



सत्यमेव जयते

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

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

(Monday the 26th day of April, 2021)

APPEAL No.470/2018
(Old No.397(7)2010)

Appellant : M/s.Sreelakshmi Cashew Company
Kadappakada P.O.
Kollam - 691008

By Adv.N.D.Premachandran

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office
Kollam - 691001

By Adv.Pirappancode V.S. Sudheer &
Megha A.

This case coming up for final hearing on 08.03.2021 and this Tribunal-cum-Labour Court on 26.04.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KLM/2454/ENF-1(2)/2009/24506 dt.13.03.2009 assessing dues U/s 7A of the EPF & MP Act, 1952 (hereinafter referred to as 'the Act') on evaded wages and non enrolled employees. The total dues assessed is Rs.3,27,863/-.

2. Appellant is an establishment engaged in the business of processing raw cashew nuts and exporting cashew kernels. The appellant entered into an agreement with the owner of M/s.Sukumar Cashew Company, Kollam on 10.05.2006 by which the appellant took the cashew factory on lease for a period upto 31.10.2008. As per the terms of agreement the appellant has to pay the statutory contributions such as provident fund and Employees State Insurance to the employees. The appellant had no liability to pay any past claim. As per the lease agreement the appellant ran the cashew factory from 05/2006 to 05/2008. The appellant during the relevant period paid all the statutory contributions. Prior to the appellant M/s.Golden Cashew Company was running the factory and there was some default in payment of provident fund contribution. When the appellant was running the factory, the respondent issued a notice U/s 7A alleging that there is failure to pay the contribution on full wages as there is difference in wages reported under ESI and PF returns. It was also reported that some of the temporary employees were not enrolled to provident fund. Notices were also issued to M/s.Golden Cashew Traders and M/s.Sukumar Cashew Company. The summons received from the respondent is produced and marked as Annexure A1. The appellant disputed the alleged difference in wages in respect to ESI and PF.

Hence the appellant requested for a copy of the report of the Enforcement Officer. Though the respondent promised to furnish a copy, the same was not furnished to the appellant. Without a copy of the report of the Enforcement Officer, the appellant expressed his difficulty to offer any comments or evidence in the enquiry. The appellant submitted a written request for a copy of the report of the Enforcement Officer on 20.01.2009, a copy of the letter is produced and marked as Annexure A2. In the meanwhile the appellant vacated the factory. In the enquiry the appellant produced documents showing the engagement and payment of wages to the temporary employees and explained that they were not enrolled to provident fund as they were not regularly available and they are already covered under the provisions of the Act through other establishments. It was also pointed out that some of them are superannuated workers whose PF account is already settled. However the appellant agreed to calculate and remit contribution in respect of temporary and casual employees and remit the contribution in respect of holiday wages during 2007-08. On 20.01.2009 also the enquiry was adjourned informing the appellant that the copy of the inspection report will be served. The appellant received a notice dt.24.12.2009 from the Recovery Officer, EPFO directing him to remit an amount of Rs.3,27,863/- being contribution for the period from 05/2006

to 05/2008. A copy of the notice is produced and marked as Annexure A3. Against the said notice the appellant filed a reply dt.08.01.2010, copy of the reply produced and marked as Annexure A4. The appellant was not served any order U/s 7A of the Act. The enquiry was deferred on 20.01.2009 and the appellant had no notice regarding the further proceedings. Hence the proceedings after 20.01.2009 was held in his absence and he was not given any opportunity to produce documents and defend the report of the Enforcement Officer. The appellant approached the respondent for a copy of the order passed U/s 7A of the Act and the respondent provided a copy under the covering letter dt.22.01.2010. A copy of the said order is produced and marked as Annexure A5. Throughout the enquiry the appellant disputed the genuineness of the claim of the Enforcement Officer that there was difference in wages reported to PF and ESIC. The appellant was not given an opportunity to adduce evidence to substantiate its position. Since the proceedings was ex-party the appellant filed a review application U/s 7B of the Act. A copy of the review petition is produced and marked as Annexure A6. In the review petition it was pointed out that the calculation given by the Enforcement Officer with regard to the evaded wages is not correct and the appellant was not given an opportunity to cross examine the Enforcement Officer. The respondent rejected the

