

4, 1971

No. 31 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT  
KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N

R. R. CHELLIAH BROTHERS Appellants

AND

EMPLOYEES PROVIDENT FUND BOARD Respondents

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CASE FOR THE RESPONDENTS

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1. The Appellants appeal against the Judgment of the Federal Court of Malaysia (Azmi, Lord President, MacIntyre, F.J., Ong Hock Thy, C.J. dissenting) dated the 24th January 1969 allowing an appeal by the Respondents against the Judgment of Raja Azlan Shah J. given in the High Court of Malaya on the 23rd May 1968 dismissing with costs the application of the Respondents for a declaration that one Kirpal Singh Brar was an employee of the Appellants within the meaning of section 2 of the Employees Provident Fund Ordinance 1951 for the period from the 1st September 1964 to the 31st January 1966 and for the consequential order that the Appellants pay the arrears of contribution in respect of such period.

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2. Section 4 of The Employees Provident Fund Ordinance 1951 (hereinafter referred to as "the Ordinance") established the Employees Provident Fund. Section 7 imposed a liability on "every employee and every employer of a person who is an employee within the meaning of this Ordinance" to pay monthly contributions to the Fund. Under section 17 all contributions payable are recoverable by the Respondents summarily as a civil debt. Section 2 of the

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Ordinance contains a definition of the word "employee" and reads:

"In this Ordinance, unless the context otherwise requires -

.....

'Employee' means any person, not being a person of the descriptions specified in the First Schedule to this Ordinance, who has attained the age of 16 years and is employed under a contract of service or apprenticeship, whether written or oral and whether express or implied to work for an employer;

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....."

The First Schedule to the Ordinance, in so far as directly material, reads:

"(2) Any person whose wages exceed 500 dollars a month:

Provided that where after an employee has become liable to pay contributions as provided in section 7 of this Ordinance, or would at any time but for the provisions of sub-sections (1), (1a) and (2) of section 16 thereof have become so liable, the wages of such employee at any time exceed 500 dollars a month such employee shall not by reason only of this paragraph be deemed to have become excluded from the provisions of this Ordinance, but his wages shall for all the purposes of this Ordinance be deemed to be 500 dollars a month:

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....."

3. It is also of some assistance to set out the following further provisions of the Ordinance:

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"7. (1) Subject to the provisions of section 16 of this Ordinance, every employee and every employer of a person who is an employee within the meaning of this Ordinance shall be liable to pay monthly contributions at the rate respectively set out in the Third Schedule to this Ordinance:

Provided that the Board may, at its discretion and on such terms and conditions as it may impose, authorise an employer, or a class or classes of employers, to pay such contributions at intervals of three months."

10 "12. (2) The Board shall cause to be credited to each employee the amount of any contributions paid in his respect by the employer on his own behalf and on behalf of such member of the Fund ....."

"13. (1) No sum of money standing to the credit of a member of the Fund may be withdrawn from the Fund except with the authority of the Board and, subject to any regulations and rules made under sections 20 and 21 of this Ordinance, such authority shall not be given unless the Board is satisfied that -

- 20 (a) the member of the Fund has died; or
- (b) the member of the Fund has attained the age of fifty five years; or
- (c) the member of the Fund is physically or mentally incapacitated from engaging in any further employment; or
- 30 (d) the member of the Fund is about to leave the Federation with no intention of returning thereto or of residing in the Republic of Singapore"

"13.(2) When a member of the Fund withdraws any amount standing to his credit in the Fund, he shall not thereafter be treated as an employee, notwithstanding that, but for the provisions of this sub-section, he would be an employee, for the purposes of this Ordinance."

First Schedule

40 "(1) (a) Any person who has worked for the same employer without a break in his employment

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for a period of less than one month and has not mutually agreed with his employer that their several liabilities to pay monthly contributions under this Ordinance shall commence with his employment"

"(1) (b) A person shall be deemed to have worked for the same employer without a break in his employment if during any temporary interruption of his work for that employer, no work is performed by him for any other employer."

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p.33

4. The facts of the case are not in dispute. Kirpal Singh Brar was employed by the Malaysian Government as a police officer from June 1957 to August 1960. During this period he fell within the definition of "employee" for the purposes of the Ordinance and consequently contributed to the Fund in accordance with section 7. In August 1960 he resigned from his post as an Inspector of Police. In the following year he proceeded to London to read law. He was subsequently called to the Bar in London and in February 1964 returned to Malaya and read as a pupil in the chambers of the Appellants. On the 10th September 1964 he was duly admitted to practice as an Advocate and Solicitor of the High Court of Malaya and with effect from the 1st September of that year he entered the service of the Appellants as an assistant advocate and solicitor at a salary of 501 dollars a month. His salary was subsequently increased to 601 dollars a month in September 1965. On the 31st January 1966 he left the Appellants' chambers to practise on his own account.

