Jit Singh and others
v.
The Director of Consolidation of Holdings, Punjab and others

Chopra, J.

finally completed. I am prepared to agree with Mr. Doabia that it does appear to be very much improper that any modification should have been made in the things which had been settled and acted upon long ago. But any interference on that ground in exercise of the extraordinary jurisdiction of this Court under Article 226 would also be equally improper. The power was there, and it is not even suggested that the exercise of it was capricious or *mala fide*.

In the result, the petition fails and is dismissed with costs.

K. S. K.

CIVIL MISCELLANEOUS

Before K. L. Gosain and A. N. Grover, JJ.

JAGATJIT COTTON TEXTILE MILLS LTD., PHAGWARA,—*Petitioner.*

versus

INDUSTRIAL TRIBUNAL, PATIALA (NOW DEFUNCT) AND OTHERS,—*Respondents.*

Civil Miscellaneous No. 143(P) of 1956

1958
Mar., 31st

Industrial Disputes Act (XIV of 1947)—Sections 7, 8 and 10—Industrial Tribunal appointed for six months on 13th August, 1955—Life expired on 12th February, 1956 but extended for another six months on 29th February, 1956 with retrospective effect—No fresh reference made—Award given in a pending dispute on 13th July, 1956—Whether valid—Constitution of India (1950)—Article 226—Writ of Prohibition—Issue of—Whether discretionary under the Constitution of India—Rules for the grant of such writ stated—Writ of Ceritioari—*Objection to the jurisdiction of the Tribunal not raised before the Tribunal—Effect of—Such objection whether can be taken for the first time in a petition for a writ of* certiorari—*Conduct of the petitioner—Whether disentitles him to such relief—Principles as to stated.*

Held. that the life of the Tribunal having come to an end on 12th February, 1956, the notification of 29th February, 1956, could not infuse fresh life in the Tribunal with effect from 13th February, 1956. In the absence of any express powers. no extension of time can be made by the State Government. There can, however, be no doubt about the validity of the appointment of the Tribunal with effect from 29th February, 1956 when the notification was issued. But if the Tribunal had been freshly constituted, it became necessary to make a fresh reference under section 10 of the Industrial Disputes Act. No question of filling of vacancies under sub-clause (2) of section 8 of the Act arose, with the result that when the life of the Tribunal which had been appointed on 13th August, 1955 came to an end by efflux of time, the new notification dated 29th February, 1956 must be held to have been made under section 7 of the Act. The notification does not contain any mention of the disputes having been referred to the Tribunal, nor was any notification issued making any such reference. No such reference having been made, the award given on the 13th July, 1956 was null and void having been made by a Tribunal that had no jurisdiction in the matter.

Held, that with regard to writ of Prohibition, the position in this Country is different from the one that obtains in England. The rule of English law that if absence of jurisdiction is apparent on the face of the record, a writ of prohibition is a matter of right and not a matter of discretion is the result of the historical background of such a writ under the English Law. but under the Indian Constitution the power to grant all kinds of writs including a writ of Prohibition is discretionary. The following rules as laid down by the Bombay High Court are generally observed for the grant of such writs:—

"(*i*) The High Court has always the power and the discretion to grant or refuse to grant this writ which though it is primarily intended for enforcement of fundamental rights must also issue where necessity demands immediate and decisive interposition.

(*ii*) The considerations that arise when this writ is asked for on the ground that any inferior Court

or person or body of persons having legal authority is committing or has committed an error of law apparent on the face of its proceedings and those that arise in a case of excess or usurpation of jurisdiction by any such Court or authority must necessariy be differentiated for in the former case there is an erroneous exercise of jurisdiction which exists while in the latter case there is no jurisdiction at all.

(*iii*) Absence of jurisdiction may be patent, that is, apparent on the face of the proceedings, or latent in the sense that it is not so apparent. Where the defect is not apparent, the Court in its discretion may refuse the writ if the facts or circumstances attending the case show undue delay, insufficient materials, misconduct, laches or acquiescence on the part of the party applying for it or are such as would render it unjust on the part of the Court to interpose.

(*iv*) Where, however, there is patent lack or jurisdiction and the Court is immediately satisfied that the inferior Court or authority has exceeded its jurisdiction, the Court will very readily interpose. The discretion to grant or refuse to grant the writ is of course there. But since discretion contemplates an exercise of arbitrium and not arbitrariness the writ must go though not of right nor of course yet almost as a matter of course unless an irresistible case for withholding the writ is made out."

Held also, that it cannot be laid down as a general rule that in every case in which the objection to the jurisdiction of the Tribunal had not been taken before the Tribunal, no relief should ever be granted in exercise of the discretionary powers. How for the conduct of a petitioner disentitles him to any relief will depend on the facts of each case, and if a reasonable explanation is forthcoming for not taking any objection to jurisdiction before the Tribunal, that may be accepted by the High Court and relief granted by way of *Certiorari.* The following principles regarding the issue of the aforesaid writ *vis-a-vis* the conduct of the petitioner are relevant:—

(1) The Court has always the power and the discretion to grant or refuse to grant the writ and while exercising discretion it will take into consideration all the relevant factors.

(2) The failure to raise objection to defect or lack of jurisdiction of the Tribunal before it, is always material and relevant factor and must be taken into account and it makes no difference whether such a defect is patent or latent.

(3) Ordinarily such a conduct would preclude the petitioner from claiming the writ unless a cogent explanation is furnished by stating the necessary facts upon affidavit which should satisfy the Court that the failure to raise the objection was not deliberate or that the petitioner had no knowledge of facts on which the objection could be based.

(4) It would naturally depend on the facts of each case whether such conduct has been established as would disentitle the petitioner to any such relief.

Case law discussed.

Case referred by the Hon'ble Mr. Justice K. L. Gosain, on 26th March, 1958 to a Division Bench for the decision of the question of the validity of oppointment of Labour Tribunal. The case was finally decided by the Division Bench consisting of Hon'ble Mr. Justice K. L. Gosain, and Hon'ble Mr. Justice A. N. Grover, on 31st day of March, 1959.

Amended petition under Article 226 of the Constitution of India praying that a writ of certiorari or any other order or direction be issued quashing the award given by S. Narindar Singh, Industrial Tribunal, at Kapurthala which was published in the Pepsu Gvernment Gazette, dated 4th August, 1956.

J. N. KAUSHAL, for Petitioner.

S. M. SIKRI and ANAND SAROOP, for Respondent.

ORDER

Grover, J.

GROVER, J.—This petition under Article 226 of the Constitution, by which an award made by the Industrial Tribunal, Patiala, is sought to be quashed by certiorari, arises in the following circumstances: Certain industrial disputes arose between the petitioner-company and its workmen and the same were referred on 11th May, 1955 to S. Sant Ram Garg, Industrial Tribunal at Kapurthala, for adjudication by means of a notification, dated 11th May, 1955, issued by the erstwhile Pepsu State. Later on another notification was issued on 13th August, 1955, by which the Industrial Tribunal at Kapurthala (later at Patiala), was constituted a Tribunal for the whole of the erstwhile Pepsu State for a period of six months and S. Narindar Singh, retired District Judge, was appointed its sole member. All pending and future industrial disputes were to be adjudicated upon by the aforesaid Tribunal. On 3rd September, 1955, another notification was issued by which the disputes pending between the petitioner and its workmen were directed to be disposed of by the aforesaid Industrial Tribunal. These disputes were still pending when the period of six months, for which the Industrial Tribunal had been constituted expired. On 20th February, 1956, the petitioner made an application to the Tribunal that the period of six months had expired, and the Tribunal was left with no jurisdiction to proceed with the hearing of the reference. Thereupon the Tribunal stayed the proceedings. On 29th February, 1956, a notification was issued by which the life of the Tribunal was extended for a period of six months from the date of the expiry of the previous period, namely, 13th February, 1956. S. Narindar Singh's tenure was also extended for the same period. On 12th March, 1956, the

Tribunal recorded an order in which it is mentioned that the parties had given their statements to the effect that they did not want *de novo* trial and that the case might be decided on the material on the record. The Tribunal gave an award on 13th July, 1956, which was published in the State Gazette on 4th August, 1956. The petitioner filed a petition in this Court on 30th August, 1956, under Article 226 of the Constitution alleging *inter alia* that the notification extending the life of the Tribunal was void and inoperative as the same could not be done with retrospective effect. It was also alleged that the award was without jurisdiction and void as no fresh reference had been made by the Government to the Tribunal, which should be deemed to have been appointed on 29th February, 1956, and that the Tribunal had no jurisdiction to decide the disputes referred to the previous Tribunal. There were allegations of illegalities and apparent errors of law and fact which, according to the petitioner, rendered the award inexecutable and inoperative. The petition was admitted on 31st August, 1956. The petitioner also filed an appeal against the award to the Labour Appellate Tribunal on the same day, i.e., 31st August, 1956; which reached the Appellate Tribunal on 4th September, 1956. That appeal was dismissed by the Tribunal on 24th December, 1956, on the ground that it was not competent. The petitioner was allowed to amend its previous petition filed under Article 226 of the Constitution on 21st September, 1956. This petition came up before Gosain, J., on 26th March, 1958; who made an order on that date to the effect that he wanted to have the assistance of another Judge for determination of the case and directed that the case be laid before the Honourable Chief Justice for orders under proviso (b), clause (xx), Chapter III-B, High Court Rules and Orders,

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunct) and others

Grover, J.

Volume V. The amended petition has thus been placed before us for final disposal.

It is contended by Mr. Jagan Nath Kaushal on behalf of the petitioner that on the expiry of six months from 13th August, 1955, the Industrial Tribunal of which S. Narindar Singh was the sole member became *functus officio,* and that His Highness the Rajpramukh was not empowered to extend the life of the Tribunal by a further period of six months from the date on which the six months' period for which the Tribunal was originaly constituted expired. It is further contended that if the life of the Tribunal could not be so extended, it would follow that the Industrial Tribunal was constituted afresh with S. Narindar Singh as its sole member on 29th February, 1956. As there is no mention of the pending disputes having been referred to this Tribunal, a fresh reference under section 10 of the Industrial Disputes Act, 1947, was necessary to clothe the Tribunal with jurisdiction. As no such reference was made, the entire proceedings before the Tribunal were *coram non judice* and the award of the Tribunal, dated 13th July, 1956, was null and void.

On behalf of the respondents a preliminary objection was taken before, and has been strenuously pressed again, namely, that the question of lack of jurisdiction should have been raised by the petitioner before the Tribunal itself, and, as it was never raised there and the petitioner took part in the proceedings, it was not open to the petitioner to agitate that question in a petition under Article 226 of the Constitution. In support of this objection the respondents have also relied on the fact that the Tribunal was called upon to decide five points and that substantially four of them had been decided in favour of the petitioner and it is

only one which was decided against it, and as the petitioner took the chance of having a decision in its favour it should not be permitted now to assail the decision of the Tribunal on the fifth point in the same award. On the other hand it is firmly maintained on behalf of the petitioner that where there is lack of inherent jurisdiction, no amount of acquiescence, waiver or consent on the part of any party can invest the Tribunal or Court with jurisdiction which it does not possess.

Before the preliminary objection can be decided it is necessary to examine whether the Industrial Tribunal had the jurisdiction to make the award or not. If the extension of the life of the Tribunal by means of the notification, dated 29th February, 1956, with retrospective effect from 13th February, 1956, was valid and could have been legally made, then it cannot be disputed that it had the jurisdiction to make the award. On behalf of the petitioner reliance has been placed on *Strawboard Manufacturing Co.* v. *G. Mill Worker's Union* (1). In that case it has been held that the State Government cannot extend the time for making an award *ex post facto*, i.e., after the time limit originally fixed therefor has expired, and that the provisions of sections 14 and 21 of the U. P. General Clauses Act, 1904 (equivalent to sections 14 and 21 of the Indian General Clauses Act) did not confer any power of extension of time and no support could be derived from the aforesaid provisions for validating an award passed after the expiry of time originally fixed, though the order giving extension *ex facie* purports to modify the original order fixing the time limit. It was contended by the learned Advocate-General in reply that the power to extend the life of a Tribunal in

(1) A.I.R. 1953 S.C. 95

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunct) and others

Grover, J.

the circumstances which obtained in the instant case was implicit in the general power which the State Government has in the matter of appointment of the Industrial Tribunal. He also seeks to derive support from the provisions of section 21 of the General Clauses Act, and submits that the notification of 29th February, 1956, merely amended the previous notification of 13th August, 1955, with regard to the period for which the Industrial Tribunal was to function. In other words, according to him, the period of six months specified in the notification of 13th August, 1955, was amended and the total period which was to be calculated from 13th August, 1955, was to be one year. It is not possible to accede to the contention raised by the Advocate-General in view of the clear pronouncement by their Lordships of the Supreme Court in the *Strawboard Manufacturing Company's case* (1), *supra,* which dealt with the points that have been raised before us and according to which, in the absence of any express powers to extend, no extension of time can be made by the State Government, nor can section 21 of the General Clauses Act be of any aid in such circumstances. The life of the Tribunal having come to an end on 12th February, 1956, the notification of 29th February, 1956, could not infuse fresh life in the Tribunal with effect from 13th February, 1956. There could be no amendment or modification of the previous notification of 13th August, 1958, within the meaning of section 21 of the General Clauses Act with retrospective effect and the notification of 29th February, 1956, could operate only prospectively, i.e., from 29th February, 1956. The other decision of their Lordships of the Supreme Court in *Edward Mills Co.* v. *State of Ajmer* (2), to which our attention was invited by the learned Advocate-General,

(1) A.I.R. 1953 S.C. 95.
(2) A.I.R. 1955 S.C. 25

can hardly lend support to the contention which he has raised on this point. In that case the term of a committee appointed by the Government under Rule 3 of the Rules framed under section 30 of the Minimum Wages Act, 1948, was extended after the term originally fixed had expired. It was held by their Lordships that the extension was not bad, but it is clear that there were a number of reasons for coming to that conclusion which are quite distinguishable from the instant case. There the committee had not functioned at all and did not work after 16th July, 1952 and before 21st August, 1952, when its term was extended. The report was submitted after the extension had been made. Their Lordships have observed at page 33 that assuming that the order of 21st August, 1952, could not revive a committee which was already dead, it could certainly be held that a new committee was constituted on that date and even then the report submitted by it would be a perfectly good report. Moreover, the committee was only an advisory body and the Government was not bound to accept any of its recommendations. Consequently, the procedural irregularities could not vitiate the final report which fixed the minimum wages. In the instant case there can be no doubt about the validity of the appointment of the Tribunal with effect from 29th February, 1956, when the notification was issued which purported to extend its life for a period of six months with retrospective effect from 13th February, 1956. But, if the Tribunal had been freshly constituted, it became necessary to make a fresh reference under section 10 of the Industrial Disputes Act, 1947. No question of filling of vacancies under sub-clause (2) of section 8 of the aforesaid Act arose with the result that when the life of the Tribunal which had been appointed on 13th August, 1955, came to an end by efflux of time, the new notification dated

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunct) and others

Grover, J.

29th February, 1956, must be held to have been made under section 7 of the Act,—*vide Minerva Mills, Ltd.* v. *Workers* (1). Even in the notification of 29th February, 1956, it is expressly stated that it was being issued in exercise of the powers conferred by section 7 of the Act. The notification in question does not contain any mention of the dispute pending between the petitioner and its workmen having been referred to the aforesaid Tribunal, nor was any other notification issued making any such reference. According to the provisions of the Industrial Disputes Act (as it was in force on 29th February 1956), the appropriate Government had to refer the dispute to a Tribunal for adjudication [Section 10(1)(c)]. No such reference having been made, it must be held that the award given on 13th July, 1956, was null and void having been made by a Tribunal that had no jurisdiction in the matter.

The question still remains whether the objection raised by the learned Advocate-General, mentioned before, should be sustained. In support of the objection reliance has been placed on *G. M. T. Society* v. *Bombay State* (2). In that case the Gandhinagar Motor Transport Society had been granted a permit to run a transport bus on a certain route under the provisions of the Motor Vehicles Act. The Society applied to the Regional Transport Officer for a permit to run a second bus. This was granted. Certain other parties had also applied for a permit, but their application was rejected. One of them appealed to the State Transport Authority which was dismissed. An appeal was taken by that party to the Government and the Government reversed the

(1) A.I.R. 1953 S.C. 505
(2) A.I.R. 1954 Bom. 202

decision of the Regional Transport Officer and directed a permit to be granted to that party. Thereupon the Gandhinagar Motor Transport Society moved the High Court under Article 226 of the Constitution. Two preliminary objections were raised by the Advocate-General in that case. The first objection was as to delay. The order which was challenged was passed on 15th January, 1953, and the petition challenging it was preferred on 11th May, 1953. It was considered that such a delay in the presentation of the petition would disentitle the petitioners to any relief. The second objection was that the Government had no jurisdiction to sit in appeal over the decision of the State Transport Authority. This point had not been raised by the petitioners when the Government heard the matter. Chagla, C. J., gave a number of reasons for accepting that objection. These may be summarised in the following manner:—

(a) English Courts have taken the view that before a question of jurisdiction is raised on a petition, objection to jurisdiction must be taken before the Tribunal whose order is being challenged.

(b) High Court exercised a special jurisdiction in such matters and is entitled to know what the Tribunal has to say on the question of jurisdiction which the petitioner wants to agitate before the Court.

(c) High Court does not exercise ordinary jurisdiction under Articles 226 and 227 of the Constitution. It is always open to a petitioner to assert his rights in a suit properly filed, but when he chooses

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

to assert his rights by calling upon the High Court to exercise its special jurisdiction, the High Court must itself lay down certain principles for the exercise of that jurisdiction.

(d) When the petitioner comes to the High Court for a writ, the Court must tell to the petitioner—"it was open to you to raise that point before the Tribunal whose order you are challenging. You have sat on the fence; you have taken a chance of the Tribunal deciding in your favour, and it is not open to you now to come to us and ask for a writ."

Chagla, C. J., relied largely on a decision in *Rex* v. *Williame*: *Phillips, Ex parte* (1). It is contended by the learned Advocate-General that the correct principles were laid down in that case which ought to be followed, particularly when the petitioner seeks to have an order quashed by certiorari. With regard to the later decision of the Bombay High Court in *S. C. Prasher* v. *Vasantsen Dwarkadas* (2), on which a great deal of reliance has been placed on behalf of the petitioner before us, it is pointed out by the Advocate-General that in that case the question was one of prohibition and not certiorari and, therefore, the rule laid down there cannot be applied to the present case. In the later decision in which also the judgment was delivered by Chagla, C. J., it has been laid down that a patent want of jurisdiction entitles the petitioner to obtain immediate relief from the High Court, even though he could raise the plea of want of jurisdiction in a higher Tribunal and, even though he may have acquiesced in the want of jurisdiction. Chagla,

(1) (1914) 1 K.B. 608
(2) A.I.R. 1956 Bom. 530

C. J., relied on an earlier English decision in *Farquharson* v. *Morgan* (1), and a fairly recent decision of the Queen's Bench Division in *R.* v. *Comptroller-General of Patents* (2). No reference was made by him to his previous judgment in *The Union of India* v. *Hasanali Mohamed Hussein Shariff* (3). In the later decsion (*S. C. Prashers case*) (4), the Income-tax Officer had issued a notice under section 34 of the Income-tax Act on 30th April, 1954, calling upon firm Purshottam Laxmidas to submit a return of its total income for a particular year. That notice was promptly challenged by a petition under Article 226. There can be little doubt that it was a case of prohibition and not certiorari and a peremptory relief was sought from the High Court to stop proceedings being taken before an authority that would have no jurisdiction.

So far as prohibition is concerned, in England the law is that where the defect of jurisdiction is apparent on the face of the proceedings and the application is made by a party, the order goes as of right and is not a matter of discretion (Halsbury's Laws of England, Volume 11, page 115). It is further stated at page 118 of that book that where the objection to the jurisdiction of an inferior Court appears on the face of the proceedings, prohibition lies at any time, even after judgment or sentence in spite of the laches or acquiescence of the applicant. Some of the High Courts in India have taken the view that where the Judgment of a Court or Tribunal is without jurisdiction, it must be set aside by a superior Court even if no objection regarding lack of jurisdiction was taken before

(1) (1894) 1 Q.B. 552
(2) (1953) 1 All. E.P. 832.
(3) A.I.R. 1954 Bom. 505
(4) A.I.R. 1956 Bom. 530

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

the Court or Tribunal. In *Raghunandanlal* v. *State of Rajasthan* (1), it was considered that the failure of the petitioner to take objection to jurisdiction before the Custodian did not prevent him from challenging it in a petition under Article 226 of the Constitution, and the impugned order was quashed. In *Dholpur Co-op. T. & M. Union* v. *Appellate Authority* (2), and *Barkatali v. Custodian-General* (3), the same view was taken. The following observations of Wanchoo, C. J., at page 216 are noteworthy:—

> "But this is a case where the lack of jurisdiction is patent, and the mere fact that no objection was taken before the Custodian or the Custodian-General would not disable the applicant from raising the point before us. The matter would have been different if the question of jurisdiction depended upon the allegation and proof of certain facts. In that case, if no objection had been taken, we would not have heard the applicant".

It may be mentioned that in all the aforesaid cases the interference was by certiorari as the orders which had already been made by the authorities who suffered from lack of jurisdiction were duly quashed. In *Babu Ram* v. *Peragi* (4), Randhir Singh, J., relied on *S. C. Prasher's case* (5), and held that in cases in which the objection went to the root of the matter, the High Court was competent to quash the order in spite of the fact that a plea of jurisdiction was not raised at the earliest opportunity or before the Tribunal. He relied on certain observations in *Bhagirathi* v. *The State* (6).

(1) A.I.R. 1952 Raj. 184
(2) A.I.R. 1953 Raj. 193
(3) A.I.R. 1954 Raj. 214
(4) A.I.R. 1956 All. 362
(5) A.I.R. 1956 Bom. 530
(6) A.I.R. 1955 All. 113

While considering this matter the distinction between cases where certiorari is granted and those cases where prohibition is granted has to be borne in mind. A writ of certiorari neither in England nor here issues as a matter of course. In *A. M. Allison* v. *B. L. Son* (1), it was observed at page 231 as follows:—

> "Proceedings by way of certiorari are 'not of course'. (*Vide* Halsbury's 'Laws of England', Hailsham Edition, Vol. 9, paras 1480 and 1481, pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice . . . ."

Even with regard to prohibition, the position in this country seems to be somewhat different from the one that obtains in England. Under Article 226 of the Constitution it is within the discretion of the High Courts whether to issue any writs, directions or orders or not. In *K. S. Rashid and Sons* v. *I. T. I. Commission* (2), Mahajan, C. J., has observed that the remedy provided for in Article 226 of the Constitution was a discretionary remedy and the High Court had always the discretion to refuse to grant any writ if it was satisfied that the aggrieved party could have an adequate or suitable relief elsewhere. The position with regard to prohibition in America is that it will ordinarily be granted to one who at the outset objected to the jurisdiction and has preserved his rights by appropriate procedure and has no other remedy, but if the jurisdiction of the lower Court is doubtful or depends upon a finding of fact made upon evidence which is not on the record, or if the complaining party has an adequate remedy by appeal or otherwise, the writ will ordinarily be

(1) A.I.R. 1957 S.C. 227
(2) A.I.R. 1954 S.C. 207

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

denied. (*Vide In Re Chicago, Rock Island, and P. R. Co.*) (1). *In Ex parte Republic of Peru* (2), it was laid down that the common-law writs of mandamus and prohibition, like equitable remedies, might be granted or withheld in the sound discretion of the court. To the same effect is the statement in American jurisprudence, Volume 42, at pages 143-144—"There is authority that though the want of jurisdiction is apparent on the face of the record, the writ does not issue as a matter of right but remains a matter of discretion in the absence of a constitutional or statutory provision to the contrary." The law with regard to issue of a writ of prohibition in India has been laid down with admirable clarity (if I may say so with respect) by Desai, J., in *S. C. Prashar* v. *Vasantsen Dwarkadas* (3), and *Madhavlal Sindhoo* v. *V. R. Idurkar* (4). According to the learned Bombay Judge, the rule of English Law that if absence of jurisdiction is apparent on the face of the record, a writ of prohibition is a matter of right and not a matter of discretion is the result of the historical background of such a writ under the English Law. Under the Indian Constitution the power to grant all kinds of writs including a writ of prohibition is discretionary. The following observations may be set out in his own words:—

> "(1) The High Court has always the power and the discretion to grant or refuse to grant this writ which though it is primarily intended for enforcement of fundamental rights must also issue where necessity demands immediate and decisive interposition.

(1) 65 L. Ed. 273—280
(2) 87 L. Ed. 1014
(3) (1956) 29 I.T.R. 857
(4) (1956) 30 I.T.R. 332

(ii) The considerations that arise when this writ is asked for on the ground that any inferior Court or person or body of persons having legal authority is committing or has committed an error of law apparent on the face of its proceedings and those that arise in a case of excess or usurpation of jurisdiction by any such Court or authority must necessarily be differentiated for in the former case there is an erroneous exercise of jurisdiction which exists while in the latter case there is no jurisdiction at all.

(iii) Absence of jurisdiction may be patent, that is, apparent on the face of the proceedings, or latent in the sense that it is not so, apparent. Where the defect is not apparent, the Court in its discretion may refuse the writ if the facts or circumstances attending the case show undue delay, insufficient materials, misconduct, laches or acquiescence on the part of the party applying for it or are such as would render it unjust on the part of the Court to interpose.

(iv) Where, however, there is patent lack of jurisdiction and the Court is immediately satisfied that the inferior Court or authority has exceeded its jurisdiction, the Court will very readily interpose. The discretion to grant or refuse to grant the writ is of course there. But since discretion contemplates an exercise of arbitrium and not arbitrariness the writ must go though not of right nor of course yet almost as a matter of

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

course unless an irresistible case for withholding the writ is made out."

It was against the judgment of Desai, J., In *S. C. Prashar's case* (1), that the matter went up in appeal to the Bench, the decision of which is reported in A.I.R. 1956 Bom. 530 (1). The principles which govern the grant of writ of prohibition, however, cannot be applied in the present case in which the award is sought to be quashed by certiorari.

