Privy Council Appeal No. 35 of 1966

Syed Ahmed bin Alwee Al-Junied and others – – – *Appellants*

v.

Muchool Khanum Reshty – – – – – – *Respondent*

(and Cross-Appeal Consolidated)

FROM

THE FEDERAL COURT OF MALAYSIA HOLDEN AT SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY 1969

Present at the Hearing:
LORD GUEST
LORD UPJOHN
LORD DONOVAN
[*Delivered by* LORD UPJOHN]

This is an appeal and cross-appeal from a judgment given on 6th April 1966 by the Federal Court of Malaysia (Appellate Jurisdiction) reversing in part a judgment given on 7th November 1964 by Choor Singh J. sitting in the High Court of Singapore substantially in favour of the plaintiffs. The facts may be shortly stated. The appellants-plaintiffs in the action (who will be referred to as the landlords) had by a lease dated 28th September 1953 demised about 550 acres of land in the Paya Lebar district of Singapore together with all the buildings erected thereon to the respondent (who will be referred to as the tenant) for a term of five years from 1st April 1953 at the monthly rent of $1,300.00. The lease expired on 31st March 1958 and thereafter the tenant remained on in possession as tenant from month to month at the monthly rent of $1,400. These rents were duly paid by the tenant. The landlords on 23rd February 1961 gave notice to determine this monthly tenancy with effect from 31st March 1961.

There was a large number, about 2,100, of sub-tenants on the land who had, with the landlords' consent, erected temporary buildings thereon at their own expense; and the tenant was receiving at the date of expiry of the tenancy a substantial profit rental therefrom, amounting after payment of rent and the substantial expenses of collection and income tax (as their Lordships understand) to about $2,000 per month.

Accordingly, it is not in dispute that had the tenant remained on in possession she would at common law have been a trespasser; and have been bound to account for this monthly sum to the landlords by way of mesne profits as from the expiry of the notice to quit.

But there is in force in Singapore a very comprehensive Control of Rent Ordinance passed in July 1953 (replacing an earlier similar Ordinance of 1947) which admittedly applies to this demised land; and the fundamental question upon the landlords' appeal is whether having regard to the provisions of the Ordinance the tenant, holding over from 1st April 1961, is liable to account to the landlords for mesne profits as aforesaid as a trespasser (as was held by the learned trial Judge) or whether (as held by the Federal Court) she was a statutory tenant as defined in the Ordinance and as such only liable for rent until an order for possession was made against her.

Upon the cross-appeal the question is whether the landlords establish a case for possession under and in accordance with the provisions of the Ordinance.

Upon this point they succeeded in both Courts below.

As the decision of the Federal Court depended to some extent upon their view that the Ordinance was strictly in line with and comparable to the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (the Rent Act 1920) of this country some general review of the Ordinance is necessary.

The scope of the Ordinance is far wider than the Rent Act 1920 for it applies to " premises " which by definition mean " any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building whether of permanent or temporary construction . . ." and cover the demised land. Then there is no limitation to the application of the Ordinance by reference to the amount of the annual value of the premises; and the machinery of administration is entirely different; the Ordinance and its predecessor created a Rent Conciliation Board whose duty is to fix rent. If not so fixed the " standard rent " was the rent of the premises on 1st August 1939.

It is provided (by section 3) that any rent paid in excess of the rent fixed by the Board, or, if not so fixed, the standard rent, is unlawful and may be recovered by the tenant. It is common ground that the standard rent for the demised premises in this case was $750.00 per month.

Then Part III of the Ordinance deals with Recovery of Possession.

Section 14 provides:

> " No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the cases set out in this Part of this Ordinance."

Then section 15 (1) sets out a large number of cases in a series of paragraphs numbered (*a*)–(*l*) in which an order for possession might be made. The relevant paragraph here is paragraph (*g*) and read with section 15 (1) is in these terms:

> 15 (1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases namely
>
> (*g*) " where the tenant having sublet the premises or part thereof receives in respect of such subletting, rents (excluding any municipal services paid by the tenant) for any sublet part of the premises in excess of the recoverable rent for that part, or rents which exceed in the aggregate one hundred and ten *per centum* of the recoverable rent paid by the tenant himself including the apportioned rental or value of any part of the premises retained by the tenant or not sublet by him; "

Not all of these paragraphs are in such categorical terms, for a number of them leave it to the discretion of the Court whether an order for possession should or should not be made. See for example paragraphs (*b*), (*j*) and (*l*). Under other paragraphs, in order to grant an order for possession the Court has to form some opinion, see paragraph (*e*); while under others the facts entitling the landlord to possession may be wholly outside any knowledge of the tenant—see paragraphs (*i*), (*j*) and (*k*).

Part IV of the Ordinance is headed " Statutory Tenants " and its two constituent sections define statutory tenants and the terms of a statutory tenancy. This has no counterpart in the Rent Act 1920. Section 27 is the crucial section on the appeal, but it will be convenient to set out the whole of Part IV.

> " 27. The following persons are statutory tenants under this Ordinance, namely:
>
> (*a*) any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord; and

Privy Council Appeal No. 28 of 1967

M. N. Guha Majumder – – – – – – – – *Appellant*

v.

The Attorney General of Sarawak – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JANUARY 1969

Present at the Hearing:
LORD GUEST
LORD UPJOHN
LORD DIPLOCK
[*Delivered by* LORD GUEST]

The appellant was born in India in 1926, in Bengal, at Rangpur, which is now part of Pakistan. He obtained his MB, BS, from Calcutta University in 1948. After serving as a medical officer in the Indian Army he proceeded to England in the latter part of 1955 for post-graduate medical studies and he there obtained additional qualifications.

In March 1957 he was serving as Senior House Officer in the General Hospital, Rochford, Essex. While there he noticed an advertisement in the British Medical Journal for a post as Medical Officer, Sarawak. This advertisement stated that the appointment would be made on a permanent basis or a short-term contract and that expatriation pay (pensionable) would be payable at various rates. Subsequently, he submitted his application for the post and on his application form he stated that his present address was "C/o. General Hospital, Rochford, Essex", and that his permanent address was "C/o. Mr. K. C. Bose, 7 Central Road, Jadavper, Calcutta-32, India". This was the address of his father-in-law.

After being interviewed for the post he wrote to the Director of Recruitment, Colonial Office, asking that any future communications should be sent to the address in Calcutta on his application form, where he would be going. On 2nd May 1958 he received a letter from the Colonial Office informing him that he had been provisionally selected for appointment and that a formal letter of appointment would soon be sent to him. Eventually a letter dated 12th June 1958 was sent to him offering him an appointment on probation for three years as medical officer, Sarawak at a salary of $1,155. The letter informed him that any addition to his basic salary allowances would be payable at rates shown in the Memorandum which was enclosed in the letter.

This Memorandum headed "Conditions of Service in Sarawak", after stating the terms of appointment, dealt in paragraph 3 with the allowances which included education allowance, child allowance and outfit allowance. Paragraph 4 was in the following terms:

> "*General Conditions of Service.* 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."

Paragraph 7 was in the following terms:

> "*Widows' and Orphans' Pensions:* In accordance with the provisions of the Sarawak Widows' and Orphans' Pensions Legislation, male officers under the age of 54 and whether married or single are required to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5 per cent of salary plus inducement pay, subject to a maximum of $50 per month."

This letter was sent with the Memorandum to the appellant through the Deputy High Commissioner in Calcutta and the appellant replied on 10th October 1958 accepting the offer under the terms and conditions set out in that letter and the Memorandum. When the appellant reached Sarawak he received a letter dated 6th December 1958 informing him that His Excellency the Governor had been pleased to appoint him to be medical officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December 1958 on the conditions embodied in the Secretary of State's letter to him dated 12th June 1958 previously referred to. He was required, if he accepted the appointment, to send an undertaking in the form attached to the letter together with a Declaration of Secrecy. The appellant by letter dated 11th December 1958 undertook to accept the appointment subject to the rules and regulations of Her Majesty's Overseas Civil Service now in force or to any amendments which might be made from time to time. He was confirmed in his appointment as a medical officer with effect from 4th December 1961.

The appellant has brought this action against the Government of Sarawak by making the Attorney General of Sarawak nominal defendant and claiming three Declarations as follows:

1. Declaration of Court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December 1958.
2. 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).
3. 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.

The Writ was dated 28th August 1963.

The trial took place before the Honourable Mr. Justice Lee Hun Hoe and on 10th September 1965 the trial judge issued an Order refusing the first and third declarations but granting the second. The appellant appealed to the Federal Court of Malaysia and there was a cross appeal by the respondent. On 18th October 1966 the Federal Court issued an Order dismissing the appeal and allowing the cross appeal to the effect that the appellant was refused all three declarations. The greater part of the evidence considered by the trial judge was documentary, but the appellant and other witnesses gave oral evidence. The appellant stated that until August 1961 he was under the impression that his salary included inducement pay and when he realised that it was not included he submitted a Petition dated 16th September 1961. This Petition was answered by the Chief Secretary informing the appellant that he had consulted the Secretary of State for the Colonies who had replied that the appellant was not a member of Her Majesty's Overseas Civil Service.

While the defence as originally framed denied that the appellant was a member of Her Majesty's Overseas Civil Service, on the morning of the trial, namely 14th July 1965, counsel for the Attorney General asked leave to amend the defence to the effect of inserting an admission that the defendant would regard the appellant, for the purposes of these proceedings, as if he had been enrolled in Her Majesty's Overseas Civil Service on 1st December 1958. At the same time there was produced to the trial judge a document of agreed facts. This was in the following terms:

1. The defendant concedes that the plaintiff has been a member of Her Majesty's Overseas Civil Service since 1st December 1958. That is to say, the defendant does not oppose the plaintiff's claim contained in paragraph 1 of the Statement of Claim for a declaration of Court to this effect.
2. The defendant admits that the appointment of the plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was published in the British Medical Journal and also in the London Gazette.

There followed three other paragraphs which are not material to this appeal.

Since these admissions moneys have been paid into the appellant's Bank as compensation. In the judgment of the trial judge there occurs this passage:

> "First I would like to say that in the light of the evidence as far as membership in HMOCS is concerned plaintiff had been shabbily treated by the colonial administration. It is a sad spectacle for the administration to inform a civil servant at the time of his appointment that he was a member of HMOCS and to turn round years later to say that he was not such a member."

Their Lordships have no hesitation in endorsing this criticism of the behaviour of the Colonial administration. They consider that the appellant was fully entitled in the circumstances which existed at the date of the raising of this action to include a declaration that he was a member of Her Majesty's Overseas Civil Service. This membership was a prerequisite of his further claims and in the face of the persistent denials by the respondent to admit his membership the appellant took the only course open to him. The tardiness of the respondent's admission was nowhere explained.

The appellant was refused the first declaration by both courts below and their Lordships cannot see any good grounds for disturbing their decisions. A declaration is always a discretionary remedy and the discretion of the trial judge will not be lightly interfered with. No grounds were put forward by the appellant upon which it could be said that the trial judge's discretion had been exercised upon improper grounds. The question of his membership of Her Majesty's Overseas Civil Service at the date when the trial judge had to make the Order was academic. There was no dispute between the parties and the court will normally not grant declarations upon academic questions. Their Lordships however wish to add that in view of the behaviour of the Colonial Office and the respondent in these proceedings, they consider that the appellant is entitled to have some protection to safeguard his future rights. They are accordingly proposing to suggest in their report to the Head of Malaysia that the Order of the trial judge should be varied to the extent of including in the Order a recital of the admission by the respondent in the terms of the agreed statement of facts already referred to. Sir Dingle Foot appearing for the respondent did not seriously oppose such a variation of the Order.

Their Lordships now pass to the second declaration which depends upon a consideration of the Overseas Service Ordinance, 1961 No. 15 of 1961. This Ordinance confirms an Agreement made between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sarawak. This Agreement provides by Clause 2 that in the event of the Government of Sarawak on or after the first day of April 1961 paying the allowances referred to in Clause 3 of the Agreement, the Government of the United Kingdom would reimburse the Government of Sarawak in the sums which are therein set out. Clause 3 provides that the allowances mentioned in Clause 2 are (*a*) inducement allowance, (*b*) education allowance, and (*c*) passage allowance. By section 3 of the Ordinance there is charged upon the general revenues of Sarawak sums required for ensuring the payments in respect of "designated officers".

By Clause 1 of the Agreement " designated officer " means an officer designated as such by a Secretary of State who is (1) an expatriate officer and (2) who is a member of Her Majesty's Overseas Civil Service. " Secretary of State " is defined by Clause 1 of the Agreement as one of Her Majesty's Principal Secretaries of State in the United Kingdom. As has been already stated, the trial judge granted the appellant this declaration, but in their Lordships' view this decision was rightly set aside by the Federal Court. There are in their Lordships' view objections to the granting of this declaration. In the first place, the Ordinance gives a designated officer no further rights than he would have under his contract; it merely provides for the financial arrangements between the two Governments in the event of designated officers being paid the allowances mentioned in the Agreement. A declaration in the terms sought would therefore not advance the appellant's case. There is a further objection to the granting of this declaration that, in the terms of Clause 1, a " designated officer " means an officer designated as such by the Secretary of State. The Secretary of State is not a party to these proceedings and moreover it is entirely within his discretion as to whether he designates an officer as such or not. He would not be compelled to do so. Their Lordships therefore conclude that the Federal Court were right in dismissing the appellant's appeal on this declaration.

