
(1960) 02 MAD CK 0025

In the Madras High Court

Case No : Writ Appeal No's. 139 and 140 of 1959

Standard Vacuum Oil Co., Madras

APPELLANT

Vs

The Addl. Commissioner for Workmens Compensation,
Madras and Others

RESPONDENT

Date of Decision : 18-02-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu Shops and Establishments Act, 1947 — Section 41(2)

Citation : AIR 1960 Mad 425 : (1960) ILR (Mad) 573 : (1960) 2 LLJ 108 :
(1960) 73 LW 410

Hon'ble Judges : P.V. Rajamannar, C.J.; Basheer Ahmed Sayeed, J

Bench : Division Bench

Judgement

Rajamannar, C.J.

(1) The facts which led up to these two appeals may be briefly stated. Prem Sagar, the contesting respondent in the two appeals, was holding a

gazetted appointment with the Government of India as an Assistant Engineer. On 5-2-1951, Messrs. Standard Vacuum Oil Co., Madras, took

him into their service as a temporary Roads Engineer on a salary of Rs.350 per mensem. On 1-6-1952, he was promoted as an Operating

Engineer on a salary of Rs.450 per month. The designation for his post was changed to Operations Assistant in 1956. By the end of February

1958, he was drawing a salary of Rs.1000 per mensem. The company alleged that, some time prior to August, 1957, his work was unsatisfactory,

he was unco-operative, malingering and generally, his productive capacity was below standard; and he was advised that improvement would be

necessary. In September 1957, his work was again reviewed and still found unsatisfactory.

In view of this, he was placed on probation for a period of six months commencing from 1-10-1957. In February 1958 his progress was again

reviewed and it was found that he did not have the capacity to exercise the full responsibilities of an Operations Assistant. He was accordingly

offered a position of a senior Operations Supervisor on a salary of Rs.900/- per mensem. This decision was communicated to him on 21-2-1958.

He, however, took leave till 30-4-1958, and, therefore, claimed to rejoin duty on 2-5-1958, as Operations Assistant. But he was prevented from

doing so. Since he would not accept the employment offered to him, his services were terminated with effect from 30-4-1958. He filed an appeal

against this order, terminating his services, before the Commissioner for Workmen's Compensation, purporting to be under S.41(2) of the Madras

Shops and Establishments Act, 1947. On behalf of the company, an objection was raised as to the maintainability of the appeal on the ground that

he came within the exemption contained in S.4(1)(a) of the Act.

The question whether the provisions of the Act applied to him was referred to the Commissioner of Labour, Madras, under S. 51 of the said Act,

who by his order dated 12-1-1959, held that the exemption contained in S.4(1) (a) of the Act would not apply to the respondent. After this

decision of the Commissioner of Labour, the Additional Commissioner for Workmen's Compensation proceeded to dispose of the appeal before

him after enquiry. He held that the termination of the services of the respondent was not for a reasonable cause. He therefore set aside the order of

the company. The company thereupon filed two writ petitions--W. P. 521 of 1959 to quash the order of the Commissioner of Labour passed

under S. 51 of the Act, W. P. No. 573 of 1959 to quash the order of the Additional Commissioner for Workmen's Compensation, setting aside

the company's order under S.4(2).

(2) The petitions were heard by Balakrishna Aiyar J. After a long and exhaustive discussion of the provisions of the Madras Shops and

Establishments Act, 1947, the learned Judge was inclined to hold that the respondent, Prem Sagar, was not a person who would be entitled to the

benefits of the provisions of the Shops and Establishments Act. But he considered that he was precluded from so holding, because of two

decisions of this court, which, according to him, were directly applicable, namely,

Ramaswami Bank v. Addl. Commr. for Workmen's

Compensation, 1956 2 Mad. LJ 254 and T.P. Chandra Vs. The Commissioner for Workmen's Compensation, Madras and Another, . The

learned Judge next discussed the question whether the respondent, Prem Sagar, would fall within the category of persons mentioned in Sec.4(1)(a)

of the Act, that is, persons employed in any establishment in a position of management.

After an examination of the material evidence in the case, the learned Judge came to the conclusion that the reasons given by the Commissioner of

Labour for taking the view that the respondent was not in a position of management did not appear to be correct or adequate. Nevertheless, he

held that the question whether a person fell within the scope of Sec.4(1)(a) of the Act that is, whether a person was employed in a position of

management or not was mainly a question of fact, and that, on such a question, the Commissioner of Labour and the Additional Commissioner of

Labour and the Additional Commissioner for Workmen's Compensation were entitled to come to their own findings, and that, merely because his

view happened to differ from theirs, he would not be justified in quashing their orders. The learned Judge further held that there was no manifest

error of law apparent on the face of the order of the Commissioner of Labour. He thus concluded his judgment:

The most that I can say is that he (the Commissioner of Labour) has taken a view of the facts different from that which I am disposed to take.

That will not justify interference.

In the result, he dismissed both the petitions. Hence these two appeals by the Standard Vacuum Oil Co.

(3) The learned Advocate General for the appellant-company, in view of the above findings, had only a two-fold task: (1) to establish that the two

decisions of this court did not preclude the learned Judge from going into the question whether the respondent was or was not a person employed

within the meaning of the Act, and (2) to convince us that this court would have jurisdiction under Art. 226 of the Constitution to quash the orders

of the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation on the ground that there was a manifest error of

law, which had a direct bearing on the jurisdiction of the Tribunals.

The learned Advocate General had no difficulty so far as the first part of his task was concerned, because even the learned advocate for the

respondent did not attempt to support the learned Judge's view that there was anything in the two decisions, to which we shall presently refer,

which was in the nature of a binding decision on the point. We are of the same opinion. In 1956 2 Mad. LJ 254, the only question which was

discussed and decided by Rajagopalan J. was whether a given employee of an establishment was a person employed in a position of management

within the meaning of Sec.4(1)(a) of the Madras Shops and Establishments Act. At the very outset of his judgment, the learned Judge said:

There was no dispute before the Additional Commissioner or before me that the second respondent was a "person employed" within the meaning

of S.2(12) of the Act.

In T.P. Chandra Vs. The Commissioner for Workmen's Compensation, Madras and Another, , to which one of us was a party, we said:

It was not contended before us that the appellant was not a "person employed" within the meaning of S.2(12) of the Act. The only question,

therefore, which falls for decision in this appeal is whether the appellant is a person who is employed in a position of management.

If the learned Judges in the above two decisions proceeded on such concession, it cannot be said that it was intended to be impliedly laid down

that a person like the respondent must be deemed to be a person employed within the meaning of the Act. We shall therefore deal with the

question as if it were res integra. The learned Judge was evidently inclined to accept the contention of the learned Advocate General that the

respondent was not a "person employed" within the meaning of S.2(12) of the Act.

But, as that position was not conceded by the learned counsel for the respondent, the question was fully discussed by counsel on both sides. The

way in which the learned Advocate General tried to support his contention was to refer to the general scheme and the different kinds of substantive

provisions in the Act to show that an employee like the respondent before us could not have been in the contemplation of the legislature as one

entitled to the benefit of the provisions of the Act.

To use an expression in the recent parlance, the contention of the learned

Advocate General is that an employee like the respondent would not fall within the coverage of the Act, because he would not fall within any of the classes or categories of employees, to whom several provisions of the Act are properly applicable. Reference was made to analogous provisions in the Factories Act; but it may not be useful or permissible to determine one unknown in terms of another equally unknown.

There are undoubtedly several sections in the Act, which indeed form a substantial portion of the Act, but which are singularly inappropriate to an employee like the respondent. Section 14, for instance, lays down that no person employed in any establishment shall be required or allowed to work for more than eight hours in any day and forty eight hours in any week. The proviso to this section permits such person to be allowed to work for any period in excess of the limit fixed, subject to payment of overtime wages, if the period of work, including overtime work, does not exceed ten hours in any day and in the aggregate fifty four hours in any week.

Under Sec.14(2), no person employed in any establishment shall be required or allowed to work in such establishment for more than four hours in any day unless he has had an interval for rest of at least one hour. Sec. 15 prescribes a spreadover of periods of work. Chapter VI deals with holidays with wages, and Chapter VII with the payment of wages, deductions from wages and fines. Sec. 30 lays down that every employer shall fix periods, in respect of which the wages shall be payable.

These are called wage periods, and no wage period shall exceed one month. For overtime work, the rate is fixed at twice the ordinary rate of wages (sec. 31). Sec. 32 prescribes the time for payment of wages. Sec. 33 expressly provides that all wages shall be paid in current coin or currency notes or in both; that is to say, payment by cheque will not be valid. Sec. 35 deals with fines which may be imposed on any person employed for acts and omissions on this part such as may have been specified in the notice exhibited in the prescribed manner on the premises, in which the employment is carried on.

There is certainly great force in the contention of the Advocate General that it would be ridiculous to apply the provisions like the above to employees like the respondent. There is also force in his contention that the Act, like the sister Acts, namely, the Payment of Wages Act and the

Factories Act, is intended to apply only to employees who may be compendiously called ""wage-earners"", and none of these Acts was intended to

apply to persons paid at the higher income rates, who may be described as salaried employees of officers.

The term ""wages"" is, no doubt, defined in S.2(18) of the Madras Shops and Establishments Act as meaning all remuneration, capable of being

expressed in terms of money, which would be payable, whether conditionally upon the regular attendance, good work or conduct or other

behaviour of the person employed or otherwise, to a person employed in respect of his employment or of work done in such employment. In In

Re: K.V.V. Sarma, Manager, Gemini Studios, Madras, , a Division bench of this court, after an elaborate discussion of the English and Indian

decisions, have drawn a distinction between "wages" and "salary" in the following manner:

We have, on a construction of the present Act, already come to that conclusion. It seems to us that, in finding out whether a person employed

directly or through any agency in a manufacturing process is receiving wages, the question has to be determined with regard to the period for which

the amount is settled to be paid.

We are definitely of opinion that, if the remuneration is to be paid daily or weekly, it can be called wages. But, where it is monthly remuneration

payable on the last day of the month of after that date and where the remuneration, considering the general standards of payment, is fairly high,

then, it has to be understood as salary.

It is certainly difficult to describe a person like the respondent, who is a qualified Engineer, drawing a salary of about Rs.1,000, a month, as a

wage earner.

(4) The method pursued by the learned Advocate General is undoubtedly attractive. But we should not overlook the fact that the Act itself

expressly defines a ""person employed"" thus:

Person employed"" means--

(i) in the of a shop, a person wholly or principally employed therein in connection with the business of the shop;

(ii) in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such factory or undertaking;

(iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or

principally employed in connection with the business of the establishment, and includes a peon;

(iv) in the case of a restaurant or eating house, a person wholly or principally employed in the preparation or the serving of food or drink or in

attendance on customers or in cleaning utensils used in the premises or as a clerk or cashier;

(v) in the case of a theatre, a person employed as an operator, clerk, door keeper, usher or in such capacity as may be specified by the (State)

Government by general or special order;

(vi) in the case of an establishment not falling under paragraphs (I) to (v) above, a person wholly or principally employed in connection with the

business of the establishment, and includes a peon;

(vii) in the case of all establishments, a person wholly or principally employed in clearing any part of the premises; but does not include the

husband, wife, son, daughter, father, mother, brother or sister of an employer who lives with and is dependent on such employer.

(5) We presume that the appellant-company would fall within the category of S.2(12)(iii), or, in any event, of Sec.2(12)(vi). According to this

definition, the only fact to be ascertained is whether the respondent is a person wholly or principally employed in connection with the business of

the establishment. We find it impossible to hold that the respondent is not such a person. He is a person wholly employed in connection with the

business of the company; he is not a casual employee engaged to do any particular piece of work for the establishment under a specific contract.

It is not denied that the employee was on the permanent staff of the establishment. It is true that the definitions contained in S. 2 of the Act would

apply, ""unless there is anything repugnant in the subject or context"". But, that saving provision cannot be relied on by the learned Advocate

General, because, according to him, employees like the respondent would not fall within the purview of the Act altogether.

(6) Apart from employees drawing salaries and belonging to a higher class of employment, there are also other employees, like travelling

inspectors, to whom, by the very nature of their work, it would be absurd to

apply several of the provisions of the Act. Surely, it will be absurd to apply to a travelling inspector the provision relating to daily and weekly hours of work. He may have to travel in a train continuously for over 12 hours while going for performing his duties. But, having regard to the remuneration paid to such employees and the kind of work which they have to perform, it may be difficult to say that they are not persons employed within the meaning of the Act.

(7) In our opinion, the framers of the Act, who presumably were aware of the difficulty and inappropriateness of applying the provisions of the Act

to certain classes of employees, provided for exemptions to achieve the object of excluding them from the operation of the Act. Sec. 4 contains

such exemptions. Certain of the exemptions, no doubt, have been made in the public interests; for example, establishment under the Central and

State Governments, establishments in mines and oil fields.