As regards certiorari, the view of the Bombay High Court in the earlier decision in *G. M. T. Society's case* (2), has already been noticed. In that case Chagla; C. J., relied on *Rex's case* (3), in which a baker had been charged under section 4 of the Bread Act, 1836, with selling bread otherwise than by weight and was convicted in the presence of two Justices. He obtained a rule *nisi* for a writ of certiorari to quash the conviction on the ground that one of the Justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the rule *nisi* was obtained did not state that any objection to the competence of the Court was taken at the hearing before the Justices, nor did it state that at the date of that hearing the applicant was without knowledge of the facts alleged to disqualify one of the justices. It was held that the aforesaid defect in the affidavit disentitled the applicant to the issue of a writ of certiorari *ex debito justitiae*. It was also held that the granting of the writ being discretionary, the discretion should be exercised by refusing the writ. It may be that in this case the defect in the constitution of the Tribunal was not of a patent nature and was

(1) A.I.R. 1956 Bom. 530
(2) A.I.R. 1954 Bom. 202
(3) (1914) 1 K.B. 608

a latent one, and for that reason it was necessary for the applicant to have taken the objection before the Justices themselves. But the observations of Channell, J., were of a general nature particularly with regard to the duty of an applicant in such cases to state facts upon affidavit which negative knowledge on his part when he was before the Court below of the facts on which he based his objection. According to Channell, J., that rule was established on good grounds. It applied equally whether the objection was on grounds which made the act of the Justices voidable or void. The following observations of Channell, J., are pertinent:—

> "In such circumstances if the granting of this writ is discretionary the Court would have no hesitation in refusing it. In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ *ex debito justitiae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari."

It may be mentioned that the earlier decision of the Court of Appeal in *Farquharson* v. *Morgan* (1), on which a great deal of reliance was placed on behalf of the petitioner in the present case, would be clearly distinguishable as there the application was for prohibition to the County Court against proceedings upon an order which was without jurisdiction, the view of the Court being that the writ must issue notwithstanding the fact that the

(1) (1894) 1 Q.B. 552

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunct) and others

Grover, J.

applicant had by his conduct acquiesced in the exercise of jurisdiction by the County Court. In *Rex* v. *West Suffolk Compensation Authority ex parte Hudson's Cambridge and Pampisford Breweries, Ltd.* (1), an application had been made by the owners of licensed premises for a writ of certiorari to quash an order of the compensation authority refusing the renewal of the licence on the ground that that order had been made without jurisdiction. It was found that the justices had no jurisdiction to make any order or reference in regard to the matter and that the reference which they made to the compensation authority on the question of the renewal together with their report thereon was invalid. On behalf of the compensation authority it was contended that the Court ought not to grant a writ of certiorari owing to the conduct of the applicants. Bray, J., observed that a person who was aggrieved by an order of that kind was entitled *ex debito justitiae* to a writ of certiorari to set it aside unless there had been some conduct on his part which disentitled him to the writ. The case of *Rex* v. *Williams, Ex parte Phillips* (2), *Supra* was distinguished by him on the ground that the applicant, knowing of the disqualification, had chosen to stand by during the hearing before the Justices without taking any objection. The writ was consequently granted as Bray, J., was of the opinion that no such conduct had been proved on the part of the applicants which disentitled them to the relief. Shearman, J., at page 390 made the following observations which lend support to the view that applications for writs of prohibition and certiorari should rest upon substantially the same basis:—

"I merely desire to add a few words, because I think it might at first sight be supposed

(1) (1919) 2 K.B. 374
(2) (1914) 1 K.B. 608

that the decision which we are giving in the present case cast some doubt upon the correctness of the decision in *Rex* v. *Chester Licensing Justices, Ex parte Bennion* (1), to which we have been referred. I draw no distinction between that case and this on the ground that there the application was for a writ of prohibition, while here it is for a writ of certiorari, because I think that applications for these two writs ought to rest upon substantially the same basis."

In another set of decisions, however, on certiorari the writ was declined on the ground that objection to jurisdiction was not taken before the Tribunal or the Justices themselves. In *Queen* v. *The Justices of Salop* (2), Crompton, J., stated his view as follows:—

"Looking at the facts which appear on these affidavits, I think that the effect is, that the parties came before the Justices, and invited them to decide the question, and that they did not at all decline the jurisdiction of the Justices. Then it is too much to come here and ask us for a certiorari, which is a discretionary writ. It is said that this application is not against good faith, but I think it is against good faith to a certain extent, because the parties say, 'We will take the chance of getting the decision of the Justices in our favour, and if we do not get it, we will go to the Court of Queen's Bench.' We ought not to allow them to lead the Justices to some extent to

(1) (1914) 3 K.B. 349
(2) 29 Law J. Rep. (N.S.) M.C. 39 at p. 41

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

think that they may go on to decide the point, and then to come here to ask us to quash the order. I think that the parties disputing the validity of the rate should tell the Justices clearly that they are to give notice to them, but here they have led the Justices to decide the question, and therefore, I think that the rule must be dischraged, with costs."

In *Rex* v. *Tabrum and another*: *Ex parte Dash* (1), Lord Alverstone, C. J., considered that when a man having pleaded guilty, withdrew his plea when he was told what the charge was, and did not ask for an adjournment and did not ask that the summons under which he was going to be proceeded against should be amended, but went on, it would be wrong to allow any steps to be taken by way of certiorari to question the proceedings of the Justices against him. In *The Queen* v. *Knox and others* (2), Wightman, J., was of the view that a party could not be allowed to lead the Justices to think that they might go on to decide, and then approach the superior Court to quash their order. In *Reg* v. *The Cheltenham Commissioners* (3), it was held that a question in the cause having been decided by a Court improperly constituted, on account of the interest of the three magistrates, the Court would quash the order by certiorari on affidavit of the necessary facts, but if a party, knowing of the interest of the Magistrates, expressly or impliedly assented to the interested magistrate acting, such party could not afterwards make the objection. It may be noticed that in none of these cases any rigid rule has been laid down, nor indeed could it be laid down that certiorari will not be

(1))1907) 97 L.T. Rep. 551 at p, 555
(2) 32 Law J. Rep. (N.S.) M.C. 257
(3) 55 R.R. 321

granted to quash an order which suffers from lack of inherent jurisdiction of the Tribunal making it, if no objection was taken before the Tribunal itself with regard to defect of jurisdiction. They appear to be based on the principle that if a party has acquiesced in the jurisdiction of an officer or a Tribunal, he should not be later on heard to say that there was no jurisdiction in that officer or Tribunal, and that such a conduct of the party applying to a superior Court for a writ disentitles him to any relief. This principle was accepted by their Lordships of the Supreme Court in *M/s. Pannalal Binjraj* v. *Union of India* (1), where orders made under section 5(7A) of the Income-tax Act for transfer of certain cases to particular Income-tax Officers were impugned and the jurisdiction of the Income-tax Officers to whom the cases had been transferred was challenged to decide the same. At page 412 of the report the following observations were made by their Lordships:—

> "There is moreover another feature which is common to both these groups and it is that none of the petitioners raised any objection to their cases being transferred in the manner stated above and in fact submitted to the jurisdiction of the Income-tax Officers to whom their cases had been transferred. It was only after our decision in *Bidi Supply Co.* v. *The Union of India* (2), was pronounced on 20th March, 1956, that these petitioners woke up and asserted their alleged rights, the Amritsar group on 20th April, 1956, and the Raichur group on 5th November, 1956. If they acquiesced in the jurisdiction of the Income-tax

(1) A.I.R. 1957 S.C. 397
(2) 1956 S.C.R. 267

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of this Court (*Vide* Halsbury's 'Laws of England', Vol. II, 3rd Ed., p. 140; para 265; *Rex* v. *Tabrum*: *Ex parte Dash* (1), *O. A. O. K. Lakshmanan Chettiar* v. *Corporation of Madras* (2)."

Their Lordships relied *inter alia* on the decision in *O. A. O. K. Lakshmanan Chettiar* v. *Corporation of Madras* (2), in which case a writ of certiorari had been sought from the Madras High Court on the ground that the Commissioner of the Corporation of Madras and the Chief Judge of the Court of Small Causes had acted without jurisdiction in declaring the petitioner to be disqualified as a candidate at some election which was to be held for selecting a Councillor. A preliminary objection was taken by the counsel for the respondents that certiorari would not lie where the person who had applied for the writ had by his conduct taken the chance of a pronouncement in his favour by the lower Court on the merits. It was observed by the Full Bench that the English authorities which had been cited *prima facie* established the proposition that in such circumstances the applicant could not obtain a writ of certiorari *ex debito justitiae*, and that the Court was exercising a purely discretionary power. The petition was dismissed on the gound that the petitioner had precluded himself by his conduct from getting the relief claimed. It may be mentioned that in the case decided by their Lordships

(1) (1907) 97 L.T. 551
(2) I.L.R. 50 Mad. 130=A.I.R. 1927 Mad. 130

of the Supreme Court (*M/s. Pannalal Birjraj's case* (1)), there was no finding that the officer or the Tribunal, before whom the proceedings had taken place, suffered from a patent defect of jurisdiction. The orders of transfer had been held to be valid and constitutional by virtue of the explanation to section 5(7A) of the Income-tax Act, and the observations set out before contained an additional reason for dismissing the petitions. They, undoubtedly, embody a rule based on acquiescence by conduct. It cannot be said that their Lordships intended to lay down any general rule that in every case in which objection to jurisdiction had not been taken before the Tribunal, no relief should ever be granted in exercise of discretionary powers. How far the conduct of a petitioner has disentitled him to any relief would depend on the facts of each case and, if a reasonable explanation is forthcoming for not taking any objection to jurisdiction before the Tribunal, that may be accepted by the High Court and relief granted by way of certiorari. There is nothing in *Pannalal Brijraj's case* (1), (supra), to show that any cogent explanation had been furnished by the petitioners for their failure to raise the objection at the earlier stage. I have already referred to the observations of Channell, J., in *Rex's case* (2), with regard to the duty of an applicant to state facts upon affidavit which might negative knowledge on his part when he was before the Court below or the Tribunal of the facts on which he based his objections. In *Dholpur Co-op. T. & M. Union* v. *Appellate Authority* (3), affidavits had been filed to the effect that the petitioners did not know about the irregularities and illegalities in the constitution of the

(1) A.I.R. 1957 S.C. 397
(2) (1914) 1 K.B. 608
(3) A.I.R. 1953 Raj. 193

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

Tribunal before whom they appeared and contested the proceedings. It was observed by the Rajasthan Bench "there is, therefore, no wonder if the petitioners were unable to raise any objection on the ground of jurisdiction before the appellate authority." In *Gopalan* v. *C. R. T. Board* (1), the learned Judge referred to this aspect of the matter and relied on the absence of any such averment in the affidavit filed in the case decided by him for the purpose of distinguishing it from the Rajasthan case. In *Manak Lal* v. *Dr. Prem Chand* (2), a Bar Council Tribunal had been appointed to make enquiry into the alleged misconduct of the appellant who was an Advocate of the Rajasthan High Court. The Chairman of the Tribunal had appeared for the opposite parties in the criminal proceedings out of which the misconduct matter arose and the appellant raised the question of bias before the High Court, although before the Tribunal he did not take that objection. The Supreme Court held that the Chairman ought never to have acted as a member of the Tribunal, but no relief could be given to the appellant inasmuch as he had failed to take the point of jurisdiction before the Tribunal. This case was decided largely on waiver as it was found that the appellant knew the material facts and must be deemed to have been conscious of his legal rights and his failure to raise objection to the constitution of the Tribunal was *deliberate*. Sinha J., in *Harendra Nath* v. *Judge 2nd Industrial Tribunal* (3), relied largely on the decision of Chagla, C. J., in *G. M. T. Society's case* (4), and referred to certain decisions of the Calcutta High Court also in coming to the conclusion that the petitioners were precluded

(1) A.I.R. 1958 Kerala 341
(2) A.I.R. 1957 S.C. 425
(3) A.I.R. 1958 Cal, 208
(4) A.I.R. 1954 Bom, 202

from putting forward the defect of jurisdiction of the Tribunal at the stage of the writ petition by their failure to raise the same before the Tribunal. Rajagopalan, J., in *Sastri Ammal* v. *Pravalavarana* (1), however, took the following view:—

> "Normally, when a party voluntarily submitted to the jurisdiction of a Tribunal which had no jurisdiction, he would not be heard in proceedings under Article 226 of the Constitution to say that the Tribunal had no jurisdiction, merely because the decision of the Tribunal went against him. Of course it is not that submission to jurisdiction that confers jurisdiction on the Tribunal. It is merely a case of a factor being taken into account before the Court decides whether it should exercise its discretion in favour of the applicant before it."

While granting a writ of certiorari, the Court will also have to take into consideration other factors like the existence of an alternative remedy, manifest injustice involved in the impugned order, etc. The decision of this Court in *Karnal Kaithal Co-operative Society* v. *The State* (2), related more to mandamus and prohibition and cannot be of much assistance in ascertaining the principles which govern certiorari. These principles may be summarised as follows in so far as it is necessary to state them for the purpose of deciding the instant case:—

(1) The Court has always the power and the discretion to grant or refuse to grant the writ and while exercising discretion it will take into consideration all the relevant factors.

(1) A.I.R. 1956 Mad, 146
(2) 1958 P.L.R. 425

Jagatjit Cotton Textile Mills, Ltd., Phagwara
v.
Industrial Tribunal, Patiala (now defunt) and others

Grover, J.

(2) The failure to raise objection to defect or lack of jurisdiction of the Tribunal before it, is always a material and relevant factor and must be taken into account and it makes no difference whether such a defect is patent or latest.

(3) Ordinarily such a conduct would preclude the petitioner from claiming the writ unless a cogent explanation is furnished by stating the necessary facts upon affidavit which should satisfy the Court that the failure to raise the objection relating to jurisdiction was not deliberate or that the petitioner had no knowledge of facts on which the objection could be based.

(4) It would naturally depend on the facts of each case whether such conduct has been established as would disentitle the petitioner to any such relief.

The petitioner was fully aware that the life of the Tribunal which had been constituted on 13th August, 1955, had come to an end on 12th February, 1956; when the notification; dated 29th February, 1956, was issued which could not revive a dead Tribunal by extending its life with retrospective effect. In these circumstances, it became necessary to make a fresh reference under section 10 of the Industrial Disputes Act, as the Tribunal was to be deemed to have been freshly constituted on 29th February, 1956. This defect of jurisdiction ought to have been raised by the petitioner on 12th March, 1956, when the Tribunal actually recorded an order, as stated before; from which it is clear

that the parties agreed to proceed with the adjudication of the disputes and did not even want a *de novo* trial. Thus, the petitioner took the chance of obtaining a favourable decision from the Tribunal and in fact four out of five points were decided in favour of the petitioner. When the award went against the petitioner on the fifth point, the present petition was instituted in which the question of defect of jurisdiction of the Tribunal was raised for the first time. There can be no doubt that such a conduct in the absence of any explanation or statement of facts in the petition or the affidavit with regard to failure to raise the point before the Tribunal would disentitle the petitioner to the relief by way of certiorari, nor can the petitioner claim any other relief under Article 226 of the Constitution in these circumstances.

For these reasons, I would dismiss the petition, but leave the parties to bear their own costs.

GOSAIN, J.—I agree.

K. S. K.

SUPREME COURT

Before Syed Jafer Imam, A. K. Sarkar and K. Subba Rao, JJ.

OM PRABHA JAIN,—*Appellant.*

versus

GIAN CHAND AND ANOTHER,—*Respondents.*

Civil Appeal No. 85 of 1959

1957

Apr., 1st

The Representation of the People Act (XLIII of 1951)—Sections 90(3), 98 and 116-A—Order dismissing an election petition on a ground stated in section 90(3)—Whether an order made under section 98 and appealable under section 116-A—Trial—Meaning of—Section 117—Deposit receipt