

(1998) 04 AHC CK 0079
In the Allahabad High Court
Case No : Writ Petition No. 4 of 1983

Rastogi Brothers and another	Vs	APPELLANT
Union of India and another		RESPONDENT

Date of Decision : 30-04-1998

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 19A, 2, 2A
Factories Act, 1948 — Section 7(1)

Citation : (1999) 1 AWC 510 : (1999) 81 FLR 71

Hon'ble Judges : S.H.A. Raza, J

Bench : Single Bench

Advocate : R.K. Srivastava and K.D. Srivastava, for the Appellant; U.K. Dhaon, for the Respondent

Final Decision : Disposed Of

Judgement

S.H.A. Raza, J.—The factual matrix of the case as set up in short compass by the parties, is that one Sri S. L. Tewari, Provident Fund Inspector, visited the firm of M/s. Rastogi Brothers. 10 Aminabad Park. Lucknow. on 28.4.78. He found that the establishment had employed more than 20 persons as on 30.4.78. The said establishment was engaged in stationery products and had completed five years from the date it was set-up. The said Inspector recommended for applicability of the provision[^] of the Employees' Provident Fund (and Miscellaneous Provisions) Act, 1952 (hereinafter called the "Act"). A list of 25 employees, working in the establishment as on 30.4.78 was enclosed with the enquiry report by the said Inspector.

2. On receipt of the enquiry report of the Inspector, the establishment was informed by the Regional Provident Fund Commissioner. U. P., that the Act and the Scheme framed thereunder was applicable to the establishment with effect from 30.4.78 provisionally, as the establishment which is engaged in stationery products, on completion of five years from the date it was set up. had employed

more than 20 persons as on 30.4.78. M/s. Rastogi Brothers submitted a reply to the notice wherein it was contended that the Inspector had wrongly informed that the establishment had employed 20 or more than 20 persons, since its inception the establishment had never employed 20 persons on any date. The total strength of the employees in the establishment never exceeded beyond 15. On the request of the petitioners, they were provided hearing and the establishment produced the cash books, ledger and the attendance registers showing 12-13 persons as employees. Regarding the employees engaged by the contractors, the petitioner explained that there was no contractor. Only the binding, ruling and printing, etc. was got done by the petitioner through others, who cannot be treated as their contractors.

3. The Regional Provident Fund Commissioner, U. P. after considering the representation of the petitioners and perusing other documentary evidence on record. came to the conclusion that the work of ruling and binding was got done by the petitioners from other parties apart from M/s. Mohammad Haider and Abrar Husain although M/s. Mohammad Haider and Abrar Husain also worked for other parties but by and large, they worked for the establishment. The Regional Provident Fund Commissioner, U. P. further took Into consideration the fact that M/s. India Ruling House had done the work of establishment for a total sum of Rs. 34,215.03 during the year 1978-79 whereas the work of other 32 parties for a total value of Rs. 10,459.55 during the same period. Similarly. M/s. Chaudhral Book Binder during the same period did the work of the establishment of a total value of Rs. 1,06,732.63 as against the work done by him of other 32 parties was of the value of 13,458.25 only. This coupled with the fact that M/s. Mohammad Haider and Abrar Husain were working within the same premises in which the establishment of the petitioner was functioning proved that the aforesaid contractors were the contractors of the establishment and the persons employed by the two contractors would be the employees of the establishment within the meaning of this Act. The contractors were not registered as a separate establishment under the U. P. Shops and Commercial Establishment Act. when the Inspector visited the establishment. They got themselves registered only on 8.9.78. The establishment, having admittedly more than 20 employees after including the persons employed by those contractors, is covered under the provisions of the Act with effect from 30.4.78.

4. The petitioners thereafter filed a representation- under Sec 19A of the Employees Provident Fi(sic) (and Miscellaneous Provisions) Act, 1952, before the Central Government. The representation was rejected and it was held that Sri Mohammad Haider and Abrar Husain were the contractors and in terms of the definition in Section 2(f) of the Act persons employed by them in connection with the work of the establishment are employees and they would have to be taken into account in computing the employees of the petitioners firm. The combined employment strength on 30.4.78 was far above 19. hence, the order of the Regional Provident Fund Commissioner was upheld by giving a finding to the effect that the petitioners establishment is a factory engaged in the manufacture

of stationery products u/s 1 (3)(a) with effect from 30.4.78.

5. u/s 2(e) of the Act "employer" means (i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier, and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, the person so named ; and (ii) in relation to any other establishment, the person who or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

6. Section 2(f) defines the "employee" which 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 person employed by or through a contractor in or in connection with the work of the establishment.

According to Section 2(g) of the Act. "factory" means any premises, including the precincts thereof in any part of which a manufacturing process is being carried on or is ordinarily so carried on. whether with the aid of power or without the aid of power.

7. Section 2(k) defines "occupier of a factory" as a person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory.

8. A perusal of the definition of the word "employee" indicates that a person would be deemed to be an employee if he does manual or clerical work or any other work either in the establishment or in connection with the work of the establishment and is paid wages for doing such work. It is a settled legal position that every employment must rest on the relationship of master and servant and for deciding the existence of such a relationship, the test of control would not be the sole criteria, meaning thereby, that if an employer engages a contractor for getting some of the work done and some of the employees engaged by the contractor work for the establishment and even paid wages by the contractor, even then they would be deemed to be employee of the establishment.

