सत्यमेव जयते

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

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

(Thursday the 11th day of November, 2021)

APPEAL No.599/2019
(Old no.776(7)2013)

Appellant : M/s.Vaidyaratnam Oushadhasala Pvt Ltd
Thaikkattussery P.O., Ollur
Trichur – 680322

By Adv.Sajith P. Warrier

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

By Adv.Thomas Mathew Nellimoottil

This case coming up for final hearing on 27.08.2021 and this Industrial Tribunal-cum-Labour Court on 11.11.2021 passed the following:

O R D E R

Present appeal is filed from order no.KR/KC/1728/ENF-2(6/2013/9337 dt.10.09.2013 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 04/2011 to 10/2012. The total dues assessed is Rs.3,40,574/-.

2. Appellant is a company manufacturing classical and patented ayurvedic medicines. It employs around 180 employees. The appellant is covered under the provisions of the Act. The appellant establishment is registered under Factories & Boilers Act and the registration certificate is produced as Annexure 1. Being a factory, it is an industrial establishment within the meaning of Sec 2(e) of Industrial Employment (Standing Orders) Act, 1946. The Model Standing Orders prescribed by the Govt of Kerala shall be deemed to be adopted by the establishment from the commencement of the factory as provided U/s 12A of the said Act. A true copy of the Model Standing Orders prescribed by the Govt of Kerala under Kerala Industrial Employment (Standing Orders) Rules, 1958 is produced and marked as Annexure 2. The Standing Orders of the appellant factory has been certified by the certifying authority on 03.03.2007. True copy of the order of certification is produced and marked as Annexure A3. Due to complexity of activities, training is necessary before appointing employees. The trainees will not be absorbed directly into the employment. The appointments are subject to successful completion of training. Stipend is paid to the trainees during the period of training. On 26.11.2012 an Enforcement Officer of the respondent conducted an inspection of the appellant establishment and directed that the trainees/apprentices engaged by the appellant establishment are required to be enrolled to the

fund. A copy of the inspection report dt.26.11.2012 is produced and marked as Annexure 4. The appellant filed a reply dt.28.12.2012 explaining the factual position. A copy of the reply dt.28.12.2012 is produced and marked as Annexure 5. Thereafter the appellant received summons dt.28.02.2013 from the respondent authority U/s 7A of the Act. A copy of the notice is produced and marked as Annexure 6. A representative of the appellant attended the hearing and filed a written statement. A copy of the written statement dt.29.04.2013 is produced and marked as Annexure 7. The respondent authority without considering the decision of the Hon'ble Supreme Court in **Regional Provident Fund Commissioner Vs Central Arecanut and Coco Marketing and Processing Company Ltd, Mangalore**, 2006 2 SCC 381 passed the impugned order. A true copy of the said order is produced and marked as Annexure 8. Assessment of contribution for the stipend paid to the apprentices engaged under Certified Standing Orders of the establishment is against the provisions of the Act. The finding of the respondent authority that the trainees are working in connection with the work of the establishment is without any evidence. The respondent ought to have found that there is no guarantee that the trainees will be taken on regular employment on completion of the training. As per the definition of employee under 2(f) of EPF & MP Act, the apprentices engaged under Standing Orders are specifically excluded.

Simply because on completion of training or thereafter they have been given an appointment to a specified post, the period of training cannot be treated as employment. As per clause 3(6) of the Model Standing Orders, the only requirement is that every apprentice shall be provided with an apprentice card which shall be surrendered if he obtains a permanent employment. Therefore it is evident that there is no prohibition under Model Standing Orders for appointing an apprentice after he learnt the trade. In **Employees' State Insurance Corporation Vs Tata Engineering & Locomotive Company Ltd**, AIR 1976 SC 66 the Hon'ble Supreme Court of India held that if the right of receiving instruction exists, a contract does not become one of service because, to some extent, the persons to whom it refers does the kind of work, that is done by an employee or because he receives pecuniary remuneration for his work.

3. The respondent filed counter denying the above allegations. On an inspection by an Enforcement Officer, it was noticed that 41 eligible employees were not enrolled to the fund. The Enforcement Officer has forwarded a list of employees under the seal and signature of the appellant establishment. The Enforcement Officer also reported the month wise wages paid to these employees. The appellant failed to enroll those employees and therefore an enquiry U/s 7A of the Act was initiated. A representative of the appellant

attended the hearing and submitted that the 41 persons are excluded from provident fund membership as they are trainees appointed under the Standing Orders of the establishment. It was also stated that trainees were appointed for 6 months and thereafter they were treated as regular employees and enrolled to the fund. The representative of the appellant produced a copy of the order appointing the trainees on probation for 6 months and then being confirmed. The representative of the appellant also submitted that there are two modes of appointment. One by direct appointment and other after imparting training. A copy of the appointment order of the so called trainees is produced and marked as Exbt.R1. It is seen that these employees are being appointed as trainees for the period of 6 months before being absorbed into the establishment on probation for a period of 6 months. It is clear that these employees termed as 'trainees' are doing the regular work of the establishment and they are kept on probation for 6 six months before being absorbed as permanent employees. The work done, service conditions, duty time, transfer, leave etc., of a trainee during the course of training is same as that at the time of probation of a permanent employee.

4. The appellant establishment employs 180 regular employees and 41 trainees. The Enforcement Officer who conducted the inspection of the appellant establishment reported that all these so called trainees are doing

the work of regular employees, paid the same remuneration but in the name of stipend for a period of 6 months. According to the Enforcement Officer, these so called trainees will come within the definition of 'employee' under the Act and therefore are required to be enrolled to the fund. The appellant refused to comply with the directions and therefore the respondent authority initiated an enquiry U/s 7A of the Act. In the enquiry, the appellant took a stand that all these trainees are engaged under the Standing Orders of the establishment and as per Sec 12A of Industrial Employment (Standing Orders) Act, the Model Standing Orders are applicable to the appellant establishment. The respondent authority after verifying the records of the appellant establishment found that the so called trainees are given induction training before they are absorbed on regular service, paid almost the same salary and also they are doing the regular work of the establishment and therefore they will come within the definition of employee and they will have to be enrolled to the fund from their due date of eligibility.

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. This is particularly relevant in the facts of the case

as the appellant establishment is engaging almost 1/4th of the total employment strength as 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 Hon'ble High Court of Kerala in **Sivagiri Sree Narayana Medical Mission Hospital** Vs Regional Provident Fund Commissioner, 2018 (4) KLT 352 examined 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 " .

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. 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 Enforcement Officer. 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 appellant 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 appellant, the appellant is already having a Certified Standing Orders and produced a copy of the order dt.03.03.2007 as Annexure 3 to prove that the appellant establishment is having a Certified Standing Orders certified by the competent authority i.e. Deputy Labour Commissioner. However the appellant is relying on Model Standing Orders to argue that as per Sec 2(g), an apprentice is a learner who is paid an allowance during the period of his training. Model Standing Orders will be applicable to an industrial establishment before certification of the Standing Orders of the establishment by the competent authority. It is not clear why the learned Counsel for the appellant is relying on Model Standing Orders after certification of the Standing Orders of the appellant establishment on 03.03.2007. In the impugned order, the assessment of dues is made for the period from 04/2011 to 10/2012. The appellant failed to produce a copy of the Certified Standing Orders of the appellant establishment. After certification of the Standing Orders of the establishment the appellant can rely only on the said Certified Standing Orders of the establishment and not the Model Standing Orders. Model Standing Orders as per Sec 3 of Industrial Employment

(Standing Orders) Act is applicable only during the process of certification of the Standing Orders of the establishment. The respondent authority has taken a specific stand that the so called trainees is doing the work of regular employees. Hence it is upto the appellant to produce the training scheme, the evaluation system etc. to substantiate their claim that they are only trainees and are being trained in the respective areas of their work. No such attempt is made by the appellant. Further the respondent produced a copy of the appointment order dt.03.10.2011 issued to one Sujith K.N. As rightly pointed out by the learned Counsel for the respondent, the said order is referring to transfer of the employee, eligibility of casual leave etc. which is not applicable in the case of a trainee or a learner. In the impugned order, the respondent authority has referred to the regularisation order which clearly shows that the so called stipend paid as a consolidated package is almost equivalent to the salary after his appointment on regular basis. So the claim of the appellant that only stipend is paid to the trainees is an eyewash as the wages paid is almost equivalent to the stipend paid to these employees. It is admitted in the pleadings by the appellant that " Appointments are subject to the successful training and development of required skills and efficiency". Hence it is clear that the employees at the best are given a pre-induction training before being absorbed into the service of the appellant establishment. The Division Bench of

the Hon'ble High Court of Madras in **Bharat Sanchar Nigam Ltd Vs UOI**, 2015 LLR 893 (Mad.DB) held that pre-induction training stage cannot be ousted from the consideration for the purpose of provident fund for the reason that the definition of employee is wide enough to include the apprentices other than an apprentice appointed under the Apprentice Act.

10. Considering 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