1962

October, 19.

UDIT NARAIN SINGH MALPAHARIA

v.

ADDITIONAL MEMBER, BOARD OF REVENUE, BIHAR

(S. J. IMAM, K SUBBA RAO, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Writ Petition—Writ of certiorari—Necessary and Proper parties—Constitution of India, Art. 226.

The settlement of a country liquor shop was made by a lot drawn in favour of one Jadu Manjhi after cancellation of the license of the previous licensee. The previous licensee preferred an appeal before the Commissioner of Excise which was dismissed and then he preferred a revision to the Board of Revenue, Bihar and obtained stay of the settlement of the shop. Later on, the Board of Revenue dismissed his petition and Jadu Manjhi also died. Thereafter a fresh lot was drawn in favour of the appellant against which the previous licensee obtained stay from the revenue court, but his petition was dismissed and after the furnishing of security on September 11, 1961, the shop was settled with the appellant and license was issued to him. On June 19, 1961, one Phudan Manjhi son of Jadu Manjhi filed a petition before the Deputy Commissioner for the substitution of his name in the place of his father which was rejected. Against that order he preferred an appeal before the Commissioner of Excise who remanded the case to the Deputy Commissioner to consider the fitness of Phudan Manjhi. One Bhagwn Rajak who was not an applicant before the Deputy Commissioner filed an application before the Commissioner demanding fresh advertisement for the settlement of the shop which was allowed and the Deputy Commissioner was directed for taking steps for a fresh settlement in accordance with the rules of the Excise Manual. Against that order the appellant filed a petition before the Board of Revenue which was dismissed and the Deupty Commissioner was directed that unless he came to a definite conclusion that Phudan Manjhi was unfit to hold the license, he should be selected as a licensee in accordance with the rules. The result was that the appellant's license was cancelled and the Deputy Commissioner was directed to hold a fresh settlement giving a preferential treatment to Phudan Manjhi. The appellant filed a petition under Art. 226 of the Constitution in the High Court to quash the said orders, in which neither Phudan Manjhi nor Bhagwan Rajak in whose

favour the Board of Revenue decided the petition were made parties. The High Court dismissed the petition *in limine*. In this Court a preliminary objection was raised by the respondents that since Phudan Manjhi and Bhagwan Rajak were not made parties, who were necessary parties to the writ petition, the High Court was justified in dismissing the petition. It was urged by the appellant that in such a writ the said tribunal or authority is the only necessary party and the parties in whose favour the said tribunal or authority made an order or created rights are not necessary parties but may at best be only proper parties and even at this very late stage it is open to this court to direct the impleading of the said parties.

Held, that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

A writ of *certiorari* lies only in respect of a judicial or quasi-judicial act and a tribunal performing a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of *certiorari* will be granted to remove the record of proceedings of an inferior tribunal or authority performing judicial or quasi-judicial acts, *ex hypothesi* it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it.

In a writ of *certiorari* not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either *suo-motu* or on the application of a party to the writ or an application filed at the instance of such proper party.

The King v. *The Electricity Commissioner*, [1924] 1 K. B. 171, *The King* v. *London County Council*, [1931] 2 K. B. 215, *Ahmedalli* v. *M. D. Lalkaka*, A. I. R. 1954 Bom. 33 and *Kanglu Baula* v. *Chief Executive Officer*, A. I. R. 1955 Nag. 49, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 586 of 1962.

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Udit Narain Singh Malpaharia
v.
Additional Member, Board of Revenue, Bihar

Appeal by special leave from the judgment and order dated July 3, 1962, of the Patna High Court in Misc. Judicial Case No. 460 of 1962.

H. N. Sanyal, Additional Solicitor-General of India, Jagat Narain Prasad Sinha and *U. P. Singh,* for the appellant.

D. P. Singh, M. K. Ramamurthi, R. K. Garg and *S. C. Agarwala,* for the respondents.

1962. October 19. The Judgment of the Court was delivered by

Subba Rao, J.

SUBBA RAO, J.—This appeal by special leave is directed against the order of the High Court of Judicature at Patna rejecting *in limine* an application for a writ of *certiorari* filed under Art. 226 of the Constitution.

The facts giving rise to this appeal may be briefly stated. There is a country liquor shop in Dumka Town. Originally one Hari Prasad Sah was the licensee of that shop, but his licence was cancelled by the Excise Authorities. Thereupon a notice was issued inviting applications for the settlement of the shop. One Jadu Manjhi, along with others, applied for the licence. On March 22, 1961, for the settlement of the shop lots were drawn by the Deputy Commissioner, Santal Parganas, and the draw was in favour of Jadu Manjhi. But Hari Prasad Sah, that is the previous licensee, filed an appeal against the order of the Deputy Commissioner, before the Commissioner of the Santal Parganas and as it was dismissed, he moved the Board of Revenue, Bihar, and obtained a stay of the settlement of the said shop. On July 13, 1961, the Board of Revenue dismissed the petition filed by Hari Prasad Sah. Meanwhile Jadu Manjhi died and when the fact was brought to the notice of the Deputy Commissioner,

he decided to hold a fresh lot on June 19, 1961 and the lot was drawn in favour of the appellant. Hari Prasad Sah filed a petition in the revenue court and obtained a stay of the settlement of the shop in favour of the appellant. Meanwhile one Basantilal Bhagat filed an application under Art. 226 of the Constitution in the High Court at Patna and obtained an interim stay; but he withdrew his application on September 8, 1961. The petition filed by Hari Prasad Sah was dismissed by the Board of Revenue on July 13, 1961. On September 11, 1961, the appellant furnished security and the shop was settled on him and a licence was issued in his name. After the expiry of the period of the said licence, it was renewed in his favour for 1962. On June 19, 1961, one Phudan Manjhi, son of Jadu Manjhi, filed a petition before the Deputy Commissioner for substituting his name in the place of his father on the basis of the lot drawn in favour of his father. The Deputy Commissioner rejected the application and Phudan Manjhi preferred an appeal against that order to the Commissioner of Excise; and the Commissioner remanded the case to the Deputy Commissioner to consider the fitness of Phudan Manjhi to get the licence and to consider whether the provisions of r. 145 of the Excise Manual, Vol. II, would apply to the facts of his case. One Bhagwan Rajak, who was not an applicant before the Deputy Commissioner, filed an application before the Commissioner alleging that there should have been a fresh advertisement for the settlement of the shop according to cl.(13) of r.101 of the Excise Manual, Vol. III; and on March 13, 1962, the Commissioner allowed his application and directed the Deputy Commissioner to take steps for a fresh settlement of the shop in accordance with rules. Against the said orders the appellant filed petitions before the Board of Revenue and the said Board, by its order dated May 30, 1962, dismissed the petitions and directed that unless the Deputy Commissioner came to a definite conclusion that

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Phudan Manjhi was unfit to hold the licence, he should be selected as a licensee in accordance with r. 145 of the Excise Manual, Vol. II. The result of the said proceedings is that the appellant's licence was cancelled and the Deputy Commissioner was directed to hold a fresh settlement giving a preferential treatment to Phudan Manjhi. The appellant filed a petition under Art. 226 of the Constitution in the High Court at Patna to quash the said orders. Neither Phudan Manjhi nor Bhagwan Rajak in whose favour the Board of Revenue decided the petition, was made a party. It is represented to us that pursuant to the orders of the Board of Revenue the Deputy Commissioner made an enquiry, came to the conclusion that Phudan Manjhi was not fit to be selected for the grant of a licence, and that he has not yet made a fresh settlement in view of the pendency of the present appeal.

Learned Additional Solicitor General, appearing for the appellant, contended that the Board of Revenue acted without jurisdiction in directing a fresh settlement, as neither r. 101 nor r. 145 of the Excise Manual would apply to the facts of the case : r. 101 does not apply as in this case no licence was cancelled for malpractices, and r. 145 is not attracted as Jadu Manjhi was not a licensee since no licence was issued in his favour.

Learned counsel for the respondents raised a preliminary objection that, as Phudan Manjhi and Bhagwan Rajak, who were necessary parties to the writ petition, were not made parties, the High Court was fully justified in dismissing the petition *in limine*.

As we are accepting the preliminary objection raised on behalf of the respondents, we do not propose to express our view on the merits of the case. It may be mentioned that the order of the High

Court does not disclose whether the petition was dismissed as the necessary parties were not before it, or on merits; but that does not preclude us from considering the question now raised, as the respondents had obviously no opportunity to raise that question in the High Court, notice having not been issued to them.

The question is whether in a writ in the nature of *certiorari* filed under Art. 226 of the Constitution the party or parties in whose favour a tribunal or authority had made an order, which is sought to be quashed, is or are necessary party or parties. While learned Additional Solicitor General contends that in such a writ the said tribunal or authority is the only necessary party and the parties in whose favour the said tribunal or authority made an order or created rights are not necessary parties but may at best be only proper parties and that it is open to this Court, even at this very late stage, to direct the impleading of the said parties for a final adjudication of the controversy, learned counsel for the respondents contends that whether or not the authority concerned is necessary party, the said parties would certainly be necessary parties, for otherwise the High Court would be deciding a case behind the back of the parties that would be affected by its decision.

To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled : it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

The next question is, what is the nature of a writ of *certiorari* ? What relief can a petitioner in

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such a writ obtain from the Court ? *Certiorari* lies to remove for the purpose of quashing the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions. It is not necessary for the purpose of this appeal to notice the distinction between a writ of *certiorari* and a writ in the nature of *certiorari* : in either case the High Court directs an inferior tribunal or authority to transmit to itself the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. It is well settled law that a *certiorari* lies only in respect of a judicial or quasi-judicial act as distinguished from an administrative act. The following classic test laid down by Lord Justice Atkin, as he then was, in *The King* v. *The Electricity Commissioner* (1) and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act :

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Lord Justice Slesser in *The King* v. *London County Council* (2) dissected the concept of judicial act laid down by Atkin, L. J., into the following heads in his judgment : "wherever any body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority—a writ of *certiorari* may issue". It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular

(1) [1924] 1 K. B. 171. (2) [1931] 2 K. B. 215, 243.

statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of *certiorari* will be granted to remove the record of proceedings of an inferior tribunal or authority exercising judicial or quasi-judicial acts, *ex hypothesi* it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it. It is implict in such a proceeding that a tribunal or authority which is directed to transmit the records must be a party in the writ proceedings, for, without giving notice to it, the record of proceedings cannot be brought to the High Court. It is said that in an appeal against the decree of a subordinate court, the court that passed the decree need not be made a party and on the same parity of reasoning it is contended that a tribunal need not also be made a party in a writ proceeding. But there is an essential distinction between an appeal against a decree of a subordinate court and a writ of *certiorari* to quash the order of a tribunal or authority: in the former, the proceedings are regulated by the Code of Civil Procedure and the court making the order is directly subordinate to the appellate court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of *certiorari* is issued to quash the order of a tribunal which is ordinarily outside the appellate or revisional jurisdiction of the court and the order is set aside on the ground that the tribunal or authority acted without or in excess of jurisdiction. If such a tribunal or authority is not made party to the writ, it can easily ignore the order of the High Court quashing its order, for, not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or tribunal is certainly a necessary party to such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition.

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The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of *certiorari* the defeated party seeks for the quashing of the order issued by the tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it ? Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of *certiorari* without making him a party or without impleading him subsequently, if allowed by the court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party.

In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may *suo motu* approach the court for being impleaded therein.

The long established English practice, which the High Courts in our country have adopted all along, accepts the said distinction between the necessary and

the proper party in a writ of *certiorari*. The English practice is recorded in Halsbury's Laws of England, Vol. 11, 3rd Edn. (Lord Simonds') thus in paragraph 136 :

> "The notice of motion or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the notice of motion or summons must be served on the clerk or registrar of the court, the other parties to the proceedings, and (where any objection to the conduct of the judge is to be made) on the judge.....".

In paragraph 140 it is stated :

> "On the hearing of the summons or motion for an order of mandamus, prohibition or certiorari, counsel in support begins and has a right of reply. Any person who desires to be heard in opposition, and appears to the Court or judge to be a proper person to be heard, is to be heard not withstanding that he has not been served with the notice or summons, and will be liable to costs in the discretion of the Court or judge if the order should be made.....".

So too, the Rules made by the Patna High Court require that a party against whom relief is sought should be named in the petition. The relevant Rules read thus:

Rule 3. Application under Article 226 of the Constitution shall be registered as Miscellaneous Judicial Cases or Criminal Miscellaneous Cases as the case may be.

Rule 4. Every application shall, soon after it is registered, be posted for orders before a Division

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Bench as to issue of notice to the respondents. The Court may either direct notice to issue and pass such interim order as it may deem necessary or reject the application.

Rule 5. The notice of the application shall be served on all persons directly affected and on such other persons as the Court may direct.

Both the English rules and the rules framed by the Patna High Court lay down that persons who are directly affected or against whom relief is sought should be named in the petition, that is all necessary parties should be impleaded in the petition and notice served on them. In "The Law of Extraordinary Legal Remedies" by Ferris, the procedure in the matter of impleading parties is clearly described at p.201 thus:

> "Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return, or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very right of the relief sought. But in order that the court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondent."

This passage indicates that both the authority whose order is sought to be quashed and the persons who are interested in maintaining the regularity of the

proceeding of which a review is sought should be added as parties in a writ proceeding. A division Bench of the Bombay High Court in *Ahmedalli* v. *M. D. Lalkaka* (1) laid down the procedure thus :

> "I think we should lay down the rule of practice that whenever a writ is sought challenging the order of a Tribunal, the Tribunal must always be a necessary party to the petition. It is difficult to understand how under any circumstances the Tribunal would not be a necessary party when the petitioner wants the order of the Tribunal to be quashed or to be called in question. It is equally clear that all parties affected by that order should also be necessary parties to the petition."

A Full Bench of the Nagpur High Court in *Kanglu Baula* v. *Chief Executive Officer* (2) held that though the elections to various electoral divisions were void the petition would have to be dismissed on the short ground that persons who were declared elected from the various constituencies were not joined as parties to the petition and had not been given an opportunity to be heard before the order adverse to them was passed. The said decisions also support the view we have expressed.

To summarize : in a writ of *certiorari* not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either *suo motu* or on the application of a party to the writ or an application filed at the instance of such proper party.

In the present case Phudan Manjhi and Bhagwan Rajak were parties before the Commissioner

(1) A. I. R. 1954 Bom. 33. 34. (2) A. I. R. 1955 Nag. 49.

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as well as before the Board of Revenue. They succeeded in the said proceedings and the orders of the said tribunal were in their favour. It would be against all principles of natural justice to make an order adverse to them behind their back; and any order so made could not be an effective one. They were, therefore, necessary parties before the High Court. The record discloses that the appellant first impleaded them in his petition but struck them out at the time of the presentation of the petition. He did not file any application before the High Court for impleading them as respondents. In the circumstances, the petition filed by him was incompetent and was rightly rejected.

That order was made on July 3, 1962; and the special leave petition was filed on July 18, 1962. Even in the special leave petition the said two parties were not impleaded. Learned counsel for the appellant suggests that this Court may at this very late stage direct them to be made parties and remand the matter to the High Court for disposal. This request is belated and cannot, therefore, be granted. In this view it is not necessary to express our opinion on the other questions raised.

The appeal fails and is dismissed with costs.

Appeal dismissed.