(1958) 12 CAL CK 0014

Calcutta High Court

Case No: A.F.O.O. No. 126 of 1958 (Matter No. 67 of 1957)

B.N. Elias and Co. Private Ltd. and others		APPELLANT
	Vs	
G.P. Mukherjee and others		RESPONDENT

Date of Decision: Dec. 24, 1958

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10(1), 10(4), 12, 12(5), 18

Citation: AIR 1959 Cal 339 : 63 CWN 347

Hon'ble Judges: K.C. Das Gupta, C.J; R.S. Bachawat, J

Bench: Division Bench

Advocate: P.P. Ginwallas, for the Appellant;Sanat Mukherji for Respondents, for the Respondent

Judgement

R.S. Bachawat, J.

This appeal arises out of writ proceedings relating to an industrial dispute between the employers B. N. Elias and Company, Private Limited, and associated concerns and their workmen represented by B. N. Elias and Co. Ltd. Employees Union. B. N. Elias and Company, Private Limited, has, at all material times been a member of the Bengal Chamber of Commerce and Industry. Most of the members of the Bengal Chamber of Commerce and Industry adopted model terms of service for their clerical and subordinate staff calculated with reference to the middle class cost of living index. In 1948 industrial disputes between numerous concerns including the appellants and the workmen were referred to the Mercantile Tribunal. The award of the Mercantile Tribunal is dated the 17th February, 1949. Under that award the grade of the subordinate staff was Rs.30 - 1 - 40 - E.B. - 1-50 and the dearness allowance as existing under the Bengal Chamber of Commerce scheme was maintained. The Mercantile Tribunal proceeded on the principle that the minimum total emoluments should be Rs.60/- out of which at least Rs.30/- should be the basic wages and directed that the minimum basic wages of a member of the subordinate

staff should be pulled up to Rs.30/- by deducting such amount from the dearness allowance as was required to make up the deficiency in the basic wages, provided the total emoluments were not below Rs.60/-. After the expiry of the period of the operation of this award, the Bengal Chamber of Commerce recommended to its members that the dearness allowance of the subordinate staff should be linked with the rise and fall in the working-class cost of living index instead of the middle-class cost of living index. Thereupon, certain adjustments having been made pursuant to this recommendation the workmen raised disputes. By an order dated the 30th August 1955, the Government referred to the Industrial Tribunal the industrial disputes between the appellants and their workmen regarding inter alia, ''fixation of grades and scales of pay of all categories of workmen including clerks, typists, stenographers, telephone and dictaphone operators, subordinate staff etc.'' The Industrial Tribunal by its award dated the 29th March, 1956, did not make any change with regard to the grade and scale of pay of the subordinate staff, holding that no revision was called for at that stage. Both workmen and employers appealed from this award. By its decision dated the 18th September, 1956, the Appellate Tribunal rejected the appeal of the workmen with regard to their demands relating to the subordinate staff observing that their total emoluments were quite satisfactory and did not call for any revision or interference. The Appellate Tribunal however modified the award with regard to certain other matters and accordingly by section 16 of the Industrial Disputes (Appellate Tribunal) Act the decision of the Appellate Tribunal is deemed to be substituted for the award of the Industrial Tribunal and has effect for all purposes in the same manner and in accordance with the same law under which the award was made.

2. Subsequently, the workman represented by the respondent No.2 raised disputes with regard to the dearness allowance of the subordinate staff. In April 1956, the Assistant Labour Commissioner called for a conference in which the representatives of B. N. Elias and Company Private Limited and their workmen were invited to attend. There was a conference as called for. By a letter dated the 1st June, 1956, the Assistant Secretary to the Government of West Bengal informed the respondent No.2 that the dispute had been enquired into and that it appearing that the subordinate staff were well paid, the dispute did not deserve further intervention at this stage. In spite of this letter, we find that the Government by its order dated the 19th December, 1956 referred to the Second Industrial Tribunal the following disputes between B. N. Elias and Co. Ltd. and its associated concerns and their workmen.

"(1) What should be the scale of dearness allowance of the subordinate staff?

(2) In the event of any change in the existing rate, whether the subordinate staff should be paid the same with retrospective effect from the 19th September, 1950, i.e. the date from which they were governed by the working class cost of living index?"

The employers thereupon lodged objections before the Tribunal questioning the order of reference and the jurisdiction of the Tribunal to proceed with the reference. By its order dated the 21st February, 1957, the Tribunal overruled those objections and decided that the reference was lawful and valid and that the Tribunal had jurisdiction to adjudicate on the issues and to make an award thereon. Thereupon on the 17th April 1957, the appellants made an application and obtained a rule nisi or the issue of appropriate writs of certiorari prohibition and mandamus so that the Tribunal might be restrained from further proceeding with the reference. On the 21st February, 1958,Sinha J. discharged the rule nisi and dismissed the application. This appeal has been preferred from this order of dismissal.

3. Mr. Ginwalla appearing on behalf of the appellant contends that the order of reference dated the 19th December 1956 is arbitrary, capricious and mala fide and in abuse of the powers conferred by the Industrial Disputes Act, 1947, and as such a nullity.

4. At one stage the Government had expressed in writing its definite opinion that the dispute relating to dearness allowance did not deserve further intervention. That opinion was expressed after hearing the parties. It appears that the Government subsequently changed its opinion and on the 1st June, 1956 (sic. 19.12.1956?) made an order of reference. The record does not disclose the reason why the Government made the order. It is curious that the Government did not consult or hear the appellants before changing its opinion. The Government would have acted wisely, if it had heard both parties again before proceeding to make the order of reference. I am, however, unable to hold that the charge of mala fides is established. It is now well settled that the order of reference u/s 10(1) of the Industrial Disputes Act is an administrative act and that the expediency of making a reference is a matter entirely for the Government to decide: see State of Madras Vs. C.P. Sarathy and Another, . The Government is not bound to give notice to the parties or to hear them before making the order of reference. The single fact that the Government at one point of time expressed an opinion that a reference was not necessary does not show that the Government acted mala fide. No ulterior motive is either alleged or established.

5. There was some suggestion that the previous decision not to refer, and communicated to the parties by the letter dated the 1st June 1956, was made u/s 12(5) of the Industrial Disputes Act on the conclusion of conciliation proceedings. The petition, however, does not allege that there were any conciliation proceedings as contemplated by Section 12. Sinha, J. has rightly observed that he found nothing on the record to come to the conclusion that there were any formal conciliation proceedings. There is also no doubt that the initiation of conciliation proceedings is not an essential preliminary to the making of an order of reference u/s 10(1).

6. Mr. Ginwalla next contended that the dispute now referred having been determined by the award made on the previous reference was not capable of being

an industrial dispute during the period of operation of that award and as such the present order of reference is invalid. He further referred is barred by principles analogous to res judicata and as such the Tribunal has no jurisdiction to proceed further with the reference. These contentions require consideration.

7. Section 10(1) of the Industrial Disputes Act empowers the Government to refer an industrial dispute or any other matter appearing to be connected with or relevant to the dispute to an Industrial Tribunal for adjudication. By Section 10(4) the Tribunal must continue its adjudication to the points of dispute specified in the order of reference and matters incidental thereto. By Section 2(b) as it stood at the material time an award means an interim or final determination of any industrial dispute or of any question relating thereto. By Section 18 an award which becomes enforceable is binding on all parties to the industrial dispute. By Section 19(3) ordinarily an award remains in operation for a period of one year. By Section 19(6) notwithstanding the expiry of the period of the operation the award continues to be binding until the expiry of a period of two months from the date of the notice by any party intimating its intention to terminate the award. In spite of the repudiation of the award u/s 19(6) the adjudication made by the award is on general principles of res judicata binding on the parties in the absence of change of circumstances: See Burn and Co., Calcutta Vs. Their Employees, .

8. Now, the present reference was made while the award and the decision made on the previous reference were in operation. The previous award and decision was then fully binding on the parties. If it can be shown that the matters now referred are concluded for the present by a binding and operative award the Tribunal will be precluded from considering and deciding those matters. The Tribunal has decided that it has jurisdiction to consider and decide the matters now referred. If that decision is shown to be clearly erroneous it may be quashed by a writ in the nature of certiorari and a consequential writ in the nature of prohibition will then follow because the Tribunal cannot assume a jurisdiction which it does not possess by coming to a wrong conclusion on a point of law. Moreover if it can be shown that the matters now referred were substantially referred by the previous order of reference it may well be argued on the strength of the decision in British India Corporation v. Industrial Tribunal, Punjab, (S) AIR 1857 SC 354, that there is no industrial dispute which can be said to arise or which may be referred during the period of operation of the previous award and as such the present order of reference is invalid.

9. It is common case before us that a dispute as to fixation of grades and scales of pay and a dispute as to the scale of dearness allowance are not identical or substantially identical disputes. The Tribunal empowered to fix grades and scales of pay could fix the basic pay but not the dearness allowance. It is not possible to say that the matters now referred were not or could not be industrial disputes or that the present order of reference is ultra vires and without jurisdiction.

10. It is still argued that the question of the scale of dearness allowance is a matter incidental to the fixation of grades and scales of pay and that the Tribunal acting under the previous order of reference was competent to determine and has in fact determined that incidental question. It is necessary to examine this contention.

11. The Appellate Tribunal by its order dated 18.9.1956, observed with regard to the claim of the subordinate staff as follows:

"As for the subordinate staff, we consider that their total emoluments are quite satisfactory and does not call for any revision.

x x x x

The total emoluments of the members of the subordinate staff are substantially at par with those of the subordinate staff employed in the commercial establishments in the neighbourhood. This does not call for any interference."

The Appellate Tribunal also noticed an argument of Sri N. De, counsel for the workmen, that "the deduction made from the dearness allowance payable to the subordinate staff to make up the deficiency in the basic wages below Rs.30/- should be restore." The Second Industrial Tribunal by its award dated 29.3.1956 had also observed:

"In regard to the grade of the subordinate staff the present scale of basic wage as fixed by the Mercantile Tribunal viz., Rs.30-1-40-E.B.-1-50 is paid by the present company and appears to be fair and adequate. With the dearness allowance of Rs.49/-, the minimum emoluments of the subordinate staff come to Rs.79/- which compare favourably with those of the comparable concerns in and around Calcutta. The revision of the scales of pay on the lines suggested by the Union will have serious repercussions on the other concerns in the locality. Accordingly that should be avoided at present. So, no revision of the wage scales of basic salaries of the subordinate staff is called for at this stage."

Having regard to these observations, it is urged that the Appellate Tribunal, as also the Second Industrial Tribunal has already adjudicated upon and determined all matters in dispute between the parties regarding the total emoluments of the subordinate staff including their dearness allowance.

12. The specific claims of the workmen were set out in their written statements which were filed by them before the Second Industrial Tribunal. From the summary of the written statements noticed in the award of the Second Industrial Tribunal and the decision of the Appellate Tribunal, it appears that the Union demanded revision of grades and scales of pay for the clerical staff as well as for the subordinate staff and for fixation of the basic pays. The specific demand regarding subordinate staff was that "they should be given a grade with Rs.30/- and Rs.100/- as minimum and maximum spread over thirty years with annual increments in three stages of 10 years each at Rs.2/-, Rs.3/- and Rs.4/- in the 1st, 2nd and 3rd stage respectively.

13. The specific dispute as to the dearness allowance was not referred by the previous order of reference. The workmen did not make any specific claim as to dearness allowance in their written statement. No specific issues as to dearness allowance was before the Tribunal in the previous reference. The question of dearness allowance was not directly and substantially in issue in the previous proceedings.

14. No doubt, in the previous proceedings the Tribunal gave due regard to the existing d. and total emoluments in coming to the conclusion that the existing grade and scale of basic pay ought not to be revised. The Tribunal seems to have considered that the existing dearness allowance neutralized the deficit in wages. The sufficiency or insufficiency of the dearness allowance was, however, not directly in question and was not directly considered by the Tribunal. No doubt, the Tribunal observed that the existing total emoluments did not call for any revision. In making those observations, the Tribunal was not giving any award with regard to the dearness allowance. Neither the award of the Second Industrial Tribunal nor the decision of the Appellate Tribunal directed that the existing dearness allowance was either to be increased or decreased or to be maintained. In spite of the award and the decision, it was open to the appellants to decrease the scale of the existing dearness allowance. Considering the matter as a whole, I have come to the conclusion that the observations in the award of the Second Industrial Tribunal and in the decision of the Appellate Tribunal with regard to dearness allowance are more expressions of opinion and are not their decisions. Those observations cannot be said to be an award or determination of the dispute relating to the dearness allowance.

15. In the previous proceedings the Tribunal was bound to confine its adjudication to the points of dispute specified in the previous order of reference and matters incidental thereto. The dispute as to the dearness allowance was certainly not a point in dispute specified in the previous order of reference. It is difficult to say on the materials on the record that the question of dearness allowance was a matter incidental to the points of dispute specified in the previous order of reference. Sinha, J. has held that if the Tribunal acting under the order of reference dated 30.8.1955, laid down the scale of dearness allowance payable, it would have exceeded its terms of reference. It is difficult to say that he is wrong in coming to this conclusion.

16. Stress was laid by Mr. Ginwalla upon the argument advanced by Mr. N. De, counsel for workmen, before the Appellate Tribunal that the deduction from the dearness allowance to make up the deficiency in the basic wages below Rs.30/- should be restored. This argument was not accepted by the Appellate Tribunal. The award of the Second Industrial Tribunal with regard to the grade and scale of pay of the subordinate staff was maintained. The argument of Mr. N. De advanced before the Appellate Tribunal was of course, on the face of it, untenable. The dispute

relating to dearness allowance had not been referred to the Tribunal nor had the workman made any claim for dearness allowance in the written statement. The claim regarding dearness allowance not having been made before the Second Industrial Tribunal, clearly the Appellate Tribunal could not give any relief on that point. I am unable to say that the matter of dearness allowance was directly or substantially in issue before either the Second Industrial Tribunal or the Appellate Tribunal.

17. In the circumstances, I have come to the conclusion that it is not shown that the matters in dispute in the present reference are concluded by the previous reference and the award and decision made thereon. It has not been shown to our satisfaction that the decision of the Second Industrial Tribunal in the present reference on the preliminary point is erroneous. It is not shown that there is any patent error on the face of the record or that the Tribunal has wrongfully assumed a jurisdiction which it does not possess.

18. In these circumstances, the appeal must fail. I am, however, bound to observe that much of the difficulty in the present reference has arisen, because of the fact that the in the previous reference the Government had referred only the questions of grade and scale of pay. It is desirable that piecemeal reference of allied disputes should be avoided. Had the Government referred the dispute as to both the basic scale of pay and the dearness allowance by the same reference, multifarious references and multiplicity of proceedings would have been avoided.

19. The appeal is dismissed. The parties will bear their own costs of the appeal.

20. K. C. Das Gupta, C.J. : I agree.

21. I wish only to repeat what my Lord has already said about the desirability of the proper authority taking care at the time of making references that the entire dispute is referred. It is difficult to understand how when the Government thought it fit to refer the dispute as regards the pay structure, they could persuade themselves that there was no dispute regarding dearness allowance which required also to be referred. If proper care had been taken in making a full reference on all the points in dispute, both the employer and the employee would have been spared unnecessary expense and anxiety.

22. I agree in the order proposed by my Lord.