

Judge has not considered as to whether the civil Court could pass such a decree although the suit stood transferred to the Special Court. In view of the reasons given by us in our judgment, we find it difficult to accept the view taken by Mr. Justice Bavdekar in the second appeal just referred to.

We, are, therefore, of the opinion that the learned Judge below was right in the order that he passed. We, therefore, direct that the learned Judge will go on with the suit and try the issues which we have indicated and then follow the procedure which we have also indicated in this judgment.

No order as to costs.

Rule discharged.

M. W. P.

1951

JETHABHAI
RAMBHAI

v.
BALA

LAXMANRAO

Chagla
C. J.

APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Bhagwati.

K. P. MUSHRAN, GENERAL MANAGER B. B. & C. I. RAILWAY
PETITIONER v. B. C. PATIL AND ANOTHER, RESPONDENTS.*

1951
August 24

Payment of Wages Act (IV of 1936), ss. 7, 8, 13, 15—Government of India Act 1935 (26 Geo. V C. 2), s. 241 (2), (4)—Indian Railways Act (IX of 1890), s. 47 (2)—Suspension of an employee—Subsistence allowance only given—Employee placed under compulsory leave—Full wages not paid—Employment continued—Whether employee entitled to full wages throughout the period he was in the employment—Railway Rules inconsistent with Payment of Wages Act—Such Rules void—Jurisdiction of the Authority under the Act to decide all claims arising out of deduction from wages and delay in payment of wages.—No error of law apparent on the face of the record—Writ of certiorari not available.

Section 241 (2) of the Government of India Act, 1935, provides that the conditions of service of persons serving His Majesty in a civil capacity in India shall be regulated, subject to the provisions of the section, in accordance with the rules prescribed by the various authorities mentioned in that sub-section. Section 241 (4) however provides that acts of the appropriate Legislature may also regulate the conditions of service of civil servants of His Majesty and it is specifically provided that in that case the rules made under s. 241 (2) by the various authorities would be subject to the provisions of such Acts of the Legislature.

The Payment of Wages Act is an Act passed by the Legislature under s. 241 (4) of the Government of India Act, 1935, and therefore to

* O. C. J. Mis. Appln. No. 179 of 1951: (with Mis. Appln. No. 179 of 1951).

1951

K. P.
MUSHRANv.
B. C. PATIL

the extent that any of the rules framed by the Railway Authorities under s. 241 (2) are inconsistent with the provisions of the Payment of Wages Act, the provisions of the Payment of Wages Act prevail over the rules framed by the Railway Authorities.

The only deductions which an employer is entitled to make from the wages of his employee are the deductions referred to in s. 7 of the Act and the only power which the employer has to impose a fine on the employee is under s. 8 of the Act.

The rules framed by the Railway Authorities which permit the employer to suspend his employee and to pay to him a subsistence allowance which is less than his full wages, are inconsistent with the provisions of the Payment of Wages Act and are therefore void.

It is within the jurisdiction of the Authority to decide that such rules framed by the Railway Authorities as are inconsistent with the provisions of the Payment of Wages Act are void. That power is given under s. 15 of the Act which empowers the Authority to hear and decide all claims arising out of deductions from the wages or delay in the payment of wages to employees.

The second respondent, R. V. Devanalkar, was an employee of the B. B. & C. I. Rly. On February 19, 1949, he was detained under the Preventive Detention Act and on February 23, 1949, he was suspended from service. On June 1, 1949, he was released and the period of his suspension ended on April 15, 1950. Under certain rules of the Railway Authorities, the second respondent was paid during the period of suspension, a subsistence allowance which was less than his wages.

From April 16, 1950 to June 11, 1950, the second respondent was compelled to go on leave on full pay; from June 12, 1950 to October 7, 1950 on half-pay and from and after October 8, 1950 on compulsory leave without pay. The second respondent had not been charged with having committed any act which was contrary to the rules of service.

The second respondent therefore applied to the Authority for payment of full wages to him by the Railway Company throughout this period.

The Authority directed the Railway Company to pay full wages to the employee.

Held, that the effect of the order of suspension was that the contract of employment was not suspended, that the relationship of master and servant continued to subsist and the rights and obligations of the parties under the contract remained unaffected. The employee had to remain at the head-quarters and report himself daily and was under an obligation to serve while the employer was under an obligation to pay wages.

Held, further that the real nature of the suspension order and the subsistence allowance was that the employer imposed a fine upon the employee and deducted it from his wages. This deduction was not covered by any of the ss. 7 to 13 of the Payment of Wages Act.

Held, therefore, that the Authority had acted within its jurisdiction in allowing full wages to the employee during his period of suspension and thereafter.

Held, also that although a writ of *certiorari* would lie even to correct an error of law which was apparent on the face of the record, there

was no such error in the present case. The Authority had properly applied the provisions of the Payment of Wages Act and had held that the deductions made by the employer were not justified.

The error of law which can be considered to be apparent on the face of the record is not an error which can be pointed out to the Superior Court after a long and elaborate argument.

The Superior Court will not interfere where the tribunal has jurisdiction but has given a wrong decision. The error of law must be so patent, so manifest, that the Superior Court will not permit the tribunal or the subordinate Court to give a decision in the face of a clear ignorance or disregard of a provision of law.

Sarin v. Patil⁽¹⁾ relied on and explained

Bird v. British Celonese Ltd.⁽²⁾; *The Highland Chief*⁽³⁾; and *Padmakant Motilal v. Ahmedabad Municipality*,⁽⁴⁾ distinguished.

Warburton v. Taff Vale Railway Co.,⁽⁵⁾ relied on.

Williams v. North's Navigation Collieries (1899) Ltd.⁽⁶⁾ referred to.

On February 23, 1949, the District Controller of Stores, B. B. & C. I. Railway acting under the Rules of the State Railway Establishment Code suspended the second respondent on account of his arrest under s. 2 (A1) of the Bombay Public Security Measures Act 1947.

On June 1, 1949, the second respondent was released from detention. He then went to work but he was not allowed to do any work though he was informed as follows:—"Please note that you should remain at headquarters and report to your officer-in-charge every day until your case is finally decided".

The second respondent attended the office every day as required until the period of his suspension ended on April 15, 1950. Thereafter the Railway authorities took action against him under the Railway Services (Safeguarding of National Security) Rules 1949 and compelled him to proceed on leave from April 16, 1950 to June 11, 1950 on full pay; from June 12, 1950 to October 7, 1950 on half-pay and from October 8, 1950 onwards without any pay although he continued to be in the service of the Railway.

The second respondent thereupon applied to the first respondent, Authority under the Payment of Wages Act, claiming (1) full wages during the period of his suspension (2) full wages for the period June 12 to October 7, 1950 and (3) full wages from October 8, 1950 onwards. The first respondent

⁽¹⁾ (1951) 53 Bom. L. R. 674.

⁽²⁾ [1945] 1 K. B. 336.

⁽³⁾ [1892] P. D. 76.

⁽⁴⁾ [1943] Bom. 1.

⁽⁵⁾ (1902) 18 T. L. R. 420.

⁽⁶⁾ (1906) A. C. 136.

1951

K. P.
MUSHRAN

?.
B. C. PATIL

1951

K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

ordered the Railway authorities to pay to the 2nd respondent his full wages without any deduction.

This petition was thereupon filed by the petitioner for a writ of *certiorari* for quashing the orders of the Authority.

N. A. Palkhiwalla, for the petitioner.

M. P. Amin, Advocate General for respondent No. 1.

D. Latifi, for respondent No. 2.

CHAGLA C. J. These two petitions challenge certain orders passed by the Authority under the Payment of Wages Act, and the facts which I am about to state do not redound very much to the credit of the Railway authorities who are the employers.

The second respondent, who is the employee, was detained under the Preventive Detention Act on February 19, 1949, and the Railway authorities passed an order on February 23, 1949 suspending the second respondent from service. On June 1, 1949, the second respondent was released from detention, and the period of suspension ended on April 15, 1950. Under certain rules, the employee was compelled to go on leave from April 16, 1950 to June 11, 1950 on full pay, from June 18, 1950 to October 7, 1950 on half pay, and from October 8, 1950 without any pay at all. Even to-day this employee is on compulsory leave and no pay is being given to him. He has not been charged with having committed any act which is contrary to the rules of service, and no result of any departmental enquiry—if a departmental enquiry has indeed been held—has been communicated to him. The employee went before the Authority under the Wages Act claiming that he was entitled to his full wages throughout the period as he was in the service of the Railway authorities. With regard to the suspension period, he was paid a certain allowance which is described as a subsistence allowance but which is less than the wages to which he was entitled, and he claimed for that period full wages. With regard to the period from April 16, 1950, to June 11, 1950, he was given full pay, and no claim was made by the employee with regard to that period. But from June 12, 1950 to October 7, 1950 he was given only half his wages, and he made a claim for the remaining half; and from October 8, 1950 he claimed the full wages to which he was entitled. The Authority under the Payment of Wages Act ordered the Railway authorities to pay to the employee his full wages without any deduction.

Now, we have had occasion to consider the general provisions of the Payment of Wages Act in *A. R. Sarin v. B. C. Patil*⁽¹⁾. But it would perhaps be necessary again to draw attention to some of the important provisions of the Act. The scheme of the Act is to compel employers, who have employed certain persons drawing certain wages, to make prompt and full payment of the wages to which these employees are entitled. The only deductions which an employer is entitled to make from the wages of his employee are the deductions referred to in s. 7 and elaborated in ss. 8 to 13, because s. 7 itself is mandatory in its terms and states that, notwithstanding the provisions of sub-s. (2) of s. 47 of the Indian Railways Act, 1890, the wages of an employed person shall be paid to him without deductions of any kind except those authorised by or under this Act. Now, sub-s. (2) of s. 47 of the Railways Act authorised the Railway authorities to punish an employee committing a breach of any of the rules with a fine which may extend to any sum not exceeding Rs. 50, and in the case of a breach of certain specific rules the power was given to the authorities to forfeit a Railway servant's pay not exceeding one month's pay. Now, the only power which the employer has under the Payment of Wages Act to impose a fine is the power given expressly under s. 8. Therefore, the only fine that the employer can impose is the fine specified in s. 8 of the Act. Further, under s. 241 sub-cl. (2) of the Government of India Act, 1935, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed by rules made by the various authorities mentioned in that sub-section. But there is a proviso to this section which is contained in sub-s. (4), and that provides that, notwithstanding anything in this section, but subject to any other provision of this Act, Acts of the appropriate Legislature in India may regulate the conditions of service of persons serving His Majesty in a civil capacity in India, and any rules made under this section shall have effect subject to the provisions of any such Act. Now, the view taken by the Authority was that the Payment of Wages Act was an Act which is contemplated by sub-s. (4) of s. 241 of the Government of India Act, and that, to the extent that any of the rules framed by the Railway authorities are inconsistent with the provisions of the Payment of Wages Act, the provisions of the Payment of

1951

K. P.

MUSHRAN

v.
B. C. PATILChagla
C. J.

⁽¹⁾ (1951) 53 Bom. L. R. 674.

1951

K. P.
MUSHRAN
v.
B. C. PATIL
—
Chagla
C. J.

Wages Act must prevail over the rules framed by the Railway authorities under s. 241 sub-cl. (2). Under s. 15 of the Payment of Wages Act, jurisdiction is conferred upon the Authority to hear and decide all claims arising out of deduction from the wages or delay in the payment of the wages. The Act lays down various periods at the end of which wages must be paid to the employees, and as I said before, it also sets out the various permissible deductions and provides that, apart from these deductions, there is a clear and unequivocal obligation upon the employer to pay the wages in full. Therefore, if an employer fails to pay wages at the time indicated in the Act, then he would be guilty of delay in payment and the Authority can compel him to pay the wages. If, on the other hand, he pays the wages but he deducts from the wages any unauthorised deduction, then also the Authority would have jurisdiction to compel the employer to pay the full wages. Section 22 of the Act bars the jurisdiction of Civil Courts, and no suit for recovery of wages or of any deduction from wages could be maintained in any Court in so far as the sum so claimed could have been recovered by an application under s. 15 of the Act to the Authority constituted under the statute. "Wages" is defined as all remuneration capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to the person employed, and if this payment is in respect of his employment or of the work done in such employment.

Now, the contention of Mr. Palkhiwalla is that, when the employee was suspended from February 23, 1949 to April 15, 1950, the contract of employment itself was suspended and no wages were due by the employer to the employee; and, further, that the question of deduction can only arise when there are any wages payable by the employer to the employee, and if no wages at all are due or payable then no question of deduction can arise which can be adjudicated upon by the Authority. Therefore, Mr. Palkhiwalla contends that, in deciding that there was an unjustifiable deduction on the part of the employer in not paying to the employee the full pay during the period of suspension, the Authority has acted in excess of his jurisdiction. Now, what the Authority has held is that the rules which permit the employer to suspend his employee and to pay him a subsistence allowance which is less than his full wages are inconsistent with the provisions of the

Payment of Wages Act, and, therefore, the liability of the employer to pay full wages to his employee is unaffected by the rule which gives the employer the power to suspend the employee. Now, if that is the decision of the Authority, it is difficult to understand why that decision is without jurisdiction. It is true that we pointed out in *A. R. Sarin v. B. C. Patil*⁽¹⁾, that delay in payment of wages can only mean delay in payment of wages which are admitted. But we have explained later on in the judgment as to what is the meaning of "wages which are admitted." When an employer refuses to pay wages, rightly or wrongly, contending that the respondent is not his employee and that he has dismissed him and therefore nothing is due to him, then, according to that decision, the Authority has no jurisdiction to determine whether the refusal of the petitioner to pay wages was justified or was valid in law. Therefore, it is only in a case where the employer has put an end to the contract of employment, has dismissed his employee, and the employee is complaining of a wrongful dismissal and claiming damages from his master for wrongful dismissal, that, according to us in that decision, the jurisdiction of the Authority was ousted to determine questions with regard to the wrongful dismissal. We further pointed out, on the same page, as follows:—

"The question as to whether X amount or Y amount is due under the terms of the contract is a case where wages may not be admitted. The employer may say that X amount is due and the servant might say that Y amount is due, and the Authority would have to decide on a true construction of the terms of the contract as to what is the amount due. Therefore, 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."

Therefore, when one analyses the case before us, the very clear position is that the employer tells his employee, "During the period of suspension, you were only entitled to X amount as wages"; the employee says, "No, I was entitled to Y amount of wages"; and that is the issue that comes up before the Authority for determination. The Authority says that the rule, upon which the employer relies for paying to his employee less than what he is entitled to on the basis of his wages, is a rule which is void, and, therefore, the employee is entitled to his full wages under the ordinary terms of employment. If this be the true position, it is clear that the case is covered

⁽¹⁾ (1951) 53 Bom. L. R. 674.

1951

K. P.
MUSHRAN

B. C. PATIL

Chagla
C. J.

1951

K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

by the principle we laid down in Sarin's case, and the Authority would have jurisdiction to decide this question. But, says Mr. Palkhiwalla, this is really a case where the contract of employment has been temporarily terminated, the employer says that he is not liable to pay wages to his employee at all, and, therefore, an issue arises which is really in the nature of the employee claiming damages against his employer for wrongfully terminating his services for a temporary period. And therefore, according to Mr. Palkhiwalla, the case falls within the ratio we have laid down in Sarin's case that it is not competent to the Authority to decide whether a servant was wrongfully dismissed by his master. Now, in order to decide this point, we have to consider what is the meaning and effect of the order of suspension. According to Mr. Palkhiwalla, the contract of employment is suspended during the period of suspension, and the obligations and rights of the parties under the contract are no longer in operation. According to Mr. Palkhiwalla, during this period the Railway authorities ceased to be an employer and the employee ceased to be an employee. Whether this is a correct position in other cases of suspension or not, we are not interested to consider or to decide. What we have to consider and decide is what is the position on the facts of this case. And, as I shall presently point out, it is clear beyond doubt that, notwithstanding the order of suspension, the contract of employment was not suspended at all, that the relationship of master and servant between the employer and the employee continued to subsist, and that the rights and obligations of the parties under the contract remained unaffected. It has been pointed out by the Authority that, notwithstanding the order of suspension, the Railway authorities issued an order to respondent No. 2 in the following terms:

"Please note that you should remain at headquarters and report to your officer-in-charge every day until your case is finally decided."

And Mr. Palkhiwalla has conceded that there is a rule under which the Railway authorities are entitled to call upon respondent No. 2 to remain at the headquarters notwithstanding the order of suspension. Now, it would indeed be curious if the Railway authorities assumed to themselves the power of dictating to respondent No. 2 what he should do during the period of his suspension if the Railway authorities were not the master or the employer of respondent No. 2.

The power to compel respondent No. 2 to remain at the headquarters can only emanate from the relationship of master and servant subsisting between the Railway authorities and respondent No. 2. If respondent No. 2 was no longer in the service of the Railway authorities during the period of his suspension, he would be free to do what he liked, he would be free to seek another employment, and he would be free to leave Bombay. But it is the contention of the Railway authorities that the second respondent was not a free agent; that he was bound to remain at the headquarters and he was bound to report himself. Therefore, it is clear on the facts of this case that the second respondent continued to remain the servant of the employer and the employer had the power, and in fact and in deed exercised the power, of issuing directions and orders to his employee. There is no obligation whatsoever upon an employer to insist upon taking work from his employee. And if, in this case, the employer told his employee, "I do not want you to work; but come to the headquarters and report yourself every day." it does not mean that thereby the employer relieved his employee from his obligation to serve under the contract: the employee was ready and willing to work, and it was entirely optional upon the employer whether he should exact any work from his employee or not. Therefore, the respective obligations of the master and the servant continued under the contract. The employee was under an obligation to serve; and if the employee was under an obligation to serve, the employer was under an obligation to pay wages. Therefore, the real nature of the suspension order and the subsistence allowance is that the employer imposed a fine upon the employee and deducted it from his wages; instead of paying the employee full wages, the employer paid him only a part of the wages, deducting the balance as a fine. Mere nomenclature does not, and should not, alter the real substance of the matter. The Railway authorities may not choose to call the difference between the subsistence allowance and the wages as a fine, but in effect and in substance it is nothing less than a fine imposed by the employer. And as I have pointed out, the only fine which can be imposed by the employer under the Payment of Wages Act is under s. 8 of the Act. And it is common ground that if what the employer has deducted is a deduction, it is not a deduction that is covered by any of the ss. 7 to 13 of the Payment of Wages Act.

1951

K. P.
MUSHRANv.
B. C. PATILChagla
C. J.

1951

K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

Mr. Palkhiwalla has strongly relied on a judgment of the English Court in *Bird v. British Celanese, Limited*⁽¹⁾. There the English Court of appeal was called upon to construe s. 1 of the Trucks Act, and that section provided that an employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman, for or in respect of any fine. This provision was similar to s. 23 of the Payment of Wages Act. Now, in the case before the English Court of appeal, an oral contract was arrived at between the employer and the employee by which the workman could be temporarily suspended from his employment if he was guilty of misconduct or breach of an order, and the workman who had been suspended for two days without pay sued his employers under the Trucks Act to recover damages or wages for the two days' suspension. And the Court held that the contract of employment whereby the workman might be suspended was not a contract for any deduction from the sum contracted to be paid within the meaning of s. 1 of the Trucks Act. The reasoning of the judgment is that there was no contract to pay wages during the period of suspension, and, therefore, non-payment of any amount during the period of suspension could not amount to a deduction from wages because no wages were due during the period of suspension; and Lord Justice Scott, at page 341, says, "You cannot deduct something from nothing". Now this expression is used in the light of the view taken by the Court that no wages were due during the period of suspension. Then the learned Lord Justice goes on to say,

"...the whole contract is suspended in the sense that the operation of the mutual obligations of both parties is suspended; the workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay."

