

(1965) 11 PAT CK 0008
In the Patna High Court

Modern Movie

APPELLANT

Vs

Tewari (S.B.) and Another

RESPONDENT

Date of Decision : 09-11-1965

Acts Referred:

Payment of Wages Act, 1936 — Section 17

Citation : (1966) 1 LLJ 763

Hon'ble Judges : R.L. Narasimham, C.J.;S.N.P. Singh, J

Bench : Division Bench

Judgement

R.L. Narasimham, C.J.—In this application under Articles 226 and 227 of the Constitution the sole point for consideration is whether the presiding officer, industrial tribunal, Bihar, exercising appellate powers under Sub-section (7) of Section 28 of the Bihar Shops and Establishments Act, 1953 (hereinafter referred to as the Act, had jurisdiction to hear an appeal from the decision of the competent authority exercising powers under Sub-section (2) of Section 28 of the Act and rejecting the claim of respondent 1 for unpaid wages due to him from his employers, namely, the petitioner. Reliance was placed on the judgment of a single Judge of this Court in United Provinces Commercial Corporation Vs. Mishra (K.N.), which supports the view that under the aforesaid circumstances an appeal will not lie. The correctness of that decision was challenged before us by counsel for respondent 1,

2. Respondent 1 was admittedly a former employee of the petitioner. He filed an application u/s 28(1) of the Act before the Assistant Commissioner of Labour (who is a competent authority under the Act), alleging that the sum of Rs. 315 was due to him from his employer, being unpaid wages for the period from 1 November 1959 to 10 May 1960. The authority issued due notice to the employee, who opposed the claim, alleging that the employer ceased to work after 4 September 1959 and, that, consequently, he was not entitled to any wages thereafter. The learned authority examined witnesses cited by both sides and also perused the documents filed by them in support of their respective

contention. Ultimately he upheld the objection of the employer and passed the following order:

On consideration of the above facts I do not find any merit in the claims of the applicant and accordingly the case is dismissed.

On appeal, however, the presiding officer of the industrial tribunal disagreed with the finding of the employee (sic) to the effect that he was re-employed from 1 November 1959 to 10 May 1960, and directed payment of arrear wages due to him, which was calculated at Rs. 285. Before the appellate authority his jurisdiction to entertain the appeal was not challenged, presumably because his judgment was delivered on 30 October 1961 whereas the aforesaid single Judge judgment was delivered on 2 November 1961.

3. The Act is undoubtedly a piece of beneficent legislation meant primarily for the benefit of the persons employed in shops and other establishments. It regulated the hours of work for the employees, intervals for rest, weekly holidays, leave with wages and other conditions of service. Arbitrary termination of the services of the employee was also restricted by Section 26. Section 28 provided a summary remedy for the employee if there has been an unauthorized deduction of his wages or undue delay in payment of the same. As the legal question involved in this application depends on the construction of Section 28, I may quote below Sub-secs. (1), (2), (3), (4) and (7) of the section:

(1) Where contrary to the provisions of this Act any deduction has been made from the wages of an employee, or any payment of wages has been delayed, or any sum is otherwise due from the employer to the employee, such employee or any legal practitioner or any authorized agent or any officer of a registered trade union or any inspecting officer may make an application in such manner, within such time, and to such authority as may be prescribed for a direction under Sub-section (2),

(2) When an application under Sub-section (1) is entertained, the prescribed authority shall hear the application in the prescribed manner and may, without prejudice to any other penalty to which an employer is liable under this Act, direct the refund of the amount deducted, or payment of the delayed wages or any other sum, to the employee, together with the payment of a compensation not exceeding ten times the amount deducted in the first case and not exceeding ten rupees in other cases:

Provided that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to-

(a) a bona fide error or bona fide dispute as to the amount payable to the employed person, or

(b) the occurrence of an emergency, or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence, to make prompt payment, or

(c) the failure of the employed person to apply for or accept payment.

(3) If the authority hearing any application under this section is satisfied that it was either malicious or vexatious, the authority may direct that a penalty not exceeding twenty-five rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application.

