Appl
R v Gough;
Ex parte Key
Meats Pty Ltd
148 CLR 582

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

GALVIN AND ANOTHER;

Ex parte AUSTRALIAN TEXTILE WORKERS' UNION.

H. C. of A. 1955.

Melbourne, *March* 7.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Industrial Arbitration (Cth.)—Award—Variation—Application by incompetent applicant—Power of conciliation commissioner to make order sought on his own motion—Prohibition—Conciliation and Arbitration Act 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 34, 49.

Prohibition does not lie to prohibit a conciliation commissioner from proceeding to hear an application for an order which the commissioner has power to make of his own motion, even if made by an incompetent applicant.

Order nisi for prohibition.

On 2nd July 1949 the Australian Textile Workers' Union, an organization of employees registered pursuant to the provisions of the *Conciliation and Arbitration Act* 1904-1952, served a log of claims on certain employers. The claims not having been acceded to by the employers, an industrial dispute arose. On 22nd June 1950 Alfred Russell Wallis, a conciliation commissioner appointed pursuant to the provisions of the said Act, made an award in settlement of the dispute (the *Textile Industry* (*Wool and Worsted Section*) *Award* 1950).

On 18th October 1954 the Wool and Basil Workers' Federation of Australia, an organization of employees registered pursuant to the provisions of the said *Conciliation and Arbitration Act*, which was neither a party to, nor bound by, the said award, applied for a variation thereof. The date of hearing of the said application was fixed for 8th December 1954 by John Michael Galvin, the chief conciliation commissioner appointed pursuant to the provisions of the said Act.

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On 11th November 1954, *Kitto* J., on the application of the Australian Textile Workers' Union as prosecutor, granted an order nisi for a writ of prohibition, directed to the said J. M. Galvin and the Wool and Basil Workers' Federation of Australia, as respondents, restraining them from further proceeding or dealing with the application on the grounds: (1) that having regard to s. 34 of the *Conciliation and Arbitration Act* 1904-1952 the chief conciliation commissioner had no jurisdiction to entertain the application by the Wool and Basil Workers' Federation of Australia for a variation of the award; (2) that having regard to the said section the chief conciliation commissioner had no power to make any variation of the award on the application of the Wool and Basil Workers' Federation of Australia.

Gregory Gowans Q.C. (with him *Dermot Corson*), for the prosecutor. We seek to restrain the conciliation commissioner not from making an order, which he may do on his own motion, but from continuing to hear the incompetent application. *Colonial Bank of Australia* v. *Willan* (1) drew a distinction between matters precedent to the right to entertain a particular proceeding and matters precedent to the making of an order on the proceeding. It is clear that prohibition will lie against the entertaining of proceedings. There are numerous cases in which courts have prohibited the entertaining of proceedings. [He referred to *R.* v. *Galvin*; *Ex parte Metal Trades Employers' Association* (2); *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (3).] In *Reg.* v. *Wimbleton Justices*; *Ex parte Derwent* (4) Lord *Goddard* C.J. pointed out that prohibition is a convenient way of preventing a tribunal from exercising jurisdiction which is not committed to it. [He referred to *Master Retailers' Association of N.S.W.* v. *Shop Assistants Union of N.S.W.* (5); *McIntosh* v. *Simpkins* (6); *Alderson* v. *Palliser* (7).] Throughout the *Conciliation and Arbitration Act* 1904-1952 there is emphasis on the character of applicants. Section 34 imposes a condition on jurisdiction to entertain proceedings: see also ss. 80, 81. Having regard to the fact that the conciliation commissioner does not exercise judicial power, it is unlikely that it was the intention of the legislature to leave the determination of the jurisdictional fact to him. [He referred to *R.* v. *Hickman*; *Ex parte Fox and Clinton*, per *Latham* C.J. (8).] The application here merely refers to an award. On reading the

(1) (1874) L.R. 5 P.C. App. 417.
(2) (1949) 77 C.L.R. 432.
(3) (1949) 78 C.L.R. 529.
(4) (1953) 1 Q.B. 380, at p. 388.
(5) (1904) 2 C.L.R. 94.
(6) (1901) 1 K.B. 487.
(7) (1901) 2 K.B. 833.
(8) (1945) 70 C.L R. 598, at p. 606.

award, it is clear that the applicant is not a party thereto. Consequently it is apparent on the face of the proceedings that there is a want of jurisdiction. [He referred to *Yirrell* v. *Yirrell*, per *Evatt* J. (1).]

R. M. Eggleston Q.C. (with him *S. H. Cohen*), for the respondent, the Wool and Basil Workers' Federation of Australia. Section 34 of the *Conciliation and Arbitration Act* 1904-1952 is not a jurisdictional section at all and prohibition does not lie to restrain its breach. The words " of its own motion " cover all cases in which there is not an application by the other persons referred to in the section. Section 34 includes any party to any industrial dispute. If the dispute must be a relevant one, there was here, on the facts, a relevant industrial dispute. [He was stopped.]

Gregory Gowans Q.C., in reply.

The following judgment of the Court was delivered by DIXON C.J.

This is an order nisi for a writ of prohibition directed to a conciliation commissioner. The proceeding which it is sought to prohibit is an application to him by the respondent for the variation of an award. The respondent is a stranger to the award which it is sought to vary and is a stranger to the dispute in settlement of which that award was made.

The power to vary an award is conferred by s. 49 of the *Conciliation and Arbitration Act* 1904-1952 in general terms. Section 34 of the Act provides that subject to the Act the court or a conciliation commissioner may exercise any of its or his powers, duties or functions under the Act of its or his own motion or on the application of any party to an industrial dispute or of any organization or person bound by an order or award.

The ground of the application for prohibition is that the respondent is not a party to an industrial dispute or an organization or person bound by an order or award within the meaning of those words in s. 34. Accordingly it is said that the conciliation commissioner may not entertain the application by the respondent.

On the construction of s. 34 and s. 49 together, it is clear that, however that may be, the conciliation commissioner may vary an award on his own motion.

We are prepared to assume that the respondent may have no *locus standi* to make the application which it is sought to prohibit.

(1) (1939) 62 C.L.R. 287, at p. 310.

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But we think that, because the order which the respondent desires may be made by the conciliation commissioner of his own motion, it cannot be outside his jurisdiction and the fact, if it be a fact, that he entertained an application by an incompetent applicant does not put such an order outside his power, if he think fit to make it. We ought not therefore to award a writ of prohibition against him.

On that short ground we think that the order nisi should be discharged with costs.

Order nisi discharged with costs.

Solicitors for the prosecutor, *Herbert & Geer.*

Solicitors for the respondent the Wool and Basil Workers' Federation of Australia, *Maurice Blackburn & Co.*

R. D. B.