But the facts here are entirely contrary. As I have pointed out, the workman does not cease to be under any present duty to work; and if he does not cease to be under any present duty to work, the employer cannot cease to be under the consequential duty to pay. This judgment, if anything is against the contention of Mr. Palkhiwalla, because the judgment clearly indicates that, if there was a duty to work, there was a consequential duty to pay on the part of the employer. The other judgment relied upon is the judgment

⁽¹⁾ [1945] 1 K. B. 336.

in *The Highland Chief*,⁽¹⁾ That was a case under the Merchant Shipping Act, which provides that every master, on discharging a seaman, had to furnish him with an account showing the wages due to him and of deductions to be made therefrom. The plaintiff in that case signed articles to serve on board the defendants' vessel as refrigerating engineer on £10 per month. He so served for two months; and thereafter, on a charge of drunkenness, he was derated and his wages were reduced to £7; and the plaintiff's contention was that, as the reduction from £10 to £7 was not shown in the accounts, he was entitled to his full wages. The Court held that this was not a case of deduction. Now, it is clear, as is pointed out in the judgment, that the articles themselves provided that, under certain circumstances, the employee could be derated and his wages could be reduced, and, therefore, the reduction of his wages from £10 to £7 did not constitute a deduction but an alteration in the wages. Again it is difficult to see how this decision can help the petitioner. We have not here a case where there is an alteration of wages. Admittedly, the wages of the employee continued to remain the same as fixed by the contract between the parties; and, admittedly, during a certain period the employee has been paid less than what he was entitled to as his wages. Reliance has also been placed by Mr. Palkhiwalla on a decision of this Court in *Padmakant Motilal v. Ahmedabad Municipality*,⁽²⁾ In that case, the Chief Officer of a Municipality, who was suspended, sued the Municipality for the amount of his wages during the period of his suspension. And Mr. Justice Wassoodew observed, at page 5, that the Municipality had the power of suspension, and, in that case, suspension would inevitably mean the suspension of the entire contract, and, therefore, of the obligation on both the sides. Whether this observation is justified or not would depend upon what were the obligations of the Chief Officer after he was suspended. In fact, the learned Judge, at page 6, observes that suspension suspends for the time being the relationship of master and servant between the parties. Therefore, if the relationship of master and servant was suspended, then the suspension must involve the suspension of the payment of wages. And on that ground Mr. Justice Wassoodew, with respect, is right when he held that the plaintiff was not entitled to claim wages during the period of suspension. As against this, there is a direct

1951

K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

⁽¹⁾ (1892) Probate Divn. 76.

⁽²⁾ (1943) Bom. 1.

1951

K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

authority in *Warburton v. Taff Vale Railway Company*⁽¹⁾. That was a case of the servant of a railway company; and the railway company had reserved the right to punish any servant by immediate dismissal, fine or suspension from duty, and they also reserved the right to deduct from the pay of their servant and retain the sums which might be imposed as fines and to withhold their wages during the time of their suspension or absence from duty for any cause. Exercising this power, the railway company suspended the plaintiff for two weeks under the rule, and thereafter dismissed him. He sued for wages for two weeks, and the contention of the railway company was that they were not liable to pay any wages during the period of suspension. And the Lord Chief Justice pointed out that, in order to succeed, the defendants must contend that the man was not in their service during the period of suspension, and the learned Lord Chief Justice held that the plaintiff was in the company's service during suspension, and, therefore, he was entitled to the wages. Mr. Palkhiwalla tries to distinguish this case by pointing out that the power was to withhold wages and not to forfeit wages. But the principle of the case with which we are concerned is that what the employee was entitled during the period of suspension was wages and not damages; and the case also shows that, during the period of suspension, the relationship of master and servant continued, that the servant earned wages, and that those wages were withheld by the employer. Reliance has also been placed upon the definition of "wages" in the Payment of Wages Act, and it is pointed out that wages can only be earned if the terms of the contract of employment, express or implied, were fulfilled. And Mr. Palkhiwalla says that, in a case of suspension, the terms of the contract are not fulfilled. In my opinion, all that this expression means is that there should be a subsisting contract of employment and that the relationship of master and servant should exist and there should be mutual rights and obligations of the parties to the contract existing. All these factors, as I pointed out, are present in the present case; and, therefore, if any remuneration is payable under the terms of the contract, it is "wages" for the purpose of the Payment of Wages Act.

Therefore, in my opinion, the employee was entitled to wages during the period of suspension, and, if the employer

⁽¹⁾ (1902) 18 T. L. R. 420.

made a deduction from the wages, it was an unauthorised deduction, and the Authority was competent to order the employer to pay the full amount of wages during the period of suspension.

Now, turning to the contention with regard to leave without pay, the position is even simpler, because it is not disputed that, during the period of leave, the employee continues to remain the servant of the employer and no question of suspension of the contract can possibly arise. The only contention that Mr. Palkhiwalla can raise with regard to this point is that there is a dispute as to the liability to pay full wages during the period of leave and that dispute as to liability cannot be determined by the Authority. There is no doubt that, as far as this question is concerned, the only dispute is as to the quantum of wages. Employment is admitted; the fact that the employee was a servant is admitted. The only dispute is that the employer says that, for a certain period, he is only liable to pay half the wages, and for a certain period he is not liable to pay any wages at all. Now, Mr. Palkhiwalla says that there is no dispute as to what is the amount due, and if there was any dispute as to the amount then the Authority could have determined the amount, but in this case the dispute raises the question of liability, and that question is kept outside the jurisdiction of the Authority. As we have pointed out in *A. R. Sarin v. B. C. Patil*,⁽¹⁾ it is only when the contract of employment is put an end to and the liability to pay damages for wrongful dismissal is disputed that the Authority has no jurisdiction to consider that question. But, when the employment is admitted, non-payment of wages can only raise the question as to deduction or delay, both of which are questions within the jurisdiction of the Authority. Now, with regard to leave on half pay, there is no doubt that there is a deduction from the wages to which the employee was entitled, and the question that the Authority had to decide was whether the deduction was justified or not. The Act deals with cases of absence from duty under Section 9, and certain deductions are permissible for absence from duty. But the deductions that the employer has made are not covered by the provisions of s. 9, and, therefore, the Authority had jurisdiction to decide that, the deductions being unjustifiable, there was a liability upon the employer to pay the full amount of wages. Then with

1951

K. P.
MUSHRAN
v.
B. C. PATIL

Chagla
C. J.

⁽¹⁾ (1951) 53 Bom. L. R. 674.

1951

K. P.
MUSHRAN
v.
B. C. PATILChagla
C. J.

regard to the period when the employee was on leave without pay, the Authority has held that there was a delay in payment as no wages whatsoever were paid. Now, I find it rather difficult to accept the proposition that, if an employer were to deduct from wages of Rs. 100 a sum of Rs. 99-15-9 it would be a deduction, but that, if he were to deduct the whole amount of Rs. 100 and not pay the employee at all, it would not be a deduction. I should have thought that giving to "delay" its plain natural meaning, delay in payment would only arise when there was no dispute as to payment of wages but the employer was only in default in not paying them on the due date. But when there is a dispute as to payment of wages, and the dispute is as to the quantum or as to the whole amount of the wages, then, whether there is a deduction of a part of the amount or the whole amount of the wages is not paid, it would still be a case of unjustified deduction. But it is unnecessary to decide whether, in the case of a failure to pay the whole amount of wages, a case of delay or deduction arises, because in either view of the case the Authority would have jurisdiction to decide the matter.

Mr. Palkhiwalla has relied on a judgment of the House of Lords in *Williams v. North's Navigation Collieries (1889) Ltd.*,⁽¹⁾ That was also a case under the Trucks Act, and there the employer deducted from the wages due to his employee a certain sum, which a Court of summary jurisdiction had ordered the workman to pay to the employer in respect of breaches of contract to work. And the House of Lords held that this was not a deduction permissible under the Trucks Act, and, therefore, the employer must pay to the workman the wages without deducting this amount. It was in the course of his judgment that Lord Norman dealt with the argument that was advanced at the Bar, and the argument was that it seemed anomalous that, if the employee sued the employer for damages for breach of contract in not paying him his wages, the employer could have set off the amount which had been ordered to be paid by the order of the Court of summary jurisdiction, and yet he could not deduct this amount under the Trucks Act, and Lord Beaumont said that this might be an anomaly, but the Trucks Act interfered in a limited degree with the freedom of contract and it should be strictly construed. And Lord Davey, in the course of his judgment, referred to the argument of Counsel

⁽¹⁾ (1906) L. R. I. A. 136.

that it would be no offence under the Trucks Act not to pay the wages in full, although it would be an offence to make a partial payment, and Lord Davey merely says that, even if that argument was sound, the result would not follow as contended for by the Counsel on behalf of the employer. Now, this is no decision whatsoever for laying down that, in the case of a failure to pay the full amount of wages, it would not be a deduction within the meaning of the Payment of Wages Act. The argument was merely advanced by Counsel, and the House of Lords never gave any decision as to the validity of that argument.

Finally, it is urged by Mr. Palkhiwalla that we must interfere by a writ of *certiorari* because the decision of the Authority is erroneous in law. Mr. Palkhiwalla contends that, when the Authority held that the rules of the Railway authorities with regard to the payment of subsistence allowance and compelling to employee to go on leave were bad as offending against the Payment of Wages Act, his decision cannot be supported, being contrary to the true position in law. Now, ordinarily the Court issues a writ of *certiorari* to correct the decisions of subordinate Courts and Tribunals when those decisions are given in excess of jurisdiction, or in the irregular exercise of jurisdiction, or, when in the exercise of jurisdiction, rules of natural justice are violated. Mr. Palkhiwalla is right that the Court has the jurisdiction to issue a writ of *certiorari* even to correct an error of law provided that error is apparent on the face of the record. Now, it is impossible to say that there is any error which is apparent on the face of the judgment of the Authority under the Payment of Wages Act. The authority has properly applied the provisions of the Payment of Wages Act and has held that the deductions made by the employer were not justified, and that, in this case where no payments were made at all, there was a delay in the making of payment. The error of law which can be considered to be apparent on the face of the record is not an error which can be pointed out to the superior Court after a long and elaborate argument. It has been often said that a Court of jurisdiction may decide wrongly in law, and yet the superior Court will not interfere with its decision. But the error of law contemplated is an error so patent, so manifest, that the superior Court will not permit the subordinate Court to come to a decision in the face of a clear ignorance or disregard of a provision of

1951

K. P.
MUSHRAN
v.
B. C. PATILChagla
C. J.

1951
K. P.
MUSHRAN
v.
B. C. PATIL
Chagla
C. J.

law. If a section of a statute is clearly misconstrued, or if a provision of the law is overlooked or not applied, and that appears from the judgment of the lower Court itself, then the superior Court may interfere by a writ of *certiorari*. But that certainly is not the case here. Therefore, in my opinion, this is not a proper case where a writ of *certiorari* should be issued to correct what is suggested is an error of law. I express no opinion whatever on the contention that the Authority has erroneously come to the conclusion, which he has done with jurisdiction on the applications made before him by respondent No. 2.

The result is, both the petitions fail and must be dismissed with costs.

Attorneys for petitioner, *Crawford Bayley & Co.*

Attorneys for respondents, *Little & Co.*

Petitions dismissed.

A. J. P.

INCOME-TAX REFERENCE

1951
Aug. 28

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

N. N. KOTAK, APPLICANT v. COMMISSIONER OF INCOME-TAX,
BOMBAY, RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 29, 30, 46 (1)—Penalty for default in payment of tax—Whether mere notice for levying penalty is compliance with the provisions of the Act or whether an order under s. 46 (1) is necessary.

The assessee who was assessed to income-tax for the years 1944-45 and 1945-46 failed to pay the full amount of his tax. Thereupon on June 23, 1948, the Income-tax Officer purported to pass an order in the following terms. "Tax not paid; Issue penalty notice" Pursuant to this order a demand for payment of penalty was made.

Held, that under s. 46 (1) of the Income-tax Act it is necessary that the Income-tax Officer must pass a formal order imposing a penalty and that order must state the specific sum to be paid by the assessee as penalty. It is only after such an order is passed that a notice of demand can be served. Therefore, the passing of the order is a condition precedent to the validity of the notice of demand.

Held, therefore, that as in this case no formal order had been passed as required by s. 46 (1) the notice of demand was bad and the penalty imposed on the assessee was void in law.

* Income-tax Ref. No. 4 of 1951.