9. The sole point for consideration in the present case is as to whether the Department was justified in treating Mohammad Haider. Proprietor of M/s. India Ruling House and Abrar Husain, Proprietor of Chaudhari Book Binder, engaged in the work of ruling and binding as contractors of the petitioners and whether M/s. India Ruling House and M/s, Chaudhary Book Binder should be treated as separate units or part of the petitioners' establishment.

10. The case of the petitioners before the Regional Provident Fund Commissioner, U. P. was that Sarva Sri Mohammad Haider and Abrar Husain who claimed themselves as Proprietor of India Ruling House and Chaudhari Book Binder were

the tenants of the godown in the building. No manufacturing activities were carried on by them, but on the scrutiny of the cash book of the establishment, it was found that against machinery account various amounts have been spent in the year 1978-79 by the petitioners and the machinery, etc. were also purchased by the petitioners, which are used in the work of the petitioners establishment. In the attendance register, the petitioners had given job description of the employees. It did not indicate that any of them was engaged in manufacturing activity. The contention of Abrar Husain was not accepted that he purchased the machines for Rs. 4.000 and the payment was made by him in cash. A finding of fact was recorded that as Mohammad Haider and Abrar Husain were the tenants of petitioners' godown, that raw materials were supplied by the petitioners, that a substantial part of the work was done by them was for the petitioners' firm and in the light of the entries in the cash book which indicated that in all probability the machinery was installed by the petitioner, the nature of the work of persons whose names figure in the attendance register showed that the work was got done by those persons on an informal arrangement hence an implied contract can be inferred from these facts.

11. What this Court has to consider is as to whether there existed between the petitioners establishment and M/s. India Ruling House and M/s. Chaudhary Book Binders of which Sarva Sri Mohammad Haider and Abrar Husain claim to be the Proprietors has a functional integrality so as to constitute the three units as a single composite establishment.

12. In *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen*, Hon'ble Supreme Court observed :

"In all such cases, therefore, the Court has to consider with care how far there is "functional integrality" meaning thereby such functional independence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and an employment the employer has actually kept the two units distinct or integrated."

It is thus evident that what the Hon'ble Supreme Court emphasised is that the provisions of the Act would be applicable if two important tests are applied for deciding the issue of functional integrality including the test, i.e.. as to whether the unit sought to be clubbed can exist conveniently and reasonably without the others"?

13. In *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, Hon'ble Supreme Court observed :

"No one test could be considered as conclusive for purpose of applying the test of functional integrality. In this case the Supreme Court illustratively referred to several tests like unity of ownership, management and control, proximity of location etc. It is well-settled that merely because the two units are owned by the same person or persons, the two units cannot be treated as one establishment."

14. Hon''ble Pandse, J., who has earned eminence by his pronouncement on such questions after considering the provisions of Section 2A of the Act in *M/s. Kerula Rubber Company Put. Lfd. v. Regional Provident Fund Commissioner*. Special Civil Application No. 198 of 1978. observed for the Bench that the relevant criteria for consideration of the issue involved was as to whether the second unit could survive on first unit being closed. After referring to the judgment in *Associated Cement Company (supra)*, the Court observed that the question required to be determined was as to whether the Aurangabad unit was a separate establishment or merely a branch or department of an earlier establishment, and whether the said unit could survive if the earlier unit were to close.

15. In view of the aforesaid situation. I am of the view that the test, of integral dependency is the most relevant test of functional integrality and for deciding such question, it has to be determined whether the establishment was given reasonable survival even if the other establishment were to close. The mere fact of premises where the manufacturing work is carried on is not sufficient to satisfy the functional integrality. Similarly the mere fact of supply of raw material or purchase of raw material for the factory by the petitioner or the sale of finished goods by the petitioner would not be sufficient to satisfy the test of functional integrality. All the relevant tests must be considered and applied before deciding the issue as to the applicability of Section 2A of the Act or of functional integrality between the three units. The principle dominant test as to whether the other two units could survive on the closure of the petitioners'' establishment or whether the two other units were merely agency of the first of unit deserve to be adjudicated upon by the Court.

16. Unfortunately, this aspect of the matter was over-looked by the Regional Provident Fund Commissioner as well as the Central Government, hence I am of the view that the proceedings deserve to be remanded for a fresh adjudication in the light of the observations made in this judgment. The Regional Provident Fund Commissioner must hold a detailed enquiry afresh after examining all the facts and circumstances of the case in the light of the observations made by me after applying all the relevant tests.

17. In view of what has been stated herein above, a writ in the nature of certiorari quashing the impugned orders dated 3.8.82 passed by opposite party No. 2 (Annexure-3) and 21.10.82 passed by the opposite party No. 1 (Annexure-8) is issued. However the matter is remitted to the Regional Provident Fund Commissioner, U. P. for a fresh adjudication after examining all the facts and circumstances of the case in the light of the observations made in the judgment.