Passing now to the third declaration, this is the only effective declaration which could assist the appellant in pursuit of his claim to inducement pay. " General Orders (Revised September 1956) of the Colony of Sarawak " provide by paragraph 4 that " General Orders have no force of law, except in so far as they set out the provisions of an Ordinance or Act of Parliament ". By paragraph 7, General Orders " are not to be publicly quoted or referred to in communications to persons outside the Government Service ".

Paragraph 192 is in the following terms:

" (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 Philippines, Siam or Singapore, and

(*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.

(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."

In the Memorandum attached to the contract documents it was provided that " An officer is subject to the General Orders of the Government in which he is serving ".

At the trial the appellant endeavoured to suggest that he came within the category of officers entitled under the General Order to and eligible for inducement pay. The trial judge, however, was not able to accept his evidence upon this matter. In the view of their Lordships the appellant must find his entitlement to inducement pay within his contract and outside the General Orders. Plainly he could only obtain inducement pay

under the General Orders if he was qualified under paragraph 192. It has been held by the trial judge that he did not so qualify and his counsel before the Board did not seriously maintain to the contrary.

However, a further and fatal objection to his claim under the General Orders is paragraph 192 (ii) whereby any question as to whether an officer is entitled to inducement pay is for the Governor in Council whose decision is final.

Their Lordships therefore proceed to consider whether the appellant can succeed in his third declaration by reason of the terms of his contract. As has already been stated the original advertisement which excited the appellant's interest was extremely general but did refer to the fact that expatriation pay was payable and it is common ground that such pay is the same as inducement pay. The learned trial judge described this advertisement as no more than an offer to treat which formed no part of the offer of the Secretary of State contained in his letter of 12th June 1958. Their Lordships agree but in their opinion the position is more accurately expressed in the judgment of Harley A. C. J. who pointed out that a formal offer was made by the Chief Secretary of Sarawak to the appellant in a letter dated 6th December 1958 which was accepted by the appellant on 11th December 1958; and in their Lordships' opinion it is these documents which constituted the contract upon which the appellant must rely. While the letter of 6th December 1958 incorporated the Secretary of State's letter of 12th June 1958 it nowhere referred to the advertisement which in their Lordships' opinion cannot therefore in any event be referred to by the appellant in construing the terms of his contract.

However the incorporation of the Secretary of State's letter of 12th June 1958 which stated that allowances were payable at the rates shown in the Memorandum necessarily incorporates that document.

The Memorandum has a heading " paragraph 3, *Allowances* ", but there is no mention under this heading of inducement allowances. Inducement pay is only mentioned incidentally in paragraph 7, " *Widows and Orphans Pensions* ", in this form, " the rate of contribution is 5 per cent of salary plus inducement pay, subject to a maximum of $50 per month ". It was argued that this paragraph by itself entitled the appellant to inducement pay. Their Lordships do not agree. In their view the proper interpretation of this paragraph is that there is set out the rate of contribution for Widows' and Orphans' Pensions and this rate is fixed at 5 per cent of the salary and, if inducement pay is payable, the contribution will be at the rate of 5 per cent on the additional sum for inducement pay. Their Lordships therefore reach the conclusion that the courts below were right in refusing the appellant his third declaration. The appeal therefore fails.

Their Lordships will accordingly report to the Head of Malaysia their opinion (1) that the Order of the High Court of Sarawak dated 10th September 1965 ought to be varied by adding thereto a further recital that the Order was made upon the court taking in account that the respondent (defendant) conceded that the appellant (plaintiff) had been a member of Her Majesty's Overseas Civil Service since 1st December 1958; (2) that the Order of the Federal Court of Malaysia dated 18th October 1966 ought to be varied so as to provide that the respondent pays the appellant's costs in the High Court of Sarawak; (3) that save as aforesaid the appeal ought to be dismissed and the Orders of the High Court and the Federal Court affirmed; (4) that there ought to be no order as to costs before the Board.

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In the Privy Council

M. N. GUHA MAJUMDER

v.

THE ATTORNEY GENERAL OF SARAWAK

DELIVERED BY
LORD GUEST

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