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5. The short point at issue between the parties to this appeal is whether for the period that Kirpal Singh Brar was in the service of the Appellants he was their "employee" for the purpose of the Ordinance. It is common ground that the proviso to (2) of the First Schedule to the Ordinance applies in cases of continuous employment where the employee's wages are increased so as to exceed 500 dollars a month. The point at issue is whether the proviso applies to employees who have previously

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contributed to, and are accordingly Members of, the Fund but have for a period ceased to be employees within the meaning of the Ordinance before taking up employment at a wage in excess of 500 dollars a month.

6. The main submissions of the Respondents are :-

10 (a) The ordinary unambiguous meaning of the words in the proviso to (2) of the First Schedule is clearly that the proviso applies to all employees who have at any time contributed to the Fund. There is no doubt that such employees fall within the category of employees who have "become liable to pay contributions...". Further, the repeated use of the words "at any time" shows that the legislature intended the proviso to apply irrespective of any break in employment.

20 (b) This construction is fully in accordance with the object of the legislation. The object is to provide for the economic future of all wage earners whose monthly income is 500 dollars or less, and to continue to provide for their future after their wages rise above 500 dollars a month but on a level of contribution appropriate to wages of 500 dollars a month. Once an employee has commenced payment of contributions he remains a member of the Fund  
30 until authority may be given for the withdrawal of the amount standing to his credit in accordance with any of the circumstances provided by section 13 (1) of the Ordinance. Where there is continuity of employment, it is clear that the legislature intended contributions to be payable in respect of all employees whose wage had at one time been less than 500 dollars a month notwithstanding that they subsequently attain a greater wage. It  
40 would be illogical if a different principle was to obtain in cases where there was a break between periods of employment or a change of employer.

(c) The possibilities of a change of employer or break of employment are expressly referred to in (1) of the First Schedule and nowhere else in the Ordinance. This shows that except in the circumstances referred to in

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this provision the legislature intended that no change of employer or break in employment should put an end to a person's status as an employee for the purposes of the Ordinance.

(d) This construction is also strongly supported by section 13 of the Ordinance. The effect of this is that once a person is an employee and "member of the Fund", he continues in this position until the occurrence of one of the events listed in sub-section (1). Further, 10 the wording of sub-section (2) clearly implies that he is to be "treated as an employee" for the purposes of the Ordinance so long as he has not become entitled to withdraw any of the contributions standing to his credit by reason of the occurrence of one of the events listed in sub-section (1).

pp.33, 42 7. As regards the judgments delivered in the High Court and Federal Court, the Respondents respectfully rely on the reasoning of Azmi, the 20 Lord President, and of MacIntyre F.J. As regards the judgments in favour of the Appellants, the Respondents respectfully draw attention to the following points.

p.7 His Honour Raja Azlan Shah J. based his judgment largely on his view as to the assistance to be derived from section 13 of the Ordinance. It is however respectfully submitted that he has erred in the inferences which he seeks to draw from this provision and that it in fact supports 30 the Appellants' contentions for the reasons submitted in Paragraph 6 (d) above.

p.37 His Honour Ong Hock Thye C.J. founded his judgment largely, if not wholly, on the view that the proviso to paragraph (2) of the First Schedule is not intended to be exhaustive and that the effect of the Ordinance was to leave it to the discretion of the Respondent Board whether or not to treat a person as an "employee", which 40 discretion "they are at liberty to exercise or not as the justice of any particular case may require." The Respondents respectfully submit that this analysis is erroneous for the reasons stated in the judgment of MacIntyre F.J. Further, the Ordinance does not vest any discretion whatever in the Respondent Board as to whether or not contributions are payable in

10 respect of a particular person. The only discretion in the Respondents in this respect is to permit payment of contributions at intervals of three months by virtue of the proviso to section 7 (1), the main part of the sub-section being mandatory in its terms. Further, if (contrary to the Respondents' submission) they have any discretion as to whether or not contributions are payable in any particular case, then they have exercised their discretion in the present case by the institution of these proceedings for the recovery of contribution.

8. The Respondents therefore humbly submit that this Appeal should be dismissed for the following among other

R E A S O N S

- 20 1. BECAUSE Kirpal Singh Brar was for the period of which contributions are claimed an employee to whom the proviso to paragraph (2) of the First Schedule to the Ordinance applied.
2. BECAUSE Kirpal Singh Brar was for the period in respect of which contributions are claimed an employee of the Appellants within the definition in section 2 of the Ordinance.
- 30 3. BECAUSE the decision in the Federal Court in Malaysia was right and should be affirmed.

MICHAEL KERR

ROBERT ALEXANDER

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PRIVY COUNCIL

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R. R. CHELLIAH BROTHERS

- V -

EMPLOYEES PROVIDENT FUND BOARD

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CASE FOR THE RESPONDENTS

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