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.394/2018
(Old no.164(7)2014)

Appellant : M/s.Vijayakumara Menon Hospital
North Fort Gate
Tripunithura
Ernakulam - 682301

By Adv.C. Anil Kumar

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office, Kaloor
Kochi – 682017

By Adv.S. Prasanth

This case coming up for hearing on 28.06.2021 and this Industrial Tribunal-cum-Labour Court on 05.11.2021 passed the following:

O R D E R

Present appeal is filed from order no.KR/KC/10275/ENF-3(5)/2013/13923 dt.17.12.2013 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non enrolled employees for 04/2011 to 02/2013. The total dues assessed is Rs.8,95,508/-.

2. The appellant is a 110 bedded hospital. The hospital is engaging 108 employees in various categories and has enrolled and is remitting contribution for 51 eligible employees on its rolls. Since it is difficult to obtain qualified and experienced employees as nursing assistant and technicians, the appellant was constrained to give training to newly passed out students from various institutions. These trainees do not have any right to get employment under the appellant. Some of the trainees after completion are given appointment depending on their suitability. During the course of training, the trainees are given certain small amount as allowance/stipend. An inspection was conducted by an Enforcement Officer of the respondent office and he submitted a report showing that the appellant has not enrolled 216 trainees engaged during 04/2011 to 05/2013. A copy of the notice dt.05.09.2013 is produced and marked as Annexure A1. The appellant submitted a reply dt.15.10.2013 furnishing the details of all the trainees engaged by the appellant. A copy of the reply is produced and marked as Annexure A2. The certificate issued by Tripunithura Municipality regarding the number of beds in the hospital is produced and marked as Annexure A3. For a 110 bedded hospital, 216 employees are not required apart from 108 permanent employees which will amount to engagement of 324 employees in the hospital. Some of these trainees were already enrolled under EPF. Ignoring the contentions of the appellant, the

respondent issued the impugned order. As per Sec 2(f) of the Act, the trainees appointed by the appellant cannot be treated as employees. They are receiving only a small amount as stipend. The stipend paid to the trainees cannot be treated as basic wages under the Sec 2(b) of the Act. Appellant is an establishment to which provisions of Industrial Employment Standing Orders Act is applicable. Eventhough there is no Certified Standing Orders for the appellant, the Clause in Model Standing Orders is applicable to the appellant. The respondent authority failed to apply the principles laid down by the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC, Mangalore**, 2006 (2) SCC 381.

3. The respondent filed counter denying the above allegations. The appellant is a hospital covered under the provisions of the Act. An Enforcement Officer who conducted inspection of the appellant establishment noticed that 216 employees of the appellant were not enrolled to provident fund. The Enforcement Officer forwarded a complete list of non enrolled employees with their name, date of joining, monthly salary drawn by each one of them during 04/2011 to 02/2013. Accordingly Annexure A1 letter dt.05.09.2013 was issued to the appellant. A list showing the details of all the 216 non enrolled employees were also forwarded to the appellant. Since the appellant failed to enroll those employees, the respondent authority initiated an enquiry U/s 7A of the

Act. A summons dt.12.09.2013 were issued fixing the enquiry on 15.10.2013. A representative of the appellant attended the hearing and furnished Annexure A2 written statement along with a detailed statement showing the name, date of joining, amount of stipend, date of leaving, designation, duration of service etc., of all 216 non enrolled employees. The only contention taken by the representative of the appellant before the respondent authority was that the non enrolled employees are trainees and trainees cannot be equated with the employees. Further it was also stated that majority of the trainees shown in the list have left after a couple of months and some of them worked only for few days. The Annexure A2 statement given by the appellant during the course of the enquiry fully affirmed the report of the Enforcement Officer. There were no excluded employees and all the employees were found to be eligible to be enrolled to the fund. The contention of the appellant that the trainees engaged by them are excluded U/s 2(f) of the Act and the allowances paid to them cannot be treated as basic wages U/s 2(b) of the Act was also examined by the respondent authority. As per Sec 2(f) the apprentices or trainees are also employees. Only apprentices engaged under Apprentices Act, 1961 or under the Standing Orders of the establishment are excluded. There is no exclusion for trainees under the Act. As per Para 26 of EPF Scheme, an employee engaged even for a day is liable to be enrolled to provident fund. The Hon'ble Supreme

Court of India in **J.P.Tobacco Products Vs UOI**, 1996 1 LLJ 822 SCC upheld the amendment to Para 26 and therefore all the employees engaged by the appellant are required to be enrolled to the fund. In **Sri.Rajesh Krishnan, Secretary Vs APFC**, 2009 (4) LLJ 720 the Hon'ble High Court of Kerala held that for excluding an apprentice from the purview of the term 'employee' as defined U/s 2(f) of EPF & MP Act, they should have been engaged under Apprentices Act, 1961 or under the Standing Orders as provided in the Industrial Employment Standing Orders Act. The Hon'ble High Court has further clarified that the term 'Standing Orders' has definite connotations under Industrial Law and Sec 2(g) of the Standing Orders Act defines Standing Orders to mean rules relating to matters set in the schedule to the Act and that such Standing Orders should specifically contain a provision where the establishment can engage an apprentice in that establishment. The non enrolled employees engaged by the appellant are not trainees/apprentices engaged under the Standing Orders Act and therefore cannot be excluded from the definition of an employee. The decision of the Hon'ble Supreme Court of India in **RPFC Vs Central Arecanut and Coco Marketing and Processing Company Ltd** (Supra) is not applicable to the facts of the present case as the Standing Orders Act itself is not applicable to the appellant establishment. The claim of the appellant that the allowances paid to the trainees are not wages is not correct. The definition of basic wages

U/s 2(b) takes into account all emoluments earned by an employee while on duty or leave or on holiday with wages. The claim of the appellant that majority of the trainees have already left and therefore their contribution need not be insisted cannot be accepted. The details of all the non enrolled employees are available with the appellant establishment and the appellant cannot be allowed to take advantage of his own violation of the provisions of the Act. The so called trainees who have been appointed as nurses, pharmacy assistant, clerks, cashier, receptionist, cleaner, attender, accounts clerk etc can only be treated as employees of the appellant and the remuneration paid to them is taken as basic wages for the purpose of assessment of dues. Employees Provident Fund & Miscellaneous Provisions Act is a beneficial legislation for the betterment of employees. The Act effectuates the economic message of the Constitution as stipulated in the Directive Principles of State Policy.

4. The main issue involved in this appeal is non enrollment of 216 trainees engaged by the appellant in their hospital. An Enforcement Officer of the respondent visited the appellant establishment and found that 216 trainees were engaged by the appellant and they were not extended with provident fund benefits. The Enforcement Officer therefore collected the complete details of these 216 trainees with their name, date of joining,

remuneration paid etc. and furnished a report to the respondent authority. He also directed the appellant to ensure enrollment of all these 216 employees/trainees. The appellant objected to the same through their Annexure A2 statement. In the Annexure A2 statement the appellant furnished the status of each employee with their date of joining, the remuneration paid and also furnished their date of leaving. Against the date of leaving, it is reported that they left without any notice. Since the appellant failed to comply, the respondent initiated an enquiry U/s 7A of the Act. In the 7A also the appellant took the same stand that these 216 persons are engaged as trainees and they cannot be treated as employees of the appellant and the remuneration paid to them cannot be treated as wages attracting provident fund deduction. The respondent authority after detailed investigation found that all these "so called trainees" are employees U/s 2(f) of the Act and the remuneration paid to them will come within the basic wages and therefore will attract provident fund deduction. In this appeal, the appellant has taken a stand that all these trainees are appointed under the Standing Orders Act and even though they don't have a Certified Standing Orders the Model Standing Orders are applicable in view of the decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd** case (Supra). The learned Counsel for the respondent took a stand that the

decision of the Hon'ble Supreme Court in the above case is not applicable to the facts of the present case as the appellant establishment is not a notified industrial establishment under the Standing Orders Act.

5. In view of the above position, it is relevant to examine the statutory and legal position in view of the various decisions of High Courts and also the Hon'ble Supreme Court. 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 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. This is particularly relevant in the facts of the case as the appellant establishment is engaging huge number of 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.

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 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 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. It was 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 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.

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 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.

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 ".

9. According to the learned Counsel for the respondent, the appellant is a 110 bedded hospital and has engaged 108 employees and provident fund is extended only to 51 employees. However the appellant claims that they have engaged 216 trainees during various spells in the hospital. He further pointed out that trainees are engaged in all categories of staff and 90% of the nursing staff are classified as trainees. He further pointed out that there is neither any training policy nor uniformity in the remuneration paid to these so called trainees. He further pointed out that the appellant establishment has violated the Act and Scheme provisions and the contention of the appellant that many of these so called trainees had already left is only the affirmation of the position that the appellant is trying to find a shelter under their own violation of statutory provisions.

10. On a perusal of the Annexure A2 statement of the appellant establishment provided to the respondent authority, it is seen that all the employees who were not enrolled to the fund are classified as trainees. It is interesting to see that there are many Trainee Cleaners and Attendants in the list and as rightly pointed out by the respondent, there are all categories including clerk, receptionist etc. classified as trainees in the list.

11. Another contention taken by the learned Counsel for the appellant is that though the appellant is not having a Certified Standing Orders still, as per Sec 12A of Standing Orders Act, Model Standing Orders are applicable to the appellant in view of the decision of the Hon'ble Supreme Court above cited. The application of Model Standing Orders as per Sec 12A of Standing Orders Act was considered by Hon'ble High Court of Madras in **Cheslind Textiles Ltd Vs Registrar, EPF Appellate Tribunal**, 2020 (2) LLJ 326. The Hon'ble High Court held that

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

The Hon'ble High Court also pointed out that in the **Central Arecanut and Coco Marketing and Processing Company Ltd** case (Supra) the employer had applied for certification of draft Standing Orders U/s 3 of Standing Orders Act and pending certification the Hon'ble Supreme Court held that Model Standing Orders are applicable to the establishment.

12. Considering the facts, circumstances, pleadings and evidence in this appeal, I don't find any merit in the appeal and therefore not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer