सत्यमेव जयते

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

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

(Tuesday the 20th day of October, 2020)

APPEAL No.303/2018

Appellant	:	M/s.Tely Medical Centre Ltd Thiruvangad Thalassery Kannur - 670103
		By Adv.Prinsun Philip
Respondent	:	The Regional PF Commissioner EPFO, Sub Regional Office Kannur - 670001
		By Adv.K.C.Santhosh Kumar

This appeal came up for final hearing on 22.01.2020 and this Industrial Tribunal cum Labour Court on 20.10.2020 passed the following:

O R D E R

Present appeal is filed from order no. KR/KNR/14123/ENF-1(2)/7A/2018-19/892 dt.14.08.2018 assessing dues U/s 7B of the Act (hereinafter referred to as 'the Act') for the trainees engaged by the appellant

for the period from 03/2014 to 08/2016. The total dues assessed is Rs.8,79,759/-.

2. The appellant is a company registered under Companies Act and owns and runs a hospital. The appellant is also a commercial establishment registered under Kerala Shops & Commercial Establishment Act, 1960. The appellant is also covered under the provisions of EPF & MP Act. The appellant is also an industrial establishment coming under Industrial Employment (Standing Orders) Act, 1946. The model standing orders are applicable to the appellant till the certified standing orders is made applicable to the appellant. As per the model standing orders an apprentice is a leaner who is paid an allowance during the period of training. Govt of Kerala as per notification dt. 07.06.2016 notified all commercial establishments coming under Shops Act as industrial establishments under the Payment of Wages Act, 1936. A true copy of the notification is enclosed as Annexure A1. In view of the above notification the appellant's hospital is an industrial establishment coming under Sec 2(ii) of the Payment of Wages Act and it is also an industrial establishment coming U/s 2(e) of the Standing Orders Act. The appellant engaged 68 trainees in their hospital during 03/2014 to 08/2016. The 68 trainees were not employees under EPF & MP Act. The trainees attended the appellant's hospital for practical training and learning the work. They were not

employed under any contract of employment. There was no employer-employee relationship between the appellant and the trainees. Out of the 68 trainees 40 trainees left on 31.08.2016. 16 trainees were taken as employees after completion of their training and they were extended the benefit of provident fund. As per Annexure A3, the Govt of Kerala issued notification dt.23.05.2013 enhancing the rate of stipend payable to the nursing trainees engaged in private hospitals. The Enforcement Officer of the respondent who conducted the inspection of the appellant establishment on 02.05.2016 gave a report stating that some of the eligible employees have not been enrolled by the appellant during the period 03/2014 to 08/2016. The respondent initiated an enquiry U/s 7A. The appellant appeared and filed a written statement informing the respondent that the 68 trainees were not employees and no wages were paid to the trainees. Without considering the above contentions the respondent issued the impugned order holding that the 68 trainees are employees coming under EPF Act and they are eligible for membership under the Act and assessed an amount of Rs.13,56,279/-. The appellant filed an application for review U/s 7B of the Act. The appellant also produced a copy of the standing orders submitted by the appellant to the certifying officer and also claimed that the 68 trainees are not employees as defined U/s 2(f) of the Act. After hearing the appellant respondent issued the impugned order

revising the assessment to Rs.8,79,759/-. In **RPFC Vs Central Arecanut & Coco Marketing and Processing Co-operative Ltd**, 2006 2 SCC 381 the Hon'ble Supreme Court held that even where there are no certified standing orders, in respect of establishment coming under Standing Orders Act, the model standing orders prescribed under the Standing Orders Act will be applicable. In **Sivagiri Sreenarayana Medical Mission Hospital Vs RPFC**, 2018(4) KLT 352 following the earlier decision of the Supreme Court, the Hon'ble High Court of Kerala held that the trainees under model standing orders are not liable to be covered under the EPF & MP Act. The decision of the Hon'ble High Court of Kerala in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar and others**, W.P.(C) 5306/2005 is not applicable to the present case as Annexure 1 notification is issued by Kerala Govt on 07.06.2013 and same was not in existence at the time when the Hon'ble High Court of Kerala decided the above matter. As per Annexure A3, the trainees are not eligible for any wages which are applicable to the permanent employees of the hospital. On the basis of Annexure A3 circular issued by Govt of Kerala, the respondent treated 28 trainees i.e. 25% of the total number of 68 trainees as trainees engaged by the appellant and treated one year period as their practical training period from the date of their 1st engagement as trainees. On expiry of the period of one year they were treated as regular employees and was assessed for provident fund liability.

Annexure A3 order issued by Govt of Kerala is not binding on the appellant in view of Annexure A1 notification dt.07.06.2013 specifying all commercial establishments coming under Shops Act as an establishment under Payment of Wages Act. The Standing Orders Act, Rules or the model standing orders do not prescribe any time limit for trainees. Hence the time limit fixed as per Annexure A3 cannot be enforced as it is contrary to the Standing Orders Act. With regard to the 48 trainees it was pointed out that they were purely learners and those trainees had no right of employment in the hospital after their training period, they are not entitled for basic wages and dearness allowance and they were paid only stipend during their training period. The Standing Orders Act or model standing orders do not prescribe any time limit for the trainees nor prescribe the number of trainees that can be engaged by institutions like appellant.

3. The respondent filed counter denying the above allegations. The Enforcement Officer of the respondent during his inspection of the appellant premises on 02.05.2016 found that 68 employees were engaged from 03/2014 onwards and they were deployed for the regular work of the establishment but were not enrolled to provident fund. Hence an enquiry was initiated U/s 7A. The appellant appeared before the respondent and filed a written note claiming that Standing Orders Act, 1946 and model standing

orders are applicable to the appellant and 68 trainees will come within the definition of apprentices and hence not liable to be covered under the Act. During the course of enquiry it has come out that the trainee employees were working at par with permanent employees and the appellant establishment is not an industry as defined under the Industrial Employment Act. In view of the decision of the **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar and others**, W.P.(C) 5306/2005 and the decision of the Hon'ble High Court of Delhi in **Indraprastha Medical Corporation Vs NCT of Delhi and others**, 2006 II LLJ 231, the 68 employees are eligible to be enrolled to provident fund and an assessment order for Rs.13,56,279/- was issued. Aggrieved by above order the appellant filed a review application U/s 7B of the Act. During the course of enquiry it was established that as per Govt of Kerala order dt.23.05.2013 only 25% of the total nursing staff can be treated as trainees for their period of practical training. The stipend given to these trainees vary from Rs.6000 to 6500/-. After elaborate consideration the respondent found that the trainees other than those notified by Govt of Kerala are employees and issued assessment order for Rs.8,79,759/-. The right of the appellant for engaging apprentices is not an absolute unconditional one, but subject to various orders issued by the Govt to protect the interest of such persons recruited as trainees. Annexure A3 is one of such orders to protect the

interest of the employees. The Hon'ble Supreme Court only held that until Certified Standing Orders are framed, model standing orders prescribed under the Act would apply. This does not mean that the appellant can designate any number of employees as trainees. According to Annexure A3, the number of employees in excess of their eligibility to be appointed as trainees as well as those trainees who continue even after one year cannot be treated as trainees. The appellant is relying on one para of Annexure A3 where as according to them the rest of the circular is not legal and are required to be ignored. The respondent treated the so called trainees working beyond one year and in excess of 25% of the total nursing staff as employees not on the ground that the appellant had no Standing Orders. When the statue is silent on certain crucial issues, the Govt try to fill in those gaps issuing administrative orders. The appellant had a maximum of 103 employees when they engaged 68 employees as trainees. As per the standing orders produced by the appellant the total number of nursing staff is 41 and the appellant is entitled to appoint a maximum of 10 trainees in the hospital. Before acquiring B.Sc Nursing Certificate the students will have to undergo practical training as part of their internship. After acquiring qualification also they under go training. It is not correct to claim that the management can retain helpless employees as trainees for any length of service.

4. The appeal was heard in detail on either side. Respondent wanted to file an argument note which was allowed on the condition that the argument note shall be filed within 2 weeks time. However no such argument note is filed on the side of respondent.

5. The main issue involved in this appeal is with regard to enrollment of 68 trainees/employees to provident fund membership. According to the learned Senior Counsel for the appellant in view of the Annexure A1 notification, the appellant hospital will come under Standing Orders Act and therefore model standing orders are applicable even if there was no Certified Standing Orders at the relevant point of time. The learned Senior Counsel for the appellant also pointed out that there is no limitation with regard to the number of trainees who can be engaged under the Standing Orders Act or under model standing orders nor there is any restriction regarding the period of training. However according to him, the restriction imposed by Govt of Kerala as per Annexure A3 order dt.23.05.2013 restricting the number of nursing trainees to 25% of the total number of nurses and also restricting the training period to one year is not correct as the same is in conflicting the Standing Orders Act. The learned Counsel for the respondent argued that though the Standing Orders Act do not restrict the number of trainees or the period of training, it is upto the Govt to take action to avoid exploitation of

the employees in the name of training. The 1st issue to be decided is whether the Standing Orders Act is applicable to hospitals. According to the learned Counsel for the respondent **Indraprastha Medical Corporation Vs NCT of Delhi and others**, 2006 II LLJ 231 the Hon'ble High Court of Delhi and in **Cosmopolitan Hospital Pvt Ltd Vs T.S.Anilkumar and others**, W.P.(C) 5306/2005 the Hon'ble High Court of Kerala held that hospital is not an industry under the Industrial Employment Standing Orders Act. However learned Senior Counsel for the appellant relied on the decision of the Kerala High Court in **Sivagiri Sreenarayana Medical Mission Hospital Vs RPFC**, 2018(4) KLT 352 to argue that Standing Orders Act is applicable to hospitals. The learned Senior Counsel for the appellant argued that the Annexure A1 notification is dt.18.06.2013 and therefore the earlier decisions referred by the respondent are not relevant in this case. However it is pointed out that in **Indo American Hospital Vs APFC,** W.P.(C).16329/2012 through its judgment dt.13.07.2017 the Hon'ble High Court of Kerala held that the 34 trainees engaged by the hospital cannot be treated as apprentices under Standing Orders and they will have to treated as employees. The learned Counsel for the respondent also pointed out that **Sivagiri Sreenarayana Medical Mission Hospital** case (Supra) has not become final as an appeal is pending before the Division Bench from that order. It is settled law that when Standing

Orders Act is applicable to an establishment, model standing orders will be applicable to that establishment even if there is no Certified Standing Orders. The learned Senior Counsel for the appellant relied on the decision of Hon'ble Supreme Court in **RPFC Vs Central Arcanut & Coco Marketing and Processing Co-operative Ltd** (Supra) to argue that the trainees cannot be treated as employees when they are engaged under model standing orders. The facts of the above case are clearly distinguishable from the present case. In the case before the Hon'ble Supreme Court the appellant was a co-operative under Govt of India having a clear training programme. They notify the training programme every year inviting application from the public and select 45 candidates after conducting interview. In the said decision the main issue was in the absence of a Certified Standing Order whether model standing orders can be considered. In the present case, the appellant is having around 100 employees and engaged around 68 persons doing the regular work of the establishment and working in shifts and claiming that they are trainees under model standing orders. As per Sec 2(f) of the Act, " employee means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and **includes** any persons employed by or through a contractor and engaged

as an apprentice, not being an apprentice engaged under the Apprentice Act, 1961 or under the standing orders of the establishment ". From the above definition it is clear that even apprentices will come within the definition of employee and only apprentices engaged under Apprentices Act or under Standing Orders of the establishment are excluded. It is also relevant to point out that trainees are also not excluded from the definition of employees. The implication of the above discussion is that if there are apprentices under going exclusive training under a training scheme and who come within the Standing Orders or Apprentice Act only will stand excluded from the definition of employee under the Act. Otherwise there is a very possibility that the exclusion in the definition of employee under the Act will be misused by unscrupulous employers. The Hon'ble High Court of Kerala has taken note of the situation in **Sivagiri Sreenarayana Medical Mission Hospital** case (Supra) when it observed that;

> " Of course, there could be many cases, where employers for the sake of evading the liabilities and various labour welfare legislations, may allege a case which is masquerading as trainees or apprenticeship, but where in fact it is extraction of work from skilled or unskilled workers. Of course, the statutory authorities concerned and the Courts will then have to lift the veil and examine

the situation and find out whether it is a case of masquerading of training and apprenticeship or whether it is one in substance one of trainee and apprentice as envisage in the situation mentioned herein above and has dealt with in aforesaid judgment referred to herein above ".

In the present case as already pointed out the appellant has less than 100 employees whereas they engaged 68 so called trainees. According to the respondent, they were doing the normal work of a permanent employee and were not under going any training in the hospital. In **MRF Ltd, Pondicherry Vs Presiding officer, EPF Appellate Tribunal**, 2012 LLR 126 (Mad.HC) the Hon'ble High Court of Chennai held that the major part of the workforce comprised of apprentices and they were working for more than 4 years and hence they cannot be treated as trainees just because model standing orders did not provide for any fixed number or fixed period for engagement of apprentices. In **Ramnarayan Mills Ltd Vs EPF Appellate Tribunal**, 2013 LLR 849 (Mad.DB) the Division Bench of Hon'ble High Court of Madras held that the apprentices who were doing regular work of the establishment and were paid certain allowances like regular employees cannot be treated as apprentices under model standing orders. In **BSNL Vs UOI**, 2015 LLR 893 (Mad.DB) the Division Bench of Hon'ble High Court of Madras held that the

employees are entitled to be enrolled to provident fund even during pre-induction training. The question whether the nurses and midwives who completed their course requires any further training was considered by the Hon'ble High Court of Kerala in **Kerala Private Hospital Association Vs State of Kerala and others**, W.P.(C) 2878/2012. The Hon'ble High Court of Kerala vide its order dt.14.03.2019 held that the order of Govt of Kerala withdrawing the training period for nurses and midwifes after completion of their course is legally valid.

6. During the course of argument the learned Senior Counsel pointed out that there were 2 types of trainees engaged by the appellant. One category is the trainees directly taken by the appellant and there is another category of trainees who are deputed by other establishments for training. It is seen from Exbt. R2 series that there are 18 nurses who are taken directly by the appellant establishment under the heading 'Internship' for a period of one year. There is another category of 40 employees who are taken as trainees under "ANM Practical Study Scheme", a scheme which is stopped w.e.f 31.08.2016. It is seen that all these persons were relieved on a particular day on 31.08.2016. It is not clear from the impugned order whether these 40 employees/trainees were part of any training programme or were being deputed by other establishments for training. It is felt that the

respondent ought to have examined the training scheme and examine whether they were actually under going any training as part of their course with the appellant establishment.

7. In the circumstance explained above, the respondent will have to examine whether the persons who were undergoing training under "ANM Practical Study Scheme" were actually learners or whether they can be considered as employees under the definition of employee in EPF & MP Act. I am not inclined to interfere with other findings of the respondent authority.

Hence the appeal is allowed, the impugned order is set-aside and the matter is remitted back to the respondent to examine whether the persons who were deployed as trainees under "ANM Practical Study Scheme" were actually learners or will come under the definition of employee under Sec 2(f) of the Act. The respondent shall issue notice to the appellant and decide the matter finally within a period of 3 months time. The amount, if any, remitted by the appellant U/s 7(O) of the Act shall be adjusted/refunded after finalisation of the enquiry.

Sd/-
(V.VIJAYAKUMAR)
Presiding Officer