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

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

(Monday the, 17th day of January 2022)

APPEAL No. 183/2019

(Old No. ATA 839(7)2015)

Appellant	:	M/s. Kerala State Ex-Service League District Committee Vimuktha Bhada Bhavanam Burnacherry Kannur – 670 013 By Adv.(Dr.)K.P.Pradeep
Respondent	:	The Assistant PF Commissioner EPFO, Sub Regional Office, V.K.Complex, Fort Road, Kannur – 670 001 By Adv. K.C.Santhosh Kumar

This case coming up for final hearing on 12.10.2021 and this Tribunal-cum-Labour Court on 17.01.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KNR/18837/Enf. 1(2)/7-A/2014-15/2993 dated 20.11.2014 assessing regular dues from 04/2007 – 01/2013 and dues in respect of non-enrolled employees' w.e.f 01/2013 – 06/2013. Total dues assessed is Rs. 10,78,220/- (Rupees ten lakh seventy eight thousand two hundred and twenty only)

2. The appellant is a charitable society registered under Travancore Cochin Societies Registration Act of 1955 and is affiliated to Indian Ex-Services League, New Delhi. The primary aim of the appellant is to look after the socio-economic and welfare matters of the Ex-Servicemen and their families. For this purpose, the league is providing opportunities to its member's for better placements on no profit no loss basis. The appellant is functioning purely in a non-commercial way. The respondent issued a notice dated 24.06.2014 directing the appellant to appear before him to assess the dues of Provident Fund contribution from June 2007 to January 2013. The appellant was heard on 10.07.2014. According to the respondent, the appellant deployed security staff in M/s. Malabar Cancer Centre which is a covered establishment under KR/KNR/18113, Thalassery and also Government Hospital Thalassery. During the enquiry, M/s. Malabar Cancer Centre informed that they are remitting the contribution in respect of security staff working with them from

01.10.2007 onwards. However, General Hospital Thalassery didn't remit any contribution. Accordingly the respondent authority assessed the dues from 01.07.2007 to 30.09.2007 with respect to the security guards deployed at M/s. Malabar Cancer Centre and from 01.04.2007 to 31.01.2013 with respect to security guards deployed at General Hospital, Thalassery. The order dated 18.11.2014 issued by the respondent authority is produced and marked as Annexure A1. The request of the appellant for waiving the employees share for the period from 04/2007 – 12/2012 was rejected on 26.03.2015. A true copy of the order dated 26.03.2015 issued by the respondent is produced and marked as Annexure A2. These two orders are under challenge in this appeal. The security guards deployed at M/s. Malabar Cancer Centre and General Hospital, Thalassery are not employees of the appellant but they are members of the appellant which is a welfare organisation. To prevent the exploitation of Ex-servicemen, the Directorate of Sainik Welfare transfered their supervisory function to the appellant as part of their welfare measure. True copy of the circular issued by the Sainik Welfare Board, Government of Kerala is produced and marked as Annexure A3. The payments made to the Ex-servicemen are subject to verification by Zila Sainik Welfare office. On the basis of the circular, the league is preparing and forwarding the panel of Ex-servicemen to the establishment which request the deployment of security guards. The establishment selects the security guards. Thereafter a contract is entered. The activities taken by the league is on behalf of the Government and these are only a public functions. The amounts received from the establishment are fully disbursed to the concerned member employees. The league is not undertaking any commercial activities or business. From the bye-law of the appellant and the income and expenditure statement, it is clear that the source of income of the league are from membership registration fees, subscriptions and donations from members and grant from Government. Hence it is clear that appellant is not an employer coming under the definition of Sec 2(e) of the Act or its members are employees. At no point of time, the appellant employed 20 Ex-servicemen to the respective establishments. Due to coercive action taken by the respondent, the appellant remitted an amount of Rs. 3,98,728/- and waited for orders in its application dated 14.11.2014 for exempting the dues prior to

January 2013. However the appellant rejected the request vide Annexure 2 order dated 26.03.2015. Since Annexure 2 is in continuation of Annexure A1 order, the time of limitation as per Rule 7(2) of the Appellate Tribunal (Procedure) Rules, 1997 is to be considered from 12.04.2015 only as Annexure 2 order is received by the appellant only on that date. The liability to remit contribution under the Act is on M/s. Malabar Cancer Centre and General Hospital, Tellichery.

3. The respondent filed counter denying the above allegations. The appeal is not maintainable for non-jointer of parties. The appeal is not maintainable as barred by limitation. As per rule 7(2) of Appellate Tribunal Procedure Rules, 1997, the appellant establishment was covered under the provisions of the Act as it employed more than 20 persons as on 01.04.2007. Coverage notice was issued to the appellant on 04.07.2013 w.e.f 01.04.2007. Since the appellant establishment failed to comply under the provisions of the Act, an enquiry under Sec 7A of the Act was initiated. After hearing the appellant and also the Enforcement Officer who inspected the appellant establishment, the respondent authority issued the impugned order assessing

dues for the period from 04/2007 – 06/2013. The request of the appellant to waive the employees' share vide letter dated 14.11.2014 was rejected vide letter dated 26.03.2015. A copy of the request dated 14.11.2014 is produced and marked as Exhibit R(a). The contention of the appellant that security guards deployed by the appellant in M/s. Malabar Cancer Centre and General Hospital, Thalassery are not employees but are the members of the appellant is not correct. As per Sec 2(f) of the Act, "employee" means any person who is employed for wages in any kind of work in or in connection with the work of the establishment who gets his wages directly or indirectly from the employers. The security guards of the appellant are employees doing security duties in connection with the work of the appellant and is drawing wages directly from the appellant. The claim of the appellant that they are not providing security services and is not undertaking any commercial activities is not correct. After entering into contract, the appellant is accepting the wages on behalf of the employees and is paying the wages to the employees. As per Memorandum of Association, Clause 5(b), the appellant can open School, College, Laboratory, Industrial Training Centres etc.

and as per Clause 5(f) they can open Co-operative institutions, Limited Companies, Trust etc. These are all commercial activities only. Profit sharing between the employees and the appellant is not a relevant consideration. The fact that appellant is having ultimate control over the affairs of the employees and wages are being paid by them will clearly establish that the appellant is an employer as per Sec 2(e) of the Act. There exist an Employer – Employee relationship between the appellant and the security personal employed in various institutions. The claim of the appellant that they never deployed 20 Ex-Servicemen to any establishment is not relevant. The applicability of the Act under Sec 1(3)(a) of the Act depends on the total employment strength and not on the number of security guards deployed in each establishment. With regard to the claim of limitation, it is pointed out that the legislature has not prescribed any limitation in recovering the amounts due under the Act. After providing more than adequate opportunity, the date of coverage was confirmed as 01.04.2007 on the basis of the submissions made by the respondent as well as the Enforcement Officer. It is the responsibility of the appellant to start compliance once the requirements under the Act are satisfied. In the event of any mistake, the appellant has got an opportunity to file a review application under Sec 7B of the Act. As per Para79 of EPF Scheme, any person aggrieved by an order made under Sec 7A (1) and who desires to obtain a review of such order may apply for a review of that order as provided in Sec 7B(1) of the Act in Form 9 to the officer who passed such order. The appellant submitted the request for waiver on 14.11.2014 before the issue of proceedings under Sec 7A of the Act on 20.11.2014. Moreover the application was not in Form 9 as provided under Para 79 of the Scheme. The appellant voluntarily remitted a part of the amount demanded as per the impugned order. Copies of letters by appellant addressed to the respondent and M/s. Malabar Cancer Centre is produced herewith and marked as Annexure R(b) and R(c). The amount so remitted by the appellant is required to be accounted in members account with interest accrued which is required to be compensated by the appellant establishment. As per the decision of the Hon'ble High Court in ***Cosmopolitan Club Vs RPFC***, 1967 (1) LLJ 797, it is not relevant whether a particular establishment is proprietary/non-proprietary or non commercial as far as the extension of the provision of EPF is concerned. The appellant had themselves admitted their liability to make the payment towards Provident Fund as is evident from the terms of agreement entered in between the appellant and the establishments. A copy of such an agreement is produced and marked as Annexure R(d). It is clear from the evidence available on record that the appellant establishment deployed 12 security personnel's in M/s. Malabar Cancer Centre and 13 security persons at General Hospital, Thalassery. Hence the claim of the appellant that the employment strength never reached 20 is factually incorrect.

4. Present appeal is filed from the impugned order issued by the respondent authority assessing dues in respect of the appellant establishment for the period from 07/2007 – 01/2013. The learned Counsel for the respondent raised a preliminary issue that the appeal is barred by limitation as the same is filed beyond 120 days as provided under rule 7(2) of Employees Provident Fund Appellate Tribunal (Procedure) Rules 1997. According to the learned Counsel, the impugned order is dated 20.11.2014 and the appeal is filed only on 08.06.2015 after a delay of more than 6 months. He relied on the decision of the Hon'ble High Court of

Kerala in ***Dr.A.V.Joseph Vs Asst. Provident Fund Commissioner and Another,*** 2009(122)FLR 184, according to which the maximum period for filing appeal is only 120 days from the date of the impugned order. He also relied on the decision of Hon'ble High Court of Delhi in ***APFC Vs EPF Appellate Tribunal***, 2006(108)FLR 35, that in view of the specific provision under rule 7(2), the Tribunal cannot condone the delay beyond the period of 120 days. The learned Counsel of the appellant pointed out that the appellants' request for waiver of employees share given on 14.11.2014 and the same was rejected vide order dated 26.03.2015 which is received by the appellant only on 12.04.2015. According to the learned Counsel, the limitation is to be considered from 12.04.2015 and the appeal is required to be filed within 60 days that is on or before 11.06.2015, and the appeal is filed on 08.06.2015 which is received by the registry on 12.06.2015. It is further pointed out by the learned Counsel for the appellant that the Annexure A2 order is only a continuation of Annexure A1 order and both these orders are being challenged in this appeal and therefore the appeal is filed within the limitation period. It is seen that the impugned order is dated 20.11.2014.

The appellant has given a request for waiver of employees' share of contribution for the period from 04/2007 – 12/2012 on 14/11/2014 vide Exhibit R(a). On a perusal of Exhibit R(a) dated 14.11.2014, it is clear that the request is given during the course of the enquiry under Sec 7A of the Act and it was upto the respondent authority to decide the same in the impugned order itself. However the respondent authority choose to issue a separate order dated 26.03.2015 rejecting the request for waiver of employees' share of contribution. Hence it is not possible to accept the contention of the learned Counsel for the respondent that the appeal is filed against the impugned order under Sec 7A only and therefore the limitation under Rule 7(2) of the EPF Appellate Tribunal (Procedure) Rule is to be considered from the date of the impugned order. It is particularly relevant in view of the fact that the appellant challenged the Annexure A2 order rejecting the request of the appellant for waiver of employees' share of contribution along with the impugned Annexure A1 order.

5. Hence I am of the considered view that the limitation under Rule 7(2) of the EPF Appellate Tribunal Procedure Rules can be considered only from the date of receipt of Annexure A2 order

by the appellant. In view of that matter, the appeal is filed within the time limit or within the condonable period of delay.

6. The learned Counsel for the appellant took a preliminary objection that the appellant establishment is not coverable under the provisions of the Act, as appellant establishment is only providing a panel of names to the establishments which request for deployment of security guards. According to him, the appellant is not an employer under Sec 2(e) of the Act. The learned Counsel for the respondent opposed the plea on the ground that the appellant establishment is deploying security guards to various establishments and the appellant establishment is paying the salary of the employees. On a perusal of the file, it is seen that this contention was never raised before the respondent authority under Sec 7A of the Act. It is further seen that the appellant establishment has request through letter No.C1032 dated 12.06.2014, 01.02.2013, 21.06.2013, 14.02.2013 and 14.02.2013 and the appellant establishment was requesting the respondent authority for allotment of separate and independent code number to remit the contribution in respect of security guards deployed by them in various institutions. Further

it is seen that as per the agreement dated 01.10.2012 executed between the appellant and M/s. Malabar Cancer Centre and the agreement dated 01.03.2013 executed between the appellant and General Hospital, Thalassery clearly states that the appellant shall comply with all provisions of the central Acts and the agency shall be responsible for payment of salaries, EPF and other statutory benefits to the security guards. Further it is also seen that the contention of the learned Counsel for the appellant that the entire salary received from the establishments are disbursed to the security staff without any deduction is not correct. As per letter dated 12.06.2014 by the appellant, addressed to the respondent authority, it is clearly stated that the amount received from the establishments less a small amount deducted as service charges is being paid to the employees. The learned Counsel for the appellant also pleaded that the employment strength of the appellant never reached 20 and therefore it is not coverable under the provisions of the Act. This is a question of fact that the appellant ought to have proved before the respondent authority. However in its letter dated, 21.06.2013 addressed to the respondent, it is stated that they were deploying 14 security guards to M/s. Malabar Cancer Centre and 10 security guards to General Hospital, Thalassery as on 04/2010 and as on 06/2013 they were deploying 30 security guards to M/s. Malabar Cancer Centre and 17 security staff to General Hospital, Thalassery.

7. Taking into account all the above facts, I am clear in my mind that the appellant establishment is rightly covered under the provisions of the Act.

8. According to the learned Counsel for the appellant, the appellant establishment was requesting for allotment of an independent code number for remitting the contribution in respect of the employees deployed in various institutions. The respondent allotted an independent code number vide coverage notice dated 04.07.2013 w.e.f. 01.04.2007. The appellant during the course of the 7A enquiry itself vide letter dated 14.11.2014 [Exhibit R(a)] requested for the waiver of the employees' share of contribution for the period from 01.04.2007 to 31.12.2012. The respondent authority rejected the request vide Annexure A2 letter dated 26.03.2015. According to the learned Counsel for the appellant, the appellant establishment is entitled for waiver of employees' share of contribution as per the existing instructions. According

to the learned Counsel for the respondent, the appellant submitted the request on 14.11.2014 and the appellant ought to have filed a review under Sec 7B of the Act as provided under Para 79(A) of the Scheme in Form 9. The request by the appellant was not as required under the provisions of the Scheme and therefore the appellant is not entitled for any waiver of employees' share of contribution. On a perusal of Annexure A2 order dated 26.03.2015, it is stated that "the Act applies on an establishment as soon as the employees' strength reaches 20. The establishment/employer has to start compliance under the Act by taking code number from PF office. The employer is under bounden duty to follow the provisions of the law and his lackness does not make him eligible to any waiver of statutory dues". The request for waiver is therefore rejected by the respondent authority. It is seen from various letters referred to above, given by the appellant to the respondent authority that the appellant had in fact requested for allotment of code number on various occasions. The respondent authority delayed allotment of code number to the appellant establishment till 04.07.2013 and issued a code number retrospectively w.e.f. 01.04.2007. M/s. Malabar

Cancer Centre is an establishment covered under the provisions of the Act and therefore they started compliance from October 2007. However General Hospital, Thalassery, being a Government hospital, doesn't have an independent code number since it is not coverable under the provisions of the Act. Therefore unless an independent code number is allotted to the appellant, the contribution in respect of the security guards deployed in General Hospital cannot be remitted, even if they wanted to do so.

9. Taking into accounts all the above facts and circumstances, I am of the considered view that the appellant establishment is entitled for waiver of the employees' share of contribution for the period from 01.04.2007 – 31.12.2012 as requested by the appellant vide its letter dated 14.11.2014, if the employees' share of contribution is not deducted from the salary of the employees during the relevant point of time. It was pointed out during the course of argument that M/s. Malabar Cancer Centre was deducting and remitting the contribution in respect of the security guards deployed by the appellant and depositing the same with the respondent authority from 04/2007 to 12/2012.

The remittances made by M/s. Malabar Cancer Centre will not be affected by this order.

10. Considering the facts, circumstances, pleadings and evidences in this appeal, I am not inclined to uphold the impugned order.

11. Hence the appeal is allowed. The impugned order is set aside and the matter is remitted back to respondent to conduct a fresh enquiry after issuing notice to the appellant and issue the final order within a period of 6 months from the date of receipt of the order after waiving the employees' share of contribution in respect of employees deployed at General Hospital, Thalassery from 04/2007 to 12/2012. If the appellant fails to attend the enquiry or produce the records called for, the respondent is at liberty to decide the matter according to law.

Sd/-
(V.Vijaya Kumar)
Presiding Officer