

Wiseman and Another Vs. Borneman and Others.

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Court : Kolkata

Decided On : Nov-01-1967

Reported in : [1969]71ITR651(Cal)

Appellant : Wiseman and Another

Respondent : Borneman and Others.

Judgement :

APPEAL, from Pennycuik J. 1

On February 23, 1967, the Inland Revenue Commissioners issued a notification to each of the plaintiffs, Cyril Robert Wiseman and Millicent Edith Wiseman, in accordance with section 28(4) of the Finance Act, 1960, that they had reason to believe that the section applied in respect of certain transaction. on March 23, 1967, the commissioners received statutory declarations from the plaintiffs stating the facts and circumstances upon which in their opinions the section did not apply.

The commissioners considered the declarations and decided to submit the matter under section 28(5) to the tribunal constituted for the purpose of that section to ascertain whether there was a prima facie case. The Inland Revenue solicitor was instructed to prepare a counter-statement but the matter had not been submitted to the tribunal.

In a letter dated May 12, 1967, the plainfiffs informed the registrar of the tribunal that they wished to be represented by counsel at the hearing and would like copies

of the certificate and counter-statement of the commissioners made under section 28.

The registrar refused the plaintiffs request, explaining that it would not be in accordance with the practice of the tribunal when considering whether or not there was a prima facie case.

The plaintiffs then issued an originating summons asking the court whether (1) the tribunal was bound to give the plaintiffs an opportunity to deal with the commissioners statement and counter-statement and to address argument and adduce evidence before the tribunal and (2) the procedure which the tribunal intended to adopt was in accordance with the rules of natural justice.

The defendants, the members of the tribunal (Roy Ernest Borneman, Sir William Carrington, Sir Richard Yeabsley, Andrew Hunter Carnwath and David Linton Pollock) and the commissioners, took out motions to strike out the summons as disclosing no reasonable cause of action.

On July 18, 1967, pennycuik J. held 1 that the summons did not raise any question which was open to serious argument and ordered that it be struck out.

The plaintiffs appealed on the grounds, inter alia, that the judge misdirected himself in holding that the originating summons did not raise any question open to serious argument in the High Court and that he ought to have held that the summons raised such a question and to have dismissed the motions.

The facts are further stated in the judgment of Lord Denning M. R.

Quintin Hogg Q. C., G. B. H. Dillon Q. C. and Michael Miller for the plaintiffs. The substantial issue is whether the tribunal was bound to apply the rules of natural justice and whether pennycuik J.1 was right. He relied on evidence which is not within the terms of R. S. C. (Rev. 1965), Ord.18, r.19(2). Section 28 of the Finance Act, 1960, deals with 'tax advantages.' The dispute between the parties is whether, before the tribunal comes to a determination, the taxpayer is entitled to see the counter-statement. A hearing involves being given an opportunity of commenting on any case made against one.

Parliament has set up what it describes as 'a tribunal' for the purpose of section 28 of the Act of 1960 : see subsections (5) and (7). In subsection (5) the expression 'take into consideration' and 'determine' are used, which are particularly apt to the judicial function. So prima facie the court will presume that, although parliament intended the tribunal to set up its own procedure, it did not intend it to disregard the rules of natural justice : see per Diplock L. J. in *Anisminic Ltd. v. Foreign Compensation Commission* 1.

Although the rules of natural justice, if they are applied, need not involve an oral hearing they must give a party a fair opportunity to correct or contradict any relevant prejudicial statement : see per Lord Loreburn L. C. in *Board of Education v. Rice* 2 and *Rex v. Housing Appeal Tribunal* 3.

In the nature of the case here, the commissioners see the taxpayers case in terms of the statutory declaration. Unless the plaintiffs are correct in their contentions, the taxpayer has no chance to challenge the contents of the commissioners counter-statement. Parliament must have intended fairness in this respect.

Pennycuik J. attached too much importance to the word 'hearing' and based himself on the belief that the plaintiffs were asking for a trial or nothing. The fact that the procedure under section 28 is for the benefit of the taxpayer is no reason for depriving him of natural justice. The procedure could also be for the benefit of the revenue. Parliament must be presumed to have intended justice and not injustice. The plaintiffs are entitled to take the statute as entitling them to natural justice unless it is expressly excluded. The interests of the Crown and that of the general body of taxpayers ought to be identical.

Although there must be a 'hearing' with both sides entitled to state their case, the tribunal can make its own procedure. But the plaintiffs ought to be allowed to know the case which is made against them and to comment on it.

[DIPLOCK L. J. What about the grand jury ?]

The grand jury was abolished partly for that reason. From 1848 the grand jury had acted side by side with the committing justices. In committal proceedings, which

are more analogous, the rules of natural justice are fully provided for .

Section 28 must be looked at and the rules of natural justice can only be excluded if it is clear that Parliament intended them to be excluded. The matter should certainly not be dealt with on a striking-out motion. Time and money is saved if the rules of natural justice are accepted in preliminary proceedings and at the final determination. The real essence of *Rex v. Housing Appeal Tribunal 1* is that it does not matter whether you are dealing with a preliminary issue or not, the rules of natural justice must be applied. Unless parliament deprives a tribunal of this elementary right, it must be applied.

As to what is involved in 'consideration', see *B. Johnson & Co. (Builders) Ltd. v. Minister of Health*. A matter can only be considered if both sides are given an opportunity of giving their views. Once you have a tribunal or a minister under a duty to consider something, both parties must know what is said against them. [Reference was made to *Punton v. Minister of Pensions and National Insurance*.]

All the cases have to be considered in their context. Reliance is put on *Stafford v. Minister of Health* and the words 'any inquiry of a judicial character' in the judgment of *du Parc L.J.* in *Rex v. City of Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.* An *ex parte* application is not a judicial inquiry. Here the *ex parte* application having been made, the revenue is allowed to put in a lot more facts and the taxpayer cannot know what they are. Reliance is also put on what *du Parc L.J.* said in *Boswell v. Partridge Jones & John Paton, Ltd.* as to the intention of the legislature. *Rex v. Architects Registration Tribunal, Ex parte Jagger* shows the width of the principle.

[EDMUND DAVIES L.J. Have you found any case where this principle was applied where a *prima facie* had to be made out ?]

Cooper v. Wandsworth Board of Works has an attractive statement by Byles.

Willmer L.J. in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Mopre* emphasised the need for the procedure before the deputy industrial injuries commissioner being in accordance with natural justice. The general principle had

been stated in *Errington v. Minister of Health*.

Here is something described as a tribunal. It is told to consider and determine. For the purpose of its interlocutory function the contention for the Crown is that the tribunal need not disclose documents to the taxpayers. The presumption is the other was as in the case of committing justices. The elementary consideration is that the principle stated by Lord Loreburn L.C. in *Board of Education v. Rice* applies. The obligation is the same as that of committing justices.

W. A. Bagnall Q.C., J. P. Warner Q.C. for the first five defendants, the tribunal, and Raymond Philips for the sixth defendant, the Inland Revenue Commissioners, were not called on to argue.

LORD DENNING M.R. We need not trouble you, Mr. Bagnall.

Some years ago the plaintiffs, Mr. and Mrs. Wiseman, had a transaction in securities. Quiet recently the revenue authorities decided to put into operation section 28 of the Finance Act, 1960. They say that Mr. and Mrs. Wiseman obtained a tax advantage in that transaction : that it was not an ordinary commercial transaction : and they propose to make an adjustment to counteract that tax advantage. In order to cancel a tax under section 28(3) specifying the adjustment which they propose to make. I will call it a 'section 28 notice.' On receiving that notice the taxpayer can appeal to the special commissioners under section 28(6) and thence to the special tribunal set up under section 28(7).

But it is provided that before the section 28 notice is given, the commissioners are to carry certain preliminaries provided by subsections (4) and (5) of section 28. These preliminaries are specifically inserted to protect the taxpayer. They are designed to ensure that the taxpayer is not harassed by a section 28 notice unless the circumstances justify it. Subsection (4) requires that the commissioners are not to give a section 28 notice until they have 'notified' the taxpayer that they have reason to believe that section 28 applies to him. That is what I may call the preliminary 'notification'. If the taxpayer is of opinion that the section does not apply to him, he can within thirty days make a 'statutory declaration' to that effect, stating the facts and circumstances upon which his opinion is based. If the

taxpayer makes such a 'statutory declaration', the commissioners must consider whether to take further action in the matter. They may decide to take no action, in which case the taxpayer goes clear. But they may decide to take further action. In that case they must send to the special tribunal a 'certificate' saying they propose to take further action. They may also send with it a 'counter-statement' if they so wish. Then there is this important provision :

'The tribunal shall' in any such case 'take into consideration the declaration' (that is the statutory declaration) 'and the certificate' (that is the certificate of the commissioners) 'and the counter-statement, if any' (that is the counter-statement of the commissioners) 'and shall determine whether there is or is not a prima facie case for proceeding in the matter...'

