

CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL NO.1

MUMBAI

Present

Justice Ravindra Nath Kakkar

CGIT-1/EPFA/44 OF 2017

M/s. Society of the Helpers Mary versus ... Appellant

Vs.

Assistant Provident Fund Commissioner ... Respondent

Kandivali

Presence:

For the Appellant : Mr. H.L. Chheda (Authorized Legal Representative)

For the Respondent : Ms. Prerna Janvekar, Adv.

Mumbai, dated 20th July 2021.

JUDGEMENT

1. The present appeal is filed by the Appellant under Section 7-I of the Employees' Provident Fund and Miscellaneous Provision Act, 1952 (hereinafter referred to as the 'Act') against the order dated 30-05-2016 passed by the Assistant Provident Fund Commissioner, the Respondent under section 7-A of the Act.
2. It is the case of the Appellant that M/s Society of the Helpers Mary was established during the year 1942 with noble cause to serve the weaker section of the society as a charitable organization registered under the Public Charitable Trust. The Appellant started hospital



during 2003. The contention of the Appellant is that provisions of the Act are not applicable to them because they do not fulfill one of the mandatory conditions as prescribed u/s 1 (3)(b) of the Act which is to employ twenty or more persons in order the Act to be applicable.

3. The purpose of Inspection of coverage as per Inspector's Manual adopted by Respondent organization is to ascertain the correct position about the total number of employees actually engaged. Hence, a thorough probe is required before coming to conclusion whether provisions of the Act applies or not in respect of employment strength together with schedule of industry or otherwise as applicable.
4. It is the contention of the Appellant that Act was made applicable on the basis of vague report submitted by the Enforcement Officer who ignored to verify whether the doctors attending the Appellant were on the contract of employment or otherwise, whether they have the obligation to attend the duties on the next day or not, and whether they were paid honorarium or salaries. The Enforcement Officer, on insufficient information, has treated the visiting doctors as employees and considered the visiting doctors for the purpose of arriving numerical strength as envisaged under the section 1(3)(b) of the Act.
5. It is further submitted by the Appellant that being a charitable trust run on the donations made by the public is aware of helping the needy of the society but is not aware that the records from the date of setup are required to be kept intact.
6. It is further submitted by the Appellant that the Enforcement Officer after verifying the available records has come to the conclusion that the doctors were not on contract of employment but were on visiting basis making their services not exclusive to just the Appellant but also rendering same services to other places as well. However, the report of Mr. Sandeep S. Babar was denied by the inquiry officer in his impugned order.



7. It is further contended by the Appellant that visiting doctors were not appointed on contract of employment to get the salary/wages but were working on honorarium basis and were defrayed the conveyance charges and further they were not under obligation to report for duty next day. The visiting doctors were attending different clinics/nursing homes besides running their own clinics. To substantiate these arguments, the Appellant has annexure the copies of related details with this appeal.
8. It is also the case of the Appellant that Respondent was not satisfied with the previous report and ordered for a fresh report u/s 7-A (1)(a) of the Act. Further, the Appellant stated that the Respondent has refused the certified report submitted by the Enforcement Officer with malice in which it is certified by doctors that they are not the employees and they are attending the hospital only on call basis and as such they may not be treated as employees. Thus the strength of the establishment is below the coverage limit and thus it is not the statutory obligation on the establishment. The report by Enforcement Officer requested for closure of the case.
9. It is also the case of Appellant that during inquiry legitimate request was made by the Appellant to allow the professional visiting doctors and nuns to participate in the proceedings to determine the applicability of the Act to the hospital but they were not summoned. The copies of their affidavits have been filed.
10. Lastly, the Appellant contended that provisions of section 1(3)(b) of the Act was completely ignored by the Respondent. The Act is only applicable if Appellant is employing twenty or more persons and when the visiting doctors cannot be treated as employees of the Appellant, the provisions cannot be made applicable.
11. In reply to the above submissions, the case of the Respondent is that grievances of the Appellant in the present appeal are being establishment does not fall in the ambit of the provisions of the Act, Act is not extended to charitable organizations registered under



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Public Charitable Trust, the Appellant are providing medical facilities to the weaker section, the professional fees to the doctors are wrongly booked under the salary and wages, nuns and sisters are not the employees of the hospital and there is no relationship of employee and employer between them.

12. In reply to the above grievances, it is stated that charitable nature of the Appellant and also whether it is run on donations, etc are not relevant for the purposes of the Act as the Act does not provide any exceptions. Appellant has admitted that they have booked the professional fees under the 'salary & wages' and therefore on records the said amount was treated as 'salary & wages'. It goes to prove that the said persons are the employees within the meaning of section 2(f) of the Act. The grounds taken in appeal are not substantiated at the time of adjudication of 7-A proceedings. Further stated that reasonable opportunity was afforded to Appellant and the order u/s 7-A of the Act is passed only after verification of the salary and wages register of the establishment where it was found that on 01-07-2003, the establishment had engaged twenty employees. The order is also based on the balance sheet of the establishment where the establishment has deducted the provident fund contribution in respect of their employees. It is also stated that Appellant has failed to produce the relevant records before adjudicating authority. The Tribunal cannot be required to adjudicate the disputed facts which Appellant failed to prove at the time of proceedings u/s 7-A of the Act.
13. Heard both the parties at length, considering the submission as raised by both the parties along with the impugned order and records available in the present appeal.
14. The crux of the matter is whether the establishment is amenable to the provisions of the Act or falls outside the ambit of it.



15. According to the Appellant, the requirement of section 1(3)(b) of the Act is to ascertain that the strength of establishment is twenty or more employees which has not been proven for the applicability of the provisions of the Act.
16. The Appellant's main challenge to the impugned order is with regard to the inclusion of visiting doctors as employees of the establishment for which appellant claims that they were not paid with salary and instead honorarium was provided to them for reimbursement of transport charges incurred by them for attending service needs of the hospital.
17. In view of the Appellant's challenge to the procedure and conduct of the inquiry wherein he stated that legitimate request for summoning and participation of the concerned visiting doctors, nuns, and sisters was turned down and the certified report of the Enforcement Officer which establishes the version of Appellant especially with regards to the visiting doctors that they are not employees of the establishment not being accepted, it is pertinent to mention that in this appeal, the copies of the affidavits of the concerned visiting doctors and the report of the Enforcement Officer have been annexed.
18. In view of the facts stated above, this Tribunal finds the impugned order to be incomplete with respect to why the statement of the concerned doctors were not taken on records during the inquiry proceedings and why was the certified report of Enforcement Officer denied merely on the grounds that payments were made under the head 'salary & wages' of the Appellant's balance sheet.
19. In addition to the above, I would like to refer some of the important and relevant ratio of the judgments delivered on the present subject.
- a. The division bench of the Hon'ble Kerela High Court in Employees' Provident Fund Organization versus Employees' Provident Fund Appellate Tribunal reported in (2012) LLR 165 wherein it held that "...Even though the appellant's counsel rightly pointed out that doctors employed regularly cannot be taken out of coverage merely because payment made is styled as "consultation charges", we do not think on facts the appellant could successfully establish regular engagement of the consultant doctors exclusively by the respondent hospital. Since there is no material to prove the



engagement of the consultant doctors by the respondent Nursing Home as employees, we do not find any ground to interfere with the judgment of the Single Judge and Ext. PS order of the Tribunal."

- b. The Hon'ble Bombay High Court in RPFV vs Syndicate Overseas Ltd reported in (2011) LLR 953 held "*For determining a person as an employee, it is to be seen whether he has an obligation to report for duty every day.*"
- c. The Hon'ble Delhi High Court in Amarnath vs RPFV [1975 LIC 1720 (Del. HC)] stated "*... the Act could apply to an establishment only if the establishment answered the description contained either in clause (a) of sub-section (3) or in clause (b) of it, or in the proviso to it or as provided in sub-section (4) of Sec.1. It follows, therefore, that, having regard to the Scheme of Sec.1 an establishment which does not answer to the description contained in either of the aforesaid four categories would be beyond the scope of the Act and there would be no authority to extend or apply the provisions of it to such an establishment...*".
- d. Moreover, Hon'ble Apex Court in Regional Provident Fund Commissioner, Andhra Pradesh vs Shri T. S. Hariharan reported in 1971 SCR 305 held that "*... the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. It, therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme.*"

20. It is pertinent to mention that inquiry conducted u/s 7-A is only with regard to applicability of the Act u/s 7-A(1)(a) and no assessment is made as provided u/s 7-A(1)(b). Perusal of section 7-A shows that in between section 7-A(1)(a) and section 7-A(1)(b), the word used is 'and'. This Tribunal is dealing with the impugned order passed u/s 7-A(1)(a) of the Act only.

21. Resultantly, I observe that:

- a. The inquiry conducted u/s 7-A of the Act is not in consonance with the ratio of the judgments cited above.
- b. Statement of the concerned doctors has not been recorded during the inquiry.
- c. The certified report of the Enforcement Officer Mr. Sandeep S. Babar was denied without assigning any cogent reasons.
- d. Legitimate request of the Appellant for hearing and participation of concerned employees has been turned down without assigning any reason.
- e. Impugned order is not speaking and reasoned order.



22. In the light of aforesaid judgments and observations stated above, I am of the considered view that impugned order is to be set-aside and the case is to be remanded back to the Authority for fresh inquiry.

23. This appeal is finally disposed of accordingly with no order as to cost.

24. The copy of the order be sent to both the parties, file be consigned to record room after the compliance.



sd/-
(JUSTICE R.N. KAKKAR)
PRESIDING OFFICER