

4, 1969

No. 28 of 1967

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

UNIVERSITY OF LONDON
INSTITUTE OF LEGAL STUDIES
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LONDON, W.C.1.

B E T W E E N:

M. N. GUHA MAJUMDER

Appellant

- and -

THE ATTORNEY GENERAL OF SARAWAK

Respondent

C A S E FOR RESPONDENT

RECORD

10 1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Harley, acting C.J., Borneo, Ismail Khan and Gill, J.J.) dated respectively the 9th day of September, 1966, and the 18th day of October, 1966, whereby the said Federal Court dismissed the Appellant's appeal and allowed the Respondent's cross-appeal from a Judgment and Order of the High Court of Sarawak (Lee Hun Hoe, J.) dated the 10th day of September, 1965, whereby the said High Court adjudged and declared the Appellant to be eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961).

pp.105,116

pp.57-78

20 2. The Appellant instituted THE PRESENT PROCEEDINGS by Writ of Summons dated the 28th August 1963. By his Statement of Claim dated 27th August 1963, he claimed against the Respondent the following declarations:

p.1
p.2

"1. Declaration of Court that the plaintiff is, and has always been,

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a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December, 1958.

II. Declaration of Court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No.15 of 1961).

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III. Declaration of Court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a Member of Her Majesty's Overseas Civil Service".

3. The said High Court of Sarawak by its said Judgment declined to make the first and third declaration sought by the Appellant, but granted the Appellant the second declaration claimed. The Appellant appealed to the Federal Court against the High Court's refusal to grant the first and third declarations, and the Respondent cross appealed, asking that the decision of the High Court should be varied by declaring that the Appellant was not entitled to the second declaration sought by him. The Federal Court dismissed the Appellant's appeal and allowed the Respondent's cross appeal.

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4. The principal questions that arise in this Appeal are:

(a) whether it was a term of the Appellant's appointment as Medical Officer in Sarawak that he should be paid "inducement pay" or "expatriation pay" (these terms being synonymous)

(b) whether under Sarawak General Orders, to which the Appellant's appointment was expressly made subject, and in particular under Order 192, the Appellant was so entitled.

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- (c) whether the Federal Court was right in upholding the High Court's refusal to grant the first declaration claimed as a proper exercise of the trial Court's discretion, and as referring to a matter which was not in dispute and would not assist in determining the Appellant's rights to extra pay, if any.
- 10 (d) whether in any event the Appellant was entitled to the second and third declarations he claimed, having regard to the form of the declarations sought and the fact that Her Majesty's Government of Great Britain and Northern Ireland were not a party to the action.
- 20 (e) whether further the Appellant was entitled to the third declaration, having regard to the provision in General Order 192 as to the decision of the Governor-in-Council being final upon any question as to eligibility for inducement pay.

5. The Overseas Service (Sarawak) Agreement 1961, which is Scheduled to the Overseas Service Ordinance (No. 15 of 1961) defines the term "designated officer" as an officer designated as such by a Secretary of State who is:

- 30 "(i) an expatriate officer in the service of the Government of Sarawak on or after the appointed day and
- (ii) who -
- (a) is a member of Her Majesty's Overseas Civil Service; or
- (b) was selected for appointment by or with the approval of a Secretary of State, or was recruited by the Crown Agents for Overseas Governments and Administrations;
- 40 (c) was otherwise recruited to a post

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for which a normal channel of recruitment is either the Colonial Office or the Crown Agents for Oversea Governments and Administrations and whose appointment for the purpose of this Agreement is approved by a Secretary of State".

Section 1 of the Overseas Service Act 1961 provides that designation under the Overseas Service (Sarawak) Agreement 1961 is subject to the consent of the United Kingdom Treasury. 10

6. Sarawak General Order 192 provides, and at all material times so provided, as follows:-

"192 - (i) An officer in Division I, II or III shall be eligible for inducement pay if:-

- (a) on the occasion of his first appointment he was habitually resident in a country other than Borneo, Burma, Ceylon, China, the Federation of Malaya, Hong Kong, India, Indonesia, Pakistan, the Phillippines, Siam or Singapore, and 20
- (b) he has his principal family and social ties and general background in any such country, and
- (c) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession or calling, shall be deemed to have been recruited from an overseas country. 30

(ii) if at any time any question arises whether any officer or class of officers is eligible for inducement pay, the decision of the Governor-in-Council shall be final". 40

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7. The Appellant, having seen an advertisement in the British Medical Journal for a post of Medical Officer in Sarawak, sent in an application to the Colonial Office for the post. In his application dated the 29th January, 1958, he gave his place of birth as India and his permanent address as c/o Mr. K.C. Bose, 7 Central Road, Jadavper, Calcutta-32, India. His "present address" he stated as "c/o General Hospital, Rochford, Essex". He gave particulars of his schooling (from January, 1934 to March 1941 in Rangpur, Bengal, India), of his University career (at Calcutta University from May 1941 to August 1948 and at London University from October 1955 to June 1956), of his medical qualifications, and of his medical appointments. These latter included appointments at Calcutta hospital from May 1949 to May 1950 and service with the Indian Army Medical Corps from May 1950 to August 1955. He was interviewed by the Medical Appointments Committee on the 27th March, 1958, following which interview he wrote to the Director of Recruitment Colonial Office requesting that all further communications should be directed to him at the previously stated address in Calcutta, where he was shortly proceeding.
- By a letter dated the 2nd May, 1958, the Appellant was informed that he had been provisionally selected for appointment as Medical Officer, Sarawak and that a formal offer of appointment would be sent to him as early as possible.
- On the 12th June, 1958, a letter was sent to him by the Colonial Office offering him appointment on probation for 3 years as a Medical Officer in Sarawak "on the conditions set out in this letter and in the enclosed memorandum". The letter detailed the salary that was offered in the following terms:
- "The salary scale of the appointment is at the rate of £870 a month for the first year; £930 a month for the second year, rising by annual increments

p.127

p.120

p.130

p.131

p.132

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of \$30 a month to \$1050 a month; then \$1085 a month rising by annual increments of \$35 a month to \$1260 a month; then \$1300 a month rising by annual increments of \$40 a month to \$1420 a month. There is an efficiency bar at \$1260 a month.

In view of your professional experience and qualifications you would enter the salary scale at \$1155 a month. This would not, of course, result in any reduction in the period of probation which as to be served. In addition to basic salary, allowances are payable at the rates shown in the memorandum." 10

p.134-135

The memorandum enclosed detailed the allowances that it was proposed should be paid to him and the general conditions to which his service would be subject as follows:

"3. Allowances

- (i) Education Allowance Married officers 20
dependent children may receive an allowance in respect of the expense to them of educating their children, up to a maximum of two in number, outside the colony. The allowance would be payable at \$100 a month for children between the ages of 5 and 17 years.
- (ii) Child Allowance Married officers 30
with one or more dependent children will receive an allowance at the rate of 7½% of salary with a maximum of \$100 a month. The allowance will be payable in respect of a child or children under the age of 17 years only; provided that if the child or children are between 17 and 21 years, the allowance shall still be payable 40
for as long as the child is receiving full time education.

- (iii) Outfit Allowance An allowance of £60 is payable to officers on first appointment as a means of assistance towards the purchase of essential tropical kit.

4. General conditions of service

10 An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State of Brunei."

20 The letter from the Colonial Office offering the Appellant the appointment was forwarded to him by the United Kingdom High Commissioner in Calcutta at the address there that the Appellant had given in his application. p.156

8. The Appellant replied on the 10th October 1958 accepting the offer under the terms and conditions set out in the letter dated 12th June 1958 and in the memorandum. The Appellant's formal appointment as Medical Officer in Sarawak was by letter from the acting Chief Secretary, Sarawak, dated the 6th December 1958 and his reply thereto dated the 11th December 1958. The Acting Chief Secretary's letter of 6th December 1958 was as follows: p.157

"22/P/728 p.139

Dr. M.N.G. Majumder,
Through Director of Medical Services
KUCHING

Sir,

40 I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service with effect from

8.

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1st December, 1958 on the conditions embodied in the Secretary of State's letter to you reference BCD/P-13847 dated 12th June, 1958.

2. The appointment is on the permanent and pensionable establishment and the salary of the post is in Division II, Scale A \$870; 930x30-1050x35-1260/BAR/1300x40-1420 a month. Child allowance is payable at the rates laid down in Secretariat Circular No. 10/1956; vacation leave, local leave, leave passages, travelling allowances and other privileges will be granted in accordance with the Sarawak General Orders. 10

3. You will enter the salary scale at \$1,155 a month, and your incremental date would be 4th December.

4. I have to request that if you accept the appointment you send an undertaking to this office in the form attached hereto together with a declaration of secrecy in accordance with G.O. 570. 20

I am, Sir,

Your obedient Servant,
(Sgd) Lo Suan Hian
for Acting Chief Secretary

Copy to Accountant-General
Director of Medical Services."

The Appellant's reply read as follows:

" Dated 11th December, 1958. 30

Sir,

With reference to my appointment as Medical Officer in Sarawak, I hereby undertake to accept such appointment subject to rules and regulations of Her Majesty's Overseas Civil Service now in force, and to any alterations or

amendments thereto which may be made from time to time.

I have the honour to be,

Sir,

Your obedient servant,

(Sgd) M.N. GUHA MAJUMDER

The Honourable
The Chief Secretary,
(Establishment Office),
KUCHING

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"

The Appellant was confirmed in his appointment as Medical Officer with effect from the 4th December 1961.

p.61,1.28

8. On the 16th September 1961 the Appellant submitted a petition bearing that date to the Governor-in-Council requesting that he be "granted inducement pay with retrospective effect from the date of my appointment in Her Majesty's Overseas Civil Service". In his petition the Appellant stated the grounds of his "appeal" as follows:

p.152

" (i) On the date of my appointment in the Sarawak Government Service I did satisfy the requirements of the Colony of Sarawak General Order No. 192.

(ii) At the time of acceptance of offer as a Medical Officer under the Sarawak Government I was already on the register of the General Medical Council as a general practitioner and, was serving as a medical staff under the Southend-on-Sea Hospital Management Committee, Essex, England, and would have continued to stay and serve in the United Kingdom but for the offer from the Secretary of State of appointment in Sarawak.

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- (iii) When I was interviewed by the Selection Board at the Colonial Office, London, in connection with my appointment in Her Majesty's Overseas Civil Service I informed the Board of my intention of going on a holiday to India before returning to England to continue in my employment under the National Health Service, but that if I were to be selected for appointment I would be prepared to proceed direct to Sarawak from India. I was then told by the Selection Board that it would be in order for me to do so. On selection, therefore, I came to Sarawak direct from India with the only difference that the Government of Sarawak did not have to pay for my postage from England to India. If the fact that I came to Sarawak from India to take up my first appointment in Her Majesty's Overseas Civil Service was interpreted as though I was recruited from India and hence I am not entitled to inducement pay, I submit that this contention is entirely unjustifiable. My stay in India, during the material time, was purely of a temporary nature and had it not been for the selection for appointment in Sarawak I would have returned to England to serve there. 10 20 30
- (iv) It is true that I gave my address care of Mr. K.C. Bose, 7 Central Road, Calcutta 32, India, but it was purely accidental. I am a refugee from Pakistan since 1946 and because at the time of submitting my application I was planning to visit my wife, who was staying with her father the said Mr. Bose, it was thought convenient to give that address then and for no other reason. 40
- (v) While officers in receipt of inducement pay are allowed free return passages home after each 24 to 30 months of service, I am allowed return passages

home only after 4 years of service. Being an expatriate officer not having a home in any nearby territory to which I could afford to pay passages, I am forced to wait 4 years before I can take my earned leave. I am perhaps the only officer in my category/grade who suffers from this disability through no fault of mine.

- 10 3. I have been without an address in
 India since 1946 and, I own no property
 in that country. I would, therefore,
 humbly submit that the fact of my
 Indian/Asian descent should not be held
 against my receiving inducement pay.
 There are several expatriate officers
 in the Sarawak Civil Service who are
 Indians/Asians like myself, but enjoying
 the privileges of officers in receipt of
 20 inducement pay. This discrimination
 against me is wholly unjust and places
 me in financial and leave disadvantages.
 My appointment in the Sarawak Government
 Service has caused dislocation and
 disturbance to a material degree just
 as such factors have affected any other
 expatriate officer in receipt of inducement
 pay and, there is no apparent
 30 justification why I should be denied
 the rights and privileges enjoyed by
 my brother officers. "

9. On the 31st January 1962 the Chief Secretary
 wrote to the Appellant in reply informing him
 that his claim to receive inducement pay could
 not be approved. The Chief Secretary's letter
 read as follows:

p.154

" Sir,

40 On 2nd October 1961, the Director
 of Medical Services was requested to
 inform you that your petition, on
 the question of your eligibility
 for Inducement Pay, was being submitted
 to the Secretary of State.

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A communication was subsequently sent to the Secretary of State enclosing your petition together with the following remarks by this Government, -

- (a) In your application form for appointment dated 29.1.1958 submitted to the Director of recruitment, Oversea Service Division, Colonial Office, you clearly stated that your permanent address was in India. 10
- (b) Because of this, and because Sarawak General Order 192 which excluded India for the purpose of Inducement Pay had been in force since August, 1957, the clause about Inducement Pay was excluded in your terms and conditions of service. This exclusion had not been challenged until the date of your petition, a period of nearly three years afterwards. 20
- (c) It appeared, from your application form mentioned above, that you were a resident in India from 1934 until you went for higher studies to England in 1955, and that the only period you resided in England was between 1955 and 1958.

The Secretary of State has now replied saying that he has given careful consideration to your petition but agrees that your claim to receive Inducement Pay cannot be admitted. He adds that in reaching this decision, he has been influenced not only by the points made by this Government, but by the fact that you applied for, and received the refund of all your contributions to the National Health Service Superannuation Scheme in April, 1958; a step unlikely to be taken by a person merely proceeding on holiday to another country and proposing to resume work in the National Health Service at its conclusion. 30 40

In view of the foregoing, I regret that your claim to receive Inducement Pay cannot be approved.

I am, Sir,

Your obedient servant,

Sgd. Chin Shin Sen

for Chief Secretary. "

10. The Appellant in his Statement of Claim dated the 27th August 1963 alleged that he did at all material times believe and continued to believe that he was a Member of Her Majesty's Overseas Civil Service and that he was "entitled to all benefits, such as inducement pay, to which officers in that Service are eligible". He further pleaded that only in or about August 1961 did he know that the salary paid to him did not include inducement pay. p.2

He relied in paragraph 8 upon the advertisement in the British Medical Journal which had prompted his first enquiry about the appointment, and also in paragraph 12 upon the issue to him before arriving in Sarawak to take up the appointment of an "outfit allowance of £60 (sixty pounds sterling) as a means of assistance towards the purchase of essential tropical kit".

11. The Respondent in his Defence dated the 2nd December 1963 pleaded that the Appellant's appointment was on the terms and conditions set out and/or referred to in the Secretary of State's letter dated the 12th June 1958, and in particular that his appointment was subject to the General Orders of the Government of Sarawak. It was submitted that the Appellant was not eligible under General Order 192 for Inducement pay and that Membership of Her Majesty's Overseas Civil Service did not ipso facto confer any entitlement to inducement pay. The Respondent denied that the Appellant was, until 1961, unaware that he was not receiving inducement pay, this being clearly disclosed to the Appellant on his monthly salary slips. p.6

RECORD

p.8 1.5

The Respondent relied inter alia as showing the Appellant's non-entitlement to inducement pay, on his habitual residence in India.

p.10,1.16

p.63,1.24

With regard to the first declaration sought by the Appellant, the Respondent pleaded that this related to a matter over which the Government of Sarawak had no control and that it was therefore not justiciable in the Courts of Sarawak, but added that the Respondent would regard the Appellant for the purposes of the suit as if he had been enrolled in Her Majesty's Overseas Civil Service on the 1st December 1958. (At the commencement of the hearing the Respondent conceded that the Appellant had been a member of Her Majesty's Overseas Civil Service since the 1st December 1958).

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As to the second declaration sought by the Appellant, the Respondent pleaded that designation was a matter wholly within the competence and discretion of one of Her Majesty's principal Secretary of State, and was not within the competence of the Sarawak Government. The Respondent further pleaded that by reason of Section 1 of the Overseas Service Act 1961 the Appellant could not be designated under the Overseas Service (Sarawak) Agreement 1961 without the consent of the United Kingdom Treasury.

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p.16

p.17,1.34

p.18,1.4

p.20,11.38

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12. The Appellant gave evidence in support of his claim, saying inter alia that he "took it for granted" that the terms and conditions appearing in the advertisement applied to him in his appointment, and that when he received his pay (at which time he was given pay slips) he thought his pay was inclusive of inducement pay.

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p.21,11.10

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p.21,1.33

-p.22,1.2

He said that he was basing his case "on the advertisement, the letter and memorandum" and that General Orders had got nothing to do with it. He claimed to have been habitually resident in England, intending to stay in England, although of Indian Origin and possessing an Indian passport.

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p.57

p.63,11.

14-21

13. The learned Trial Judge in his judgment dated the 10th September 1965 appears to have rejected the Appellant's evidence that until August 1961

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he was under the impression that his salary included inducement pay, holding that the monthly salary slip would have indicated the true position to him.

- The learned Trial Judge held that the advertisement in the British Medical Journal had been no more than an invitation to treat and was not an offer. The offer had been made in the letter dated the 12th June 1958 and the memorandum enclosed, and this clearly made the appointment subject to the General Orders of the Government of Sarawak. The Appellant was resident in India when the offer was made and accepted.
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14. In the result, the learned Judge declined to make the first declaration claimed, since the point raised had become academic, and declined also to make the third declaration, since the effect of General Order 192 was to make a Civil Servant's entitlement to inducement pay entirely a matter for the prerogative of the Governor-in-Council. However, he granted the Appellant the second declaration that he claimed.
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15. By Notice of Appeal dated the 9th October, 1965 the Appellant appealed to the Federal Court against the refusal of the High Court to grant the first and third declarations.
16. By Notice of Cross-Appeal dated the 1st December, 1965, the Respondent cross-appealed against the decision of the High Court granting the Appellant the second declaration sought by him. The grounds relied upon were
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- "(1) That the learned trial judge erred in law in making a declaration affecting a person not a party to the action namely Her Majesty's Government of Great Britain and Northern Ireland who had an interest in the subject matter of the declaration.
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- (2) That the learned trial judge should have refused to make the second declaration as in the circumstances such a declaration was not effectual

p.73,11.19
-22

p.73,1.41
-p.74,1.4

p.73,11.30
-32

p.66,11.
1-10
p.76,1.36
-p.77,1.6

p.70,11.
1-6

p.79

p.86

p.87,11.
1-14

RECORD

and enforceable."

p.105
p.116

17. On the 9th September, 1966, the Federal Court delivered Judgment and on the 18th October, 1966 entered a Decree dismissing the Appellant's appeal, allowing the Respondent's cross-appeal and ordering that the costs of the Appeal and the costs in the Court below should be paid by the Appellant to the Respondent.

The principal Judgment was delivered by Harley (Acting C.J., Borneo).

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p.105 11.29-
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With regard to the first declaration claimed by the Appellant, the learned Acting Chief Justice held that the learned trial judge had not exercised his discretion wrongly in refusing to make the declaration, since the matter was not in dispute and the declaration sought would not assist in determining the Appellant's rights to extra pay, if any.

p.113,1.19
-p.115,1.5

With regard to the second declaration claimed by the Appellant, the learned Acting Chief Justice held that for the reasons set out in the Respondent's grounds of cross-appeal it was outside the discretion of the Court to grant it. Designation was for the Secretary of State of the United Kingdom. It was impossible for the Respondent to bind or represent Her Majesty's Government in Britain, and the Courts should not make declarations which concerned persons interested but not joined as parties.

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p.106,1.17
-p.113,1.18

As to the third declaration, the learned Acting Chief Justice held that General Order 192 applied to the Appellant's appointment, which was expressly subject to all such Orders and regulations. The Appellant in his Petition to the Governor-in-Council of the 16th September, 1961, had relied in terms upon this very General Order. The Appellant's contract did not provide for inducement pay and by General Order 192 he was excluded from any entitlement to it, since he was habitually resident in India. In any event, under General Order 192 it was for the Governor-in-Council to decide, and decide finally, upon the Appellant's entitlement.

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Ismail Khan and Gill, J.J., concurred in the Judgment of Harley (Acting C.J., Borneo).

p.115,11.
15-20
p.118

18. The Appellant was granted final leave to appeal to His Majesty the Yang di-Pertuan Agong on the 11th September, 1967.

10 19. The Respondent respectfully submits that this Appeal should be dismissed and the said Judgment and Order of the Federal Court of Malaysia dated respectively the 9th day of September, 1966, and the 18th day of October, 1966, affirmed and that the Appellant should be Ordered to pay the Respondent's costs of this Appeal for the following amongst other

R E A S O N S

1. BECAUSE the Appellant was not entitled to the declarations claimed.
- 20 2. BECAUSE the learned trial Judge in the exercise of his discretion rightly refused the Appellant the first and third declarations claimed and the Federal Court was right to decline to intervene.
3. BECAUSE Her Majesty's Government in the United Kingdom were not a party to or represented in the proceedings.
- 30 4. BECAUSE the subject matter of the first declaration claimed was not in dispute and further it would not have assisted in determining any right or entitlement of the Appellant had the Court granted either the first or the second declaration claimed.
5. BECAUSE the effect of section 1 of the Overseas Service Act 1961 was to disentitle the Appellant to the second declaration claimed.
6. BECAUSE the terms of the Appellant's appointment did not provide for the payment to the Appellant of inducement

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pay, but on the contrary excluded any entitlement thereto.

7. BECAUSE the Appellant's appointment was subject to the General Orders of the Government of Sarawak, and the effect of General Order 192 was to disentitle the Appellant to inducement pay.
8. BECAUSE upon the concurrent findings of the Courts below that the Appellant was resident in India, he was not entitled to inducement pay. 10
9. BECAUSE by virtue of General Order 192 it was for the Governor-in-Council to decide finally the question of the Appellant's entitlement to inducement pay.
10. BECAUSE the Judgment of the Federal Court of Malaysia was right for the reasons therein stated.

(Sgd) DINGLE FOOT

(Sgd) MONTAGUE SOLOMON

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No. 28 of 1967

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

C N A P P E A L
FROM THE FEDERAL COURT OF
MALAYSIA

B E T W E E N:

M.N. GUHA MAJUMDER
Appellant

- and -

THE ATTORNEY GENERAL OF SARAWAK
Respondent

C A S E F O R R E S P O N D E N T

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