CALCUTTA HIGH COURT

Pankaj Kumar Ganguly

Vs.

Bank of India

A.F.O.O. No. 144 of 1954

(Chakravartti, C.J. and Sarkar, J.)

17.04.1956

JUDGMENT

Chakravartti, C.J.

1. The only question involved in this appeal is whether Sinha, J., was right in quashing by a writ of certiorari an order of the Labour Appellate Tribunal on the ground that the Tribunal had no jurisdiction to entertain the appeal in which the order had been made and had wrongly decided that it had such jurisdiction. The appellants contended that in so quashing the Tribunal's order, the learned Judge had himself assumed a jurisdiction which he did not possess under Article 223 of the Constitution and that his decision on the question of the Tribunal's jurisdiction was also wrong on the merits.

2. The appeal has arisen out of an industrial dispute between the Bank of India and 13 out of its 37 probationary temporary employees in its office at Calcutta. The facts of the dispute have been set out by the learned Judge in careful detail, but for the purposes of the present appeal it is necessary to state only a few of them. It appears that on and from the 24th December 1951, there was a strike in the Calcutta office of the Bank of India, during which all the local employees, except only 24 of the 37 probationary or temporary ones, remained absent from duty. While the strike was still in progress, notices of discharge were served on the remaining 13 of the probationary or temporary employees on the ground that they had failed to report for duty in spite of special notices being issued to them, both before and after the commencement of the strike, to attend office and help in the annual closing of accounts. Subsequently, on the 7th January 1952, the strike was called off on the intervention of Government, but the Bank refused to take back the 13 dismissed employees. An agreement was then reached that the cases of those 13 would be referred to an Industrial Tribunal for adjudication and, in due course, Government referred the dispute to a single-member Tribunal constituted of one Mr. K. S. Campbell Puri. The terms of the reference were that the Tribunal should decide whether the termination of the services of the 13 employees had been justified and if not, what relief should be accorded to them.

3. The strike was a legal strike. Not unnaturally, therefore, the Bank appears to have been

anxious to make out before the Tribunal that the 13 employees had not been discharged for their participation in the strike but they had been discharged on account of indiscipline and breach of promise, inasmuch as, having assured the management that they would attend office during the period of the strike, they had failed to carry out that assurance. The case of the employees was that they had been prevented from entering the premises of the Bank by the intense picketing carried on near the gate. The Tribunal held that the 13 employees had either participated in the strike or had been prevented from going to their work by the admitted picketing, but whichever might have been the cause of their absence from duty, the termination of their services had been unjustified.

4. Having thus disposed of the first part of the reference, the Tribunal proceeded to deal with the second which was concerned with the relief to be granted. The employees concerned were either probationers or persons holding temporary appointments. The majority of them were clerks, but a few were sepoys and peons. In the case of the probationers, the terms and conditions of service included a term that a candidate 'accepted for probation' might be dismissed within six months of his first joining his post or at the expiration of that period without the Bank assigning any reason for such dismissal. Nine of the employees had joined their posts between March and May, 1951, three in June and one in December of that year. The Tribunal took into consideration the nature of the appointments held by the employees and came to the conclusion that compensation and not reinstatement would be the proper relief to be granted in the case. It observed as follows :

> "The next question is one of relief. The applicants were admittedly either probationers or temporary hands and even on general principles of employment, they have no right upon the employer to continue in service even if the employer be called upon to take them back in service. The management naturally would be within its right not to confirm them or after some time dispense with their services on some other reasons. Without elaborating the point further, I am of the definite opinion that it is not a fit case in which reinstatement should be allowed."

5. The Tribunal then proceeded to award as compensation, "on careful consideration of all facts and circumstances and the prospective career of the applicants", six months' basic salary plus allowances to 12 of the employees and three months' basic salary plus allowances to the one who had joined his post only in December 1951.

6. The employees, being dissatisfied with the award, preferred an appeal to the Labour Appellate Tribunal under Section 7 (1) of the Industrial Disputes (Appellate Tribunal) Act. That section provides-under item (a) that an appeal shall lie to the appellate Tribunal from any award or decision of an Industrial Tribunal, if the appeal involves any substantial question of law.' The rest of the section which provides for an appeal in other cases is not relevant. In dealing with the appeal, the Appellate Tribunal proceeded to consider first whether it involved any substantial question of law and held that it did, because, according to the Tribunal, in refusing the relief of reinstatement, the Tribunal of first instance had ignored certain legal principles which the Appellate Tribunal had laid down in an earlier case as bearing upon the determination of circumstances in which reinstatement or compensation instead of reinstatement was to be granted and that it had also proceeded on considerations which were wholly extraneous. The principles laid down in the earlier case were that in cases where the termination of service was found to

have been wrongful or unjustified, the normal rule would be to order reinstatement, but in deciding whether such order should be made in any particular case, the Industrial Tribunal would have to balance fairplay to the employee against considerations of discipline in the concern to which he belonged. No exhaustive rules could be laid down as to, how this was to be done and each case would have to be dealt with on its own facts, but the past record of the employee, the nature of his alleged lapse and the grounds on which the order of the management was being set aside would be relevant considerations. Those being the principles applicable, the Appellate Tribunal thought that, in the present case, the Tribunal of first instance had paid no regard to them in departing from the normal rule of directing reinstatement, after holding in favour of the employees that the termination of their services had been unjustified. It had not taken info account facts found by itself, such as that the absence from duty for which the employees had been discharged, had been satisfactorily explained by them, that nothing unfavourable to them had been shown from their past records and that the mode in which they had been discharged from service had been of a summary character, no charge-sheets being delivered and no opportunity being given to explain the circumstances alleged. On the other hand, the Tribunal ot first instance had reiused to direct reinstatement merely on the ground that since the employees concerned were probationers or temporary bands, the Bank might, after taking them in, dispense with their services after some time on some other ground and would be quite within its rights in doing so. That, the Appellate Tribunal thought, was an extraneous consideration and it was also not a proper consideration, inasmuch as it involved an imputation of bad faith to the employers who were taken as likely to defeat an order of reinstatement by the adoption of a device after complying with it nominally. An appeal which questioned an order vitiated by such detects involved, in the opinion of the Appellate Tribunal, a substantial question of law.

7. Having thus held that the appeal was maintainable, the Appellate Tribunal proceeded to its decision. It observed that in dealing with the preliminary question, it had already indicated its views on the merits. It held that where the termination of the services of an employee was found to have been unjustified, the normal rule was reinstatement and since in the present case no circumstances had been proved which would justify the Tribunal in departing from the normal rule, particularly as the Bank had been found guilty of discrimination between the permanent employees and the 13 probationers or temporary hands, an order for reinstatement would have been the proper relief to grant. Accordingly, it directed reinstatement of the 13 employees.

8. Thereafter, the Bank applied to this Court under Article 226 of the Constitution for a writ of or in the nature of certiorari on the Labor Appellate Tribunal, requiring it to return and certify to this Court the records of the proceedings in order that its order might be quashed, a writ of or in the nature of prohibition on the Tribunal, the Bank and 12 out of the 13 employees, prohibiting them from giving effect or further effect to the order and a writ of or in the nature of mandamus on the Tribunal, commanding it to cancel the order. For some unexplained reason, one of the employees, Ram Bhadra Misra, was not impleaded as a respondent. A Rule was issued on the application by Lahiri, J.

9. Sinha, J., who came to deal with the Rule at its final hearing, held that the appeal to the Tribunal involved no question and certainly no substantial question of law and therefore the Tribunal had no jurisdiction to entertain it. He pointed out that Industrial Tribunals were to make their orders, including orders for reinstatement, in their discretion, being guided by not law but considerations of fairness, expediency and the interest of industrial peace and as the discretion

was to be exercised according to the facts of each case, no principle of law could be enunciated as governing its exercise. Nor was the Appellate Tribunal competent to lay down any law. There was thus no 'rule of law' that, normally, where a dismissal was found to have been wrongful or unjustified, reinstatement was to be ordered, though the Appellate Tribunal might have expressed itself to that effect; and no question of law could arise out of a disregard by a Tribunal of first instance of principles laid down in decisions of the Appellate Tribunal, because such principles could only serve as words of good counsel to inferior Tribunals, but could not rank as legal principles. The learned Judge held next that while the Appellate Tribunal would be entitled to interfere in an appeal it the Tribunal of first instance exercised its discretion arbitrarily or capriciousiy or if it proceeded on principles which were really extraneous, the precarious nature of the tenure of probationary or temporary employees and the probability that it they were thrust on the employer, he would get rid of them by exercising his right of dismissal under the contract, were not considerations extraneous to the question of their reinstatement. They were valid considerations in determining whether an award of compensation would not confer a greater benefit on the employees than an order for reinstatement. The learned Judge also held that the Tribunal of first instance could not be said to have acted on an apprehension of bad faith or adoption of a device on the part of the Bank, because if some time after the decision of the present dispute, the Bank exercised its legal right of discharging the employees, there could be no question of its having acted in bad faith or adopted a device. For all those reasons the learned Judge held that the Appellate Tribunal had no jurisdiction to entertain the appeal before it. Accordingly, he directed a writ in the nature of certiorari to issue, quashing the order of the Tribunal and also made an order, prohibiting the Tribunal, the Bank, the Employees' Union and the 12 employees before him from acting on or giving effect to the order.

10. Against the decision of the learned Judge, 8 of the employees preferred the present appeal. The remaining 4 were made respondents, besides the Appellate Tribunal, the Bank and the Employees' Union.

11. Since the prohibitory order made by Sinha, J., was only consequential to the writ of certiorari issued by him, it is only necessary to consider the correctness of the writ. Before the learned Judge it was not contended by the employees that on an application for a writ of certiorari, he was not entitled to go into and revise the finding of the Appellate Tribunal that the appeal before it was maintainable. Nor was any such ground taken in the memorandum of appeal. In opening the appeal, however, the learned counsel for the appellants put the ground in the forefront of the points which he wished to argue. We allowed him to take it, because it was a pure question of law, going to the root of the jurisdiction of the learned trial Judge and because it was clear that the hearing would go over the day so that the respondents would have sufficient time to consider it. I may add that besides pointing out that the ground had not been taken at any earlier stage, Mr. Basu, who appeared for the Bank, did not contend that it could not be allowed to be taken and did not ask for an adjournment.

12. The contentions of the appellants were (1) that the learned Judge who was not sitting in appeal but dealing with an application for a writ of certiorari, had no jurisdiction to re-open the finding of the Appellate Tribunal that the appeal before it was maintainable and (2) that assuming he had such jurisdiction, his decision that the appeal involved no substantial question of law was erroneous. The first of the points is not free from difficulty. Since it was not taken before the learned Judge, we have not had the benefit of his views upon it.

13. The writ of certiorari is undoubtedly an English writ. But the Constitution of India does not speak of the English writs, as such, but of writs in the nature of those writs and, again, not of such writs alone but, generally and comprehensively, of directions or orders or writs, including such writs. As to writs, that language does not appear to tie down the Courts, on which the power to issue them has been conferred, to the writs or what they are now called, orders, as they are known in England or to the special incidents which they carry there. Indeed, the language of Articles 32 and 226 which provide for the issue of writs has been held by the Supreme Court to be very wide and it has further been held that in view of the express provisions in the Constitution, Courts in India need not now leak back to the early history or the procedural technicalities of the writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges (*T. C. Basappa v. T. Nagappa*[1], But in spite of the breadth of Articles 32 and 226 of which notice has been taken, neither the Supreme Court, nor any of the High Courts has so far attempted to extend the scope of the named writs, as they are in their English form, nor attempted to evolve new forms of writs for the purposes of the Articles. On the other hand, speaking of the writ in the nature of certiorari, the Supreme Court has said in the same case that Courts in India ean issue the writ in appropriate cases and in an appropriate manner so long as they "keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting of such writs in English Law". In this case, we are not concerned with the whole law of certiorari. But in view of the observation of the Supreme Court, a brief reference to the principles settled by English decisions, so far as they bear on the short point before us, will not be out of place, particularly as they have been expressly adopted by the Supreme Court in two of its subsequent pronouncements.

14. It is not necessary to go beyond the decision of" the Divisional Court in *Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[2]. the decision of the Court of Appeal in the same case, (1952) 1 KB 338 and two earlier decisions, one of the House of Lords and one of the Judicial Committee, which those decisions recalled, viz., *Walsall Overseers v. London and North Western Rly. Co. (1878) 4 AC 39* and *Rex v. Nat Bell Liquors Ltd*[3]*.,* It appears that, in recent years, the writ of certiorari was falling into comparative desuetude in England and the Courts were limitng it to cases where the inferior Tribunal had acted without or in excess of jurisdiction. Even the Court of Appeal took that restricted view of the writ in *Racecourse Betting Control Board v. Secretary of State for*[4] But, to use the language of Denning, L. J., the writ was 'resorted to its rightful position' by the present Lord Chief Justice of England by his Judgment on behalf of the Divisional Court in the Northumberland Tribunal case and his view was upheld by the Court of Appeal. After the restoration, it is now established that certiorari is not a remedy which can be granted only when the inferior tribunal acted without or in excess of its jurisdiction, but it can be granted also to correct an error appearing on the face of the

[1]1955-1 SCR 250 at p. 256 : (AIR 1954 SC440 at p. 443**)**
[2](1951) 1 KB 711
[3](1922) 2 AC 128
[4] AIR 1944 Ch 114

record, as when the error complained of it a 'speaking order', giving reasons for the decision and those reasons are bad in law and this may be done although no question of jurisdiction may be involved. The error contemplated appears to be an error of law and not an error of fact. It is clear from the cases that a wrong decision on the facts is outside the scope of certiorari, but the English Courts have not yet said what the position would be if it appeared on the face of the record that, in deciding the case on the merits, the inferior Tribunal had assumed the existence of some vital

fact which did not exist or ignored the existence of some vital fact which existed. Be that as it may, the condition of the error appearing on the face of the record is an indispensable condition, when the error is an error of law. In the Northumberland Tribunal case, on appeal, it was stated by Denning, L. J., to be a governing rule that certiorari was only available to quash a decision for error of law if the error appeared on the face of the record. I may add, though it is not necessary for the purposes of the present case, that where the question is one of jurisdiction, parties may state further facts to the Court, generally by affidavits.

15. Apart from defect of jurisdiction, error of law appearing on the face of the record is thus also amenable to correction by certiorari. But certain further questions arise. What is the nature of the jurisdiction which the Court exercises in correcting patent errors of law by certiorari? In (1922) 2 AC 128, Lord Sumner said that the jurisdiction was one of supervision and not of review; and in *Rex v. Northumberland Compensation Appeal Tribunal, on appeal*[5], it was said by Morris, L. J., that certiorari could not be used as the cloak of an appeal in disguise. It did not lie in order to bring up an order or decision for a rehearing of the issue raised in the proceedings. Secondly, what is the nature of the error of law which will attract certiorari? In the Nat Bell case, Lord Sumner said that the second point to which supervision by certiorari went was observance of the law by the inferior Tribunal in the course of the exercise of its jurisdiction." Does it mean that the superior Court will only see if the appropriate law has been applied and if any procedural error has been committed or does it mean that the superior Court will also see, so far as it can be seen on the face of the record, if the appropriate law has been correctly applied in the sense that a decision, correct in law, has been arrived at? In the English cases to which I have referred, no direct answer to this question can be found in the formulation of principles except what is implied in the view that a proceeding for certiorari is not an appeal, but the actual decision in one of them seems to be opposed to the implication of that view. In older decisions given in times when the Courts were limiting certiorari to errors of jurisdiction, the answer was in the negative. See Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 62 and the cases mentioned there.

16. For the purpose of defining the power of the High Courts in regard to the issue of a writ in the nature of certiorari under Article 226 of the Constitution, the Supreme Court, while alive to the width of the language in which the Article is expressed, has adopted the principles, now re-stated by the English Courts as governing the issue of orders of certiorari in England. The earlier decisions contained only broad or partial statements of the principles, though there was a fairly complete formunation of them in *Veerappa Pillai v. Raman and Raman*[6] Since the decisions in the Nortnumberland Tribunal case, a detailed exposition has been given in two decisions, (1955) 1 SCR 250: AIR 1954

[5](1952) 1 KB 338

[6](1952) SCR 583: AIR 1962 SC 192

Supreme Court 440 and *Hari Vishnu Kamath v. Ahmed Ishaque*[7], on the same lines and practically in the same terms as used by the English judges, save as regards the nature of the error of law which will attract certiorari on which some additional observations have been made. The principles thus laid down, so far as material for the purposes of the present case, are that certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when, in the exercise of undoubted jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. The jurisdiction in certiorari is, however, not appellate, but only

supervisory. By its exercise, only a patent error can be corrected, but not also a wrong decision. Illustrations of the error in the decision itself which is amenable to correction by certiorari are ignorance of the law and disregard of its provisions. The want of jurisdiction which is also so amenable may arise inter alia from the nature of the subject-matter of the proceeding or the non-existence of some collateral but essential fact, although the inferior Tribunal may have wrongly found that it existed.

17. I shall add one other principle applied by the Supreme Court in another decision. It is that the Legislature, in constituting a Tribunal may vest such Tribunal itself with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts on which its jurisdiction to proceed further depends, exists. In such a case, the rule that a Tribunal cannot give itself jurisdiction by a wrong decision as to the existence of the preliminary facts does not apply and accordingly certiorari shall not go to correct such a decision. In the case of an appeltate Tribunal, the jurisdiction to decide whether an appeal to it lies or not is such jurisdiction. *Ebrahim Aboobaker v. Custodian General of Evacuee Property*[8]*,*

18. This somewhat long introduction has been necessary, because in the application of the principles laid down by the Supreme Court to the facts of the present case, certain difficulties have to be met which are not exactly covered by any express decision and which could not be appreciated unless the relevant principles were fully stated. The question here is whether the learned trial Judge was entitled in an application for certiorari to examine the finding of the Appellate Tribunal that the appeal before it was maintainable and quash the decision in the appeal on his own view that the finding was erroneous. In the English cases, the condition of the error appearing 'on the face of the order' seems to have expanded itself into a condition of error appearing 'on the face of the record' and there was some discussion by Lord Sumner in (1922) 2 AC 128 and by Denning, L. J., in *Rex v. Northumberland Compensation Appeal Tribunal on appeal*[9] as to what 'record' meant. We are not troubled by that question here, because, for a consideration of the alleged error, it is not necessary to go beyond the Tribunal's order and the learned judge has not done so. Nor is there any problem as to whether the Tribunals order is a 'speaking order', because not only is the order, without question, a 'speaking order', 'telling', in the words of Cairna, L. C., in (1874) 4 AC 30), 'its own story', but it is also a voluble order, giving the reasons for the finding in the form of an elaborate discussion. But the first question is, is the error an error of jurisdiction or an error of law? The learned Judge appears to have treated it as an error of jurisdiction but obviously he

[7](1955) 1 SCR 1104: AIR 1955 SC 233 [9](1952) 1 KB 338
[8](1952) SCR 696: AIR 1952 SC 319

was looking at the matter generally, without the distinction between errors of law and errors of jurisdiction for the purposes of certiorari present to his mind. Whether the error is of one kind or the other seems to be a matter of some difficulty. This is not a case where the competence of the Tribunal depended on the satisfaction of some condition precedent of an external and factual character, such as the actual service of a notice or the location of the subject-matter within a defined area and where there is an erroneous finding of fact with regard to that condition. The error alleged here is an error of law in deciding a preliminary question on which jurisdiction to entertain the appeal depended and which, besides being bound up with the matter to be decided in the appeal, is itself a question of law. In one sense, the error is certainly an error of jurisdiction, because unless the preliminary question was decided in favor of the appellant, the Tribunal could not proceed further. But in another sense, it is an error of law, because whether an appeal lies or

not under a provision providing for appeal is a legal question and an error in the decision of such a question is a legal error. The jurisdiction we are now considering is not jurisdiction to decide the preliminary question - for, such jurisdiction there must always be - but jurisdiction to entertain the main proceeding, in this case the appeal. It has been said in certain decisions that the error of wrongly entertaining the main proceeding in such a case is not an error of jurisdiction but an error of law, because it cannot be that there is jurisdiction if the preliminary decision in favor of it is right but none if it is wrong, there being initial and general jurisdiction with regard to the subject-matter. The error alleged here is an error of law in deciding the question of jurisdiction and it is perhaps best described as a mixed error of jurisdiction and law. As the order is a speaking order and the error, assuming it is an error, appears from the order itself, it was certainly amenable to correction by certiorari, unless the nature of the error excluded such interference by reason of the operation of some other principle.

19. I am proceeding now on the assumption that there was an error. The next question is whether it was an error of a kind which would expose the order to certiorari and make it liable to be put out of existence. It has been laid down that a proceeding for certiorari is not an appeal, that the superior Court will not substitute its own finding for that of the inferior Tribunal and that only a patent error can be corrected by certiorari, but not a wrong decision. Manifest ignorance of the law and disregard of its provisions have been instanced as illustrations of patent error. Obviously, by 'wrong decision' only such decision on questions of fact is not meant. Does it then mean that the superior Court will only see it the appropriate law has been applied without any procedural error being committed, but it will not further see if the decision is correct in law? If so, the error in the present case would not seem to be amenable to certiorari. It would have been amenable, if, for example, the Tribunal had accepted the appeal on some ground not included in Section 7 (1) of the Industrial Disputes (Appellate Tribunal) Act or disregarded the condition that there must be a substantial question of law involved. But the Tribunal addressed itself correctly to item (a) of the sub-section, proceeded to consider if the appeal involved some substantial question of law and decided that it did. This Court could find an error in that decision only by substituting for it a contrary decision of its own, just as it might do in an appeal. Can it be said that there is a distinction between the inferior Tribunal's decision on a preliminary question and its decision on the merits and that while the superior Court will not, in certiorari, examine the correctness of the latter by considering the matter for itself, it will do so in the case of the former? There may be a valid basis for such a distinction in a case where the preliminary question is unrelated to the merits, but where it is related and is indeed a part of the issue on the merits to be tried, it does not see to be possible to maintain it. But even if the rule that certiorari is not an appeal and a wrong decision will not be revised, be limited to the decision on the merits, I find it impossible to reconcile the theoretical statement of the law with actual practice. Where the power given to the inferior Tribunal is discretionary, the superior Court will undoubtedly not see in certiorari whether a correct discretion was exercised, but only whether some condition attached to its exercise or some relevant consideration was disregarded - *Seereelal Jhuggroo v. Central Arbitration and Control Board*[10], Where however the power is not discretionary, superior courts appear to have quashed wrong decisions on the ground that they were wrong in law. In (1951) 1 KB 711, the question was whether in computing the compensation payable to the petitioner for loss of employment as a clerk, a certain period of his service was to be taken into account under the regulations framed in 1948 under the National Health Service Act, 1946. The Tribunal held that the period concerned could not be taken into account. In quashing the award by an order of certiorari, Goddard L. C. J, observed as follows :

> "The tribunal have told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and we are of opinion that the construction which they placed on this very complicated set of regulations was wrong."

20. I find it impossible to distinguish what was done in that case from an exercise of appellate jurisdiction, except that the Court made no substantive order of its own. Obviously, the Court was setting aside a decision on the merits and doing so on the ground that in interpreting the relevant law and applying it to the facts of the case, the Tribunal had erred and therefore come to a wrong conclusion. If example was to be followed rather than precept, I would have found it extremely difficult to hold that Sinha, J., had no jurisdiction to consider for himself whether the Appellate Tribunal had rightly held the appeal to be maintainable and to proceed on his own view of the matter. But, in view of the facts of the present case, there is another principle laid down by the Supreme Court which I have already mentioned and which must be considered.

