellant society by virtue of Sub Section (a) & (c) of Sec 16 (1) of the Act. Further the order issued is illegal in view of the fact that the assessment is made in respect of excluded employees. The impugned orders are also bad since the assessment is made in respect of trainees who are not employees within the meaning of the Act. Annexure A1 and A4 orders are bad and illegal as also the orders are violative of Section 7A (3) of the Act, since proper opportunity was not provided to the appellant. The appellant is registered under Kerala Co-operative Societies Act and employs less than 50 employees and also works without aid of power and therefore is excluded under sub clause (a) of Sec 16 (1) of the Act. Annexure A1 & A4 orders are illegal, ultra virus in as much as the Act does not apply to the appellant, by virtue of sub clause (c) of sec 16 (1) of the Act, in as much as the appellant

is not an establishment set up under Kerala Co- Operative Societies Act 1969 which is a State Act, with their employees being entitled to the benefits of contributory provident fund and old age pension in accordance with the rules and scheme framed under the Kerala Co-operative Societies Act 1969. Annexure A1 & A4 orders also illegal in view of the fact that assessment of dues is made in respect of excluded employees in terms of Para 29 and 2(f) (ii) of EPF Scheme. The impugned orders also bad in view of the fact that it reckons trainees / apprentices as employees under the Act.

3. The respondent filed counter denying the above allegations. The appellant establishment is hospital which is a class of establishment notified by Government of India vide notification No. 1082 dt. 29/09/1973 covered U/s 1(3)(b) of EPF and MP Act 1952. The respondent authority assessed the dues for the period from 10/2013 to 03/2016 on the basis of the report of the Enforcement Officer as the appellant failed to

appear in the 7A proceedings. The appellant filed a review application U/s 7B of the Act. In the 7B review application the contention of the appellant was that the dues were assessed for excluded employees within the meaning of Para 2(f)(2) of EPF Scheme as the pay of the non-enrolled employees exceeded Rs.15000/-. The Enforcement Officer of the respondent conducted a fresh inspection of the appellant establishment considering the contentions raised in the 7B review application. The Enforcement Officer forwarded the inspection report dt. 23/03/2018 to the appellant alongwith the employee wise, month wise dues statement. Thereafter a summons was issued to the appellant fixing the enquiry on 03/05/2018. A representative of the appellant attended the hearing and submitted a representation stating the poor financial condition of the hospital. The representative was directed to produce relevant documents such as wage register, attendance register, balance sheet etc. The documents were produced on the next date of hearing. The representative of the

appellant also pointed out that the salary of the non- enrolled employees were revised with retrospective effect from 01/09/2014 to Rs.15001/- and therefore they are excluded as per the provisions of the scheme. The appellant establishment vide proceedings dt. 04/11/2016 passed a Board Resolution to retrospectively revise the salary of the employees as Rs.15001/- w.e.f 01/09/2014. A copy of the proceedings is produced and marked as Exbt R1. The decision of the appellant to revise the salary retrospectively from 01/09/2014 does not show any bonafide intention on the part of the appellant and it is a clear afterthought to exclude the eligible employees from enrollment to provident fund. The claim of the appellant that the trainees/apprentices are not employees cannot be accepted since the appellant failed to produce any records to prove that the trainees have been engaged under Apprentices Act 1961 or under 'Standing Orders' of the appellant establishment. The Hon'ble High Court of Kerala in **Rajesh Krishnan Vs Assistant PF Commissioner,** OP No.

38287/2002 held that without any standing orders, the apprentices even if, engaged by the petitioner cannot be excluded from the purview of the definition of employee U/s 2(f) of the Act. The appellant establishment is a hospital working with the aid of power and it cannot be excluded U/s 16 (1) (a) of the Act. Further the appellant establishment is only registered under Kerala Co-Operative Societies Act and cannot be said to be setup under the said Act.

