सत्यमेव जयते

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

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

(Monday the 4th day of January, 2021)

APPEAL No.275/2018
(Old no.A/KL-52/2017)

Appellant : M/s.Baby Memorial Hospital
Indira Gandhi Road
Kozhikode - 673004

By Adv.P. Ramakrshnan

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office
Kozhikode - 673006

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for final hearing on 13.11.2020 and this Tribunal-cum-Labour Court on 04.01.2021 passed the following:

O R D E R

Present appeal is filed from order no.KR/KK/11737/ENF-1(1)/2017/7453 dt.28.03.2017 assessing dues U/s 7A of the EPF & MP Act(hereinafter referred to as 'the Act')) deciding the enrollment of 320 employees of the appellant.

2. The appellant is a multi speciality hospital. The respondent initiated action to bring trainees engaged by the appellant under the provisions of the

Act. The appellant employed around 1300 employees and 327 trainees in various departments of the hospital. Service conditions of the employees of the hospital are governed by the certified standing orders, certified U/s 5 of the Industrial Employment (Standing Orders) Act, 1946. A true copy of the certified standing orders is produced and marked as Annexure A2. A squad of Enforcement Officers of the respondent conducted an inspection of the appellant establishment on 03.02.2012 and 18.12.2012. According to the report submitted by the squad, the trainees are required to be enrolled to the fund. On the basis of the report of the Enforcement Officer, the Assistant Provident Fund Commissioner of the respondent's office initiated action U/s 7A of the Act. After hearing the appellant, the Assistant Provident Fund Commissioner vide order dt.07.01.2013 held that the trainees appointed under the standing orders are not required to become members of the fund. A true copy of the order is produced and marked as Annexure A3. After almost an year of the Annexure A3 order, the respondent served a summons on the appellant for an enquiry under Sec 7B read with 7A of the Act on the ground that the trainees are not enrolled to provident fund. A true copy of the summons dt.18.12.2013 is produced and marked as Annexure A4. The appellant challenged the A4 notice before the Hon'ble High Court of Kerala in W.P.(C) no.1084/2014. The Single Bench of the Hon'ble High Court dismissed the writ petition vide its judgment dt.29.09.2014.

The appellant filed Writ Appeal no.1582/2014 and the Division Bench of the Hon'ble High Court also dismissed the appeal vide its judgment dt.18.10.2016. A true copy of the judgment in W.A.no.1582/2014 is produced and marked as Annexure A5. In view of the above decision, the appellant filed a detailed statement dt.17.11.2016 before the respondent. A true copy of the statement is produced and marked as Annexure A6. The Enforcement Officer of the respondent gave a reply which is produced and marked as Annexure A7. After hearing the parties the respondent issued the impugned order. The definition of 'employee' under Sec 2(f) of the Act specifically excludes an apprentice engaged under Apprentice Act or under the standing orders of the establishment. Hence the trainees engaged by the appellant are not employees and are not liable to be enrolled under the Act. In **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC, Mangalore**, 2006 (2) SCC 381 the Hon'ble Supreme Court held that trainees under standing orders are not required to become members of the Fund. The said decision has been followed by the Hon'ble High Court of Kerala in W.P.(C) no.15453/2006 and 10644/2007. The decisions in **Indraprastha Medical Corporation Ltd Vs NCT of Delhi and others**, 2006 (2) LLJ 231 and W.P.(C) no.5306/2005 were not relevant to the facts of the present case. In **Sr. Tarcisia Vs State & others**, O.P. no.5577/1995 the Hon'ble High Court held that every industrial establishment

to which the provision of Factories Act are not applicable is a commercial establishment in terms of Sec 2(4) of the Kerala Shops and Commercial Establishments Act, 1960. By notification dt.24.01.1984 issued under Proviso to Sec 1(3) of the Industrial Employment (Standing Orders) Act, the State Govt has notified that the provisions of the Act is applicable to the establishment employing 50 or more workers. Further by a notification dt.07.06.2013 issued U/s 2(II)(h) of the Payment of Wages Act, the Govt had ordered that all commercial establishments coming under the purview of Kerala Shops and Commercial Establishments Act, 1960 would be establishments under the Payment of Wages Act, 1936. Hence the provisions of Industrial Standing Orders Act is applicable to the appellant establishment. Under Clause 3(IV) of the Certified Standing Orders, a trainee/apprentice is entitled to only training allowance and there is no obligation for the appellant to employ the trainees on conclusion of their training. The finding by the respondent that the trainees are assigned specific task and are working under supervision and that there is no difference between the employees labelled as apprentices and regular employees and they are attending the regular work is denied by the appellant. Sec 7B of the Act provides that an order U/s 7A could be reviewed on discovery of new and important matter or evidence or on account of mistake or error

apparent on the face of the record or for any other sufficient reason. No such reason is disclosed in the impugned order.

3. The respondent filed counter denying the above allegations. The appellant is an establishment covered under the provisions of the Act w.e.f. 30.09.1990. A squad of Enforcement Officers visited the appellant establishment and during the inspection they found that the trainees were not enrolled under Provident Fund Act even though benefits under ESI Act was extended to them. The Assistant Provident Fund Commissioner who conducted the hearing passed an order U/s 7A holding that the trainees/apprentices engaged under standing orders of the establishment are not required to become members of the Fund. The Regional Provident Fund Commissioner while reviewing the 7A orders, decided to re-open the matter U/s 7B of the Act as there was error apparent on the face of the record. Hence a summons was issued to the appellant, which was challenged before the Hon'ble High Court of Kerala in W.P.(C) no.1084/2014. The Hon'ble High Court dismissed the writ petition and directed the appellant to appear before the respondent authority. The appellant challenged the judgment of the Single Judge in W.A. no.1582/2014 and the Division Bench of the Hon'ble High Court of Kerala dismissed the appeal holding that the power of the authority in re-opening the case U/s 7B is without any limitation of time. Hence the enquiry was resumed by the respondent. The

mere fact that appellant establishment is having a certified standing order does not mean that the appellant is free to designate the employees employed by him as trainees and deprive them of the benefits of social security. According to the report of the squad of Enforcement Officers, the so called trainee employees have already obtained necessary training as part of their course and they cannot be appointed without necessary qualification. The remuneration/salary paid to these trainees during their training period is almost similar to salary paid by similar establishments. These trainees are working at par with permanent employees and they are also working in night shifts. The decision of the Hon'ble High Court of Delhi in **Indraprastha Medical Corporation** case (Supra) and the Hon'ble High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar**, WP(C) 53906/2005 have clarified that hospital is not an industry under Industrial Employment (Standing Orders) Act. Under EPF & MP Act, 1952 also, hospitals are classified as establishments and not as industry. The decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC** is not applicable to the facts of the present case as the same is confined to an industry notified under the Industrial Establishment (Standing Orders) Act.

4. The main issue raised in this appeal is whether the 327 trainees engaged by the appellant can be treated as employees U/s 2(f) of the Act and

whether they are required to be extended with the benefits of provident fund. As already discussed above, the question whether an order issued U/s 7A of the Act can be reviewed U/s 7B by the authority on his own motion, is already decided by the Division Bench of the Hon'ble High Court Kerala in W.A. no.1582/2014. The Hon'ble High Court also held that the time limit under Para 79 of the Scheme is inapplicable to the proceedings initiated by an officer on his own motion in exercise of his power U/s 7B of the Act. The only question that is left open by the Hon'ble High Court was whether the proceedings U/s 7B was initiated beyond a reasonable period and whether as a result any prejudice has been caused to the appellant. No such issue was raised by the appellant in this proceedings.

5. Coming to the facts of the present case, the appellant is employing around 1300 employees and also engaging 347 trainees. The squad of Enforcement Officers who conducted the inspection of the appellant establishment found that the trainees, though engaged under certified standing orders, are doing the regular work of the appellant establishment and therefore are required to be enrolled to the benefits under EPF & MP Act. According to the appellant, trainees are being engaged in all departments and after completion of training there is no compulsion on the part of the appellant to retain them and the trainees are having an option to seek employment

elsewhere. According to the learned Counsel for the respondent, the definition of 'employee' as per Sec 2(f) of the Act treats apprentices 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.16329/2012 vide 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 this 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. This is particularly relevant in the facts of the case as the appellant establishment is engaging almost 1/4th of the total employment strength as trainees. 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. The same view was taken in **C. Engineering Works Vs RPFC**, 1986(1) LLN 242 wherein the Hon'ble High Court held that the documents to prove the employment strength is available with the establishment to discredit the report of the Enforcement Officer and if the employer fails to produce the documents, the authority U/s 7A can take an adverse inference. A similar view was taken by the Hon'ble Delhi High Court in **H.C Narula Vs RPFC**, 2003 (2) LLJ 1131.

6. 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 Govt of Kerala fixing one year training and also fixing the stipend was withdrawn by the Govt 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 in 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 hereinabove " .

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 and also they are engaged in night shift also. There is also a clear finding that the so called stipend paid to these trainees are almost same as wages paid to the regular employees. 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 and also that they are only paid stipend and not wages as reported by the squad of Enforcement Officers. 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 held to be 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.

7. The appellant relied on the decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC**, AIR 2006 SCC 971 to argue that the trainees engaged by the hospital 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 21 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.

8. 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.2/2021 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 infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons ".

In the light of the observations of the Hon'ble High Court it was not adequate on the part of the appellant to prove that they are having a certified standing order. The appellant ought to have proved before the respondent authority that the trainees engaged by them are apprentices and therefore learners by producing the supporting documents before the authority. In the report filed by the squad of officers, it was indicated that the so called trainees are doing the work of regular employees and the so called stipend paid to these trainees are almost equivalent to the wages paid to the regular employees. Having failed to contradict and prove the finding of the 7A authority, the appellant cannot come up and plead that the trainee will not come within the definition of employee U/s 2(f) of the Act.

9. Considering all the facts and circumstances of this case, I am inclined to hold that the so called trainees engaged by the appellant fall within the definition of employees U/s 2(f) of the Act and the contribution under the provident fund is required to be paid from the date of eligibility.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer