सत्यमेव जयते

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

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

(Monday the 3rd day of May, 2021)

APPEAL No.396/2018

(Old No.287(7)2014)

Appellant : M/s.Lakshmi Hospital
Chittur Road
Palakkad - 678013

By Adv.P. Ramakrishnan

Respondents :
1. The Assistant PF Commissioner
EPFO, Regional Office
Eranhipalam P.O.
Kozhikode – 673006

2. The Assistant PF Commissioner(Recovery)
EPFO, Regional Office
Eranhipalam P.O.
Kozhikode – 673006

3. The Enforcement Officer
EPF Inspectorate
Chandranagar
Palakkad - 678007

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up for final hearing on 22.01.2021 and this Tribunal-cum-Labour Court on 03.05.2021 passed the following:

O R D E R

Present appeal is filed from order no.KR/KK/17036/ENF-4(2)/2013-14/7468 dt.18.02.2014 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non enrolled employees for the period from 04/2011 to 05/2013. The total dues assessed is Rs.20,34,118/-.

2. The appellant establishment is engaged in hospital services. The appellant is covered under the provisions of the Act. After routine inspection conducted by the Enforcement Officer of the respondent on 11.06.2013 and 27.06.2013 directed the appellant to remit contribution in respect of 83 alleged non enrolled employees. The appellant vide letter dt.23.07.2013 requested the Regional Provident Fund Commissioner to give an opportunity to present their factual position. A copy of the request letter dt.23.07.2013 is produced and marked as Annexure B. In response to the request by the appellant, the respondent initiated an enquiry U/s 7A of the Act. Copy of the notice dt.25.07.2013 is produced and marked as Annexure C. The appellant participated in the said enquiry and pleaded that all the 83 employees as reported by the Enforcement Officer are excluded employees since they are trainees as per Standing Orders, a certified copy of the Standing Orders together with training scheme framed thereunder and two specimen offer letters issued to apprentices are produced as Annexure D, D1, D2 and D3 respectively. The

appellant also filed a detailed written statement on 20.08.2013. A copy of the written statement dt.20.08.2013 is produced and marked as Annexure E. A copy of the judgment of the Hon'ble Supreme Court in **RPFC Vs Central Arecanut and Coco Marketing and Processing Co Ltd, Mangalore** 2006 (108) FLR 805 is produced and marked as Annexure E1. During the course of enquiry, the 1st respondent also took up the issue relating to 7 employees who is continued to be employed with the appellant. The appellant clarified that these employees consequent upon their joining with the appellant establishment had submitted a declaration in Form 11 to the effect that they have already withdrawn their provident fund amount of erstwhile company. The appellant further submitted an additional written statement along with copies of lease agreement, copies of declaration Form 11, wage register etc. Copies of these documents are marked as Annexure F, F1, F2, F3 and F4 respectively. (It is seen that Annexure F3 and F4 produced in this appeal at page 76 and 79 of the appeal booklet are not copies of Form 11 and wage register but are the trainees stipend for the month of 11/2012 and 12/2011 respectively.) The order issued by the respondent is without any clarity and seen to be issued mechanically.

3. The respondent filed counter denying the above allegations. The appellant is covered under the provisions of the Act. The employer defaulted in payment of contribution for the period 04/2011 to 05/2013 in respect to substantial number of employees employed by them. Hence the respondent summoned the appellant U/s 7A of the Act. A representative of the appellant along with an Advocate attended the hearing. The appellant never produced a copy of the Certified Standing Orders before the enquiry authority during the course of enquiry. Besides the area Enforcement Officer reported that the appellant admitted that the appellant does not have any certified standing orders. The appellant himself has made clear that the appellant is a well equipped super specialty hospital with various specialised departments. Hence it is clear that the so called trainees are also doing the same work as that of regular employees and getting their remuneration in accordance with the work performed and not paid uniformly. The enquiry was conducted in accordance with principles of natural justice. The Certified Standing Orders now produced in this appeal is certified by the competent authority only on 29.01.2014. The proceedings were initiated well before the standing orders are certified by competent authority. The dictum laid down by Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Co Ltd** (Supra) is not applicable to the present case. With regard to the 9 employees whose

continued applicability is decided in the impugned order, the employees were appointed by the appellant on 01.06.2012 and the provident fund benefits of these employees were not settled as on that date. Hence the employees cannot be considered as excluded employees as per Para 2(f) of EPF Scheme. In **ESIC Vs Tata Engineering and Locomotive Corporation Ltd**, 1975 (2) SCC 835 the Hon'ble Supreme Court held that in apprenticeship the dominant object and intended is to impart on the part of the employer and to accept on the part of other persons learning under certain agreed terms. There is nothing on record to show that the dominant object and intend of engaging the so called trainees were to impart and accept training. It is clearly established that the so called trainees were engaged in regular work of the establishment and no proof of any training scheme is produced by the appellant.

4. The basic issue raised by the appellant in this appeal concerns non enrolment of 83 employees to provident fund membership. The appellant took the premises of M/s. Vijaya Hospital on lease w.e.f. 01.06.2012 and started running a multi specialty hospital. An Enforcement Officer who conducted the inspection of the appellant establishment found that 83 employees were not enrolled to provident fund membership from their due date of eligibility. According to the learned Counsel for the appellant these employees are in two categories. First category of employees are trainees/apprentices under

Certified Standing Orders of the appellant establishment and another category of 9 employees are excluded employees since they are already taken provident fund settlement from the previous management. Hence the issues to be examined in this appeal are

1. Whether the trainees engaged by the appellant can be treated as apprentices under the Standing Orders of the appellant establishment?
2. Whether the 9 employees who have taken settlement from the previous management can be considered as excluded employees under Para 2(f) of EPF Scheme.