Other exemptions are given, because of practical difficulties in applying the provisions of the Act and also because of the nature of such

establishments. Instances of these are establishments in places where fairs or festivals are held only temporarily. Employees, whose work involves

travelling, and persons employed as canvassers and caretakers are covered by clause (b) of S.4(1). Then, we come to the class of persons

described in clause (a) as "persons employed in any establishment in a position of management.

(8) The question-indeed, the main question-in this case is whether the respondent is a person who would fall within this class. Was he, when his

services were terminated, employed in a position of management? The learned Judge, Balakrishna Aiyar J., was clearly of the view that the

respondent did fall within this class. The correctness of this view was challenged by counsel for the respondent. The basis of the respondent's

counsel's argument was that no employee would ever fall within this class, unless he is performing managerial duties.

That would mean, in practice, that, for one establishment, probably, there may be only one or two-say, the General Manager and Deputy or

Assistant Managers. If we accept that basis, then, it would certainly follow that the decision of the Commissioner of Labour was right, because, the

respondent was not one of such officers. But we think that that is not the correct

legal position. There is an essential difference between managerial capacity" and "position of management". In this connection, reference may be made to the definition of "employer" in S.2(5) of the Act, which runs thus:

"employer" means a person owning, or having charge of, the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment.

(9) Obviously, though there may be one person acting in the general management or control of an establishment, there would be in a large establishment, several others who would be in management or control of particular departments of the establishment, or, particular classes of manual or clerical or lower class of employees. Though such employees would not fall within the definition of "employer" they would certainly fall within Sec.4(1)(a) of the Act, as being persons employed in position of management. The amount of pay or salary drawn may not be an absolute test.

There may be a skilled workman drawing a larger amount as remuneration than a branch manager in a small establishment. We are in entire agreement with the reasoning of Balakrishna Aiyar J., on this point and in his comment that the reasons given by the Commissioner of Labour are not correct or adequate. We are clearly of the opinion that the Commissioner of Labour made a mistake which went to the root of the case that no employee would fall within the class specified in S.4(1)(a), if such employee was subject to the overall supervision of a superior officer. In the present case, the respondent was subject to such supervision of the Operations Manager.

That fact, by itself, would not make the employee any the less a person employed in a position of management. The Operations Manager, who was examined before the Commissioner of Labour, gave an account of some of the duties of the respondent. His duty in regard to the people under him was supervision. He was responsible for carrying out construction of depots, petrol pumps, erection of tanks, and also maintenance and repair works for the various company's buildings, and other structures.

He had authority to spend to a maximum of Rs.2500 on budgeted jobs without reference to anybody else, and authority to spend to a maximum of

Rs.1000 even on unbudgeted items without reference to the Operations Manager. He was responsible for all the correspondence work in

connection with the construction work, including correspondence with the Government. He was the officer to engage casual labour and he was

responsible for taking disciplinary action against all those who were working under him. The general scheme of the staff in the central office of the company at Madras appears to be this.

There is at the head a manager. Under him, there are four departments, each under a departmental manager, namely, (1) Operations, (2) Sales, (3)

Accounts, and (4) Employee Relations. The respondent was working as an Operations Assistant under the Operations Manager. But the

Operations Assistant was in complete charge of the Depots. We have no hesitation in holding that, on the evidence on record, the respondent

would be a "person employed" in a position of management within the meaning of S.4(1)(a) of the Act.

(10) Balakrishna Aiyar J., though he practically agreed with the contentions raised on behalf of the appellant-company, yet, refused to quash the

orders of the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation because of two reasons: (1) that he was

bound by the decisions in 1956 2 Mad LJ 254 and T.P. Chandra Vs. The Commissioner for Workmen's Compensation, Madras and Another, ,

and (2) that there was no manifest error apparent on the face of the record. We have already dealt with the first reason which was not supported

even by learned counsel for the respondent.

As regards the second reason, we are clearly of the view that there is a manifest error of law--manifest on the face of his (Labour Commissioner's)

order--which would justify the issue of a writ of certiorari to quash the orders of the Commissioner of Labour and the Additional Commissioner for

Workmen's Compensation. The error of law is not merely one which relates to the merits of the dispute between the parties, namely, the validity of

the termination of the services of the respondent, but it is an error of law which goes to the root of the jurisdiction of the Additional Commissioner

for Workmen's Compensation.

If the respondent falls within the category of persons mentioned in Sec.4(1)(a) of the Act, then, the Act itself would not apply to such employee,

and the appeal under S.41(2) of the Shops and Establishments Act would itself be incompetent. Any order passed purporting to be under the provision, would be an order passed without jurisdiction.

(11) Certain early decisions of the Supreme Court were cited by learned counsel for the respondent, confining within narrow limits the jurisdiction

of the High Court to issue a writ of certiorari under Art. 226 of the Constitution, as for example, the decision in *Parry and Co. Ltd. Vs.*

Commercial Employees' Association, Madras, in which Mukharjea J. as he then was, observed thus:

No certiorari is available to quash a decision passed with jurisdiction by an inferior Tribunal on the mere ground that such decision is

erroneous..... It was conceded by Mr. Isaacs that, in spite of such statutory provisions, the superior court is not absolutely deprived of

the power to issue a writ, although it can do so only on the ground of either a manifest defect of jurisdiction in the Tribunal that made the order or

of a manifest fraud in the party procuring it.

It may be incidentally pointed out that, in that case, an application for the issue of a writ of certiorari was filed before the date of the Constitution.

The same learned Judge, Mukherjea J. observed thus in a later case, *T.C. Basappa Vs. T. Nagappa and Another*, .

Certiorari may and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the

nature of the subject matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted

or suffer from certain disability by reason of extraneous circumstances (vide *Halsbury*, 2nd Edn. Vol. IX, page 880).

When the jurisdiction of the court depends upon the existence of some collateral fact, it is well settled that the court cannot by a wrong decision of

the fact give it jurisdiction which it would not otherwise possess..... An error in the decision or determination itself may also be

amendable to a writ of certiorari, but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance

or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari, but not a mere wrong decision.

Venkatarama Aiyar J. dealt with the matter exhaustively in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, . One of the four

propositions, which, according to the learned Judge, emerge from the authorities, is thus laid down:

It may therefore be taken as settled that a writ of "certiorari" could be issued to correct an error of law. But it is essential that it should be

something more than a mere error it must be one which must be manifest on the face of the record.

This statement of the law was affirmed in a recent decision in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and*

Appeals, Assam and Others, , where B. P. Sinha J. as he then was, summed up the result of the authorities thus;

It is clear from an examination of the authorities of this court, as also of the courts in England, that one of the grounds on which the jurisdiction of

the High Court on certiorari may be invoked, is an error or law apparent on the face of the record and not every error either of law or fact, which

can be corrected by a superior court, in exercise of its statutory powers as a court of appeal or revision.

We think that, in the present case, there is such a manifest error of law on the face of the order of the Commissioner of Labour. The error of law is

this: that it is only when an employee is exercising managerial owners in relation to the Head Office of the Company where he was employed that

he can be said to be employed in a position of management within the meaning of S.4(1)(a) of the Act.

It is because of the approach from this erroneous point of view, based on a wrong construction of S.4(1)(a) of the Act, that the Commissioner of

Labour held that the respondent did not fall within the scope of S.4(1)(a) of the Act. In *R. V. Medical Appeal Tribunal; ex parte Gilmore*, 1957 1

QB 574, Denning L. J. explained the scope of interference by certiorari on the ground of an error in law thus:

It is now well settled that, when a tribunal come to a conclusion which could not reasonably be entertained by them if they properly understood

the relevant enactment, then, they fall into error in point of law; (see *Edwards v. Bairstow*, 1956 AC 14 : 1955 3 All ER 48). When the primary

facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to

warrant the intervention of this court by certiorari.

(12) Balakrishna Aiyar J. evidently thought that the question whether an employee fell within the ambit of S.4(1)(a) of the Act is a mere a question

of fact than a question of law; but, with respect to the learned Judge, we cannot agree. It is a question of law to be decided on proved facts, or, at

least a question of mixed fact and law (vide 1956 Ac 14). This court cannot certainly go behind the facts found by the Commissioner of Labour.

But, if, on the facts, the Commissioner of Labour makes a patent error of law, and, as a result of such error, the Additional Commissioner for

Workmen's Compensation entertains an appeal under S.41(2) of the Madras Shops and Establishments Act, we hold that this court has the

power to issue writs of certiorari to quash their orders.

(13) In the result, we allow the appeals and quash the aforesaid two orders of the Commissioner of Labour and the Additional Commissioner for

Workmen's Compensation. In the circumstances of the case, we make no order as to costs.

(14) Appeals allowed.