1939

SIR BYRAMJEE JEEJEEBHOY v. PROVINCE OF BOMBAY

Kania J.

In my opinion therefore the impugned Act is not *ultra vires* the Provincial Government and the urban immoveable property tax is legal and valid.

Per Curiam. The plaintiff's suit fails and must be dismissed with two sets of costs.

Certificate under s. 205 of the Government of India Act, 1935, granted.

Attorneys for plaintiff: Messrs. *Payne & Co.*

Attorneys for defendant No. 1: Messrs. *Little & Co.*

Attorneys for defendants Nos. 2 and 3: Messrs. *Crawford, Bayley & Co.*

Suit dismissed.

N. K. A.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

1939
August 15

P. M. DIXIT AND ANOTHER (ORIGINAL OPPONENTS NOS. 1 AND 3), APPLICANTS *v.* SENIOR INSPECTOR OF FACTORIES, DIVISION INSPECTOR UNDER PAYMENT OF WAGES ACT, AHMEDABAD (ORIGINAL PETITIONER), OPPONENT.*

The Payment of Wages Act (IV of 1936), ss. 3, 15, 19—Recovery of delayed wages of workers in a mill—Proceedings can be instituted against either manager or employer but not against both.

Under s. 15 of the Payment of Wages Act, 1936, proceedings should in the first instance be instituted against either the employer or against the manager but not against both. If a manager is appointed, the proceedings should be against the manager alone, but if no manager is appointed they should be against the employer.

CIVIL REVISION APPLICATION against the order passed by G. H. Guggali, District Judge, Ahmedabad, confirming the order passed by I. T. Almaula, City Magistrate, Ahmedabad.

* Civil Revision Application No. 15 of 1939.

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

The Senior Inspector of Factories made an application to the Additional City Magistrate of Ahmedabad, who was an authority constituted under s. 15 of the Payment of Wages Act, 1936, for a direction that delayed wages amounting to Rs. 2,313–11–0 due to the workers in Vimal Mills Ltd. at Ahmedabad from March 28, 1937, to April 30, 1937, be ordered to be recovered from persons responsible under the Act. Opponent No. 1, P. M. Dixit, was made a party in his capacity as owner of the mills. Opponent No. 2, D. M. Mehta, was impleaded as co-owner. Opponent No. 3, M. C. Dave, was made a party as manager.

Under the orders of the District Magistrate, the case was transferred to the Court of the City Magistrate, who was also appointed an "authority" under s. 15 for the City.

Opponent No. 1, P. M. Dixit, remained absent.

Opponent No. 2, D. M. Mehta, pleaded that he had no interest in the mill.

Opponent No. 3, M. C. Dave, contended that the mill was closed from April 12, 1937, and he was manager only till that date.

The City Magistrate held that part of the mill was working till April 30, 1937, and that Mr. Dave was manager till then and gave a direction that Rs. 2,309–11–6, the amount of delayed wages, *plus* Rs. 5 per worker as compensation, be recovered from the manager and if the money could not be recovered from him, then it should be recovered from the employer Mr. Dixit under s. 19 of the Payment of Wages Act, 1936. The Court also held that opponent No. 2 was not liable.

Against the order of the City Magistrate, the opponents Nos. 1 and 3 appealed to the District Judge at Ahmedabad. The learned Judge held that the District Magistrate's order transferring the case from the Court of the Additional

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

City Magistrate to that of the City Magistrate was not illegal. He further held that no appeal was provided against an order passed under s. 19 of the Payment of Wages Act, 1936, and agreeing with the findings of the Magistrate on merits, dismissed the appeal.

Opponents Nos. 1 and 3 applied in revision to the High Court.

M. G. Purohit, with *N. M. Majmudar*, for the applicants.

B. G. Rao, Assistant Government Pleader, for the opponent.

DIVATIA J. This revisional application arising under the Payment of Wages Act is preferred by original opponents Nos. 1 and 3 against whom, along with opponent No. 2, the original application was filed by the Senior Inspector of Factories. The first and the second opponents were described as co-owners of a mill called the Vimal Mills Ltd. at Ahmedabad and the third was described as the manager. It was filed to recover Rs. 2,000 and odd as the delayed wages of workers in the mill under s. 15 of the Act under which the authority, in this case the Stipendiary Magistrate, is to hear the applicant and the employer or other person responsible for the payment of wages under s. 3, and, after such further inquiry as may be necessary, direct the payment of the delayed wages.

Various defences were taken on behalf of the opponents. One of them was that the owner or employer, who was opponent No. 1, (opponent No. 2 was not found to be a co-owner), could not be impleaded in the application under s. 15. It was further contended that the application, which was originally filed in the Court of the Additional City Magistrate, Ahmedabad, was transferred by the District Magistrate to the Court of the City Magistrate, and that the District Magistrate had no power to direct such transfer. It was also contended that the mill was not working at the material time for which the application was made, namely, the period between March 28, 1937,

to April 30, 1937, and that therefore the mill authorities were not liable to pay any wages to the workers.

The learned Magistrate held that the second opponent was not liable on the ground that he had no interest in the mill, and the application as against him was dismissed. On the merits the learned Magistrate found that part of the mill was working up to April 30, 1937, that the manager, who was opponent No. 3, was also working as such till that date, that there was, therefore, no reason why the workers should not have been paid up to the period when the mill was working, that is, up to April 30, 1937, and that no reason was given on behalf of the opponents why payments were not made to the workers in time. The learned Magistrate, therefore, passed an order for the payment of the delayed wages *plus* Rs. 5 per head as compensation against opponent No. 3, i.e. the manager, in the first instance, and directed that if the whole or part of the amount could not be recovered from him, the balance should be recovered from the employer, i.e. opponent No. 1, under s. 19 according to which if the authority passing the order of payment under s. 15 or s. 17 against any person (other than an employer) liable under s. 3, is unable to recover the amount, it shall be recovered from the employer.

Against this order there was an appeal by opponents Nos. 1 and 3 to the Court of the District Judge at Ahmedabad as provided in s. 17 of the Act. On behalf of the first opponent it was contended that no order could be passed against him under s. 15 as his liability would arise only under s. 19 if and when the whole of the amount could not be recovered from the manager. It was also contended on the merits that the mill was not working during the material period, and therefore, no party was liable. The contention urged before the Magistrate as to the illegality of the transfer by the District Magistrate was also repeated before the learned District Judge.

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

Divatia J.

The learned District Judge has rejected the appeal on all the grounds and has confirmed the order of the learned City Magistrate. With regard to opponent No. 1, the learned Judge does feel a difficulty in passing the order as against the employer, i.e. appellant No. 1 before him, and he says that the contention as urged by him is correct, but though the proceedings under s. 15 were to be taken against the person responsible, namely, the manager, still as the trial Court had directed that the employer was liable only for that much of the amount which could not be recovered from the manager, there was no illegality in that order. Besides, appellant No. 1 had no right of appeal as no appeal by an employer against an order passed under s. 19 of the Act had been provided. On the other points the learned Judge has confirmed the findings of the Magistrate and held that part of the mill was working till April 30, and that the original opponent No. 3 continued to work as manager during that whole period. With regard to the jurisdiction of the District Magistrate to make the transfer, the learned Judge was rather doubtful as to who was the officer who could make an order for transfer in this case, but as the City Magistrate was one of the authorities mentioned in s. 15 (*1*), who could take cognizance of the application under that section, he was of opinion that there was no illegality because ultimately the Magistrate who tried the case was a Magistrate who had jurisdiction to do so under the section.

Against this order of the District Judge dismissing the appeal the two opponents have come to this Court in revision under s. 115, Civil Procedure Code, and all the grounds urged by them before the lower Court have been also urged before me.

With regard to the merits of the case as to whether the wages were delayed, and, secondly, whether the mill was working during the material period or not, both the Courts have found against the present petitioners on the evidence,

and whether those findings are right or wrong, they could not be disturbed in this revision application. But even apart from that, I am satisfied that the mill had not entirely closed down and no notice had been given to the workers that the mill would stop working after a particular time. It is also found that opponent No. 3, i.e. applicant No. 2 here, did work as manager during that period. Therefore, there is no doubt in this case about his liability under s. 15 (*3*) of the Act.

The only point that requires consideration is about the liability of the first applicant in this application under s. 15 (*3*) under which the authority is to hear the applicant and the employer or other person responsible for the payment of wages under s. 3. Under this section every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under the Act: provided that in the case of persons employed in a factory if a person has been named as the manager of the factory under the Factories Act, the manager would be responsible for the payment; in the case of industrial establishments, if there is a person responsible to the employer for the supervision and control of that establishment, then such person who is responsible to the employer is liable; and, thirdly, in the case of railways, if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned, then the person so nominated shall be responsible. The present case is that of a factory, so that if a person is named as the manager of the factory under the Factories Act, then he would be liable for the payment of wages.

Now, turning back to s. 15 (*3*), it says that "the authority shall hear the applicant and the employer or other person responsible for the payment of wages". On behalf of the applicants it is contended that the proper party, or rather the only party, to these proceedings is the manager

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

Divatia J.

if the employer has appointed any such manager. In this case it is clear that Mr. Dave, original opponent No. 3, has been employed as manager. It is, therefore, contended that the application should have been filed against him alone and not against the original employer Mr. Dixit. In reply to that it is contended that the section speaks of the employer or other person responsible for the payment of wages under s. 3, and that therefore the case of the employer is also included in this section, so that he also could be proceeded against. Although it is conceded that by virtue of the provisions of s. 19 the employer cannot be made responsible for the amount in the first instance but that he is responsible only for the balance which could not be recovered from the manager, it is urged that it is not illegal on the part of the Magistrate to direct, if the employer is made a party, that the amount should be recovered in the first instance from the manager, and in so far as the whole or part of the amount could not be recovered from him, the balance should be recovered from the employer. The learned Judge himself has felt some difficulty in maintaining the order as originally passed against opponent No. 1. He says that the contention of the employer seems to be correct because the proceedings under s. 15 are to be taken against the person responsible under s. 3, i.e. the manager in this case, but that when the authority is unable to recover the amount from him, it can give a direction to recover the amount from the employer under s. 19. Then he says that it was not, however, clear whether the lower Court found before passing the order under s. 19 that the money could not be recovered from the manager and he winds up his reasoning by observing, "There are however no provisions for an appeal against an order passed under s. 19".

If the learned Judge was of opinion, as he seems to have been, that petitioner No. 1 was a proper party under s. 15, it is erroneous to say that he has no right of appeal on the

ground that no right of appeal has been provided under s. 19, because in that case the order against the employer would be both under ss. 15 and 19. Besides, his further reasoning that although it was not yet clear that the money could not be recovered from the manager, still an order could be passed against the employer before that is ascertained appears to me to be incorrect. The point is in what sense is the word "employer" used in sub-s. (*3*) of s. 15 ? The words are, "the employer or other person responsible for the payment of wages under s. 3". Does it mean the employer where no manager is appointed, or also the employer where a manager is appointed ? It is contended on behalf of the opponent here that the word "employer" is also used in the sense of an employer where a manager is appointed, and that, therefore, even though the manager would in the first instance be liable, the employer could also be made a party in the proceedings under s. 15, and an order against him be passed under s. 19. This argument, however, seems to me to be erroneous. Section 3 speaks of the liability of an employer or any other person who is named as the manager. In other words, the section means that in all cases where a manager or a responsible person or a nominated person is appointed, then these persons are liable, but where no such persons are appointed or nominated in the case of factories, industrial establishments or railways, then in those cases only it would be the employer who would be responsible for the payment of wages, and therefore it is that the words as they appear in sub-s. (*3*) of s. 15 are "the employer or other person responsible for the payment of wages under s. 3". It should be noted that the words are not "the employer *and* other person responsible", but they are "the employer *or* other person responsible for the payment of wages under s. 3". In other words, it is distinctly contemplated that the proceedings in the first instance should be against either the employer or against the manager but not against both.

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

Divatia J.

Therefore, if a manager is appointed, the proceedings should be against the manager alone, but if no manager is appointed they should be against the employer. I think the use of the word " or " instead of " and " clearly shows that the proceedings under s. 15 are to be instituted against only one person, whether he is the manager as in the case, or the employer, but not against both.

It is true that if after the order is passed against him the whole of the amount could not be recovered from the manager, the balance could be recovered from the employer under s. 19, and no appeal is provided against an order passed under s. 19 with the result that as the employer cannot be made a party to the application under s. 15 in the first instance, and if subsequently an order is passed against the employer to recover the balance from him, the employer has no right of appeal against that order passed under s. 19, and that it may appear inequitable that the employer should be saddled with liability without giving him any right of appeal against the order. But the remedy, if at all, to that defect is, in my opinion, in the hands of the Legislature. It cannot, however, be contended that in order to give a right of appeal to the employer, he should also be impleaded as a party in the first instance where a manager has been appointed. Looking to the plain phraseology of s. 15 (*3*) and reading it with ss. 3 and 19, I think it is clear that the manager alone in this case ought to have been made a party to the application, and that the liability of the employer would arise only if it is subsequently found that the whole or part of the amount could not be recovered from the manager. I think the Legislature contemplated that before fixing the employer with any liability, it must be first found that the whole or any part of the amount could not be recovered from the manager. There is no such finding in this case, and there could not be any such finding as the stage of recovery from the manager has not yet come.

1939

P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES

Divatia J.

In the result, therefore, I am of opinion that Mr. Dixit, opponent No. 1, i.e. applicant No. 1 here, was not a proper party to this application under s. 15, and that the order against him should be set aside. The order against applicant No. 2, i.e. the manager Mr. Dave, is maintained. As regards applicant No. 2 the rule is discharged with costs. As regards applicant No. 1 the rule is made absolute with costs.

Order varied.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

GULAM HUSSEIN RAWJI (ORIGINAL ACCUSED NO. 1), APPELLANT *v.* EMPEROR.*

1939
August 24

Bombay Prevention of Gambling Act (Bom. IV of 1887), ss. 4 (a), 5, 6, 7—"Having the use of"—Interpretation—Accused receiving bets in passage—Passage is place—Accused not shown to have interest in passage—Finding of instruments of gaming—Onus on accused to show that place was not common gaming house.

The words "having the use of" occurring in s. 4 (*a*) of the Bombay Prevention of Gambling Act, 1887, must be read *ejusdem generis* with the previous words "owner or occupier" and they mean "having the right to the use of" under some title, e.g. license which is less than ownership or right of occupation.

Where it was proved that the accused was receiving bets in a certain passage and it was not shown that the accused had any interest whatever in the passage :—

Held, that the accused could not be convicted under s. 4 (*a*) of the Bombay Prevention of Gambling Act, 1887.

Where the Crown proved the finding of instruments of gaming and the presence of the accused in the passage :—

Held, that the conviction of the accused under s. 5 of the Act was justified since the onus was upon the accused to show that the place was not a common gaming house.

In upholding the conviction under s. 5 the Court reduced the sentence of fine, having regard to the fact that the prosecution had failed to prove the case under s. 4 (*a*) of the Act.

*Criminal Appeal No. 245 of 1939.