5. According to the learned Counsel for the appellant, the appellant establishment is having a Certified Standing Order certified by the competent authority. A copy of the same is produced in this appeal as Annexure D. It is seen that the competent authority certified the same on 29.01.2014. The appellant also produced a training scheme for this trainees as Annexure D1. It is specifically stated that the training scheme is meant for persons to be appointed as nursing assistants, staff nurses, security staff, sweepers, clinical and front office staff. The training period for nursing assistant is 12 months, for staff nurses it is 7 months, for cleaners and sweeper it is 6 months and for front office staff, it is 12 months. There is also a training evaluation programme

at the end of the training period wherein certain effective tools of evaluation like written test, group discussions, quiz and practical test would be applied. Interestingly these two important documents were not produced before the respondent authority at the time of 7A and the appellant had no claim regarding the existence of these documents before the respondent 7A authority. Even in the Annexure E representation dt.20.08.2013 given to the respondent authority the only claim by the appellant was that these trainees are required to be consider as learners within the meaning of Industrial Employment (Standing Orders) Act. The appellant also produced Annexure D2 offer of engagement given to Mrs.Manju M. as a nursing assistant trainee and on completion of training she was appointed as nursing assistant w.e.f. 01.03.2012 on a salary of Rs.6804/-. Similarly the appellant also produced the Annexure D series of communication issued to Ms.Saranya M. as a staff nurse trainee and on completion of training she was appointed as staff nurse from 01.09.2012 on a salary of Rs.7444/-. As per Annexure F3, the trainee stipend statement for the wage month of 12/2011, it is seen that Ms.Saranya and Manju were treated as trainees during that month. As per Annexure F4 trainees stipend statement for the wage month 11/2012 also it is seen that these two employees are treated as trainees and they were paid stipend at a higher rate of Rs.6975/- and 7550/- respectively. The learned Counsel for the respondent pointed out that the

documents produced by the appellant itself will clearly show that the two employees for whom the documents are produced would clearly prove that they were paid stipend at exorbitantly high rates with in a gap of one year and they were treated as trainees even after one year. It is also seen that security guards, sweepers, laundry assistants, receptionists, typists, autocad operators etc., are also given training allegedly on the basis of the Certified Standing Orders and the training scheme now produced by the appellant establishment.

6. The question whether nurses 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 Vs APFC,** W.P(C) No.16329/2019 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. According to the learned Counsel for the appellant, the writ appeal filed from the said order is not even admitted by 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. 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. It is also seen from the training scheme now produced by the appellant that even sweepers and security guards are kept as trainees, which challenges the bonafides of the appellant. It is felt that it is clear misuse of the benevolent provisions of a statute. 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 before the respondent authority 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. In view of the contradiction and conflict in the evidence adduced by the appellant in this appeal and also due to the fact that the availability of Certified Standing Orders and the training schedule was not examined by the respondent authority it is felt that in view of the authorities and evidence discussed above, the issue regarding the trainees will have to be examined in detail by the respondent to arrive at a conclusion whether these trainees can be treated as employees for the purpose of provident fund deduction.

10. The respondent shall also keep in mind that the objective of the Industrial Employment (Standing Orders) Act is to require the employees in industrial establishments to define with sufficient precision the conditions of employment under them and to make said conditions known to workmen employed by them. The provisions of the said Act shall not be allowed to be misused to deny social security benefits to vast majority of the employees

employed by an establishment. However if the statutory requirements are satisfied, the respondent shall take a fair decision in the circumstances of this case.

11. The second issue involved in this appeal is with regard to enrollment of 9 employees who were working with the earlier management. According to the learned Counsel for the appellant, all these 9 employees took their provident fund settlement before they joined the new management and therefore they will have to be treated as excluded employees under Para 2(f) of EPF Scheme. Though the appellant claimed that Form 11 in respect of these 9 employees are annexed to this appeal, it is seen that the same is not part of this appeal. According to Para 2(f) of EPF Scheme, "excluded employee" means,

1. An employee who, having been a member of the fund, withdrew the full amount of his accumulations in the fund under clause (a) or (c) of sub para (1) of para 69
2. An employee whose pay at the time he is otherwise entitled to become a member of the fund, exceeds Rs.6500/- per month.

As per para 69;

1. (a). A member may withdrew the full amount standing to his credit in the fund on retirement from service after attaining the age of 55 years

   (b). - - -

(c) Immediately before migration from India for permanent settlement or for taking employment on abroad.

Hence from the above provisions, an employee can be treated as excluded employee if he attains the age of 55 and has withdrawn his provident fund money standing to his credit. In this particular case the appellant has no case that the 9 employees mentioned in the report of the Enforcement Officer has taken their provident fund settlement on attaining the age of 55 years and therefore they can be treated as excluded employees. The learned Counsel for the respondent on the other side argued that these 9 employees joined the service of the appellant establishment on 01.06.2012 and as on that date the provident fund account of none of the employees were settled under Para 69 (1)(a) of EPF Scheme. Hence looked at from any angle these 9 employees continued to retain their membership under Para 26(1)(a) of EPF Scheme.

12. Considering the facts, circumstances, pleadings and evidence in this appeal, I am inclined to hold that the issue whether the trainees can be treated as employees will have to be re-examine by the respondent and the question regarding continued applicability of 9 employees is decided in favour of the respondent.

Hence the appeal is partially allowed, the assessment with regard to the trainees is set aside and the matter is remitted back to the respondent to examine the issue in the light of the observations made above within a period of 6 months after issuing notice to the appellant. The finding regarding the continued applicability of 9 employees is upheld. The pre-deposit made by the appellant U/s 7(O) of the Act as per the direction of this Tribunal shall be adjusted or refunded after conclusion of the enquiry.

Sd/-

(V. Vijaya Kumar)
Presiding Officer