application vide order dt.19.05.2010. A copy of the order is produced and marked as Annexure A7.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 01.08.1981. An Enforcement Officer who conducted the inspection of the appellant establishment reported vide his report dt.11.07.2008 that there was default in payment of contribution for the period from 05/2006 to 05/2008. As per the report, the regular dues for the period from 10/2004 to 04/2006 was outstanding. There are 21 temporary employees not enrolled to the fund for the period from 03/2008 to 05/2008. No provident fund contribution is paid on holiday wages for 2007-08. There is difference of wages between EPF and ESIC for the period from 05/2006 to 09/2007. Copies of the inspection report and Part II is produced and marked as Exbt.R1. since the appellant refused to comply, summons were issued to the appellant as well as M/s.Golden Cashew Company fixing the date of hearing on 10.10.2008 wherein the appellant was directed to produce the relevant records for finalising the issue. There was no representation from the appellant on 10.10.2008 and the enquiry was adjourned to 12.11.2008. The appellant requested for an adjournment and the case was adjourned to 17.12.2008. On 17.12.2008 Sri.Anilkumar the authorised representative of

the appellant attended the hearing. He stated that the factory was taken on lease from 05/2006 to 05/2008. He also submitted that there is no dispute regarding the dues reported by the Enforcement Officer in respect of 21 non enrolled employees and also the contribution payable on holiday wages for 2007-08. He also submitted that the difference in wages between ESIC and EPF reported by the Enforcement Officer has to be verified and hence requested for adjournment. Accordingly the case was adjourned to 20.01.2009. Sri.Anilkumar the authorised representative of the appellant appeared and requested for copy of documents/records relating to the volume of ESI contribution payable for the relevant period under enquiry in respect of the appellant. A copy of the report of the Enforcement Officer dt.11.07.2008 was handed over to the representative. A copy of the order sheet duly signed by the authorised representative is produced and marked as Exbt.R2. Despite repeated adjournments, the appellant did not produce any records. The enquiry was adjourned to 04.02.2009. Even on 04.02.2009 there was no representation on the appellant. Since the appellant failed to produce any records, the respondent issued the impugned order on the basis of the available information. The appellant preferred a review application U/s 7B of the Act on the ground that the impugned order is issued without hearing the

appellant and without considering the factual circumstances and evidence on the subject matter and also relying on documents which was not produced or copy given to the appellant. The appellant was given an opportunity for hearing on 30.03.2010 and he was also directed to produce the relevant records. The appellant was represented in the review but failed to produce any documents. Hence the enquiry was adjourned to 21.04.2010 with a direction to produce all the relevant records. There was no representation on the side of the appellant. Hence the enquiry was again adjourned to 19.05.2010. On 19.05.2010 a representative of the appellant attended the hearing but again failed to produce any documentary evidence or records such as wage register, salary register, muster roll, ledger, balance sheet and cash book to support their claim. Hence the review application filed by the appellant was rejected by the respondent. The appellant challenged the order before EPF Appellate Tribunal, New Delhi. The EPF Appellate Tribunal vide order dt.09.02.2011 dismissed the appeal holding that "it cannot be said that no opportunity was given to the appellant or there was breach of principles of natural justice. No infirmity is noticed in the order of the authority and the appeal is dismissed". The appellant challenged the above said order of EPF Appellate Tribunal and the Sec 7A and 7B orders before the Hon'ble High Court of Kerala in

W.P.(C)no.10294/2011. The Hon'ble High Court of Kerala vide order dt.10.08.2011 quashed the order of the Tribunal dt.09.02.2011 and remitted the case back to the Tribunal. The appellant was given more than adequate opportunity to represent his case and produce records to substantiate their claims before the respondent authority. The appellant failed to avail the opportunities and hence cannot claim that he was not provided adequate opportunity to represent his case.

4. The appellant establishment was running the unit on lease for the period from 05/2006 to 31.10.2008. The premises of the appellant establishment is owned by M/s.Sukumar Cashew Company Ltd and prior to the appellant, one M/s.Golden Cashew Company was running the factory. The dispute in this appeal is confined to the period from 05/2006 to 31.10.2008 when the appellant was running the factory on lease from the owner of the factory. The Enforcement Officer of the respondent after inspection of the appellant establishment reported that 21 employees are not enrolled to the fund from 03/2008 to 05/2008, contribution is not paid on holiday wages for the period 2007-2008 and there is difference in wages reported to EPF and ESIC for the period from 05/2006 to 09/2007. The above observations of the Enforcement Officer is relevant and applicable to the appellant and hence only those issues were taken up for consideration