21. In regard to cases where the jurisdiction of a tribunal depends upon the existence of some preliminary tact of a collateral character, that is, collateral to the actual matter which the tribunal has to try, a distinction has been made between cases where the Legislature has merely laid down the condition that if the preliminary tact exists, the tribunal shall have jurisdiction and cases where while laying down the condition, the Legislature has made it clear that it intends the very same tribunal to have jurisdiction to decide whether the preliminary fact exists or not. It is not that, in the first case, the tribunal has no jurisdiction to decide the preliminary question. It must decide it in the first instance, because only on a finding that the requisite fact exists can it have jurisdiction to enter upon the enquiry on the merits. But its decision on the preliminary question is not intended to be final for the purposes of the writs, as it is in the second case. The second case is one where the tribunal has not to decide the preliminary question merely as of necessity, but it is a case where the Legislature has conferred jurisdiction on the tribunal itself to determine whether the preliminary state of facts exists. This distinction between

[10](1953) AC 151

two types of cases, in both of which the existence of some collateral fact is a condition precedent to the assumption of jurisdiction, has its origin in the judgment of Lord Esher, M. R. in the well-known case of *Reg v. Commissioners for Special Purposes of Income-tax*[11], There, after pointing out the distinction, the learned Master of the Rolls laid it down that the 'formula' that a tribunal could net give itself jurisdiction by a wrong decision on the preliminary facts on which its jurisdiction depended, did not apply to the second type of cases. The reason given was that, in such cases, the Legislature had given the tribunal jurisdiction to determine the existence of the preliminary fact and therefore it could give itself jurisdiction by determining it even wrongly. These principles have been accepted in English law as general. The case before Lord Esher was one of mandamus, but it has been applied in cases of certiorari as well. See *R. v. City of London Rent Tribunal*[12], *R. v. Fulham, Hammersmith and Kensington Rent Tribunal*[13],

22. I must confess that the basis of the distinction made by Lord Esher between the two types of cases does not appear to be very clear. It cannot be presence or absence of jurisdiction to determine the preliminary fact, because if the tribunal must necessarily determine it even in the first type of cases, it does not act without jurisdiction in determining it, although the Legislature

may not have expressly entrusted it with the jurisdiction, as in the second type of cases. Secondly, if error of jurisdiction justifies corrective interference by a superior Court, it seems to be immaterial whether the error is committed in making the determination as to the preliminary fact under an express power or it is committed in making the determination of necessity. The basis may therefore be the intended finality of the determination, but how such intention is or may be expressed is not clear. The absence of a provision for an appeal which the learned Master of the Rolls mentions can hardly be an indication, because there would ordinarily be no appeal even in the first type of cases, at a party would not think of going to the Court for the writs. Besides, there is no finality against certiorari, unless the writ is expressly taken away by statute, but as to defects of jurisdiction, it cannot even be taken away. (1951) 1 KB 711 at p. 716 (B). Perhaps the real basis of the distinction is that in the second type of cases the Court, in exercising the power to issue the prerogative writs and orders, respects the express entrustment of jurisdiction to determine the preliminary fact which has been made by the Legislature to the tribunal itself, with no provision for an appeal, and therefore it treats the determination of the tribunal in favor of the existence of the fact as final. The word 'final' was not used by Lord Esher, but as all expositions of his rule have proceeded on the view in the case of second class of tribunals contemplated by him, the Legislature intended their decision as to the preliminary fact to be final. In any event, whatever its basis, the distinction made by Lord Esher has now become a part of the law of England and has been accepted by the Supreme Court.

23. The appellants before us contended that the Labour Appellate Tribunal belonged to the second type of tribunals in Lord Esher's classification and therefore its determination on the preliminary question as to whether the appeal before it involved a substantial question of law was not open to correction by certiorari. That argument proceeded on the footing that the preliminary question was a collateral question, on which I shall have to say something later and which appears to me to have been a concession which the appellants made against themselves. But assuming that the facts of this case are within

[11](1888) 21 QBD 313

[12](1951) 1 All England Reporter 195

[13](1951) 1 All England Reporter 482

Lord Esher's rule, I think, if the matter were res integra, a serious question might have to be considered as to whether the rule was applicable in India. The reason given for the rule is that the Legislature has entrusted the tribunal itself with jurisdiction to determine its own jurisdiction by deciding whether the preliminary state of facts exists. That may be a good reason in England where Parliament is supreme and where the Courts may properly defer to the will of the supreme law-making body by not trying to re-open a finding of an inferior tribunal on a matter concerning its jurisdiction which Parliament has committed to its own decision and by not interfering with it on the ground that by a wrong decision on the matter, jurisdiction was wrongly assumed. But in India, the Constitution which gives the superior Courts the power to issue writs and orders is supreme and it is above Parliament and above the State Legislatures. If the Constitution empowers the superior Courts to issue writs and orders to any person or authority within their jurisdiction and if errors of jurisdiction can be corrected by certiorari, there seems to be no reason here to desist from interfering with a decision of an inferior tribunal as to a preliminary fact, where by such decision it has assumed jurisdiction erroneously, simply because the Legislature has vested the tribunal with jurisdiction to decide the question. The Legislature may have bestowed the jurisdiction to decide, but no Legislature can bestow a jurisdiction to decide wrongly with impunity against the power of correction by certiorari, given to the Superior Courts by the Constitution itself. The appellants, however, contended that Lord Esher's rule had been

accepted and applied by the Supreme Court in the case of (1952) SCR 696 : AIR 1952 Supreme Court 319 and that decision must govern the present case. They also cited a decision of the Allahabad High Court, Firm *Dewan Sugar Mills v. Government of the State of Uttar Pradesh*[14], which was concerned with the identical point under Section 7 of Industrial Disputes (Appellate Tribunal) Act, with only this difference that the Tribunal's order in that case was that the appeal was not maintainable. The Allahabad High Court purported to follow the decision of the Supreme Court.

24. I feel constrained to hold that the contention of the appellant is correct. The facts of the case before the Supreme Court were as follows. An application was made to the East Punjab High Court for a writ of certiorari against an appellate order of the Custodian-General of Evacuee Property on the ground that the appeal in which it had been made was not maintainable. The provision for an appeal was contained in Section 24 of Ordinance XXVII of 1949 which, so far as is material, read as follows :

> "Any person aggrieved by an order made under Section 7, Section 16, Section 19 or Section 38 may prefer an appeal in such manner and within such time as may be prescribed -
> (a) x x x x
> (b) to the Custodian General, where the original order has been passed by the Custodian, an Additional Custodian or an Authorized Deputy Custodian."

25. It was contended that the appeal did not lie, because the appellant was not a person aggrieved, because the order against which the appeal was expressly directed was not appealable, and it could not be treated as, in substance, an appeal against another order, as had been done and because the latter order was also not appealable. The High Court repelled those contentions on the merits and declined to issue a writ. On appeal, the

[14] AIR 1953 All 531

Supreme Court held that the questions raised has no merits and further that they were not questions bearing upon the jurisdiction of the Court of Appeal or its authority to entertain them. It was argued on behalf of the appellants that no Court of limited jurisdiction could give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of its jurisdiction depended and it was said that the question involved in the appeal before the Custodian General were collateral to the merits. In dealing with that contention, the Supreme Court referred to the principles laid down by Lord Esher M. R. (1888) 21 QBD 313 and observed as follows :

> "Like all courts of appeals exercising general jurisdiction in civil cases, the respondent has been constituted an appellate Court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a Court of appeal has not only the jurisdiction to determine the soundness of the decision of the inferior Court as a Court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by parties. Such jurisdiction is inherent in the very constitution of a court of appeal. Whether an appeal is competent, whether a

> party has locus stand to prefer it, whether the appeal is in substance from one or another order and whether it has been preferred in proper form and within the time prescribed, are all matters for the decision of the appellate court so constituted. Such tribunal falls witnin class 2 of the classification of the Master of the Rolls. In those circumstances it must be held that the order of the High Court of Punjab that a writ of certiorari could not issue to the Respondent.....was right."

26. On the question as to whether Sinha, J., had jurisdiction to quash the order of the Appellate Tribunal on the ground that the appeal to the Tribunal did not lie, I find it impossible to distinguish the decision of the Supreme Court. Mr. Basu tried to do so and submitted that the appellate jurisdiction of the Custodian-General was general and its exercise did not depend on the existence of any particular state of facts, as the Supreme Court itself pointed out. That is true, but I do not think that that circumstance is the key to the decision. The appellate jurisdiction of the Custodian-General was undoubtedly general in one sense, but it was limited in another in that an appeal to him lay only from certain kinds of orders and at the instance of a certain kind of person. Whether a particular appeal was from one or another of the appealable orders and whether it was an appeal by a competent person would thus be preliminary questions. Secondly, all that the Supreme Court said was that the exercise of the appellate jurisdiction did not depend on the existence of "any particular state of facts", but it nevertheless proceeded on the basis that there was a preliminary question of a collateral character on which the appellate jurisdiction depended. Otherwise, the reference to Lord Esher's classification and the statement that the appellate Court constituted of the Custodian-General fell within Class 2 of the Classification cannot be understood. That class, according to Lord Esher's own definition is composed of cases where

> "the Legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction. On finding that it does exist, to proceed further."

The contention before the Supreme Court was that the questions raised in the appeal before the Custodian-General as to its maintainability were collateral to the merits and that since the appellate Court had given itself jurisdiction by a wrong decision on them, its order was liable to be quashed by certiorari. It was that contention which the Supreme Court repelled, not by holding that there were no collateral questions but by holding that the appellate Court being of the second category in Lord Esher's classification, the decision of those questions was within the jurisdiction entrusted to it and therefore no writ of certiorari could issue, even if the decision was erroneous. Likewise, it appears to me, it must be held in the present case that the question whether the appeal before Appellate Tribunal involved a substantive question of law and was therefore maintainable was within the Tribunal's jurisdiction as an appellate court to decide and, therefore, no certiorari could issue against its decision.

27. As to the applicability of Lord Esher's rule in India, I have already pointed out that in regard to the powers conferred on the superior Courts in India by the Constitution itself, without some such qualification as "unless Parliament or the State Legislature otherwise directs", their position vis-a-vis the Legislatures and their enactments is different from the position of the English Courts vis-a-vis the Parliament and Parliamentary statutes. The difference appears to me to be very real. But since the Supreme Court has nevertheless applied the rule, I venture to think that their

Lordships did so on the basis that although the power of correction by the writs was conferred by the Constitution itself and although the Constitution was supreme and above the Legislatures, still, it was inherent in the very nature of the power provided, and of the writs by the issue of which the power was to be exercised, that it was exercisable only to the same extent as in England. That would seem to appear from the observation I have already quoted from the judgment in (1955) SCR 250: AIR 1954 Supreme Court 440. It also finds sup port from the observation in *Election Commission, India v. Venkata Rao*[15], that upon finding that the prerogative writs which had been developed by the Courts in England would be peculiarly suited for a quick and inexpensive enforcement of the fundamental rights, the framers of the Constitution had conferred on the High Courts wide powers of issuing directions, orders and writs, primarily for the enforcement of those rights but also for 'any other purpose', the latter being added

> "with a view apparently to place all the High Courts in the country in somewhat the same position as the Court of King's Bench in England."

It would thus seem that the powers of the High Court under Article 226 have been regarded as no higher than the powers of the King's Bench and I think that may be the reason why Lord Esher's rule has been held to apply in India as well. But even if I am completely wrong as to reasons underlying the Supreme Court's decision, the decision remains and, in my view, it governs the present case. The High Courts are bound by the decision and cannot disregard Lord Esher's rule or the Supreme Court's application of it to appellate Courts in regard to their liability to certiorari for a wrong decision as to the maintainability of appeals preferred to them. The result is that no certiorari could issue in the present case. The question whether the superior Court can correct a wrong decision in a certiorari or can only see if the correct law has been applied or whether the inability to correct a wrong decision is limited to decisions on the merits, does not arise.

[15](1953) SCR 1144 : AIR 1953 SC 210

28. It has sometimes been said that the second class of cases contemplated in Lord Esher's propositions is one where the presence or absence of jurisdiction is not a separate question, capable of being determined independently but is a question which can be determined only in the course of the enquiry into the main question which the tribunal has to decide. That view does not appear to me to be correct. In both the classes of cases contemplated by Lord Esher, there is a collateral question as to the existence of a preliminary state of facts on which the jurisdiction to proceed further depends. The only difference between the two types of cases is that in the second, the Legislature has not merely stated the condition of jurisdiction, but it has also given the tribunal itself the power to determine it without any provision for ail appeal, thus intending that the determination shall be final. The case where the question of jurisdiction can be decided only as a part of the general enquiry and is therelore not a collateral question, is altogether different. The whole position has been summarized in Halsbury's Laws of England, 3rd Edition, Vol. If, at pp. 142-43 in the following words:

> "The case is more difficult where the jurisdiction of the inferior tribunal depends.....upon the existence of some particular fact. If the fact is collateral to the actual matter which the interior tribunal has to try, that tribunal cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess, unless by statute the inferior tribunal is given power to determine conclusively questions

> relating to its own jurisdiction. (1888) 21 QBD 313. C. A..... On the other hand, if the fact in question is not collateral, but a part of the very issue which the lower court has to enquire into, certiorari will not be granted, although the lower Court may have arrived at an erroneous conclusion with regard to it. *R v. St. Olave's District Board*[16],."

29. There are thus three cases: (1) where jurisdiction is given to an inferior tribunal on condition that a particular state of facts exists, but without more; (2) where jurisdiction is given on such condition along with jurisdiction to determine if the condition has been satisfied; and (3) where the fact on which jurisdiction depends is not collateral, as in the first two cases, but is a part of the matter which the tribunal has to enter into and try. Lord Esher's propositions cover only the first two cases.

30. If the English principles as to the issue of certiorari are to be followed in India, it appears to me that even if it be held that Ebrahim Aboobaker's case does not apply in the present case, because the jurisdiction of the Appellate Tribunal here was not general, the case is still within the last proposition contained in the passage I have quoted from Halsbury's Laws of England and therefore no certiorari to quash the Tribunal's order could issue. The matter to be decided in the appeal was whether the order of the Tribunal of first instance, refusing reinstatement and awarding compensation in stead was bad, because, as was alleged, it had been made in disregard of certain legal principles and was based on extraneous considerations. Whether or not the appeal lay depended on whether it involved a substantial question of law and the substantial question of law was said to be whether the Tribunal of first instance had acted in contravention of law in proceeding on certain extraneous consideration and in disregard of certain legal principles. It is not material here whether the allegation as to the nature of the original Tribunal's order was correct or whether, even if they were correct, any question of law substantial or

[16](1859) 8 E and B 529

otherwise, could really arise. Those are matters bearing on the merits of the contention. What is material is that the issue to be actually decided in the appeal and the issue that was to be decided in determining whether the appeal was maintainable were identical. The latter was not a collateral question, external to the actual controversy in the appeal and was not even merely a part of the question which was to be actually decided, but was that very question itself. in those circumstances, it appears to me, that the last proposition in the passage in Halsbury must apply. Elsewhere in the same work, the law is thus stated :

> "If the fact in question is not collateral, but a part of the very issue which the inferior tribunal has to enquire into, an order will not be granted, although the inferior tribunal may have arrived at an erroneous conclusion with regard to it."- Third Edition, Vol. 11, p. 60.

31. In the Allahabad decision cited by the Appellants, the learned Judges, besides relying on the decision of the Supreme Court in Ebrahim Aboobaker's case, held that the question whether any substantial question of law was raised in the appeal before the Labour Appellate Tribunal was not a collateral matter, but was one of the issues which the Tribunal had to decide and therefore no certiorari could issue on the ground that the question had beea wrongly decided. I agree with that view, since the English principles must be held to be applicable.

32. It may also be added that if the condition of the error appearing on the face of the order or record is to be insisted on, there would not seem to be any such error in the present case. In (1955) 1 SCR 1104 : AIR 1955 Supreme Court 233, the Supreme Court approved of the test that no error could be said to appear on the face of the record if it required an examination or argument to establish it though it was added that there might be cases where the test would not suffice. In the present case, the learned Judge required a long and argumentative judgment to establish that no question of law was involved in the appeal before the Appellate Tribunal. I do not, however, rely much on that ground. An order is a speaking order, because it speaks its reasons and if those reasons are to be examined, some argument is unavoidable.

33. Mr. Basu cited the decision of the Judicial Committee in *Joy Chand Lal v. Kamalaksha Chaudhury*[17], where it was held that although a mere error in a decision of a subordinate Court would not entitle the High Court to interfere with it in revision under Section 115 of the Civil Procedure Code, it would be entitled to interfere if the error had resulted in the Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction, so vested. In that particular case, the subordinate Court had wrongly held a loan to be a commercial loan and had, accordingly, refused to apply to it the Bengal Money-Lenders Act. I do not think the case cited by Mr. Basu is relevant. Considerations applicable to the remedy by way of revision under the Civil Procedure Code and those applicable to the remedy by way of the issue of a writ of certiorari are altogether different.

34. For the reasons I have given, I must hold that the first contention of the appellants that the learned trial Judge had no jurisdiction to interfere by a writ of certiorari with the

[17]53 Cal WN 562: (AIR 1949 PC 239)

Appellate Tribunal's order on the ground that, in his view, the appeal to the Tribunal was not maintainable, though wrongly held to be so, must succeed. I must add that it was hardly fair to the learned Judge that this contention should have been reserved for the appeal Court and should not have been raised before him.

35. I am further of opinion that even if I am wrong in upholding the first contention of the appellants, their second contention must succeed. What makes an appeal maintainable under Section 7(l)(a) of the Industrial Disputes (Appellate Tribunal) Act is that it should involve a substantial question of law. The word is 'question' and not 'error' or 'proposition' of law. The learned Judge himself concedes that if the Tribunal of first instance, though vested with discretionary powers, acts arbitrarily or capriciously or really proceeds on extraneous considerations, the Appellate Tribunal will be entitled to interfere. That implies that, in such a case, an error of law will be committed which will attract the jurisdiction of the Appellate Tribunal and entitle it to reverse the order for such error. It appears to me that a question as to the commission of such error will be a question of law and if it be, on the facts, an arguable question and not untenable on the face of the order appealed from, there will be a substantial question of law, sufficient to give the Appellate Tribunal initial jurisdiction to entertain the appeal, whatever the ultimate decision on the question may be. The facts of the present case were of that character. It is well-settled that if a tribunal proceeds on considerations which are irrelevant and extraneous to the matter for decision, it commits an error of law. The learned Judge himself has not said otherwise. If the tribunal disregards certain legal principles, then it clearly commits an error of law, about which there can be no dispute. It appears to me that at the initial stage when it is only to be considered whether the appeal is entitled to be entertained, all that Section 7(1)(a) of the

Act requires is that there should be, involved in it, a 'question' of law, that is to say, a disputable matter of a legal character and that it should be a substantial question. It is not necessary that it should incontrovertibly appear that an error of law has been committed. The condition that an appeal shall lie, if a substantial question of law is involved appears in other enactments as well, e.g., in Section 30(1) of the Workmen's Compensation Act, read with the proviso thereto, Section 110 of the Civil Procedure Code and Article 133(1) of the Constitution. As far as I am aware, the expression 'question of law' 'has always been interpreted in the sense I have indicated. 'Substantial' has been explained by the Judicial Committee as substantial as between the parties *Raghunath v. Deputy Commissioner of Pratapgarh*[18], I am unable to say, in view of the contentions of the employees in the appeal, that it involved no 'question' of law or to say, in view of the fact that success of the contentions would mean the reversal of the original order and their re-instatement, that it was not a 'substantial' question. The learned Judge has pointed out, rightly if I may say so with respect, that an Industrial Tribunal is not required to go by the strict law of master and servant and has to make orders which it thinks will be just and expedient and also in the interest of industrial peace. But as the learned Judge himself concedes, a Tribunal cannot act capriciously or arbitrarily or on extraneous considerations and if it does so, it creates an occasion for an appeal. It is not therefore correct to say that no question of law can ever arise out of an order of an Industrial Tribunal. The Bombay decision in *Eugene Fernandes v. Labour Appellate Tribunal of India, since reported in*[19] on which the learned Judge relied, turned on its own facts.

[18]31 Cal WN 495: (AIR 1927 PC 110)

[19] AIR 1954 Bom 342

36. I have already pointed out that at the initial stage, when considering whether an appeal lies or not, it is only necessary to see if any 'question' of law of a substantial character is involved. It is not necessary to be convinced that an error of law has been committed. The learned judge has, however, said that since the principles alleged to have been disregarded by the Tribunal of first instance were only principles laid down by the Appellate Tribunal which had no jurisdiction to lay down any law, no question of law could at all arise out of the disregard of such principles. He has said further that the probability of an early termination of the services of the employees under the terms of the contract of employment was not a matter extraneous to the question of their re-instatement and that an apprehension that such termination might take place did not involve any imputation of bad faith to the employer Bank, as wrongly held by the Appellate Tribunal. For those reasons the learned Judge appears to have thought that the Appellate Tribunal's decision that the original Tribunal had been guilty of illegality was wrong. This opinion bears more on the point as to whether the Appellate Tribunal was right in making its final order on the basis that errors of law had been committed than on the point as to whether it was right in entertaining the appeal on the basis that a substantial question of law was involved. It appears to me, however, that the principles laid down by the Appellate Tribunal in an earlier decision to which it referred, were not put forward as law created by it by its own authority, but they were only stated as principles of the general law which every tribunal, having to act judicially with respect to such matters as fall to be considered by Industrial Tribunals, was required and expected to follow. Statute law and judge-made law are not the only laws. There is something like a common or general law, the principles of which govern the making of judicial decisions and which Courts and Tribunals state from time to time. An industrial tribunal, it may be pointed out, does not make a settlement, but adjudicates. I think further that although, ordinarily, the practical utility of making an order for re-instatement will certainly be a relevant consideration in deciding whether such an order ought or ought not to be made, a presumption or apprehension that the employer may defeat the order would involve an imputation of bad faith to him and therefore would not be

a proper consideration and that the reason on which the Tribunal of first instance proceeded in this case did involve such an imputation. Although the terms of employment of the officiating and temporary employees made them liable to be discharged on reasonable notice but without assignment of any reason, normally, the employer Bank would consider the case of each employee on the merits, confirming those of the officiating hands who had proved themselves to be competent and absorbing in the permanent establishment those of the temporary hands who had been found suitable and who could be absorbed. The Bank would not discharge such employees simply because it had a right to do so. It could not therefore be presumed that the employees concerned might all be discharged within a short time after re-instatement without presuming that the Bank would act in anger or bad faith and not in accordance with the merits of the employees. Such a presumption, I think, was not a relevant or proper but an extraneous consideration. I am therefore unable to agree with the learned Judge that the Appellate Tribunal was wrong in holding that the order under appeal before it was vitiated by errors of law. But as I have said, the real question before the learned Judge was and before us is not whether the ultimate decision of the Appellate Tribunal was correct, but only whether its decision that the appeal before it was maintainable, was correct. For the reasons I have already given, I cannot agree that no question of law could possibly arise out of the allegation of disregard of the principles enunciated by the Appellate Tribunal or out of the contention that the Tribunal of first instance had proceeded on extraneous considerations. There was, in any event, an arguable question with respect to both the points and that was sufficient to sustain the appeal.

37. The present appeal must, for the foregoing reasons, succeed. Although one of the 13 employees was not before Sinha, J., the order of the Appellate Tribunal in his favour does not survive, since the learned Judge quashed the whole order. But that employee is not even a party to the present appeal. Of the remaining 12, only 8 are appellants before us. The other 4, although impleaded as respondents, did not appear and it is not known whether, since the restoration of the original order by Sinha, J., they have not availed themselves of the award of compensation under it. In the circumstances, the appeal is allowed and the order of Sinha, J., is set aside only so far as the appellants before us are concerned and the order of the Appellate Tribunal is restored only so far as it directs the reinstatement of the 8 appellants.

38. As the appellants succeed mainly on a ground which they did not take before the trial Judge, there will be no order for costs.

Sarkar, J.

39. I agree.

Appeal allowed.