सत्यमेव जयते

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

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

(Friday the 9th day of April, 2021)

APPEAL No.762/2019
(Old no.611(7)2012)

Appellant : M/s.Devi Hospital Pvt Ltd
XXI/64 Near N. S. S. College
North Gate, Thripunithura
Ernakulam - 682301

By M/s.B.S.Krishnan Associates

Respondent : The Assistant PF Commissioner
EPFO, Sub Regional Office, Kaloor
Kochi - 682017

This case coming up for final hearing on 25.02.2021 and this Tribunal-cum-Labour Court on 09.04.2021 passed the following:

O R D E R

Present appeal is filed from order no.KR/KC/10356/ENF-3(5)/2012/2953 dt.30.05.2012 assessing dues U/s 7A of the EPF & MP Act, 1952 (hereinafter referred to as 'the Act') against non enrolled employees for the period from 03/2011 to 02/2012. The total dues assessed is Rs.8,59,150/-.

2. Appellant is a hospital covered under the provisions of the Act. The appellant used to engage trainees who completed their nursing degree and nursing related courses. The appellant used to pay stipend which vary from person to person. While so an Enforcement Officer of the respondent visited the appellant establishment and pointed out that the non enrolment of the trainees. The appellant also submitted a detailed bifurcated statement of stipend of all the trainees for the period from 03/2011 to 02/2012. The respondent thereafter initiated an enquiry U/s 7A of the Act. A representative of the appellant attended the hearing, narrated all the facts and also produced vouchers evidencing the payment to the trainees. The respondent was also informed of the fact that some of the trainees already left after completing the training. Without considering the request from the appellant the respondent issued the impugned order. None of the trainees are employed for wages and therefore they cannot be treated as employees for the purpose of the Act. None of the trainees were assigned any specific duty or carry out any work in the hospital. Looked at from any angle these trainees cannot be treated as employees under the provisions of the Act. Many of the trainees approached the appellant establishment for training. The request given by some of the trainees are produced and marked as Annexure A2 series. The offer of training given by the appellant to these trainees are produced and marked as Annexure

A3 series. The contract between the appellant and the trainees are not to do work but learn work for which stipend is paid to them.

3. The respondent filed counter denying the above allegations. The appellant establishment is covered under the provisions of the Act w.e.f. 30.09.1985. During the inspection of the appellant establishment, it was noticed that the appellant had not enrolled all the eligible employees to provident fund membership. On verification of records, it is noticed that the enrollment of the employees does not tallying with the amount shown as salary and wages in the Income & Expenditure account and balance sheet. On further investigation, it was revealed that 124 employees engaged as trainees are not enrolled to provident fund. The list of employees includes the trainees and cleaning staff engaged by the appellant establishment. The Enforcement Officer therefore requested the appellant to enrol all those non enrolled persons and produce challans. Since the appellant failed to comply with the directions, an enquiry U/s 7A of the Act was initiated. Representatives of the appellant attended the hearing however they were not in a position to clarify the difference in wages as per books of account and non enrollment of 124 persons. The claim of the appellant that none of the trainees are paid wages and none of the trainees were assigned any specific duty or carry out any work in the

hospital is not correct. As per the definition of employee U/s 2(f) of the Act 'employee' means any person employed for wages in or in connection with the work of the establishment who gets his wages directly or indirectly from the employer and includes any person engaged as an apprentice not being an apprentice engaged under Apprentices Act, 1961 or under the Standing Orders of the establishment. From the above definition it is very clear that only apprentices engaged under Apprentices Act, 1961 and under Standing Orders of the establishment are excluded from the definition of 'employee' U/s 2(f) of the Act. The appellant never took the plea that the non enrolled employees are trainees before the respondent authority U/s 7A of the Act. The contention of the appellant that the trainees are engaged only in nursing related areas is not correct. It is seen that there are trainees who passed B.Com examination. Hence the training imparted was not only for nursing related duties. There is a legal bar that no plea, which was not taken before the statutory authority U/s 7A of the Act, can be taken for the first time in appeal. The respondent authority decided the issue on the basis of the documents and pleading available before him and non production of records by the appellant cannot be pleaded stating that the documents are voluminous. The claim of the appellant that the stipend paid to these employees are not wages is not correct. The definition of basic wages as per Sec 2(b) of the Act takes into account all

emoluments which are earned by an employee while on duty or on leave in accordance with terms of contract of employment and which are paid or payable in cash. It is further pointed out that in the Income & Expenditure account of the appellant establishment all the payments made to the so called trainees are booked under the head 'Wages and Allowances' only. In **Shri.Rajesh Krishnan, Secretary Vs APFC**, O.P. no.38287/2002 the Hon'ble High Court of Kerala held that for excluding an apprentice/trainee from the purview of the term 'employee' as defined U/s 2(f) of EPF & MP Act, he should have been engaged under the Apprentices Act, 1961 or under the Standing Orders as per the Industrial Employment (Standing Orders) Act.

4. The main issue under dispute is with regard to non enrolment of 124 persons engaged by the appellant. The Enforcement Officer who conducted the inspection reported the non enrolment and the respondent directed the appellant to comply with the provisions of the Act and Schemes thereunder. Since the appellant failed to comply, an enquiry U/s 7A of the Act was initiated. The appellant was represented in the 7A. It is seen from the impugned order that the appellant has not taken any specific contention regarding the non enrolment of 124 employees. The respondent therefore assessed the dues on the basis of the remuneration paid to these trainees. In this appeal the

appellant took a stand that the 124 non enrolled employees were trainees engaged by the appellant and they also produced few applications from the trainees and the acceptance letters of the appellant given to the so called trainees. According to the learned Counsel for the respondent the trainees are not excluded from the provisions of the Act. As per Sec 2(f) only apprentices engaged under Apprentices Act, 1961 or under the Standing Orders of the appellant establishment can claim exclusion from coverage. Since appellant has no case that these persons are engaged under the Apprentices Act, 1961 or under the Standing Orders of the appellant establishment they cannot claim exclusion. 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. 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.

5. 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. The learned Counsel for the appellant argued that that the so called trainees are doing the work of 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. 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.

6. 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 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.

7. 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 ".

8. It is seen that the claim of the appellant that the training is given on nursing related duties is not correct. From the few communications produced by the appellant in Annexure A3 series it is seen that the appellant is engaging trainees for telephone operator, pharmacy assistant etc., also apart from the

nursing related duties. It is also seen that there is no specific training period or training schedule for these persons. Some of the so called trainees are being trained for 5 months, some of the persons are trained for 6 months, some of them are 8 months and others are trained for 10 months. It can be seen that there is absolutely no logic or system in this kind of training imparted to persons. The communication issued to the trainees by the appellant also states that they will not pay any remuneration but as reported by the respondent remuneration is being paid to all these persons and same is accounted in wages and allowance account in the Income & Expenditure account of the appellant establishment. Hence it is clear from the above facts the concept of trainee is brought in as an after thought at the time of filing this appeal and the appellant has no case that these employees were trainees when the matter was being taken up U/s 7A by the respondent authority. Having taken such a stand it was upto the appellant to produce records and substantiate their claim that they were actually trainees and they were not in any way contributing the production of the appellant establishment. The appellant ought to have produced the training schedule if any, the nature of training imparted etc., before the respondent authority and pleaded their case that the appellant establishment was engaging 124 persons as trainees. Having failed to do so this appeal shall failed.

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

10. During the course of the proceedings it was pointed out that the appellant remitted 40% of the assessed dues with the EPF Appellate Tribunal, New Delhi on the basis of its order dt.03.10.2012. The respondent shall take action to collect the amount from EPF Appellate Tribunal, New Delhi and account the same while recovering the contribution from the appellant establishment.

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer