

(1960) 06 CAL CK 0020

In the Calcutta High Court

Case No : A.F.O.O. No. 180 of 1958 (Matter No. 1 of 1958)

Workmen of Kettlewell Bullen and Co. Ltd. and Another

APPELLANT

Vs

Kettlewell Bullen and Co. Ltd. and Others

RESPONDENT

Date of Decision : 23-06-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, 17(2), 2

Citation : AIR 1961 Cal 315 : 64 CWN 950 : (1960) 1 FLR 384 : (1961) 2 ILR (Cal) 35 : (1960) 2 LLJ 189

Hon'ble Judges : S.C. Lahiri, C.J;R.S. Bachawat, J

Bench : Division Bench

Advocate : A.C. Gupta, Sachin Das Gupta, S.K. Mukherjee and Manas Roy, for the Appellant; P.P. Ginwalla and J.N. Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Bachawat, J.—This appeal and cross-objection arise out of an order-passed by Sinha, J., under Article 226 of the Constitution. The litigation relates to an industrial dispute between Messrs. Kettlewell Bullen and Co Limited and their workmen.

2. The principal business of Messrs. Kettlewell Bullen and Co. Limited (hereinafter referred to as the company) is that of managing agents of other limited companies. The associated companies or concerns carry on business as manufacturers and sellers of jute textiles, cotton textiles and tea. The company as also the associated concerns have their registered and principal offices at premises No. 21 Strand Road in the town of Calcutta. The company maintains a clerical and subordinate staff at its office at No. 21 Strand Road.

3. The workmen of the company claimed payment of bonus for the year 1955 on the ground that the company made huge profits in 1955. This claim-was resisted by the company. An industrial dispute accordingly arose between the company and their workmen. By order dated 9-4-1957 the State Government acting u/s

10 of the Industrial Disputes Act 1947 referred the dispute relating to "bonus for 1955" existing between the company and its workmen represented by the Kettlewell Bullen Employees" Union to the Fourth Industrial Tribunal for adjudication. By another order dated 5-0-1957 the State Government corrected its previous order and stated that the workmen were represented in the dispute by the National Union of Commercial Employees also. Pursuant to the directions of the Tribunal the parties filed their respective statements. The Kettlewell Bullen Employees Union claimed a bonus amounting to three months" basic pay. The National Union of Commercial Employees claimed a bonus amounting to five months" wages inclusive of dearness allowance. Both the Unions claimed that all the 163 employees working at the head office of the company at premises No. 21 Strand Road and named in Ext. 4 were the workmen of the company.

The company disputed the claim for bonus as also the claim that all the employees working at No. 21 Strand Road were entitled to payment of bonus out of the profits of the company, the company maintained that only 84 persons named in Ext. 5 were its workmen and that the remaining 79 of the 163 persons named in Ext. 4 were the employees of the associated concerns of which the company was the managing agent. The company submitted that the claim for bonus by those 79 persons should be rejected. The company stated that the claim of bonus of individual employees should be determined on the basis of the profits made by the different concerns employing them and that as some of the managed concerns did not make any profit during the relevant year the claim of their respective employees could not be entertained. The company submitted that the Tribunal had no jurisdiction to grant bonus to a person working at 21 Strand Road who was not an employee of the company.

4. Oral and documentary evidence were adduced by the parties before the Tribunal. The Tribunal made its award on 26-9-1957. By its award the Tribunal pointed out that having regard to the defence of the company two issues arose, namely, (i) whether the employees of the company were entitled to any bonus for 1955 and (ii) whether all the employees employed at 21 Strand Road were the employees of the company.

5. On the first issue the Tribunal found that there was sufficient surplus profit for 1955 available for distribution as bonus after deducting the prior charges allowable under the Full Bench Formula. It was not disputed on behalf of the company that the existing rates of "wages had not reached the ceiling of living wages. Considering all the attendant circumstances, the Tribunal awarded that the claim of three months" basic pay as bonus was reasonable, and could be paid out of the surplus.

6. On the second issue the Tribunal, after meticulous and exhaustive consideration of the oral and documentary evidence on the record, came to the conclusion that all the 163 employees, who were employed at the head office of the company at 21 Strand Road, were the employees of the company and that the relationship of master and Servant was established between the company

and all the 163 employees. The Tribunal accordingly found and awarded that all the 163 employees mentioned in Ext. 4 were entitled to get bonus at the rate of three months' basic pay out of the profits for the year 1955.

7. On 15-1-1958, the company applied to this Court and obtained a Rule calling upon the respondents to show cause why a Writ in the nature of Certiorari should not be issued to quash and set aside the award in so far as it pretended to decide that all the persons working at 21 Strand Road, Calcutta were employees of the applicant company. In the petition the company alleged that the Tribunal acted without jurisdiction in making the impugned award in so far as it decided that all the persons working at 21 Strand Road were the employees of the applicant company. The company alleged that assuming that the Tribunal had jurisdiction to decide the question there was no evidence before it upon which it could so decide, that the Tribunal failed to appreciate that the question whether a particular person was or "was not an employee of the company could only be decided upon evidence relating to that person's particular contract of employment and could not be decided upon alleged general principles which the Tribunal had pretended to apply, the company submitted in the alternative that the award was erroneous in law upon the face of it. These allegations and submissions were disputed by the respondents.

8. The application came up for hearing before D. N. Sinha, J. By his judgment and order dated 30-5-1958, Sinha, J., noted that the first objection of the company was that the second issue, namely, whether all the employees employed at 21 Strand Road were the employees of the company was not within the scope of the reference at all. Referring to this objection Sinha, J., ruled that he should not then decide that point and that the point might be dealt with at some other appropriate stage. He examined the propriety of the finding of the Tribunal on the second issue. He was unable to agree with the finding on that issue with regard to 76 employees. By his order dated 30-5-1958, he quashed and set aside that part of the award which dealt with those 76 employees and the finding of the Tribunal in so far as it affected them and directed that the proceedings should go back to the Tribunal so that the Tribunal might complete the record by taking evidence and then decide the matter according to law. Both parties are dissatisfied with this judgment. The workmen represented by the two Unions have preferred this appeal and have contended that the learned Judge ought to have discharged the rule and ought not to have issued any writ in the matter at all. On the other hand the company has preferred the cross-objection and has contended that the learned Judge should have held that the Tribunal had no jurisdiction at all to decide the issue whether or not all the persons employed at 21 Strand Road, Calcutta were the employees of the company and that he should have quashed the award wholly so far as it decided that issue, and that he erred in directing that the matter should go back to the Tribunal.

9. The controversy in this case relates to the second issue decided by the Tribunal. Only the workmen of the company were entitled to the bonus and a

question arose whether all the persons working at the head office of the company at 21 Strand Road were the workmen of the company and as such entitled to the bonus. The Tribunal decided this question in the affirmative.

10. In support of his cross-objections Mr. Ginwalla contends that the learned Judge should have pronounced on the objection as to the jurisdiction of the Tribunal instead of leaving it open for future decision. This contention appears to be correct. The objection as to jurisdiction raises pure questions of law & it can and should be decided on the present application. If the Tribunal has no jurisdiction to determine the second issue the further questions whether its award on that issue is defective or erroneous and whether the matter should be sent back to the Tribunal do not arise.

11. Mr. Ginwalla contends that the question whether all the persons working at the office of the company at 21 Strand Road were the workmen of the company and as such were entitled to the bonus was not referred to the Tribunal by the order dated 9-4-1957 and consequently the Tribunal has no jurisdiction to decide the second issue. I am unable to accept this contention.

12. This contention raises a question of construction of the order of reference. The order dated 9-4-1957 referred the dispute relating to the "bonus for 1955" existing between the company and its workmen. The reference was particular in the sense that only the dispute relating to the bonus for 1955 was referred. But the reference was general in the sense that all disputes relating to the bonus for 1955 was referred. The particular disputes relating to the bonus which existed between the company and the workmen were not mentioned. But the reference need not specify the precise dispute, see *State of Madras Vs. C.P. Sarathy and Another*, . By Rule 13 of the Bengal Industrial Disputes Rules 1947, the Tribunal is empowered to ask the parties to state their respective cases. The parties "were accordingly asked to file their statements of case. The statements so filed crystallise all the disputes between the parties relating to the bonus for 1955, see *J.K. Iron and Steel Co. Ltd., Kanpur Vs. The Iron and Steel Mazdoor Union, Kanpur*, . They show that one of the disputes relating to the bonus for 1955 was whether all the persons working at the office of the company at 21 Strand Road were its workmen and as such entitled to the bonus. The disputes so raised is a dispute relating to the bonus for 1955 and the Tribunal was competent to adjudicate upon that dispute.

13. If there were no dispute between the parties as to the persons who, as workmen of the company, "were entitled to the bonus, the Tribunal could make an award in general terms providing that all the workmen of the company were entitled to a bonus at a certain rate. But if such a dispute arose the Tribunal could decide who the workmen "were and as such entitled to the bonus. The Tribunal could not provide for payment of bonus only to the 84 persons named in Ext. 5 without deciding that no other person was entitled to the bonus. The

Tribunal could not award bonus to a section of the "workmen of the company, see *Burn and Co., Calcutta Vs. Their Employees*, .

14. I should notice one other point in this connection. The company submitted before the Tribunal that the Tribunal had no jurisdiction to grant bonus to any person who was not its workman, but it never raised any objection that the Tribunal had no jurisdiction to decide who its "workmen were. On the contrary it invited the Tribunal to decide that question and adduced oral and documentary evidence on that point. Though the objection as to the jurisdiction is based on a pure point of law, the omission to raise that objection before the Tribunal is good ground for refusing to entertain, that objection in an application for a writ or order in the nature of certiorari, see *Lakshmanan Chettiar v. Corporation of Madras* ILR 50 Mad 130 : (AIR 1927 Mad 130) ; *Mannarghat Union Motor Services Ltd., Mannarghat, South Malabar Vs. Regional Transport Authority, Malabar and Others*, , *Pannalal Binjraj Vs. Union of India (UOI)*, . If the objection were raised before the Tribunal, the workmen might have obtained an order from the State Government referring the particular issue to the Tribunal for adjudication. The company took the chance of an award by the Tribunal in its favour and it cannot now turn round and contend that the Tribunal had no jurisdiction to decide the issue.

15. Mr. Ginwalla next contends that assuming that the order dated 9-4-1957 pretended to refer the dispute as to the persons who were the workmen of the company and as such were entitled to the bonus, the State Government had no power to refer that question to the Tribunal u/s 10 of the Industrial Disputes Act. He contends that the dispute raised by the second issue is not an industrial dispute. There is no substance in this contention. Bonus is a distinct head of industrial dispute mentioned in item No. 5 of the third schedule to the Industrial Disputes Act, 1947. The dispute relating, to the bonus for 1955 is a dispute between the company and its workmen connected with "the terms of employment..... of any person" and is an industrial dispute within the meaning of Section 2(k) of the Industrial Disputes Act 1947. The reference of the dispute is competent, though there is also an incidental dispute "whether the persons claiming the bonus are workmen or not, see *South India Estate Labour Relations Organisation Vs. The State of Madras and Others*, . It should also be noticed that this objection was not taken either in the petition or in the court below.

16. Mr. Ginwalla contends that the second issue raised questions of contractual rights, questions whether the company had entered into contracts of employment with the 79 persons. Relying upon the observations of the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works* 1949 AC 134 referred to by the Supreme Court in *Niemia Textile Furnishing Mills Ltd, v. Second Punjab Tribunal*. 1957 SCA 646 at p. 656: ((S) AIR 1957 SC 329 at p. 337) he contends that the industrial court is not the proper forum for the adjudication and determination of the contractual rights. There is no substance in this contention. The first answer to this contention is that in the instant case the

workmen do not seek to enforce contractual rights, They claim an industrial bonus not on the basis of contractual rights but on the basis of industrial law and socio-economic justice. Such a claim can be enforced only by an industrial court. If, for the purpose of deciding the claim, it is necessary to determine "whether the company employed certain persons, the Tribunal has the power and the duty to determine that question. The Tribunal can determine all incidental questions involved in the determination of the industrial dispute. The second answer is that the Industrial Tribunal can decide industrial disputes involving contractual claims, see *Ispahani Ltd., Calcutta Vs. Ispahani Employees' Union*, and *Titaghur Paper Mills Co. Ltd. Vs. Its Workmen*, .

17. The preliminary point that the Tribunal had no jurisdiction to decide the second issue therefore fails.

18. In support of the appeal Dr. Gupta argues that the finding of the Tribunal on the second issue is a finding of fact and that the learned Judge had no jurisdiction to interfere with that finding in his supervisory jurisdiction under Article 226 of the Constitution.

19-20. The Tribunal found that the relationship of master and servant existed between the company and the employees mentioned in Ext. 4 and on that finding awarded that all those employees were entitled to get bonus at the rate of three mouths" basic pay. (His Lordship considered the, evidence and proceeded.)

In my opinion there was sufficient evidence on the record upon which the Tribunal could come to that conclusion.

21. The finding that all the employees working at 21 Strand Road were the employees of the company is a finding of fact, see *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, , *Sri Sita Ram Sugar Mills Ltd., Baitalpur, District Deoria (U.P.) and Deoria Sugar Mills Ltd., Deoria (U.P.) Vs. Their Workmen*, . Sinha, J., himself treated that finding as a finding of fact. Sinha, J., however, came to the conclusion that he was entitled to interfere with that finding. He agreed with the conclusion of the Tribunal that three of the 79 employees mentioned in Ext. 4 viz; Amarendra Nath Mitra, Soumendra Nath Sen and Anath Nath Ghosh were the employees of the company. He was however not inclined to agree with its conclusion with regard to the remaining 76 employees. He observed: "The Tribunal has taken some evidence and upon this has come to the conclusion that these 76 persons are also employed by the petitioner company. In my opinion, not only is the conclusion not justified, but it is not supported by the evidence on record, which in my opinion, is entirely incomplete". He also observed. "In my opinion, the reasons and the conclusions are erroneous on the face of it. Some of the reasoning, as I have pointed out above, cannot be followed at all, and the conclusions, in my opinion, are not warranted. The evidence, as I have said, is wholly incomplete and I cannot say that the record is such that such a conclusion is possible. The question therefore is whether, under the circumstances, it is possible to set aside this order.

Undoubtedly it involves questions of fact but they are facts which have to be gathered from the evidence given, and it appears to me that that the evidence is incomplete and the reasoning is erroneous and the conclusions are not warranted. A finding of fact just as much as a finding of law can be found to be erroneous on the face of the record and quashed by a writ of certiorari".

22. The reasons given by the learned Judge do not justify an interference "with the finding of the Tribunal, (a) The learned Judge thought that the conclusion was not justified by the evidence on the record and that the evidence was consistent with the employment of the 79 employees by the managed concerns. In my opinion it was open to the Tribunal to conclude that the evidence was more consistent with the employment of those 79 employees by the company on its own behalf, (b) The learned judge thought that the evidence was incomplete and that a conclusion was not possible on the state of the record and that the matter should go back so that the Tribunal could complete the record by taking, evidence. In my opinion it was open to the Tribunal to come to the conclusion on the record as it stood. The parties had full opportunities to adduce whatever evidence they desired to produce before the Tribunal, (c) The learned Judge thought that it was difficult to understand the meaning of the following observation of the Tribunal. "The attendance registers being separate for separate departments show that all the employees are under the establishment of Kettlewell Bullen and Co, Limited". The observation is somewhat cryptic. But I think that the Tribunal recorded the finding that there were separate attendance registers for separate departments of the company. The Tribunal took this fact into account in holding that all the employees were under the establishment of the company. The learned Judge looked at the attendance registers and found that the names of the employees were tabulated under the separate names of the managed concerns. But the fact remains that separate books were kept for separate departments of one establishment and not for the alleged separate establishments of the different managed concerns, (d) The learned Judge observed that "the most important test In order to ascertain whether a particular employee is an employee of the managing agents or of the associated companies is to find out as to who pays his wages"*. He also observed that "until it is shown, that they are being paid out of the coffers of the managing agent, it cannot be said that they are employees of the managing agent". I am unable to agree with these observations. A person may be the servant of another though a third party pays him his wages or though several third parties make proportionate contributions towards his wages, see, Sri Sita Ram Sugar Mills Ltd., Baitalpur, District Deoria (U.P.) and Deoria Sugar Mills Ltd., Deoria (U.P.) Vs. Their Workmen, . The Tribunal took into consideration the relevant facts and came to the conclusion that the fact that the pays of some of the employees were debited to more than one managed concern was not sufficient to disprove the relationship of master and servant between the company and those employees, (e) The learned Judge observed that

"the institution of managing agents is so "widespread in Calcutta and West

Bengal that it would be disastrous if the employees of the associated companies are held to be the employees of the managing agents. If this is so held, the managing agency system would soon disappear".

This observation assumes that the 76 employees were not the servants of the managing agents. But as a matter of fact the Tribunal has found that those employees were the servants of the managing agents. The finding is confined to the particular facts of the case. It does not enunciate any general principle subversive of the institution of managing agency. If the finding is correct there is no scope for any apprehension of disaster to the managing agency system. On the facts of a particular case it is open to the Tribunal to find that the employee working at the head office of a company carrying on managing agency business are the servants of the company notwithstanding the fact that the salaries are contributed proportionately by the managed companies, sec (1960) 1 Lab LJ 558 (SC).

Mr. Ginwalla argued that the en masse determination of the question whether or not the 70 employees were employed by the company is erroneous. He submits that the question whether a particular person was or was not an employee of the company could only be decided upon evidence relating to that person's particular contract of employment and could not be decided upon general principles. This point was not taken by the company before the Tribunal. Though taken in the petition, the point does not appear to have been urged before Sinha, J. Both parties appear to have proceeded before the Tribunal on the footing that the question of employment of the 79 individuals involved common Questions of fact. In the circumstances the Tribunal could lawfully decide on the evidence common to all that each of them was employed by the company. The question whether the agarias were employed by the salt manufacturing company was decided as a collective question in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, . Again the question whether a certain term as to bonus became implied in the contract of employment of all the employees was considered and answered collectively in Ispahani Ltd., Calcutta Vs. Ispahani Employees" Union, and Titaghur Paper Mills Co. Ltd. Vs. Its Workmen, .

23. The learned Judge treated the finding on the second issue as a finding on a question of fact which the Tribunal had jurisdiction to decide finally; nevertheless he was of the opinion that a finding of fact found to be erroneous on the face of it can be quashed by a writ of certiorari. I am unable to share this opinion.

24. It is now well settled that that the High Court has no power under Art 226 of the Constitution to quash by a writ of certiorari an error of fact even though the error may be apparent on the face of the record, Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, . By the express words of Sub-section (2) of Section 171 of the Industrial Disputes Act, 1947, the award of the Tribunal is final. There is no right of appeal to the High Court. In the exercise of its supervisory jurisdiction, the High Court cannot convert itself into a court of appeal and correct errors of fact, errors in the

appreciation of oral and documentary evidence and errors in drawing inferences or omission to draw inferences. The Queen v. James Bolton 1958 SCR 1240 , Prem Singh and Others Vs. Deputy Custodian General, Evacuee Property and Others, . In Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, the Supreme Court observed,

"The Court Issuing a writ of "certiorari" acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior court were to re-hear the, case on the evidence, and substitute its own findings in "certiorari"."

25. But Mr. Ginwalla raises a new contention in this Court. He contends that the disputed fact whether the 79 employees were the servants of the company is a collateral fact upon the existence of which the jurisdiction of the Tribunal to award bonus to those employees depends and that consequently the court can review the finding of the Tribunal with regard to the collateral fact and decide whether the Tribunal had assumed jurisdiction which it did not otherwise possess by giving a wrong decision on the collateral fact. This contention raises the question of the limits of the powers of the High Court in proceedings for certiorari in relation to the findings of the Tribunal on a question of jurisdictional fact

26. In Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, , disputes arose between a company engaged in the manufacture of salt and the agarias working in the salt works of the company as to the conditions under which the agarias should be engaged by the company. The State Government referred the disputes to the Industrial Tribunal, Saurashtra State, Rajkot, for adjudication. The company took the preliminary objection that the status of the agarias was that of independent contractors and not of workmen and that the State was not competent to refer the dispute u/s 10 of the Act. The Tribunal held that the agarias were workmen within the meaning of the Act and that the reference was intra vires. The finding of the Tribunal was challenged by an application under Arts. 226 and 227 of the Constitution. The Saurashtra High Court held that the question whether the agarias were workmen was a collateral fact and that though the Tribunal must decide as to the collateral fact in the first instance, the superior court could upon certiorari enquire into the correctness of the decision and could quash the proceedings of the Tribunal if the decisions was erroneous or at any rate if there was no evidence to support it. The High Court then examined the finding of the Tribunal and decided that the finding that the agarias "were the workmen employed by the company was correct. The decision of the High Court is reported in Dharangadhra Chemical Works Ltd. v. State of Saurashtra AIR 1955 Sau 33. The Supreme Court dismissed the appeal preferred by the company from this decision. Before the Supreme Court it was urged on behalf of

the agarias that the question as regards the relationship between the company and the agarias was a pure question of fact, that the Tribunal had jurisdiction to decide that question and that the High Court exercising its jurisdiction under Arts. 226 and 227 was not competent to set aside the finding of fact recorded by the Tribunal. Bhagwati, J., delivering the judgment of the Supreme Court said that there was considerable force in this contention. He observed "It is equally well settled that the decision of the Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless at the least it is shown to be fully unsupported by evidence". He rules that there were materials on the record on the basis of which the Tribunal could come to the conclusion that the agarias were not independent contractors but were workmen within the meaning of the Act.

27. The judgment of Devlin, J., in *R. v. Fulham Hammersmith and Kensington Rent Tribunal; Ex Parte Zerek* (1951) 1 All ER 482, contains a lucid statement of the practice of the English Courts in proceedings for orders of certiorari in relation to the findings of an inferior Tribunal on a question of a collateral fact upon the existence of which its jurisdiction depends. If a collateral fact is in dispute the inferior court must hold an enquiry and must give its own decision on the merits of that dispute. If this decision is challenged on certiorari the superior court is generally content to act on the materials disclosed at the enquiry before the Tribunal. The court interferes if there is a plain excess of jurisdiction. "Where the question of jurisdiction turns upon disputed questions of fact the court generally declines to interfere. The remedy of certiorari is not designed to raise issues of fact to be determined *de novo* by the superior court. The court "will interfere if there is no evidence to support the decision. But the court will not look into the evidence to see if the decision is, on the balance of evidence, right or not. In the instant case there is sufficient material on the record upon which the Tribunal could come to the conclusion that the 79 employees were the servants of the company. The finding of the Tribunal is fully supported by the evidence on the record. The court therefore ought not to interfere with the finding of the Tribunal on the second issue.

28. Mr. Ginwalla relied upon the decision in *Mcleod and Co. Vs. Sixth Industrial Tribunal, West Bengal and Others*, . That decision is distinguishable. It is sufficient to say that there the learned Judge found that the decision of the Tribunal as to the collateral fact, far from being supported by the evidence, "was plainly contradicted by the Tribunal's own finding.

29., In my opinion the decision of the learned Judge that the finding of the Tribunal on the second issue should be quashed, cannot be sustained. The appeal should therefore be allowed and the order of the learned Judge should be set aside.

30. I propose that the following order be passed.

31. The appeal be and is hereby allowed, and the decision and Order of Mr. Justice Sinha be set aside and the Rule obtained by the respondents on the 6th January, 1958 be discharged.

32. The cross-objections be and is hereby dismissed.

33. Each party do pay and bear his own costs both here and in the court below.

Lahiri, C.J.

34. I agree.