सत्यमेव जयते

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

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

(Tuesday the 5th day of October, 2021)

APPEAL No.498/2019
(Old no.536(7)2016)

Appellant : The Managing Director
M/s.Metromed International Cardiac Centre
Thondayad Bypass Road
Kozhikode - 673014

By Adv.K. Abdussalam

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office
Eranjipalam P.O.
Kozhikode - 673006

By Adv.(Dr.)Abraham P. Meachinkara

This case coming up final hearing on 23.03.2021 and this Tribunal-cum-Labour Court on 05.10.2021 passed the following:

O R D E R

Present appeal is filed against order no.KR/KK/28663/ENF-1(15)/ 2015-16/83 dt.07.04.2016 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non enrolled employees for the period from 05/2014 to 09/2015. The total dues assessed is Rs.5,94,036/-.

2. The appellant is a hospital and is covered under the provisions of the Act. An Enforcement Officer of the respondent organization after conducting an inspection in the hospital reported that 37 trainees engaged by the appellant establishment for the period from 05/2014 to 09/2015 are required to be enrolled to the Fund. The Enforcement Officer admitted that the 37 non enrolled persons are trainees and the amounts paid to them are only stipend. The respondent authority initiated an enquiry U/s 7A on the basis of the report of the Enforcement Officer. It was pointed out to the respondent authority that the amount of stipend and names of 37 trainees provided in the report of the Enforcement Officer is not disputed by the appellant. Therefore the respondent authority proceeded to consider whether the 37 trainees can be considered as employees for enrollment to provident fund. Govt of Kerala issued a notification dt.07.06.2013 in exercise of its power conferred by Sec 2(II)(b) of the Payment of Wages Act, 1936 notifying all commercial establishments coming under the Kerala Shops and Commercial Establishment Act, 1960 as industrial establishments coming U/s 2(ii) of Payment of Wages Act, 1936. A true copy of the said notification is produced. Hospital is a commercial establishment registered under Kerala Shops and Commercial Establishment Act, 1956, a true copy of the registration certificate issued by the Asst. Labour Commissioner registering the company under the Act is produced. In

view of the above notification, hospital is an industrial establishment coming U/s 2(ii) of Payment of Wages Act and it is also an industrial establishment coming U/s 2(e) of the Standing Orders Act. The appellant framed draft Standing Orders and the same was certified by the competent authority under the Standing Orders Act. A copy of the Certified Standing Orders is produced. The Standing Orders of the appellant provides for trainees/apprentices and an apprentice/trainee is a learner who is paid stipend/allowance during the period of his training. The 37 trainees mentioned in the list of the Enforcement Officer are trainees engaged by the appellant under the standing orders. The appellant paid only stipend to these trainees. There is no employer-employee relationship between the appellant and 37 trainees. Stipend paid to the trainees will not come within the definition of wages. The trainees also will not come within the definition of employees under the Act. The trainees are engaged for a period of one year. The true copies of the office copy of the engagement order is produced. The Hon'ble High Court of Kerala in **Kerala Institute of Medical Science Vs RPFC**, W.P.(C) no.10644/2007 held that even if an industrial establishment coming under Standing Orders Act has not framed Standing Orders the Model Standing Orders provided under the Standing Orders Act will apply. Even Govt of Kerala has accepted the necessity of giving practical training in hospitals and providing stipend to the trainees

under the training period. A true copy of the order dt.04.08.2012 issued by Govt of Kerala is produced. The observation of the respondent authority that hospital is not an industry is also not correct. The Hon'ble Supreme Court of India in **Bangalore Water Supply Vs Rajappa and others**, AIR 1978 SC 548 held that hospital is an industry. The respondent authority also did not consider the judgment of the Hon'ble High Court of Kerala in 2008 1 KLT 388 which made it clear that if the employer and employee comes before the certifying authority for Standing Orders to be adopted in the establishment, the certifying authority should certify the Standing Orders. The respondent authority did not consider the decision of the Hon'ble Supreme Court reported in 2006 (2) KLT SN 35 that trainees are excluded from the definition of 'employees' as contained U/s 2(f) of the Act. In the judgment refereed by the respondent authority in AIR 2001 SC 946 the Hon'ble Supreme Court decided the status of workman under the provisions of the Industrial Disputes Act and has not decided the status of trainees.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 22.11.2012. The appellant failed to enroll 37 employees labelling them as trainees for the period from 05/2014 to 09/2015. Therefore an enquiry U/s 7A was initiated. Summons dt.12.11.2015 was issued to the appellant

fixing 17.12.2015 as the date of enquiry. The representative of the appellant establishment attended the hearing and filed a written objection regarding the report of the Enforcement Officer. The enquiry was adjourned to 09.03.2016 and the appellant was heard in detail. The appellant establishment camouflaged 37 regular employees as trainees to avoid remittance of provident fund contribution to them. As per Sec 2(f) of the Act, only the apprentices who are appointed under the Apprentices Act 1961 and Certified Standing Orders are excluded. U/s (1)(3)(b) of the Act a hospital is classified as an establishment and not as an industry U/s (1)(3)(a). Hence Industrial Employment Standing Orders Act will not applicable to it. The judgment of the Hon'ble High Court of Delhi in **Indraprastha Medical Corporation Vs RPFC**, 2006 (11) LLI 231 and the Hon'ble High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar**, W.P.(C)no.53906/2005 confirm that hospital is not an industry under the Industrial Employment Standing Orders Act. Govt of Kerala has brought hospitals under the Payment of Wages Act only with an intention of safeguarding the interest of employees. It is clear from the notification that the Govt has not specifically included hospitals in the schedule under Payment of Wages Act. It has just added all the commercial establishments coming under the Kerala Shops and Commercial Establishments under the Industrial Standing Orders Act, 1946. From the

very notification it is clear that the same is done to protect the interest of persons employed in such establishments. The Hon'ble High Court of Bombay in **Raliwolf Ltd Vs RPFC and others**, 2001(1) LLJ 1423(Bom.HC) held that provident fund contribution is a part of wages of the employees and non remittance of contribution under the Act is a violation of the fundamental rights of the employees employed in an establishment as guaranteed under Article 21 of the Constitution. Hence a notification issued for the protection of employees cannot be construed for the purpose of denying the minimum social security benefits and therefore the fundamental rights of employees. The apprentices/trainees classified in the Certified Standing Orders should have a clear training scheme approved by the Labour Commissioner. On the verification of the records of the appellant, it is clear that there is no scheme for training. The trainees are assigned regular and specific work and they were working under supervision. All the 37 employees fall within the ambit of definition of employee U/s 2(f) of the Act. The payments made to them are only wages with regard to the work done by the so called trainees. It is seen that there is no difference in the work done by the trainees and the regular employees. Both are attending to the regular work and the only difference is the remuneration paid to the so called trainees are termed as stipend. All the trainees and apprentices engaged by an establishment are employees

except those persons employed under the Apprentices Act, 1961 or under the Standing Orders of the establishment.

4. The question to be decided in this appeal is whether the 37 persons engaged by the appellant establishment as trainees will come within the definition of 'employee' U/s 2(f) of the Act. The case of the appellant is that, the appellant establishment is having a Certified Standing Order, certified by the competent authority on 18.12.2013 and the trainees are engaged under the said Certified Standing Orders. On a perusal of the Certified Standing Orders, it is seen that the relevant pages are missing and therefore it is not clear as to the definition of trainees in the Certified Standing Orders. The learned Counsel for the appellant also submitted that the trainees are being paid stipend which cannot be treated as wages for the purpose of provident fund deduction. The learned Counsel for the appellant also relied on the decision of the Hon'ble High Court of Kerala in **Bharat Hotel Vs Employees' State Insurance Corporation**, 2014 (3) KLT 1130. In the above case, the Hon'ble High Court was considering the definition of 'wages' and 'employee' U/s 2(22) and Sec 2(9) of Employees State Insurance Act. The definition of 'wages' and 'employee' in the said Act are entirely different from that of the definition in EPF & MP Act and therefore is not relevant to the present appeal. The learned Counsel for the appellant also relied on the decision of **Muthoot Pappachan**

Consultancy & Management Services Vs Labour Commissioner, 2008 (1) KLT 388. In the above case the Hon'ble High Court was considering the provisions of the Standing Orders Act. The Hon'ble High Court only stated that " It is always desirable for every industrial establishment to get the standing orders approved by a statutory authority after obtaining the views of the workmen also so that the management and workman would be aware of their rights and duties with precision and they can arrange their conduct and affairs accordingly which would in turn promote industrial harmony ". The observation of the Hon'ble High Court was with an intention to promote industrial harmony and welfare of workers and not to deny the social security benefits in the name of Certified Standing Orders. The learned Counsel for the respondent took this Tribunal through various offer letters produced by the appellant, to argue that there is no uniformity or pattern in the offer letters given to the so called trainees. He pointed out that all these trainees were being paid remuneration equivalent to that of the regular employees and they were all doing the work of regular employees. He pointed out that the receptionist trainee for eg., as per Annexure E.32 was being paid a remuneration of Rs.8500/- which was equivalent to the salary of regular employees. Similarly the remuneration paid to the medical records trainee is Rs.8500/- as per Annexure E.33 which is equivalent to the salary being paid to the regular employee. According

to him the so called stipend paid to these persons who are classified as trainees varies between Rs.3500-10,000/- and they are doing the regular work of the employees and therefore they will come within the definition of employee and the remuneration paid to them will attract provident fund deduction.

5. 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. 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 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. 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 Officer that the trainees are not engaged in the regular work and also that they are only paid stipend and not wages. 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 decision of the Hon'ble Supreme Court in **Central Arecanut and Coco Marketing and Processing Company Ltd Vs RPFC**, AIR 2006 SCC 971 is also relevant to the issue. 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 can be clearly distinguished.

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 organization are infact apprentices, lies on the establishment because that is a fact especially within the knowledge of the establishment which engages such persons ".

As already pointed out the evidence produced by the appellant will not support the claim of the appellant that the so called trainees are engaged under the Standing Orders of the appellant. Though the respondent took a specific stand that the so called trainees are being engaged in the regular work of the establishment and are being paid remuneration almost equivalent to the wages of regular employees the same was not denied or proved otherwise by the appellant. It is also seen that majority of these trainees are staff nurse trainees as already pointed out, the circulars issued by the Govt of Kerala is already withdrawn and the same is approved by the Hon'ble High Court of Kerala in W.P.(C) no.2878/2012. As rightly pointed out by the learned Counsel for the respondent, Ms.Rajeena N, who is appointed as Receptionist Trainee on 22.12.2014 is paid a remuneration of Rs.6500/-

whereas Ms.Soumya C.P. appointed as Receptionist Trainee on 26.03.2015 is paid a remuneration of Rs.8000/-. Hence it is very clear that the appellant establishment has no scheme for training and no policy regarding the remuneration payable to the so called trainees. If trainees are appointed under Standing Orders, the appellant cannot adopt different standards for same category of employees.

From the above facts it is clear that this is a case where the appellant for the sake of evading the liability under the Act is masquerading the Standing Orders and training, but is extracting work from the skilled workers.

Considering the facts, circumstances, pleadings and evidence, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer