



सत्यमेव जयते

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

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

(Tuesday the 27th day of April, 2021)

APPEAL No.512/2019
(Old no.427(7)2008)

Appellant : Shri.N. Nandakumar
M/s.Sastha Enterprises
Beach Road
Kollam - 691001

By Adv.M.K.Saseendran

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

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

This case coming up for final hearing on 18.02.2021 and this Tribunal-cum-Labour Court on 27.04.2021 passed the following:

ORDER

Present appeal is filed from order no.KR/KLM/1282/ENF-1(3)/2008/1365A dt.21.04.2008 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act') in respect of non enrolled employees for the period from 10/2004 to 03/2007. The total dues assessed is Rs.5,53,164.15.

2. The appellant is engaged in cashew processing and export business and operates several factories. The appellant unit is covered under the provisions of EPF Act. The appellant was remitting contribution regularly. There was lot of pressure on appellant to engage retired workers. The appellant engaged some retired employees also on a casual basis. The respondent initiated an enquiry U/s 7A. The appellant was directed to be present on 06.12.2007 and the appellant appeared before the respondent on the said date. The enquiry was adjourned from time to time. The appellant also received a letter dt.11.01.2008 stating that there were variations in calculation of wages by the appellant. It is also reported that the wages on which contribution paid under ESIC and EPF varies substantially. The appellant was called upon to explain the reasons for such difference. The appellant furnished a reply dt.22.01.2008 explaining that 120 retired employees were re-employed by the appellant for whom ESIC contribution is being paid whereas they are not enrolled to provident fund being excluded employees. Without considering the pleadings by the appellant, the respondent issued the impugned order. The appellant did not provide adequate time to produce the records for the period 2004 and the enquiry was concluded in a hurry.

3. The respondent filed counter denying the above allegations. The appellant operates large number of cashew factories. From the records maintained by the office of the respondent, it is seen that most of the factories

owned by the appellant are chronic defaulters. They deducted the provident fund contribution from the wages of poor employees and never remit the same to the fund within time. Only when action is initiated for recovery of dues the appellant will remit the amount. There are also many instances where the assessment orders issued by the respondent U/s 7A of the Act are challenged before the Tribunal and also before the Hon'ble High Court of Kerala thereby delaying the remittance of contribution as well as not extending the social security benefits to poor cashew workers. The appellant failed to remit the statutory dues for the period from 10/2004 to 03/2007. In spite of the efforts made by the Enforcement Officer of the respondent, the appellant failed to comply with the directions. Accordingly an enquiry U/s 7A was initiated and a summons dt.27.11.2007 was issued fixing the enquiry on 06.12.2007. The appellant was directed to produce the relevant records and appear in the enquiry either in person or through an authorised representative. The Proprietor of the appellant establishment attended the hearing but did not produce any records called for. A copy of the report of the Enforcement Officer dt.23.11.2007 and copies of leave books of 9 employees for the year 2005-06 were also handed over to the appellant. The enquiry was adjourned to 27.12.2007 for filing his statement if any, on the report of the Enforcement Officer and also on the leave books handed over to him in the enquiry. None attended the hearing on 27.12.2007 and produced any records

called for. From the data made available by the report of the Enforcement Officer, there was substantial difference between the amount of wages on which ESI and EPF dues had been remitted for the months from 09/2004 to 03/2007. Since the appellant failed to attend the hearing and produce records, a letter dt.11.1.2008 was issued to the appellant to attend the enquiry on 22.01.2008 and also clarify difference in wages found between ESI and EPF. None appeared in the enquiry on 22.01.2008. However a letter was received from the appellant dt.22.01.2008 admitting the difference in wages and stating that provident fund is being paid only to permanent employees whereas ESI dues have been remitted for all the employees including casual employees. The appellant also enclosed a list of 120 employees who were stated to be retired provident fund members and those who are re-employed after withdrawal of their benefits. It is seen that ESI benefits were being paid for 400 employees and the appellant was required to substantiate his claim by identifying those 120 workers by providing the ESIC numbers. In the hearing on 01.02.2008 the appellant was directed to furnish the ESI account numbers in respect of these 120 workers. The appellant neither appeared nor furnished the required details. The appellant could not therefore substantiate its contention that 120 employees who were claimed to be retired employees but were enrolled to ESIC membership. Ordinarily EPF dues have to be remitted on the same wages as that of ESI contribution. There can be specific

cases of excluded employees who were not given provident fund membership which is required to be explained by the appellant. In spite of providing many opportunities the appellant failed to provide the minimum required details called for by the respondent in the enquiry. It was very clear that the appellant was trying to delay the whole process of assessing the dues. It is not correct to say that there was delay in initiating the enquiry and therefore the appellant had difficulty in retrieving and producing the records before the respondent. The period of default was 10/2004 to 03/2007 and the enquiry was initiated on 27.11.2007 itself.

4. The impugned order was challenged by the appellant before the EPF Appellate Tribunal, New Delhi in Appeal no.ATA 427(7)2008. The EPF Appellate Tribunal after hearing both the parties vide its order dt.12.01.2007 dismissed the appeal as no inconsistency was noticed in the impugned order. The appellant challenged the order of EPF Appellate Tribunal in W.P. no.5076/2011 before the Hon'ble High Court of Kerala. The Hon'ble High Court heard the case along with other similar petitions. Vide a common order dt.03.01.2012 the Hon'ble High Court remanded the case back to the Tribunal observing that the orders passed by the EPF Appellate Tribunal are stereotype orders and directed the EPF Appellate Tribunal to take back the appeals to file and pass fresh orders.

5. On abolition of EPF Appellate Tribunal, this appeal is transferred to this Tribunal and the parties concerned were heard and the matter was taken up for final order.

6. The issue involved in the appeal is with regard to the assessment of dues made U/s 7A of the Act on non enrolled employees for the period from 10/2004 to 03/2007. The case of the respondent is that the wages on which the provident fund contribution and ESIC contribution were paid substantially varies during this period or time. An Enforcement Officer of the respondent's office was deputed to inspect the records of the appellant. The Enforcement Officer reported that there is substantial difference in wages reported in provident fund and ESIC. The Enforcement Officer also produced leave book in respect of 9 employees who were not enrolled to provident fund. The respondent initiated an enquiry U/s 7A of the Act. On the first day of enquiry, a copy of the report of the Enforcement Officer and copies of leave book in respect of the 9 employees were given to the appellant to clarify the difference in wages reported to EPF and ESIC and also non enrollment of the employees. The appellant thereafter failed to attend the enquiry. Hence the respondent issued a notice to the appellant to clarify the difference in wages and also non enrolment. Though the appellant failed to attend the enquiry on the next date of posting he sent a letter stating that the appellant is enrolling only regular employees to provident fund and 120

casual employees were not enrolled to provident fund. A list of 120 employees who were alleged to be retired employees was also enclosed along with the letter. It is clear that out of 400 employees engaged by the appellant only 280 employees were enrolled to provident fund whereas all the 400 were enrolled to ESIC membership. According to the appellant the 120 employees were not enrolled to provident fund since they are retired employees who had taken their provident fund settlement. The respondent called for the ESIC details of these 120 employees and posted the matter for further details. The ESI membership details were required as there were more than one worker with the same name in the list forwarded by the appellant. In spite of specific directions and several adjournments the appellant failed to furnish the details. The Enforcement Officer substantially proved in the enquiry that many employees were not enrolled to provident fund. The appellant also admitted that 120 employees out of total 400 employees were not enrolled to provident fund. Now it is upto the appellant to substantiate that those employees who are not enrolled to provident fund are entitled for exclusion under the provisions of the EPF Scheme. As per Para 2(f);

“ An excluded employee means

1. An employee who have 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. - - - -

As per Para 69;

1. A member may withdraw the full amounts standing to his credit in the fund
 - a) On retirement from service after attaining the age of 55 years provided that a member, who has not attained the age of 55 years at the time of termination of his service shall also be entitled to withdraw the full amount standing to his credit in the fund if he attains the age of 55 years before the payment is authorized.
 - b) . . .
 - c) Immediately before migration from India for permanent settlement abroad or for taking employment abroad “

From the above provisions it is very clear that an employee who was a member of provident fund has taken his provident fund settlement after attaining the age of 55 years is treated as an excluded employee. It is for the appellant to substantiate his claim that all the 120 employees had attained the age of 55 years

and has taken their provident fund settlement to claim the benefit of exclusions under the provisions of the Scheme. Having failed to do that, the appellant cannot come up in appeal and argue that he was not provided adequate opportunity to substantiate his case. It is seen that the appellant was given more than adequate time by the respondent before issuing the impugned order. The appellant was only required to furnish the ESIC numbers of the 120 employees listed by him to be excluded employees. According to the appellant, all these 120 employees were enrolled to ESIC benefit to take care of their medical requirements. The claim of the appellant that the impugned orders issued in a hurry and that the old records could not be retrieve immediately for assessment are also not correct. The default taken up for assessment by the respondent is for the period from 09/2004 to 03/2007 and the enquiry was initiated on 06.12.2007. Further the only information called for by the respondent was the ESIC numbers of 120 employees who according to the appellant was enrolled to ESIC membership but not enrolled to provident fund. Since the appellant failed to furnish the required information, the respondent took an adverse view and assessed the dues.

7. It is seen that the appellant succeeded in delaying the remittance of contribution for the period from 09/2004 to 03/2007 for such a long period. Any further delay in recovering and crediting the amount to the account of the poor

cashew workers will be a complete failure of justice. Since the employees are already identified there is difficulty in accounting the contribution and also giving the benefit to the eligible employees.

8. Considering all the facts, circumstances, pleadings and evidence in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer