BOMBAY HIGH COURT

Viswanath Tukaram

Vs.

General Manager

Special Civil Appln. No. 2810 of 1956

(Chagla, C.J., S.T. Desai and K.T. Desai, JJ.)

. 21.07.1956. 04.07.1957

JUDGMENT

Chagla, C.J.

1. This special civil application has been referred to a Full Bench by Mr. Justice Shah and Mr. Justice Gokhale. No question has been formulated by the learned Judges, but it seems that they took the view that the decision of a Division Bench of this Court in *Anthony Almeda v. Taylor*[1], requires reconsideration inasmuch as a decision of the Supreme Court, in *D'Costa v. Patel*[2], seems to the learned Judges inconsistent with the view taken of the law in Almeda's case.

2. Now, curiously enough, the Advocate General emphatically asserts before us that not only the decision of the Supreme Court is not inconsistent with Almeda's case, but that the decision of the Supreme Court supports and reinforces the view taken by this Court in Almeda's case, and Mr. Singhvi not so emphatically also agrees that it is difficult to find any inconsistency between the judgment of the Supreme Court and the judgment in Almeda's case. But inasmuch as the matter has been referred to the Full Bench and the matter has been argued at great length and the Advocate General tells us that a decision should be given by us because a large number of petitions are pending and the decision of which would be governed by the view we take in this Full Bench, we must proceed to decide the question referred to us.

3. Now, to state the facts briefly, the petitioner was employed as a Khalasi in the Loco Shed of the Central Railway at Kalyan. He was employed on 3rd October 1947. On 26th October 1949 he was arrested on a charge under Sections 457 and 380 of the Indian Penal Code and placed before the First Class Magistrate at Kalyan, and it appears that he was released on bail on 4th November 1949. On 6th May 1953 he was discharged by the learned Magistrate and the learned Magistrate gave him, as it were, a clean bill and said in his judgment that there would be no objection to his being reinstated by the Railway Authorities. He resumed his work - and we are using a neutral expression - on 20th October 1953, and he filed a petition before the Authority under the Payment of Wages Act claiming wages from the period 25th October 1949 to 19th October 1953. The

[1]58 Bom LR 899: (AIR 1956 Bom 737)

[2]57 Bom LR 738: AIR 1955 SC 412
Authority decreed his claim. There was an appeal to the District Court and the learned
District Judge took the view that the Authority under the Payment of Wages Act had no jurisdiction to deal with this matter. Thereupon the employee filed a petition under the Constitution before the Division Bench consisting of Mr. Justice Shah and Mr. Justice Gokhale and it is this Bench that has referred the matter to us.

4. Now, we should have thought, but for the fact that we are sitting here as a Full Bench, that the law as to the jurisdiction of the Authority under the Payment of Wages Act is fairly well settled. If it is necessary at all, we will reiterate it as briefly as possible. The leading case on the subject is *Sarin v. Patil*[3], where a Division Bench was for the first time called upon to consider the scheme of the Act and the jurisdiction of the Authority under the Act, and in that decision we laid Mown that the Authority had no jurisdiction to decide whether the services of an employee had been rightly or wrongly terminated or whether the dismissal was lawful or unlawful. We said that such a question would not come within the purview of the special tribunal set up under the Act. Although that was the question that arose for our determination, we also made it clear as to what was the nature and ambit of the jurisdiction of the Authority, and in brief what we said was that the primary function of the Authority was to determine what the wages of the employee were and whether there had been a delay in payment of those wages or a deduction from those wages, and in order to determine the wages it may be necessary to determine what the terms, of the contract were under which the employee was employed and under which he was claiming his wages. It may also be necessary, we pointed out, to decide whether the employee was employed by the employed or not because the question of a contract can only arise provided there was employment. Therefore, in order to determine what the contract was, what the terms of the contract were, what were the wages due under the contract, it might become necessary for the Authority to determine whether in the first place there was an employment or not.

5. The next decision which followed upon Sarin's case, was the case of *Mushran v. Patil*[4], That was really a logical extension of the principle laid down in Sarin's case(C), because in that case there was a suspension of an employee by the Railway Authorities and the contention put forward was that in view of the suspension no claim could be made by the employee in respect of the period of suspension, and what the Court held was that it was open to the Authority under the Payment of Wages Act to consider whether during the period of suspension the relationship of master and servant subsisted between the employer and the employee and if such relationship subsisted, notwithstanding the suspension the employer was liable to pay to his employee wages for that period. Here again, therefore, the point that we were emphasizing was that it was competent to the Authority to determine whether during the relevant period the employee was in fact employed by the employer.

6. Then a third judgment to which reference might be made is *C. S. Lal v. Shaikh Bad-shah*[5], In that case certain employees of the Railway Authorities who had migrated to Pakistan returned and purported to exercise the option given to them to be re-employed by the Railway Authorities, and they claimed the wages of the period antecedent to the time when they exercised the option, and the question that arose first before my brother

[3]53 Bom LR 674: (AIR 1951 Bom 423)
[4]53 Bom LR 1009: (AIR 1952 Bom 235)
[5] 56 Bom LR 859: (AIR 1955 Bom 75)

Mr. Justice S. T. Desai was whether the Authority under the Payment of Wages Act had

jurisdiction to decide this question, and the learned Judge at page 864 with respect, correctly enunciates the principles emerging from the authorities that we have considered. "Again, it is well established that it is open to the Authority under the Payment of Wages Act, in order to decide what sums are payable as wages, to determine whether a person has been employed or not, because the question of contract of employment can only arise if there was at the relevant time a subsisting contract of employment." Therefore, it will be noticed that again in this case the emphasis is on the question as to whether there was an employment by the employer of the employee or, in other words, whether there was relationship of master and servant between the employer and the employee or, again to use different language, whether there was a subsisting contract of employment between the employer and the employee. Mr. Justice Desai held in favor of the employee. There was an appeal and the Court of appeal upheld the view taken by the learned Judge.

7. Then we come to 58 Bom LR 899 : (AIR 1956 Bombay 737). In that case there was no dispute as to employment. The dispute was whether the employee was entitled to receive wages under a contract which he had set up or wages under a contract which was set up by the employer. These two contracts were relied upon by the employee and the employer in respect of the same period for which wages were claimed by the employee and what the Court held was that when there is a dispute as to which is the contract that governs the relationship of the parties and if two rival contracts are in the field, then the Authority under the Payment of Wages Act has no jurisdiction to decide which of the contracts should regulate the rights of the parties, and the distinction that was drawn in that case was that whereas the Authority could determine what was the contract, it could not determine which was the contract. As the Advocate General has rightly pointed out, in Almeda's case, also we enunciated the principle that was laid down in Sarin's case. At page 901 (of Bom LR) : (At p. 738 of AIR), of the judgment the ratio of Sarin's case, is thus stated that the jurisdiction of the Authority really is to determine the terms of the contract in so far as they relate to the payment of wages and in so far as he has to decide the liability of the employer to pay wages under the terms of the contract.

8. Turning to the decision of the Supreme Court, which has necessitated this Full Bench, in 57 Bom LR 738: AIR 1955 Supreme Court 412, the question that arose for the consideration of the learned Judges was an entirely different question. The employee there was a carpenter employed on daily wages. The Railway Administration subsequently introduced a scheme which created a cadre of skilled labourers on the scale of monthly rates of pay and admitted to it only those who passed a test. The employee did not pass the test and continued to serve as an employee on daily wages, and he sued the Railway Administration before the Authority under the Payment of Wages Act to recover the additional amount of wages that would have become payable to him had he been taken up on the cadre of monthly rated employees, complaining that he was wrongly not treated as such by the Administration, and the Supreme Court held that this was not a claim for actual wages but it was a claim for potential wages and that the Authority under the Payment of Wages Act had no right to determine whether the employee was entitled to be put on the cadre which had been created; that was the function of the Railway Administration and not the Authority under the Payment of Wages Act. In this connection the Supreme Court at page 745 (of Bom LR): (at p. 416 of AIR), gives expression to the same principle that has been enunciated both in Sarin's case and Almeda's case, and what Mr. Justice Sinha says is :

> "But it is said on behalf of the respondent that the Authority has the jurisdiction not only

> to make directions contemplated by Sub-Section (3) of Section 15 to refund to the employed person any amount unlawfully deducted but also to find out what the terms of the contract were so as to determine what the wages of the employed person were. There is no difficulty in accepting that proposition."

Now, that is exactly the proposition to which legal effect was sought to be given in both the cases of this Court to which reference has just been made. Therefore, we agree with the Advocate General that it is impossible to contend that D'Costa's case, has in any way undermined the authority of Almeda's case. On the contrary, D'Costa's case, reinforces the decision given by this Court. This was also the view taken by a Division Bench of this Court consisting of Mr. Justice Gajendragadkar and Mr. Justice Chainani in Special Civil Appln. No. 2520 of 1956 on 23-11-1956, and Mr. Justice Gajendragadkar delivering the judgment points out that in all cases properly filed before the authority there should be no dispute about the contract itself, and the learned Judge with respect, rightly explains the decision in Almeda's case by pointing out that when the employer and the employee come before the authority and rely on different contracts, it is not within its jurisdiction to decide which of the two contracts is subsisting and under which of them the employer is liable to pay wages. The learned Judge refers to D'Costa's case and points out that the limits of the jurisdiction of the authority under the Payment of Wages Act are no longer in doubt.

9. Now, this being the settled law, let us turn to the facts before us and apply that law to those facts. It is clear that the claim of the employee was made on the basis that he continued to be in the employment of the railway authorities during the relevant period, viz., the 25th October 1949 to the 19th October 1953, because rightly or wrongly his case was that during that period he was under suspension and did not cease to be in the employment of the Railway Authorities. Let us see what the answer of the Railway Authorities was to this claim. They denied in para. 3 of the written statement that the employee was in their employment, and in para. 5, which is the most material paragraph and on which great reliance has been placed by the Advocate-General, the Railway Authorities say :

> 'After a period of three months he was treated as 'absconding' and a temporary employee engaged in the vacancy. His name was automatically struck off the attendance register as nothing was heard about him. He cannot therefore be regarded as an employee of the opposite party for any length of time." and in para. 9 the Railway Authorities' case is that the employee was re-employed as a fresh entrant on the 20th October 1953, and they end the written statement by saying:
> "As he was neither an employee nor can be said to be 'in service' he is legally not entitled to any 'wages'; neither he can claim them under the Payment of Wages Act."

In our opinion, on these pleadings the issue directly and substantially arises as to whether the employee was in the employment of the Railway Authorities during the relevant period, and there can be no doubt that that is an issue which the Authority under the Payment of Wages Act can try and determine. It is not the case of the Railway Authorities that the services of the employee were terminated, nor have the Railway Authorities contended that he was dismissed. They have relied on the fact that automatically his name was struck off from the attendance

register for the purpose of contending that he must be regarded as not being an employee during the relevant period. We agree with the Advocate-General that if the Railway Authorities' case was that the employee's services were terminated or that he was dismissed or discharged, then in view of Sarin's decision, that was an issue which could not have been tried by the Authority under the Payment of Wages Act. But when the dispute and controversy between the parties is whether the employee was in employment or not, that surely is an issue which is directly within the jurisdiction and competence of the Authority. The Advocate-General has laid great emphasis on the case of the employee that he was reinstated and on the case of the Railway Authorities that he was re-employed, and says the Advocate-General that it is clear on these pleadings that two contracts are in the field, and that the employee is relying on the original contract under which according to him he was continued and reinstated, and the Railway Authorities are relying on another contract under which he was re-employed at the "relevant date. In our opinion, that argument is based on a misapprehension. Whether the employee was reinstated or re-employed depends upon the fact as to whether the employee continued to be employed during the relevant period. If the employee continued to be employed during the relevant period, then he was reinstated as contended by the employee. If, on the other hand, he did not continue to be employed, then the employment having come to an end there was a case of re-employment as alleged by the Railway Authorities. It is also erroneous to suggest that there are two conflicting contracts in the field. There are not. If the employee was in the employment during the relevant period, then the only contract is the original contract, the terms of which have to be construed in order to determine what wages the employee was entitled to. It is not suggested by the Railway Authorities that if the employee was in the employment during that period any other contract regulated the rights of parties. The second contract could only come into play provided the employee was not in employment during the relevant period. But if the employee was not in employment during the relevant period, no further question survives and it would not be necessary to determine what the terms of the subsequent contract were, because if the Authority holds that the employee was not in service the claim made by the employee with regard to wages must fail. Therefore, we cannot accept the contention of the Advocate-General that his case falls within the principle of Sarin's case for the reason that no issue as to the termination of the services of the employee can arise on these pleadings. We might point out that the Railway Authorities have not even indicated when his services were terminated. Nor does the case fall within the principle of Almeda's case because, as just pointed out, we do not have here a case where the Court has to determine which contract regulates the rights of the parties.

10. Turning to the judgment of the Authority under the Payment of Wages Act, the view taken by the Authority is that the employee should be deemed to have been suspended and having been deemed to have been suspended, under the rules in the Railway Manual he was entitled to full salary as he was reinstated and as no obloquy attached to his conduct in respect of which he was charged, he indeed having obtained an honourable discharge from the Magistrate. The Authority may be right or wrong on the facts, but his decision turned on this that on his construction of the rules and of the attendant circumstances he took the view that the employee was in the service of the Railway Authorities during the relevant period and he also determined the quantum of wages on a construction of the contract as full salary during the period. When the matter went to the learned District Judge, the view that he took was this - and to quote from his judgment:

> "On these pleadings one of the issues that arise for consideration is: Whether the respondent was discharged from service and re-employed as the appellant contends or

was suspended from service and was reinstated. This issue involves the question whether the respondent was really discharged from service and if so whether he was legally discharged. And, in my view, this issue is beyond the competence of the Authority under the Payment of Wages Act."

Now with respect to the learned District Judge he would be quite right if the issue that was involved was the issue set out by him. But, as we have already pointed out, the question that had to be considered by him and had to be considered by the Authority was not whether the employee was discharged from service and if so legally discharged, but what had to be considered was whether the employee was employed by the Railway Authorities during the relevant period.

11. The Advocate-General has drawn our attention to the relevant rules and has pointed out that even suspension from service does not automatically entitle the worker to wages unless he actually works, and he has also drawn our attention to the fact that even if there is a case of reinstatement it is for the Railway Authorities to determine whether he should get his full wages or not. Now, these are matters affecting the merits of the case. They go to determine what the quantum of wages is to which the employee would be entitled. It may be that the learned District Judge to whom we are proposing to send the matter back may take the view that during the relevant period there was no employment and that the relationship of master and servant did not subsist between the employee and the Railway Authorities, and even if he takes the view that the employment continued he may take the view on a consideration of the relevant rules that the employee was not entitled to the wages because he did not do any work or that he was entitled not to full wages as claimed by him but to much less. But these are all questions of determining the wages due to the employee on a construction of the terms of the contract. These are not questions which affect the jurisdiction of the Authority under the Payment of Wages Act.

12. Therefore, in our view, the learned District Judge was in error in holding that the Authority under the Payment of Wages Act had no jurisdiction to entertain the application filed by the employee. We will, therefore, set aside the order of the learned District Judge, send the matter back to him, and direct him to try the following issues:

(1) Whether the employee continued to be in the employment of the Railway Authorities during the relevant period, viz., 25th October 1949 to 19th October 1953?

(2) If he continued to be in employment, what are the wages, if any, to which the employee is entitled under the terms of the contract subsisting between the employee and the Railway Authorities?

13. The petitioner to get the costs of the petition. No order as to costs of the hearing before us.

Case sent back.