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CA 81/78: Flavourite Foods Ltd vs. OWTU

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal
No. 81 of 1978.

BETWEEN

FLAVOURITE FOODS LTD.

Appellant

AND

OILFIELD WORKERS' TRADE UNION

Respondent

Coram: Sir Isaac E. Hyatali, C.J.
Cecil Kelsick, J.A.
Clinton Bernard, J.A.

January 26, 1983.

Andre Jessamy for the Appellant
Allan Alexander S.C. & Miss Judy Jones - for the Respondent

J U D G M E N T

Delivered by Clinton Bernard, J.A.

By a letter of the 30th June, 1977, Flavourite Foods Ltd., (the appellant) terminated the services of one Narinedath Maharaj who was then employed by it as a driver/salesman on the ground that his conduct was unsatisfactory in that he was guilty of a number of irregularities in the course of his work

/and further.....

and further that in particular, in the course of a certain transaction with one of its customers, to wit one Aphzal Mohammed of Aranguez, in June of the said year he had displayed conduct that "evinced an intention to defraud the Appellant or otherwise to tarnish its reputation."

Maharaj ("the worker") was then a member of the Oilfield Workers Trade Union ("the respondent") which was at the material time a recognised trade union under the Industrial Relations Act No. 23 of 1972 - now Chap. 88.01 ("the Act"). The appellant was at all material times a private company engaged in the manufacture of ice cream products.

The dismissal of the worker resulted in a dispute between the appellant and the respondent. It was unresolved. In consequence, the appellant, pursuant to S. 59(2) of the Act, challenged the worker's dismissal in the Industrial Court ("the Court") on the ground, inter alia, that it was "harsh and oppressive and contrary to good industrial relations practice."

After hearing the evidence of which, it should be noted, none was called for the appellant the Court in a written judgment delivered on the 16th October, 1978, found that the dismissal of the worker was in the circumstances of the case harsh and not in keeping with good industrial relations practice. In the result, it awarded the payment of exemplary damages to the worker in the sum of \$5,000 to be paid by the

/appellant.....

appellant on or before the 7th November, 1978. Against that finding and award of the Court this appeal has been lodged. The appeal was against the whole of the judgment of the Court whereby it adjudged that the dismissal of the worker was not in keeping with good industrial relations practice and for an Order that its judgment be set aside upon grounds to which I shall hereafter refer.

When the appeal came up for hearing before this Court, counsel for the respondent without objection by counsel for the appellant, took a point in limine that this Court had no jurisdiction in the matter, having regard to the provisions of S. 10(6) of the Act when read either alone or, indeed, in conjunction with S. 18 and in particular, subsection (2) thereof. As to this contention issue was joined by counsel for the appellant. But before going into the relative arguments of counsel it will be convenient to set out here the provisions of the Act under scrutiny and the particular grounds of appeal.

Sub-sections 3 - 6 of S. 10 of the Act provide as follows:-

"(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall -

/(a).....

- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
 - (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.
- (4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or re-instatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or re-instatement, or the payment of exemplary damages in lieu of such re-employment or re-instatement.

/(5).....

- (5) An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.
- (6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever."

/Section 18.....

Section 18 of the Act provides as follows:-

18. "(1) Subject to subsection (2), the hearing and determination of any proceedings before the Court, and any order or award or any finding or decision of the Court in any matter (including an order or award) -
- (a) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever; and
- (b) shall not be subject to prohibition, mandamus or injunction in any court on any account whatever.
- (2) Subject to this Act, any party to a matter before the Court is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other:
- (a) that the Court had no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken

/at some

at some time during the progress of the matter before the making of the order or award;

- (b) that the Court has exceeded its jurisdiction in the matter;
- (c) that the order or award has been obtained by fraud;
- (d) that any finding or decision of the Court in any matter is erroneous in point of law; or
- (e) that some other specific illegality not mentioned above, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.

(3) On the hearing of an appeal in any matter brought before it under this Act, the Court of Appeal shall have power -

- (a) if it appears to the Court of Appeal that a new hearing should be held, to set aside the order or award appealed against and order that a new hearing be held; or

/(b).....

(b) to order a new hearing on any question without interfering with the finding or decision upon any other question;

and the Court of Appeal may make such final or other order as the circumstances of the matter may require.

(4) The Court of Appeal may in any matter brought on appeal before it, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred although it is of the opinion that any point raised in the appeal might have been decided in favour of the appellant."

The grounds of appeal were as follows:-

"(1) The Honourable Court misdirected itself or erred in law as follows:

(i) In holding there was no evidence for the Company to rely on to establish that a purchase was made by Aphzal Mohammed.

/(ii).....

- (ii) In refusing to hold that the inescapable inference if a purchase was made by Mohammed was that some misconduct or fraud was effectuated by the worker.
- (2) The Honourable Court ought to have held that the evidence of Mohammed was so unsatisfactory that the Court having instructed itself properly in law and acting judicially could not have concluded that the testimony of Mohammed was acceptable."

In my opinion, in this appeal, it is essential to determine in the first place as a prerequisite to an adjudication upon the validity of the objection taken what in essence is the issue in this forum. To resolve this question, regard must, in my view, be had to the nature of the dispute, the premises upon which such dispute was contested and to the findings of the Court.

First of all, it was never at any time in dispute either before the Court below or before this Court that the Court below lacked jurisdiction to entertain the dispute. Another thing: it is also clear from the Records of the proceedings and indeed it is not disputed before this Court

/that the sole.....

that the sole issue before the Court below was whether the dismissal of the worker was, in the circumstances then existing, harsh or oppressive or not in accordance with the principles of good industrial relations practice and that it was on that issue and that issue alone that the Court below expressed its opinion accordingly. In my judgment the foregoing fact is vital to an answer either way to the arguments that were advanced for both sides.

My understanding of the sum total of the submission of counsel for the respondent was that since the sole issue before the Court was whether, in the circumstances then existing, the dismissal or termination of the services of the worker was harsh, oppressive or not in accordance with the principles of good industrial relations practice, the Court's opinion thereon was by reason of S. 10(6) or the conjoint effect of this section and of S. 18(2), not appealable. Besides, while S. 10(6) alone may not operate to bar certiorari proceedings, in any event there was here in reality a complaint about an error on the face of the record and no more in which case proceedings by way of certiorari would not even have been available to the appellant.

My understanding of the sum total of the argument of counsel for the appellant was that whatever be the provisions of Section 10(6) of the Act the right of appeal was preserved and maintainable in this case by reason of S. 18 - Sub-section 2 - and in particular paragraph (d) thereof. Further, the

/question.....

question of the right to the remedy by way of certiorari did not arise for consideration since by the provisions of the Act the Court was made a Superior Court of Record.

In Re Gilmore's Application 1957 1 A.E.R. 796

the question arose as to whether the provisions of Section 36 - Sub-section 3 of the National Insurance (Industrial Injuries) Act 1946 of the United Kingdom operated to oust the jurisdiction of the High Court of England from enquiring into the legality of a decision by the Medical Appeal Tribunal in relation to an incident involving a certain worker which such decision was by the Act "final" for all purposes. On appeal to the Court of Appeal it was held by that Court, inter alia, that the provisions of the particular legislation merely meant that the decision of the tribunal should be final on the facts and should not be the subject of appeal. In other words while the sub-section operated to oust appellate jurisdiction on findings of fact it did not by the same token operate ipso facto to oust resort to the appropriate prerogative remedy. This is clear from the judgments of all three judges of the Court and more particularly the dictum of Denning L.J. as he then was when at Page 801 he stated:-

"The second point is the effect of S. 36(3) of the National Insurance (Industrial Injuries) Act, 1946, which provides that "any decision of a claim or question ...

/shall be.....

shall be final." Do those words preclude the Court of Queen's Bench from issuing a certiorari to bring up the decision? This is a question which we did not discuss in R. v Northumberland Compensation Appeal Tribunal Ex p. Shaw (4) (1952 1 All E.R. 122), because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law...."

In my opinion, where the contest between the parties is whether the termination of a worker is, in the circumstances existing at the time of such termination; harsh or oppressive or not in accordance with the principles of good industrial relations practice that question is one of fact.

/In Transport.....

In Transport Industrial Workers Union v Public
Transport Services Corporation - Civil Appeal No. 38 of 1973
this Court held that where a dispute is within the jurisdiction
of the Court and the sole question for determination before the
Court is whether the dismissal of a worker was, in the circum-
stances then existing, harsh or oppressive or not in accordance
with the principles of good industrial relations practice and
the Court has expressed its opinion thereon, no appeal lies
against that opinion. This decision is in keeping with the
decision in Gilmore (supra) and with the thinking in South
East Asia Fire Bricks v Non-Metallic Union (1980)2 All E.R.
689 insofar as appeals are concerned.

As I said earlier it is essential to determine
at the end of the day what is the real issue in this appeal
having regard to all the circumstances. The complaint here
is not that the Court lacked or that it exceeded its juris-
diction in that for example that it was guilty of a breach
or breaches of the rules of natural justice or that some
fraud was committed in the course of hearing or determination
of the dispute, in which case, if established, the proceedings
would have been a nullity. When regard is had to the issue
that had been joined between the parties, the way that contest
had been fought, the decision of the Court and the grounds
of appeal, it seems to me that the complaint here is plainly
one of a challenge to the Court's opinion that the dismissal
of the worker was harsh or oppressive or not in accordance

/with the.....

with the principles of good industrial relations practice because in so coming to this decision the Court committed an error or errors which were clearly manifest on the face of the record.

In the South East Asia Fire Bricks Case (supra) a like question arose for consideration in the Privy Council where the Board had to construe a provision of the Industrial Relations Act 1967 of Malaysia, namely S. 29 - Sub-section 3(a), which was the only provision in that Act relating to challenges to the Court's awards and which was in the following terms:-

"29. 3(a) Subject to this Act an award of the Court shall be final and conclusive and no award shall be challenged, appealed against, reviewed, questioned or called in question in any court of law."

However, before coming to deal specifically with the case itself several things, in my view, fall to be noticed about the Malaysian legislation when compared with the Act. First of all S. 10(6) of the Act is, in my view, couched in stronger and more emphatic language than the corresponding ouster provision in the Malaysian Act. Next, the Malaysian provision relates to awards generally whereas S. 10(6) relates

/to an award.....

to an award of the Court where the dispute is of a special kind. Finally, the Malaysian Act does not contain a provision similar to S. 18 - Sub-section 2 of the Act.

In my judgment, the conjoint effect of S. 10(6) and 18(2) of the Act is that where the sole issue is whether the dismissal of a worker is harsh or oppressive or not in accordance with the principles of good industrial relations practice, the opinion of the Court either way on this cannot be the subject of reinvestigation by the process of appeal - See in this connection Transport Industrial Workers Union v Public Transport Service Corporation Civil Appeal No. 38/73.

In deference to counsel and if only for the sake of completeness, I turn to the question of the remedy, if any, by way of certiorari under the Act (a procedure available for judicial review of proceedings by inferior tribunals) which arose in the course of the arguments by both sides.

It is a moot point whether the Court having by the Act been declared to be a Superior Court of Record - see in this connection S. 4 of the Act - certiorari will lie to it. However, it is not necessary for the purposes of this appeal to decide the point. In the event, I express no opinion either way on it now but would prefer to leave the question for another and more appropriate occasion if necessary. For the present, I would proceed on the assumption that the remedy is, despite the wording of the legislation as a whole, still at large and available. Even so the law is clear that

/the remedy.....

the remedy of certiorari in cases of the kind under review, that is to say where the matter is governed by a Statutory Ouster Clause, lies for lack of jurisdiction or excess of it - Anisminic Ltd. v Foreign Compensation Commission 1969 1 A.E.R. 208; 1969 2 W.I.R. 163. It does not lie for an error of law on the face of the record - South East Asia Fire Bricks v Non-Metallic Union (supra).

Thus in the South East Asia Fire Bricks Case (supra) Lord Fraser of Tullybelton in declaring the Opinion of the Board stated ibid at Page 692:

"The decision of the House of Lords in Anisminic Ltd. v Foreign Compensation Commission (1969 1 All E.R. 208, (1969) 2 AC 147, shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' (1969) 1 All E.R. 208 at 213, (1969) 2 AC 147 at 171 per Lord Reid). But if the

/inferior.....

inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In Pearlman v Keepers and Governors of Harrow School (1979) 1 All E.R. 365 at 372, (1978) QB 56 at 70, Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be 'discarded'. Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane LJ, when he said (1979) 1 All E.R. 365 at 375, (1979) QB 56 at 74):

'..... the only circumstances in which this court can correct what is to my mind the error of the county court judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration or addition".'

/Further.....

Further at P. 695 Lord Fraser had this to say:-

' in the opinion of their Lordships there is no doubt that the dispute between the appellants and the respondents was a trade dispute within the definition in the Industrial Relations Act 1967, s2. It was therefore a dispute which the minister had power to remit to the Industrial Court under s. 23(2). The Industrial Court applied its mind to the proper question for the purpose of making their award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law on its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that s 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings....."

See also Thomas v A.G. of Trinidad and Tobago 1981 3 W.L.R. 601 at 617 - 618.

/In my opinion.....

In my opinion, since the dispute was one within the jurisdiction of the Court and, since the sole issue before it was whether the dismissal of the worker was, in the circumstances then existing, harsh or oppressive or not in accordance with the principles of good industrial relations practice, the Court having applied its mind to this sole question before it and having expressed its opinion thereon, the provisions of s. 10(6) read either alone or in conjunction with s. 18 would have operated to effectively oust the jurisdiction of the High Court to quash the Court's opinion even though it could be said that there was an error or errors of law on the face of the record.

Looking at the matter another way I would say this purely as a postscript to this judgment. Several acts of misconduct were relied on by the appellant before the Court but the evidence in respect of these were not of a credible nature having regard to the system which the Court found was obtaining at the material time. These were not seriously pursued before the Court nor indeed before this Court. So reliance for the justification for the worker's dismissal and, a fortiori, the appellant's action in both Courts was placed on his alleged particular single dealing with the customer, Mohammed. As to this incident, the evidence of Hamid - a witness for the worker - as to the account which Mohammed gave him pertaining to the nature of the particular transaction between himself and the worker was, of course,

/admissible.....

admissible by reason of S. 9 of the Act, even though it was hearsay. But this bit of evidence when looked at against the rest of the evidence which included the fact as found by the Court that there was no evidence to establish positively from the company's records that anything was amiss, was tenuous and of little if any probative value in the circumstances. Further, in my view, since the company called no evidence at all and since the evidence of the witness Mohammed including the explanation for the inconsistency in his evidence was also not challenged, it was open to the Court to accept his account and to treat him in the circumstances as a credible witness. The Court chose not to adopt this course in relation to Mohammed. All in all, however, at the end of the day it came to the conclusion on the facts before it, that the worker's dismissal was in all the circumstances harsh or oppressive and not in accordance with the principles of good industrial relations. Whatever one may think of its approach is immaterial for the matter was within the exclusive province of the Court and by the operation of S. 10(6) and 18(2) of the Act, its decision in this regard is not open to appeal.

/I would uphold.....

I would uphold the preliminary objection, and accordingly dismiss the appeal. Pursuant to S. 10(2) of the Act I would make no order as to costs.

Clinton Bernard,
Justice of Appeal.