in this appeal. The respondent initiated an enquiry U/s 7A on the basis of the report of the Enforcement Officer. A representative of the appellant attended the hearing. During the course of the 7A, the representative of the appellant requested vide Annexure A2 dt.20.01.2009 for a copy of the report of the Enforcement Officer with regard to the difference in wages between EPF and ESIC. **It is seen from the proceedings dt.20.01.2009 of enquiry produced as Exbt.R2 that a copy of the report is given to the representative on 20.01.2009 and the representative has acknowledged the same in the proceedings itself.** In Exbt.R2 itself the next date of posting is given as 04.02.2009 but according to the learned Counsel for the respondent, no body attended the hearing thereafter. Hence the respondent issued the impugned order on the basis of the available information. The appellant filed a review application U/s 7B of the Act raising same or similar contentions. The appellant was given opportunities on 30.03.2010, 21.04.2010, 19.05.2010 to produce any additional documents which could not be produced at the time of Sec 7A enquiry. The respondent also found that a copy of the report of the Enforcement Officer based on which the enquiry was initiated was also handed over to the appellant during the course of 7A enquiry. In the absence of any additional evidence or documents, the respondent dismissed the review application

vide order dt.10.06.2010(Annexure A7). The appellant challenged the 7A and 7B order before the EPF Appellate Tribunal, New Delhi and EPF Appellate Tribunal rejected the appeal vide order dt.09.02.2011. The appellant challenged the order of the EPF Appellate Tribunal before the Hon'ble High Court of Kerala in W.P.(C) no.10294/2011. The Hon'ble High Court vide order dt.10.08.2011 set aside the order of the EPF Appellate Tribunal and remitted the case back to the Tribunal on the ground that the EPF Appellate Tribunal has not adverted to the material contentions raised by the petitioner in Exbt.P8 memorandum of appeal.

5. The appeal was transferred by EPF Appellate Tribunal, New Delhi to EPF Appellate Tribunal, Bangalore which is transferred to this Tribunal on abolition of EPF Appellate Tribunal.

6. The basic contention raised by the learned Counsel for the appellant is that order U/s 7A of the Act was issued without providing him a copy of the report of the Enforcement Officer and also without giving him an opportunity to adduce evidence to counter the claim of the Enforcement Officer. As already pointed out there were 3 issues raised by the Enforcement Officer in his report. The issue regarding the non enrolled employees and the issue regarding the contribution on holiday wages were conceded by the appellant and there was no further dispute on those

issues. The major dispute is with regard to the difference in wages reported in ESI and PF returns on the basis of which there is underreporting of wages while remitting provident fund contribution. It is seen that the appellant requested for a copy of the report of the Enforcement Officer vide Annexure A2 letter dt.20.01.2009. In the proceedings U/s 7A, the respondent authority has recorded the request and also indicated that a copy of the report of the Enforcement Officer is provided to the representative of the appellant. The appellant has acknowledged the same in the proceedings itself. The respondent has produced the copy of the proceedings as Exbt.R2. In Exbt.R2 proceedings it is further indicated that the enquiry was adjourned to 04.02.2009 as the appellant failed to produce any records inspite of repeated adjournments. Hence the appellant was aware that the enquiry was adjourned to 04.02.2009 but according to the learned Counsel for the respondent the appellant failed to attend the enquiry and also failed to produce any documents to disprove the claim of the Enforcement Officer. Hence the respondent issued the impugned order U/s 7A. Thereafter the appellant filed a review petition U/s 7B of the Act. It is seen that during the course of hearing of the review petition also the appellant was given adequate opportunity to produce new evidence, if any, to prove his claim or disprove the claim of the Enforcement Officer. The

appellant failed to avail those opportunities also. It is very clear that the appellant was aware of the issue involved. The appellant filed the provident fund as well as ESI returns along with the contribution. If there is no difference in wages in these two returns, production of the copy of the ESI returns will suffice to prove the claim of the appellant that there was no difference in wages reported to provident fund and ESIC. Having failed to do that inspite of the opportunities given to him, and inspite of the fact that the report of the Enforcement Officer was available with him, it is not possible to accept the claim of the appellant that he was not given the opportunity to defend his case by the respondent. During the course of hearing the learned Counsel for the appellant produced a copy of the judgment of the Hon'ble High Court of Kerala in **Sreelakshmi Cashew Company Vs The APFC and another**, W.P.(C) no.10109/2011(K). In that case the contention of the appellant was that he was not given the report of the Enforcement Officer and the Hon'ble High Court of Kerala found that the concept of fairness requires the adjudicating authority to furnish the documents upon which reliance has been placed. In this particular case the document relied on by the respondent is the report of the Enforcement Officer and the respondent succeeded in proving that the copy of the report of the Enforcement Officer was provided to the appellant during

the course of hearing and adequate opportunity was given during the Sec 7A enquiry and also during Sec 7B review to produce documents to disprove the claim of the Enforcement Officer and also to substantiate the claim of the appellant.

7. Considering all the facts, circumstances, pleadings and evidence in this appeal, I am inclined to hold that there is no merit in the appeal.

Hence the appeal is dismissed.

Sd/-
(V. Vijaya Kumar)
Presiding Officer