सत्यमेव जयते

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

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

(Friday the 23rd day of October, 2020)

Appeal No.333/2018

Appellant : M/s.Malabar Medical College Hospital & Research Centre
Modakallur P.O.
Kozhikode – 673323

By Adv.K.K.Premalal

Respondent : The Regional PF Commissioner
EPFO, Regional Office
Eranhipalam P.O.
Kozhikode - 673006

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for hearing on 03.03.2020 and this Tribunal-cum-Labour Court on 23.10.2020 passed the following:

O R D E R

Present appeal is filed from order no.KR/KK/23652/ENF-1(4)/2018-19/4272 dt.31.08.2018 assessing dues U/s 7A of EPF & MP Act, 1952

(hereinafter referred to as 'the Act') for the period from 08/2016 to 07/2017. The total dues assessed is Rs.1,73,36,528/-.

2. The appellant is covered under the provisions of EPF & MP Act. Pursuant to an inspection conducted by an Enforcement Officer of the respondent, action U/s 7A was initiated for determination of contribution under various heads. This includes non payment of regular contribution in respect of employees and belated enrollment of employees. The appellant has already remitted a part of the assessed amount which is reflected in the impugned order itself. The appellant is also making efforts to remit the balance regular contribution at the earliest possible. In respect of belated enrollment, it is pointed out that the appellant being a medical college is imparting training in all departments before regular appointments. This training is treated as apprenticeship as no work is extracted from these persons. The Enforcement Officer during inspection noticed that 196 trainees were working with the appellant. The hospital is employed more than 50 employees and by virtue of Sec 12A of the Industrial Employment (Standing Orders) Act, 1946 the model standing orders are applicable. The above trainees are engaged under model standing orders and hence falls under the category of excluded employees under para 2(f) of the Act. On completion of successful training 65 persons were regularized in the service of the appellant and they were also enrolled to PF. These facts were

explained to the respondent at the time of 7A. The representation dt.22.02.2018 is produced and marked as Annexure 1. The true copy of the representation dt.20.04.2018 is produced and marked as Annexure 2. The Enforcement Officer verified the submissions made by the appellant and submitted a letter dt.17.05.2018 which is produced and marked as Annexure 3. The appellant produced another representation dt.23.05.2018, a true copy of which is produced and marked as Annexure 4. The appellant hospital is registered under the provisions of Kerala Shops & Commercial Establishments Act, 1960. A true copy of the registration certificate is produced and marked as Annexure 5. Govt of Kerala vide notification dt.18.06.2013 included all commercial establishments under the Shops Act as notified establishments under Payment of Wages Act, 1936. A true copy of the notification dt.18.06.2013 is produced and marked as Annexure 6. The appellant was not provided with the documents relied on by the respondent and was not allowed to cross examine the Enforcement Officer who conducted the inspection. The appellant is a multi specialty hospital. The nursing students are required to under go internship for a period of one year as prescribed by the University. The internship is a part of their study. Similarly trainees are being appointed in other departments of the appellant. These apprentices on completion of their period of training could leave the establishment. The trainees are paid only stipend for their subsistence. In **Employees' State Insurance Corporation Vs Tata**

Engineering and Locomotive Co Ltd, AIR 1976 SC 66 the Hon'ble Supreme Court considered the term apprentice and the scope of training. The stipend paid to the apprentices will not fall within the definition of basic wages as defined U/s 2(b) of the Act. In **Bharat Hotel Vs Regional Director, ESI Corporation and another**, 2014 LAB IC 3862 the Hon'ble High Court of Kerala held that the legislature has in its wisdom decided that an apprentice cannot be employed whereas an apprentice can only be engaged. The Hon'ble Supreme Court in **RPFC Vs Central Arecanut and Coca Marketing and Processing Co-operative Ltd, Mangalore**, 2006 (2) SCC 381 held that the apprentices will not come under the definition of employee U/s 2(f) of the Act. The appellant adopted model standing orders prescribed under the Kerala Industrial Standing Employment (standing orders) Rules, 1958 in the establishment. Hence a separate certification of the standing orders is not necessary. The Industrial Employment Standing Orders Act or the rules made thereunder do not prescribe any procedure method or provision for engagement of trainees or apprentices. The Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC**, W.P.(C) 14751/2017 held that the Industrial Employment Standing Orders Act is applicable to hospitals. The contribution calculated under the head Annexure 2 'evasion' in the impugned order does not form part of basic wages. It represents special allowance paid to its employees.

3. The respondent filed counter denying the above allegations in the appeal memorandum. It was reported that the appellant failed to remit the regular contribution for the period form 08/2016 to 07/2017 including the evaded wages for the above said period and also failed to enroll 196 employees for various spells for the period from 08/2011 to 07/2017 and also belated enrollment for the period from 12/2008 to 10/2015. An enquiry U/s 7A of the Act was initiated directing the appellant to appear and produce records before the respondent on 18.01.2018. The enquiry was adjourned to 22.02.2018 and the appellant submitted a letter dt.22.02.2018. In the letter the appellant has disputed the enrollment of 196 employees for the period from 08/2011 to 07/2017. On 15.03.2018 the respondent was represented by the Enforcement Officer and the appellant was also represented in the hearing. It was submitted by the representative of the appellant that they admitted the liability of regular dues from 08/2016 to 07/2017 amounting to Rs.1,87,87,045/-, evasion of wages from 08/2016 to 07/2017 amounting to Rs.16,69,397/- and belated enrollment for the period from 12/2008 to 10/2015 amounting to Rs.3,96,805/-. It was also submitted that the appellant deposited Rs.1,02,07,027/- towards regular dues. The details furnished by the appellant was given to the department representative and was directed to file her response on the next date of posting. On 05.04.2018 the department representative filed her submissions, a copy of which was handed over to

the representative of the appellant. The appellant's representative wanted some time to respond to the submissions made by the department representative. On the next date i.e. 24.05.2018 the appellant filed its response to the report of the Enforcement Officer dt.17.05.2018. According to the representation filed by the appellant, 65 out of 196 employees were already enrolled to the Fund from 01.10.2015. Out of the balance 131, 3 employees were stated to be ex-Govt employees and one is an excluded employee. The balance 127 persons were stated to be trainees. On the request of the appellant the soft copies of the regular dues including evasion of wages and belated enrollment of the respective period were sent vide e-mail on 13.03.2018. The appellant was provided all the opportunities to prove their side of the claim. All the documents requested by the appellant were provided to them. The dues have been worked out month wise relying on the salary disbursement registers of the appellant establishment. The Enforcement Officer has prepared a detailed inspection report after verification of the records/registers maintained by the appellant and a copy of the inspection report was also provided to the appellant. All the employees claimed to trainees will fall within the ambit of definition of employee U/s 2(f) of the Act. What is provided to them as stipend is nothing but wages as provided under the Act. The definition of the employees under the Act is very clear. That even a person engaged as an apprentice is an employee for the purpose of the Act. The only

exemption is in the case of apprentices engaged under Apprentices Act, 1961 or under the standing orders of the establishment. For apprentices or trainees under standing orders, there should be clear training scheme which is not available in the appellant establishment. The nursing trainees were employed for wages and they were working in the same manner as regular employees of the appellant establishment. During the course of hearing on 24.05.2018 the appellant establishment confirmed having enrolled 65 employees out of 196 to PF. It is clear from the notification issued by Govt of Kerala including hospitals under the schedule of Payment of Wages Act that the Govt intended to protect the interest of employees which is clear from the explanatory note itself. The appellant has claimed that they adopted model standing orders under Kerala Industrial Employment (Standing Orders) Rules. The appellant could not substantiate the same in the 7A enquiry. There was a similar case against the appellant for non enrollment of employees earlier where the management on the claimed that those employees were trainees. The appellant during the course of 7A admitted the liability and remitted the contribution after the 7A orders were issued by the respondent. As per definition of basic wages U/s 2(b) of the Act, special allowances are not excluded. Hence the appellant is liable to remit contribution on wages including special allowances.

4. On a perusal of the impugned order it is seen that the Enforcement Officer of the respondent who conducted the inspection of the appellant establishment by her report dt.13.11.2017 has reported four types of irregularities.

1. The regular dues for the period from 08/2016 to 07/2017 was not paid which amounting to Rs.1,87,87,045/-
2. Evasion of wages from 08/2016 to 07/2017 amounting to Rs.16,69,397/-
3. Belated enrollment for the period from 12/2008 to 10/2015 amounting to Rs.3,96,805/-
4. Non enrollment of 196 employees from their due date of eligibility

It is seen that the appellant during the course of the enquiry U/s 7A of the Act admitted their liability with regard to the first 3 irregularities indicated above. The only serious dispute that was raised before the respondent authority was with regard to the enrolment of 196 employees. In this appeal the appellant also contested, though feebly, the evasion of wages. However the main contest is still on enrolment of 196 trainees. According to the learned Counsel for the appellant the appellant establishment comes under Standing Orders Act and therefore model standing orders are applicable to them and no special provision is indicated in the Standing Orders Act or Rules as to how trainees are required to be engaged.

According to him being a hospital, trainees are being engaged in all departments and after the completion of training the appellant may regularize some of the trainees and they are also 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 judgemtndt.13.07.2017 in Para 7 held that;

> " It is to be noted that an apprentice would fall 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 orders 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 coming 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 by the Hon'ble High Court as reproduced above, the appellant herein also failed to substantiate his claim that the trainees are apprentices engaged under the model standing orders applicable to the appellant establishment. The appellant ought to have produced the training scheme and the duration of training and the scope of training etc., 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. 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 High Court in **H.C Narula Vs RPFC**, 2003 (2) LLJ 1131.

5. The Hon'ble High Court of Kerala in **Kerala Private Hospital Association Vs State of Kerala**, W.P.(C)2878/2012 vide its decision dt.14.03.2009 held that " the decision taken by the Private Hospital Managements to insist one year experience for the appointment of staff nurses in private hospital is against the provisions of the Nurses and Midwives 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 were required to be trained as training 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 relied on the decision of Kerala High Court in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar**, WP(C) 53906/2005, to argued that industrial standing orders are not applicable to hospitals. He also relied on the decisions 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 are not applicable to hospitals. The learned Counsel for the appellant relied on the decision of the Kerala High Court in **Sivagiri Sree Narayana Medical Mission Hospital Vs RPFC**, 2018 4 KLT 352. According to the learned Counsel for the respondent, the above referred decision has not become final as an appeal from the above decision is pending before the Division Bench of the Kerala High Court. The Hon'ble High Court in **Sivagiri Sree Narayana Medical Mission Hospital** (Supra) has also anticipated the risk of allowing establishments and industries to engage apprentices on the basis of model standing orders. The Hon'ble High Court held that;

" Of course, there would be many cases, where employers for the sake of evading the liabilities and various labour welfare legislations, may allege a case which is masquerading as training or apprenticeship, but where infact it is extraction of work from 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 out whether it is a case of masquerading of training or apprentice or whether it is one in substance one of trainee and apprentice as envisaged in the situation mentioned herein above and has dealt within the afore cited judgments referred to herein above ".

This is a typical case wherein the test given by the Hon'ble High Court of Kerala is required to be applied. From the Annexure 1 document produced by the appellant, it is seen that the terms of conditions of engagement as trainees would be borne out from the orders issued to them for training. As already pointed out it was upto the appellant to produce those documents before the respondent at the time of hearing. It is seen from Annexure 2 produced by the appellant that security staffs are also kept as trainees and it is also stated that some of the trainees are kept for years together. From Annexure 4, it is seen that out of 161 trainees 65 trainees already been enrolled under the PF and some of the trainees are engaged

as trainees for more than 4 years duration. These documents produced by the appellant themselves would clearly show that there is no clear training scheme for the appellant and even security guards are kept as trainees for years together. As already pointed out qualified nurses cannot be kept as trainees as already decided by the Hon'ble High Court of Kerala. Hence it is clear that the claim of the appellant that these trainees are apprentices under model standing orders cannot be accepted. The Hon'ble High Court of Madras in **MRF Ltd Vs Presiding Officer, EPF Appellate Tribunal** held that " the authority constituted U/s 7A of the EPF & MP Act has got power to go behind the terms of appointment and to find out whether they were reality engaged as apprentices. The authority U/s 7A can go behind the term of appointment and can come to a conclusion whether the workmen 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 respondent authority has concluded that the so called trainees were actually doing the work of regular employees and hence they cannot claim any benefit of the exclusion of U/s 2(f) of the Act. 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 apprentices but required to do the work of regular employees have been rightly held as employees of the mill.

6. The learned Counsel for the appellant relied on the decisions of the Hon'ble Supreme Court in **RPFC Vs Central Arecanut and Coca Marketing and Processing Co-operative Ltd, Mangalore**, AIR 2006 SC 971 to argue that model standing orders are applicable even if certified standing orders of the establishment are not available. He further relied on the above decision to argue that the trainees engaged by the hospital are therefore apprentices under the Act. In the above case, the establishment was an industry defined U/s 1(3)(a) of the Act and they were having a training scheme under which 25 trainees are taken every year after notifying in news papers and after conducting interviews regarding the suitability of the trainees. In the present case the appellant failed to produce any training scheme and also prove that the trainees are actually apprentices and therefore the finding of the Hon'ble Supreme Court in the above case cannot be relied on by the appellant to support his case.

7. Considering all the facts and circumstances of this case, I do not have any hesitation in holding that the so called trainees engaged by the appellant fell within the definition of employees U/s 2(f) of the Act and contribution under provident fund is required to be paid from the date of eligibility.

8. The learned Counsel for the appellant also raised the question that the special allowances will not come with in the definition of basic wages

U/s 2(b) of the Act. There is some conflict with regard to the definition of basic wages U/s 2(b) and Sec 6 of the Act on the basis of which the contributions are required to be paid. Sec 2(b) excludes certain allowances whereas some of those allowances are included U/s 6. This conflict is finally resolved by the Hon'ble Supreme Court in **Bridge & Roof Company India Ltd Vs UOI**, 1963 (3) SCR 978. In **Manipal Academy of Higher Education Vs RPFC**, 2008 (5) SCC 248 the Hon'ble Supreme Court relied on the decision of **Bridge & Roof**'s case (Supra) and held that on a combined reading of Sec 2(b) and Sec 6;

(1) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(2) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages.

The Hon'ble Supreme Court had an occasion to examine whether various allowances including special allowances would form part of basic wages. In **RPFC Vs Vivekananda Vidyamandir & Others**, 2019 KHC 6257 the Hon'ble Supreme Court reiterated the earlier decisions and held that in the absence of evidence, these allowances will not form part of basic wages. The Division Bench of Hon'ble High Court of Calcutta in **RPFC Vs Vivekananda Vidyamandir & Others**, 2005 LLR, 399 (Cal) held that special allowances will form part of dearness allowances and therefore will form

part of basic wages. In **Mangalore Ganesh Beedi Works Vs APFC**, 2002 LIC 1578 (Kart.HC) the Hon'ble High Court of Karnataka held that special allowance paid under settlement will form part of basic wages and will attract provident fund deduction. In **Damodarvalley Corporation, Bokaro Vs UOI**, 2015 LIC 3524 (Jhar. HC) the Hon'ble High Court of Jharkhand held that the special allowance will form part of basic wages and will attract provident fund deduction.

In view of the above legal provisions it is held that the special allowances paid to the employees of the appellant will attract provident fund deduction.

Considering all the facts, pleadings and evidence, I am of the considered view that there is no merit in the appeal and hence the appeal is dismissed.

Sd/-
(V. VIJAYA KUMAR)
Presiding Officer