4. The respondent authority issued Annexure A order U/s 7A of the Act assessing dues in respect of non-enrolled employees for the period from 10/2013 to 03/2016 assessing an amount of Rs.23,25,630/-. Since the said order was an ex-parte order without hearing the appellant, the appellant establishment filed a review application U/s 7B of the Act. The respondent authority issued Annexure A4 order after hearing the parties and also verifying the documents produced by them. Since the appellant raised new grounds which were

not considered in the earlier proceedings U/s 7A, the respondent authority got the same investigated by an Enforcement Officer. The only ground taken in the review application U/s 7B of the Act was that the appellant revised the wages of the employees retrospectively from 01/09/2014 to Rs. 15001/- and therefore these employees against whom the assessment is made are excluded employees .

5. In the present appeal, the appellant has taken various grounds which are not taken before the Sec 7A or Sec 7B authorities. One of the contention taken by the learned Counsel for the appellant is that the report of the Enforcement Officer who conducted the inspection were not provided to them at all. The learned Counsel for the categorically denied the claim of the appellant stating that a copy of report of the inspection dt. 23/03/2018 was sent to the appellant by the Enforcement Officer alongwith the employee wise, month wise dues statement. Further it can be seen that the impugned

order U/s 7B is issued on the basis of the records produced by the appellant and not exclusively based on the report of the Enforcement Officer. The 2nd ground taken by the learned Counsel for the appellant is that the appellant establishment is registered under Kerala Co-Operative Societies Act 1969 and is therefore excluded U/s 16 (1) (a) of the Act. According to the learned Counsel for the respondent the appellant establishment is a hospital working with the aid of power and it cannot be excluded U/s 16 (1) (a) of the Act. In **Kottayam District Co-Operative Hospital Vs Regional PF Commissioner,** 2009 LLR 839 (KHC) the Hon'ble High Court of Kerala held that in order to fall within the purview of the exception of 16 1 (a) of the Act, the concerned co-operative society has to satisfy both the limps of the Section simultaneously ie, the requisite number of employees has to be less than 50 and the establishment must be working without the aid of power. Since Kottayam District Co-operative Society, is running CT scan , medical store and Pathological

lab is evidently using power for this purpose it cannot fall under the exemption U/s 16 (1) (a) of the Act . The Division Bench of Hon'ble High Court of Kerala also considered this issue in **Assistant PF Commissioner Vs Karappuram White Line Shell Vyvasaya Co-Operative Society Ltd and Others ,** 2017 (3) CLR 552 (Ker. DB) and held that in order to bring U/s 16 (1) of the Act the twin condition of employing not less than 50 persons and working without aid of power are to be fulfilled. As the total number of employees in the said establishment was 80 the Hon'ble High Court held that the establishment is not entitled for exemption U/s 16 (1) (a) of the Act. In the present case, also the identified non-enrollment alone is 65 employees as per Annexure A4 order and therefore the claim of the appellant for exclusion U/s 16 (1) (a) of the Act cannot be accepted. The learned Counsel for the appellant pointed out that EPF & MP Act has no application to the appellant in view of Sec 16 (1) (c) of the Act. Since the appellant establishment is set up under Kerala

Co-operative Societies Act which is a State Act and the employees are entitled to the benefits of contributory provident fund and old age pension in accordance with rules and scheme framed under the said Kerala Co-operative Societies Act. The learned Counsel for the respondent pointed out that this issue was considered by the Hon'ble Division Bench of the Hon'ble High Court of Kerala in **Kottayam District Co-operative Hospital Society Ltd Vs regional PF Commissioner**, 2015 LLR 540. In the above case the Hon'ble High Court of Kerala held that " It is settled position that provisions of the Kerala Co-operative Societies Act and rules only enable registration and formation of the societies by taking recourse to the formalities prescribed thereunder for such purposes and appellant society is one such society so found and registered under the enabling provisions of the said Act and Rules. It is also well settled that a Co-operative society registered under Kerala Co-operative Societies Act is not created by the said Act and therefore the

appellant co-operative society cannot be said to be set up under a State Act as envisaged in Sec 16 (1) (c) of the EPF Act 1952 …… ". The first contention raised by the learned Counsel for the appellant is with regard to employees who are excluded in terms of Para 29 and 2(f)(2) of the EPF Scheme. According to the learned Counsel, 48 of the non-enrolled employees are drawing salary of Rs. 15001/- w.e.f 01/09/2004 and therefore they are excluded employees as per the provisions of this Scheme. The appellant establishment has adopted a very strange method to claim this exclusion. The respondent authority issued the Annexure A1 order U/s 7A of the Act on 3rd October 2016. On 4/11/2016 the appellant hospital passes a Board resolution to enhance the salary of the employees retrospectively from 01/09/2014 to Rs.15001/-. The significance of 01/09/2014 is that Government of India has enhanced the statutory limit of wages to Rs.15000/- w.e.f 01/09/2014. Even in Annexure A2 review application the appellant has taken a contention that the board resolution to

enhance the salary could not be produced before the Sec 7A authority. Strangely, the board decision itself is dt. 04/11/2016 after the impugned order U/s 7A quantifying the dues in respect of the non-enrolled employees was issued on 03/10/2016. Hence there was no possibility of producing the board resolution, Exbt R1 before the Sec 7A authority. As on 01/09/2014 all the listed employees have become eligible to be enrolled to the fund and the retrospective revision of wages, just one rupee above the statutory limit on 04/11/2016, that to after the Annexure A1 order is issued by the respondent authority, cannot exclude them from the provisions of the Act and Schemes. This is the limit up to which an establishment can go to deny the minimum social security benefits to its employees and the strategy adopted by the appellant cannot be accepted and appreciated at any cost. The last contention raised by the appellant is that some of the non-enrolled employees are trainees. It is seen that the contention is not taken before the 7A/7B authorities. This is an issue

which is to be factually proved by the appellant. No records or documents what so ever is produced in this appeal to show that who are those non-enrolled employees who are claimed to be trainees / apprentices. The learned Counsel for the appellant relied on the decision of the Hon'ble High Court of Kerala in **Sivagiri Sree Narayan Medical Mission Hospital Vs Regional PF Commissioner,** 2018 KHC 542 to argue that Industrial establishment (Standing Orders Act) is applicable to Hospitals and therefore the trainees engaged by the appellant establishment shall be treated as trainees engaged under the Model Standing Orders. The Hon'ble High Court of Kerala in the above cited decision held that

> *" Of course, there could be many cases, where the employees for the sake of evading the liabilities under various labour welfare legislation, may allege a case which is masquerading as training or apprenticeship, but where in fact it is extraction of work from skilled or unskilled worker. Of course, the statutory authority*

concerned and the course will then have to life the veil and examine the situation and find out whether it is a case of masquerading or trading/ apprentice or whether it is one in substance one of trainee and apprentice as envisaged in the situation mentioned herein above and has dealt with in afore cited judgment refers to herein above. ".

As already stated it is the responsibility of the appellant to establish beyond any reasonable doubt that the so called trainees will come within the definition of excluded employees under para 2(f)(2) of EPF scheme. The appellant completely failed to do so before the respondent authority as well as in this appeal. The Hon'ble High Court of Chennai, in **Cheslind Textiles Ltd Vs Registrar Employees PF Appellate Tribunal,** 2020 (2) LLJ 326 (Mad) examined when an establishment can invoke Sec 12A of Standing Orders Act 1946. The Hon'ble Court held that

"In the case on hand, when the petitioner who has not complied with the statutory requirements for certification of the draft Standing Orders as prescribed U/s 3 Industrial Establishment (Standing Orders) Act 1946, they are legally barred from taking protection U/s 12A of Industrial Establishment (Standing Orders) Act 1946 for adoption of Model Standing Orders to circumvent the payment of Employees Provident Fund Contributions to their employees/workers.".

The Hon'ble High Court also distinguished the decision of Hon'ble Supreme Court in **Regional PF Commissioner Vs Central Arecanut and Cocoa Marketing and Processing Co-operative Ltd**, 2006 (1) LLJ 995 on that ground. The above decision makes it very clear that if an establishment is claiming any benefit under the Standing Orders Act to exclude the trainees on the basis of Model Standing Order as

per Sec 12A of the said Act, the establishment ought to have initiated process U/s 3 for certification of the Standing Orders. In this case the appellant has no case that they have initiated any process for certification of their Standing orders U/s 3 of the Standing Orders Act 1946.

Considering the facts, circumstances and pleadings, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-
(V.Vijaya Kumar)
Presiding Officer