



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

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

(Tuesday the 10th day of March, 2020)

Appeal No.25/2019

(Old No. 765(7) 2012)

Appellant : M/s. Ram Laxman & Sons,
AMC-24/530,531,
Sreedhara Buildings,
Mamom,
Attingal - 695101

By Adv. Vijaya Chandra Babu

Respondent : The Assistant PF Commissioner
EPFO, Pattom
Thiruvananthapuram – 695004

By Adv. Nitha N.S

This appeal came up for hearing on 31/01/2020 and this Industrial Tribunal cum Labour Court issued the following order on 10/03/2020.

ORDER

Present appeal is filed from order No. KR/26389/Enf.1 (4) 2012/4183 dt. 07.6.2012 assessing dues U/s 7A of EPF & MP Act, 1952 (hereinafter referred to as 'the Act'.) for the period from 04/2010 to 10/2011. Total dues assessed is Rs. 3,93,232/-.

2. The appellant is a distribution agency distributing different items such as cigarettes, confectionery, biscuits and tinned food to various shops on commission basis. The commission agents are not employees and they are eligible only to get commission. There is no employer/employee relationship between the commission agent and appellant. The Assistant Labour Commissioner, Attingal inspected the establishment and issued a registration certificate with 5 employees on 07/02/2004 and this employment strength continued up to December 2010. The Enforcement Officer of the respondent who inspected the appellant establishment on 09/11/2010 seized 13 registers which are recorded in the notice dt. 09/11/2010. There was also a further direction to produce 17 more documents. A copy of the

notice dt. 09/11/2010 containing 13 documents is produced and marked as Annexure A1. The Enforcement Officer issued a notice as to why the appellant shall not be prosecuted for violating provision containing Sec 13(2) of the Act. The show cause notice dt. 23/12/2010 is produced as marked as Annexure A2. On the basis of the inspection conducted by the Enforcement Officer the appellant establishment was covered under the provision of the Act w.e.f 01/04/2010. The coverage memo is produced and marked as Annexure A3. The Enforcement Officer as per inspection report dt. 15/11/2011 computed the contribution. A copy of the inspection notice together with Form 12A details are produced and marked as Annexure A4 series. On the basis of the report of the Enforcement Officer an enquiry U/s 7A of the Act was initiated by the respondent. The appellant filed a detailed objection with regard to the coverage of the appellant under the provision of the Act. A copy of the objection dt. 30/01/2012 is produced and marked as Annexure A6. The Enforcement Officer and representatives of the appellant were examined during the course of the 7A enquiry. The deposition recorded during the cross examination of the Enforcement Officer held on

29/02/2012, is produced and marked as Annexure A7. Without considering any of the objection, the respondent issued the final order U/s 7A. Aggrieved by the order, the appellant filed a review application U/s 7B of the Act. The review application was rejected by the respondent vide order dt. 30/07/2012, a copy of which is produced and marked as Annexure A10. Sec 13 of the Act deals with Inspectors and Sec 13(2) deals with the powers of the Inspectors. At the time of examination of the Enforcement Officer he admitted that Sec 13(2) deals with his power. Hence issuing a notice U/s 13(2) was to threaten the appellant to get a list of employees with salary as per the requirement of the Enforcement Officer. A coverage notice was issued to the appellant on 28/03/2010. After issuing the coverage notice, the Enforcement Officer again issued a notice dt. 31/10/2011, ignoring the dispute of the appellant regarding the coverage. The purpose of his visit was only to collect the details of the employees with their wages to protect his interest. The 7A authority relied on this list containing the names of the employees and their salary in the letter head of the employer. This letter is collected by the Enforcement Officer from the appellant before deciding the

applicability of the Act to the establishment. It was not correct on the part of the Enforcement Officer to calculate the contribution even before the coverage of the appellant under the Act is finalized. The Enforcement Officer during his cross examination admitted that the employment strength of the appellant establishment from 2004 onwards was only five. The proposed coverage is for 26 employees in April 2010 and from December 2010, it was again reduced to 8 employees. In order to cover the establishment under the provision of the Act the Enforcement Officer increased the employment strength from 08 to 26 for a period of 08 months. This was done by including commission agents also for the purpose of the coverage. The monthly salary of all the employees were above Rs.6500/- and therefore they are excluded employees as per the provisions of the Act.

3. The respondent filed counter denying the above allegations in the appeal memorandum. The appellant establishment was coverable under the provision of the Act with effect from 01/04/2010 as the appellant engaged more than 20 employees as on that date. It was also reported that the appellant was having a branch at Varkala also. The appellant contested the

coverage on the ground that the employment strength of the appellant was less than 20. An enquiry U/s 7A of the Act was initiated, and the appellant was directed to appear before the respondent with documentary evidence. An advocate, representing the appellant attended the hearing and requested a copy of the report of the Enforcement Officer which was provided to him. The Advocate filed a Written Objection contesting the coverage of the appellant establishment. The Enforcement Officer representing the department submitted the coverage proposal along with the documents including details of employees engaged by the appellant during 04/2010 duly signed by the appellant. The said list is produced and marked as Annexure R1. The Enforcement Officer also produced the original day book for 01/04/2010 to 30/08/2010. The contention of the appellant that the employment strength never exceeded 10 at any point of time is contradictory daybook maintained by the appellant. The counsel appearing for the appellant also agreed that the employment strength including the commission agents was above 20 for the period 04/2010 to 11/2010. The appellant however failed to produce any evidence to distinguish the employees and

so called commission agents. Further as per the ledger and written list of employees submitted by the appellant, there was only one category of the employees and there was no indication regarding any commission agents. It is clear from evidence available that all the employees were getting salary along with monthly batta. Hence it was clear that the employment strength of the appellant as on 01/04/2010 was above 20. This is without taking into account the employment strength of the branches at Varkala and Koyilandy. Hence the respondent authority confirmed the coverage of the appellant establishment w.e.f 01/04/2010. The appellant filed a review application U/s 7B of the Act which also came to be rejected, as there was no discovery of important matters or evidence which even after exercise of due diligence was not within a knowledge of the appellant, or was one that could not be produced by him at the time when the order was issued. The registration certificate issued by the Assistant Labour Commissioner cannot be relied in view of the entries in the day book made by the appellant himself showing details of 27 employees to whom salary was being paid during 04/2010. The action of the Enforcement Officer in seizing the records and

directing production of additional records are in conformity with powers of Inspectors contained U/s 13 of the Act. The show cause notice issued to the appellant was a not a prosecution notice. It was issued to secure records and registers from the appellant. The notice also conveyed that in the event of failure of production of documents, action U/s 14 read with Para 76 of the EPF Scheme will be initiated against the appellant. The allegation that the notice issued to threaten the appellant was denied by the respondent. The authority U/s 7A examined the documents maintained by the appellant and confirmed that 24 employees were working with the appellant during the month 04/2004 and issued the impugned order. There is no restriction for the Enforcement Officer to visit an establishment to verify records to confirm the coverage and also to assess the dues, Sec13 of the Act gives adequate powers to Enforcement Officer's to conduct inspection and in the event of resistance search and seize records from establishments. The allegation that the appellant gave the list of employees to the Enforcement Officer under threat is unfounded and contrary to facts. The appellant only extracted the contents of the day book showing the employment strength for

the month of 04/2010 under his letter heads seal and signature. Any averment to the contrary is only to delay the coverage of the establishment. Sec 13 of the Act authorized the Enforcement Officers to examine the records of the establishments. The Enforcement Officer visited the establishment on 09/11/2010 and issued a letter requesting the appellant to make available the balance records before him on 15/11/2010. The letter was delivered by hand to the manager of the appellant on 09/11/2010 itself. The appellant neither responded to the letter nor produced any records letter called for. There after the Enforcement Officer issued the show cause notice dt. 23/12/2010. The show cause notice was not a prosecution notice U/s 14 of the Act. The notice only stated that if the appellant failed to produce the records, action will be initiated to prosecute the appellant. The applicability of the.EPF & MP Act to the appellant establishment w.e.f 01/04/2010 was already communicated to the appellant on 28/03/2011. Since the appellant failed to comply with the provision of the Act the Enforcement Officer inspected the establishment and reported the dues w.e.f 01/04/2010. Further the appellant contested the applicability only after receipt of the

summons for enquiry U/s 7A of the Act on 30/01/2012. The contention of the appellant that the Enforcement Officer increased the employment strength from 8 to 26 for 08 months is denied by the respondent. The appellant under his seal and signature informed the respondent that he had engaged 27 employees during 04/2010. By virtue of sec 1(5) of the Act an establishment to which the Act applies shall continue to be governed by the provision of the Act notwithstanding the fact that the number of employees had fallen below 20. From the documents produced by the appellant it can be seen that out of 27 employees only one employee was drawing salary above Rs. 6500 and he is excluded from the assessment.

4. The learned Counsel for the appellant was emphasizing the point that the appellant was not coverable w.e.f 01/04/2010 as the employment strength of the appellant never crossed 19. According to respondent, the coverage of the appellant establishment was finalised on the basis of the employment strength furnished by the appellant under his seal & signature. According to the learned Counsel for the appellant the above statement was taken from the appellant by threatening him with

prosecution U/s 14 of the Act. On a perusal of the impugned order it can be seen that the Enforcement Officer during his inspection of the appellant establishment seized the day book and some other registers of the appellant establishment as per Annexure A1 series. The respondent, 7A authority has taken into account the day book and salary and allowance slip produced by the Enforcement Officer along with the list of employees provided by the appellant to finalise coverage as per the impugned order. Hence it is not possible to accept the claim of the learned Counsel for the appellant that the list of employees along with salary details were obtained by the Enforcement Officer under threat. Since the coverage of the appellant establishment is made on the basis of the daybook and other registers maintained by the appellant in the normal course of business, I don't find any infirmity in the impugned order as far as the employment strength is concerned.

5. The learned Counsel for the appellant also submitted that the employment strength of the appellant was between 5 to 8 and the other names reflected in the day book and list of employees are commission agents. It is pointed by the respondent

that this issue was never raised before the 7A authority and is being raised in this appeal for the first time. The learned Counsel for the respondent argued that an issue which was not raised before the 7A authority and not adjudicated before the authority shall not be allowed to be raised in the appeal. Though the proposition of the respondent is correct there is no evidence even in this appeal to decide whether the commission agents can be treated as employees. In **Focussed Corporate Services India Private Ltd., Vs Union of India** 2011 LLR 989 (Madras High Court), the Hon'ble High Court of Madras examined the question whether the commission agents can be treated as employees for the purpose of coverage under the Act. The Hon'ble High Court of Madras held that the definition of the employees in the Act is wide enough to include a commission agent and definition of basic wages U/s 2b though exclude commission, the remuneration received by the commission agent cannot termed as commission within the meaning of the exclusion part of definition U/s 2b. Ultimately it is not the nomenclature which matters but the actual work done by the commission agents. Hence even assuming for arguments sake that some of the employees were

commission agents it will not in any way help the appellant to escape the liability of paying Provident Fund contribution to them. One final argument raised by the learned Counsel for the appellant was that many of the employees were excluded employees as they were drawing a salary of more than Rs. 6500/- as on 4/2010. As rightly pointed out by the learned Counsel for the respondent, the list provided by the appellant on the basis of the day book maintained by him, there was only one employee who was drawing more than Rs. 6500/- as salary as on 04/2010 and it is seen that he is excluded from the assessment made in the impugned order.

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

Hence the appeal is dismissed.

Sd/-

(V. Vijaya Kumar)
Presiding Officer