(4) Any amount directed to be paid under this section shall be recovered in the prescribed manner.

* * * (7) An appeal against a direction made under Sub-section (2) or Sub-section (3) may be preferred, in such manner, within such time and to such authority as may be prescribed, and such authority shall consider and dispose of such appeals in the prescribed manner.

It will be noticed that Sub-section (1) requires the aggrieved employee or other persons acting on his behalf to make an application in the manner provided for in the rules for a direction under Sub-section (2). Sub-section (2) says that the prescribed authority shall hear the application in the prescribed manner and shall direct refund of the amount deducted, or payment of the delayed wages or any other sum due to the employee, together with the payment of compensation. This procedure to be followed by the authority while hearing an application from the aggrieved employee under Sub-section (1) of Section 28 is regulated by the rules framed under that Act. Sub-section (7) merely says that an appeal shall lie against a direction made under Sub-section (2) or Sub-section (3).

The crucial question for consideration is whether the word " direction " occurring in this sub-section should be construed as direction for payment only and not a direction for non-payment. It is obvious that once the prescribed authority enquires into the application of the aggrieved employee and comes to a finding that his grievance is not genuine, he can dismiss the application. It is true that Sub-section (2) of Section 28 does not expressly provide for such dismissal of the application after it is heard on merits. But there is no other provision in Section 28 conferring an express power on the prescribed authority to dismiss an application after hearing it on merits.

4. It is now necessary to scrutinize the provisions of Rule 22 of the Bihar Shops and Establishments Rules, 1955 (hereinafter referred to as the rules). Rule 22 runs as follows:

22. (1) An application under Sub-section (1) of Section 28 shall be made to a Subdivisional Magistrate or an Assistant Commissioner of Labour of the local area or the labour court at Muzaffarpur for Tirhut Division and at Ranchi for Chotanagpur Division or an officer authorized in this behalf by a notification in the official gazette within six months from the date on which deduction from the wages was made or from the date on which the payment of wages was due to be made as the case may be:

Provided that an application may be admitted after the period of six months if the applicant satisfies the authority that he had sufficient cause for not making the application within such period:

Provided further that the application pending before the labour court, Patna, before coming into force of this rule shall be heard and disposed of by it.

(2) An application under Sub-section (1) of Section 28 by or on behalf of an employee shall be made in duplicate in form XII, form XIII or form XIV, as the case may be, one copy of which shall bear the requisite court-fee as prescribed in Rule 25. The application shall also be accompanied by a certificate signed by the applicant to the effect that the contents of the application are true to the knowledge and belief of the applicant, and that no such application for the same dues has been filed before any other authority.

(3) The authorization to act on behalf of an employee or employees u/s 28 shall be given by a certificate in form XV and shall be presented to the authority hearing the application and shall form part of the record.

(4) Documents relevant to an application may be presented in person or sent by registered post to the authority at any time during such hours as may be fixed by the authority for this purpose.

(5) The authority shall at once endorse or cause to be endorsed on each document the date of the presentation or receipt, as the case may be.

(6) (i) The authority may refuse to entertain an application presented under Sub-rule (1), if after giving the applicant an opportunity of being heard, the authority is satisfied, for reasons to be recorded in writing, that the applicant is not entitled to present an application or the application is barred by reason of the provisions in Sub-rule (1) or the applicant shows no sufficient cause for making a direction u/s 23.

(ii) The authority may refuse to entertain an application which is insufficiently stamped or is otherwise incomplete, and, if he so refuses, he shall return it with a note about the defects, the application suffers from. If the application is presented again after removing those defects, the date of re-presentation shall be deemed to be the date of presentation for the purposes of the provisions in Sub-rule (2).

(7) If the application is entertained, the authority shall call upon the employer by a notice in form XVI to appear before him at a specified time together with all relevant documents and witnesses, if any, and shall inform the applicant of the time so specified.

(8) The authority shall briefly record the evidence adduced before him, shall hear the parties summarily and after making such further enquiry as he may consider necessary for a just and proper decision, shall pass orders recording in writing the direction which he may issue under Sub-section (2) or Sub-section (3) of

Section 28, as the case may be, giving the reasons therefor, and communicate the same to the parties without delay.

(9) If the employer or his authorized agent fails to appear at the specified time, the authority may proceed to hear and determine the application *ex parte*.

(10) If the applicant fails to appear at the specified time, the authority may dismiss the application.

(11) An order passed under Sub-rule (9) or Sub-rule (10) may, on good cause being shown, be set aside and the application reheard within thirty days of the date of the said order, notice being served on the opposite party of the date fixed for rehearing.

(12) The authority shall in all cases enter the particulars of every direction under Sub-section (2) of Section 23 in form XVII which shall be signed and dated by him.

Sub-rules (1),(2), (3), (4), (5) and (6) deal with the stage prior to the entertainment of the application and issue of notice to the employer. The two clauses of Sub-rule (6) expressly authorize the authority to refuse to entertain the application if it is insufficiently stamped or otherwise incomplete, if there is undue delay in presenting the application or if the applicant is not entitled to present the application or for other similar reasons. A refusal to entertain an application for those reasons may reasonably come within the scope of Sub-section (1) of Section 28 of the Act, because that sub-section requires the application to be in the prescribed manner before the authority concerned.

5. But Sub-rules (7) to (12) deal with the stage after the application is entertained. Thereafter the authority is required to give notice to the employer, to examine the witnesses cited by the parties, peruse the documents filed by them or hold such further enquiry as may be necessary and pass appropriate orders giving reasons for the same and communicate the same to the parties. Sub-rule (9) authorizes the disposal of an application *ex parte* if the employer fails to appear, and similarly Sub-rule (10) authorizes the authority to dismiss the application if the applicant fails to appear. But strangely enough there is no express provision in the rule authorizing the competent authority to dismiss the application if after hearing both parties he is satisfied that there is no merit in the claim. Thus, neither in the rules nor in Section 28 is there an express provision authorizing the dismissal of an application after it is heard on merits. But this power must obviously be implied to exist because it is unreasonable to suppose that though the authority can dismiss the application *in limine* for some defects, or can dismiss it due to the non-appearance of the applicant on a specified date, he has no authority to dismiss it after it is heard on merits. Such dismissal of the application on merits must necessarily come within the scope of Sub-section (2) of Section 28 of the Act, read with Sub-rules (7) and (8) of Rule 22. Hence, on a reasonable construction, it must be held that a "direction" made under Sub-section (2) of Section 28 will include a direction for payment and also

a direction for nonpayment. If, as contended by counsel for the petitioner, the word " direction" in Section 28 means only direction for payment, the legislature would not have used the expression " direction for the payment" in the proviso to Sub-3ec. (2) and also the words "directed to be paid" in Sub-section (4). One should not readily attribute tautology to the legislature.

6. Apart from his consideration, it is difficult to understand how in a piece of beneficial legislation made primarily for the protection of the employees the employee will be deprived of the right of appeal if his application is dismissed by the competent authority on merits, whereas the employer alone will get a right of appeal if the competent authority allows the application of the employee and directs payment under Sub-section (2) of Section 28. Such a view cannot be justified unless the language of the section is clear and explicit on the subject. As pointed out in *Maxwell on Interpretation of Statutes*, 11th Edn., at p. 241,

an omission which the context shows with reasonable certainty to have been unintended may be supplied, at least in enactments which are construed beneficially, as distinguished from strictly.

Any inaccuracy in drafting should not stand in the way of such a construction. In my opinion, therefore, the expression " direction" in Sub-section (7) of Section 28 means only an order under Sub-secs. (2), and it will include not only a direction to the employer to pay but also an order dismissing the application of the employee after hearing it on merits.

7. This conclusion is supported by the well-known rule that an " act" always includes an illegal omission. This is expressly provided in Section 4(2) of the Bihar and Orissa General Clauses Act. In *Poulsum v. Thirst* (1867) L.R. C.P. 449 it was "held that an act required to be done under the statute will include an act omitted to be done. This principle was reiterated in *Wilson v. Mayor and Corporation of Halifax* (1866) L.R. Ex. 114 by Kelly, C.B., in the following terms:

It is now settled by authority that an omission to do something that ought to be done in order to be complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done....

The Privy Council also reiterated the same principle in *Queen v. Williams* 1884) 9 App. Cas 418 in the following terms:

Omission to do something which ought to be done in order to be the complete performance of a duty imposed upon a public body under an Act of Parliament or the continuing to leave any such duty unperformed amounts to an act done or intended to be done within the meaning of a clause requiring a notice of action.

Following the same principle in *Harman v. Ainslie* (1904) 1 K.B. 699 it was held that

a duty to perform includes the omission to perform.

In Maxwell these decisions have been noticed at p. 71 in the following terms:

The statutes which require notice of action for any thing "done " under them, are construed as including an omission of an act which ought to be done as well as the commission of a wrongful one.

8. Applying the aforesaid principle on which the definition of the General Clauses Act is based to the present case, it is obvious that, if on merits the employee is entitled to get a direction for payment and the original authority omits to direct such payment, he will be guilty of an illegal omission, and a direction must, therefore, in the context be held to include an illegal non-direction. If, therefore, the appellate authority is of opinion that on the facts of the case the original authority ought to have issued such a direction for payment, it must be held that he has jurisdiction to hear the appeal on the principle that an act (here a direction) which a statute requires to be done by a public officer must necessarily include his illegal omission to do the same.

9. The learned single Judge has been very much influenced by the decisions given by some of the High Courts on the interpretation of the expression " direction" occurring in Section 17 of the Payment of Wages Act, 1936, prior to the amendment made in 1957. He referred to *Rajendranath Karmakar and Others Vs. Manager, French Motor Car Co., Ltd.*, *Sitaram Ramcharan and Others Vs. M.N. Nagrashna and Another*, and *Mohd. Matin Kidwai Vs. District Executive Engineer, N.E. Rly., Izatnagar and Another*. He noticed the contrary view taken in *A.C. Arumugham and Ors. v. Manager Jawahar Mills, Ltd.* 1956 I L.L.J. 519 but he was not inclined to accept the same in preference to the aforesaid three decisions. It is unfortunate that his attention was not drawn to other decisions where a view similar to the Madras view was taken. Thus, In *C.S. Lal v. Shaikh Badshah and Ors.* 1956 I L.L.J. 457 Chagla, C.J., pointed out that there would be a right of appeal if the authority concerned refuses to give a direction for payment after considering the application of the employee on merits. The same view was taken in *Mir Mahomed Haji Umar v. Divisional Superintendent, N.W. Railway* AIR 1941 Sind 191, *Anant Ram and Ors. v. District Magistrate, Jodhpur*, and *Anr.* AIR 1955 Raj. 145 and *P.L. Singh and Another Vs. C.B. Kekre, Dist. Judge and Others*. Thus, even under the corresponding provision of the Payment of Wages Act, as it stood prior to the amendment of 1957, there was a sharp conflict of judicial opinion as to whether the expression " direction" in Section 17(1) of that Act should be restricted to a direction for payment only, or else, whether it would include a direction for non-payment by a competent authority after the application of the employee is heard on merits. It is with a view to resolve this conflict that the legislature stepped in and made the necessary amendment to Sub-section (1) of Section 17 of that Act by the amendment Act (68 of 1957). But the mere fact is (?) that the narrow view of the word " direction " taken by some of the High Courts was the correct view. The legislature merely wanted to place the matter beyond any doubt.

10. So far as this case is concerned, in view of the aforesaid conflict in the

judicial opinion as regards the interpretation of the corresponding provision of the Payment of Wages Act, there is no compelling reason why we should take a narrow view, especially while interpreting such a beneficent piece of legislation, meant primarily to give summary relief to the aggrieved employees of establishments.

11. For these reasons, with great respect, we are unable to agree with the view taken in the aforesaid single Judge judgment of this Court. The appellate authority had jurisdiction to hear the appeal. The other questions are pure questions of fact which cannot be agitated here.

12. The petition is, therefore, dismissed, but, in the circumstances, without costs.

S.N.P. Singh, J.

13. I agree.