If the tribunal determine that there is no prima facie case, the tax-payer goes clear. But if they decide that there is a prima facie case, the commissioners can then proceed to give a section 28 notice, stating the adjustments necessary to counteract the tax advantage. An illustration of this procedure is given in *Inland Revenue Commissioners v. Cleary*. [1967] 2 W.L.R. 1271; [1967] 2 All E.R. 48, H.L.(E.).

In the present case the commissioner have given the preliminary 'notification.' The plaintiff taxpayers have made the 'statutory declaration.' The commissioners have decided to take further action. They have sent to the tribunal a 'certificate' and a 'counter-statement,'

Now at this stage the plaintiffs have taken out an originating summons. They claim that, before the tribunal determines whether or not there is a prima facie case, they are entitled to be heard; or, if not to be heard, at least to see the counter-statement of the commissioners and to correct any statement in it to which they object. In short, to see the case against them and to put in an answer to it. They contend that, although section 28 does not so provide, nevertheless natural justice requires it. Before the judge it was contended that the plaintiffs were entitled to be represented before the tribunal and to adduce argument and evidence. That was clearly untenable, and the judge rightly so held. Before us Mr. Hogg put the case much more moderately and effectively. He reminded us of the words of Lord

Loreburn in *Board of Education v. Rice* [1911] A.C. 179, 182; 27 T.L.R. 378, H.L.(E.), that statutory tribunals

'have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.'

They can determine their own procedure. If they so determine, they can dispense with an oral hearing, and allow written representation only. They must, however, always give a party fair opportunity for correcting or contradicting any relevant statement prejudicial to his view.

Mr. Hogg has presented, clearly as always, the principles and authorities to us. But I must say there is a great difference between, on the one hand, a tribunal which has to decide on the rights and wrongs of the parties, and on the other hand, a tribunal which has to determine simply whether there is or is not a *prima facie* case. In seeing whether there is a *prima facie* case, a tribunal has, of course, to consider the case presented by one side : but it need not at that stage hear the other side. Diplock L. J. reminded us of grand jury. They had to decide whether there was a true bill, that is, a *prima facie* case. They only heard one side. They did not hear the accused. We have canvassed other instances, such as an *ex parte* application to serve a writ out of the jurisdiction. The master has to see if there is a *prima facie* case or a good arguable case : and he does so without, at that stage, hearing the other hand, in committal proceedings before magistrates, the accused must be present and be heard to argue there is no *prima facie* case.

In this case the question is to my mind resolved by the words of the statute. It says that the tribunal are to take into consideration : 'the declaration,' that is the declaration of the taxpayer, 'the certificate,' that is the certificate of the commissioners; 'and the counter-statement, if any,' that is the counter-statement of the commissioners; 'and shall determine whether there is or is not a *prima facie* case.' When Parliament thus expressly states the matters which are to be taken into consideration. If the tribunal were, at this stage, empowered to make a final determination, the courts would readily imply that the taxpayer ought to be given a

fair opportunity to see the counter-statement and to correct anything in it prejudicial to his interests. But as the enquiry is only to see if there is a prima facie case, there is no reason to make any such implication. Natural justice does not require it : because a prima facie case decides nothing except that there is enough to call for an answer. If the tribunal decide that there is a prima facie case, the taxpayer will have full opportunity to see the counter-statement and to make his case before the special commissioners and the tribunal.

I may add, as Pennycuik J. did, that section 28 reproduces a procedure which has been in force for over thirty years. It is the procedure about surtax directions in the Finance Act, 1927. In those cases there never has been anything in the nature of a hearing. The board of referees have only the documents which are specified in the statute, and nothing else. They too have only to decide whether there is a prima facie case.

I agree with Pennycuik J. that this originating summons discloses no cause of action and should be struck out. I would dismiss this appeals.

DIPLOCK L.J. I agree, and but for the fact that the argument in this court has been largely based on some observations of mine in *Anisminic Ltd. v. Foreign Compensation Commission*, I should be content to say no more than that.

I should, however, point out that the observations in the *Anisminic* case were directed to the jurisdiction of a tribunal to make a determination whether a described situation existed or not; that determination when made being final, subject to any appeal that might be provided therefrom, the observations were in no way concerned with a preliminary decision whether a prima facie case had been made out that a described situation existed which merited further inquiry as to whether or not it did. Where such a jurisdiction is conferred by statute upon a person or a tribunal one must in my view look at the statute to see what are the materials upon which that preliminary decision is to be based. There is no prima facie presumption that Parliament intended that the rules of natural justice applicable to final determinations, whether subject to appeal or not, have to look far in the practice of this court to see that that kind of inquiry is dealt with frequently *ex parte*, and I need only mention an application for leave to serve a writ

out of the jurisdiction under R.S.C., Ord. 11, r. 4, or an application for leave to apply for an order of prohibition, mandamus or certiorari under Ord. 53, r. 1. All these and many similar ones are dealt with without hearing the other side at all upon material which is produced by the applicant.

When one examines the procedure laid down in section 28 of the Finance Act, 1960, it is in my view quite apparent that the kind of determination with which we are concerned at this stage is the latter kind of determination, that is to say a preliminary one made on the application ex parte of the Commissioners of Inland Revenue. Subsection (4) requires the commissioners in the first instance to notify the taxpayer of their intention to serve a notice and entitles the taxpayer, if he so wishes, to make a statutory declaration of his opinion that the section does not apply to him, stating the facts and circumstances on which his opinion is based. If he does that, then the Commissioners of Inland Revenue, if they wish to proceed further in the matter (which they need not do), make an application under subsection (5), which is plainly an ex parte application, to the tribunal to determine whether there is or is not a prima facie case for proceeding in the matter. The material which the subsection lays down shall be put before the tribunal are the statutory declaration of the taxpayer, a certificate and a counter-statement, if the Commissioners of Inland Revenue desire to submit one. It is that material which the tribunal is required by the express words of the statute to take into consideration, and no other material.

The question to which they have to address their minds is : do these documents disclose a case which merits further inquiry as to whether the circumstances described in subsection (1) of the Act exist in the case of that taxpayer. There is in my view no room in this procedure, and in the face of the express words of the statute, for the application of the well known doctrine to which Mr. Hogg has referred, that you must give to the other side an opportunity of commenting upon the material on which a tribunal intends to act which is adverse to a particular party. That kind of case has got nothing to do with this present case : nor was it being dealt with in any way in the Anisminic case which has been relied upon.

I agree that this appeal should be dismissed.

EDMUND DAVIES L.J. Although I find myself in agreement with my brethren, for once that fact does not induce in me a state of unbridled happiness. Even though we are here concerned with the material upon which the tribunal should determine simply whether a prima facie case for issuing a section 28(3) notice has been made out, rather than a final determination of the rights of the parties, if the taxpayer equally with the Commissioners of Inland Revenue (a) knew what material was being placed before the tribunal, and (b) had an opportunity of commenting upon that material, I entertain no doubt that greater satisfaction would enure to the taxpayer than under the present one-sided system, and might well result in a saving of costs on both sides. These are important considerations which might well be considered in another place hereafter. But, having said that, I find myself compelled, by the wording of section 28(5), to agree to the dismissal of this appeal. That provision required that 'the tribunal shall take into consideration the (statutory) declaration and the certificate and the counter-statement,' and nothing else. It is upon those documents alone that the tribunal has to 'determine whether there is or is not a prima facie case for proceeding in the matter,' and I do not think that the tribunal can look at other material outside that specified.

However desirable in some respects it might be that the taxpayer should have an opportunity of making his own comments upon the commissioners counter-statement, I do not consider that the rules of natural justice demand that the provisions of section 28 should be so expanded or interpreted as to give the taxpayer a legal right to that opportunity. It is not without significance that, despite the mountain of authorities which have almost completely obscured our view of counsel and the many reported decisions relating to the requirements of natural justice, not a single authority has been cited to this court which applies the *audi alteram partem* rule to the determination of whether a prima facie case exists. *Rex v. Housing Appeal Tribunal*, upon which Mr. Hogg very understandably -and commendably - sought to rely, was quite unlike the present case in at least two important respects : (1) the court was there dealing with the nature of the material upon which the tribunal was to arrive at a final determination as to the legal position of the parties; and (2) the relevant statutory rules there required the appeal tribunal to consider, in addition to the specified documents, ' . . . any further particulars which may have been furnished by either party.'

I am not oppressed by the fact that the machinery of section 28 is virtually identical with that which has existed for forty years, for the operation of that machinery is apparently now being subjected to judicial scrutiny for the first time. But, having been so scrutinised, I do not consider that the law requires its condemnation. Accordingly, though with no enthusiasm, I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Leave to appeal to the House of Lords refused

Solicitors : Beer & Co.; Treasury Solicitor; Solicitor of Inland Revenue.

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