Judgment 4, 1971

No. 31 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN :

R.R. CHELLIAH BROTHERS — Appellants

- and -

EMPLOYEES PROVIDENT FUND BOARD — Respondents

RECORD OF PROCEEDINGS

GRAHAM PAGE & CO.,
49/55 Victoria Street,
London, S.W.1.

Solicitors for the
Appellants.

COWARD, CHANCE & CO.,
St. Swithin's House
Walbrook,
London, E.C.4.
Solicitors for the
Respondents.

4, 1971

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS TRANSMITTED TO THE JUDICIAL COMMITTEE BUT NOT REPRODUCED

Description	Date
Notice of Motion for Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong	7th March 1969
Affidavit of Robert Rajendram Chelliah	5th March 1969
Order of the Federal Court granting Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong	9th June 1969

No. 31 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN:

R.R. CHELLIAH BROTHERS Appellants

- and -

EMPLOYEES PROVIDENT FUND BOARD Respondents

RECORD OF PROCEEDINGS

No. 1

In the High Court in Malaya

No. 1

Originating Summons

26th October 1967

ORIGINATING SUMMONS

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 227 of 1967

Between

Employees Provident Fund Board Applicants

And

R.R. Chelliah Brothers Respondents

LET R.R. Chelliah Brothers of Cho-Tek Building, (4th Floor), 135, Jalan Tuanku Abdul Rahman, Kuala Lumpur, the Respondents abovenamed within eight (8) days after the service of this Summons on them, inclusive of the day of such service, cause an appearance to be entered for them to this Summons, which is issued upon the application of the Employees Provident Fund Board for:-

In the High Court in Malaya

No. 1

Originating Summons

26th October 1967 (continued)

(1) A Declaration that Kirpal Singh Brar was an employee within the meaning of Section 2 of the Employees Provident Fund Ordinance 1951, as amended, of the Respondents during the period from 1st September 1964 to 31st January 1966.

(2) A Declaration that upon its true construction the proviso to paragraph (2) of the First Schedule of the Employees Provident Fund Ordinance 1951, as amended, applies to Kirpal Singh Brar, during the period from 1st September, 1964 to 31st January, 1966.

(3) A Declaration that the Respondents are liable for the arrears of contributions amounting to $800.00 and interest thereon under the provisions of the Employees Provident Fund Ordinance 1951, as amended, in respect of the employment of Kirpal Singh Brar for the period 1st September, 1964 to 31st January, 1966.

(4) An Order that the Respondents do pay to the Applicants the said arrears of contributions of $800.00 and interest calculated in accordance with the provisions of Section 11 of the Employees Provident Fund Ordinance 1951, as amended.

(5) Costs.

Dated this 26th day of October, 1967.

(Sgd.) Marina Yousoff.

Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Summons will be supported by the Affidavit of Edward Max Stanley affirmed on the 26th day of October, 1967 and filed herein.

This Summons was taken out by Messrs. Shook Lin & Bok, Solicitors for the Applicants abovenamed and whose address for service is 801-809, Lee Wah Bank Building, Medan Pasar, Kuala Lumpur.

The Respondents may appear hereto by entering an appearance either personally or by their advocates

and solicitors at the Registry of the High Court at Kuala Lumpur.

NOTE:- If the Respondents do not enter appearance within the time and at the place above-mentioned such Order will be made and proceedings taken as the Judge may think just and expedient.

In the High Court in Malaya

No. 1

Originating Summons

26th October 1967 (continued)

No. 2

AFFIDAVIT OF EDWARD MAX STANLEY

No. 2

Affidavit of Edward Max Stanley

26th October 1967

I, Edward Max Stanley of full age and residing at No. 6, Jalan 30/18, Petaling Jaya, do solemnly and sincerely affirm and say as follows:-

1. I am the Deputy Manager of the Employees Provident Fund Board, (hereinafter referred to as "the Board") the Applicants abovenamed, and I am authorised to make this Affidavit.

2. The Respondents are a firm of advocates and solicitors practising at Cho Tek Building (4th Floor) 135, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

3. Between the period from 16th June, 1957 to August, 1960, one Kirpal Singh Brar (hereinafter referred to as "the employee") was an employee within the meaning of the provisions of the Employees Provident Fund Ordinance 1951, as amended (hereinafter referred to as "the Ordinance") and was a member of the Fund being employed by the Malaysian Government as an Inspector of Police.

4. The employee resigned from his employment as an Inspector of Police sometime in August, 1960. On or about April, 1961 the employee proceeded to London to read law, wherefrom he returned to Kuala Lumpur in February, 1964 and read in the Respondents' Chambers, as a pupil as required by the provision of the Advocates and Solicitors Ordinance 1947, as amended.

In the High Court in Malaya

No. 2

Affidavit of Edward Max Stanley

26th October 1967 (continued)

5. The employee was duly admitted to practise as an Advocate and Solicitor of the High Court, States of Malaya on 10th September 1964, and he was employed as an Assistant Advocate and Solicitor by the Respondents as from the 1st September 1964 at the salary of $501.00 per month, which was increased to $601.00 per month in September, 1965.

6. The employee continued in such employment until the 31st January 1966, when he terminated his services with the Respondents and practised as an advocate and Solicitor under his own name.

7. By reason of the matters stated above the Board contends that upon the true construction of the proviso to paragraph (2) of the First Schedule of the Ordinance, the employee continues to be an employee within the meaning of the Ordinance during his period of employment by the Respondents.

8. Accordingly, the employee (sic, ? employer) was liable to pay contributions under the provisions of the Ordinance and the Applicants pray for judgment in the terms set out in the Summons herein.

AFFIRMED at Kuala Lumpur by the said Edward Max Stanley this 26th day of October, 1967 at 12.10 p.m.) (Sgd.) Edward Max Stanley

Before me,

(Sgd.) Soo Kok Kwong

Commissioner for Oaths,
High Court, Kuala Lumpur.

This affidavit is filed by Messrs. Shook Lin & Bok, Solicitors for the Applicants whose address for service is 801-809, Lee Wah Bank Building, Medan Pasar, Kuala Lumpur, on the 26th day of October, 1967.

In the High Court in Malaya

No. 3

Notice of Appointment to Hear Originating Summons

7th November 1967

No. 3

NOTICE OF APPOINTMENT TO HEAR ORIGINATING SUMMONS

TAKE NOTICE that you are required to attend the Judge in Chambers at the High Court at Kuala Lumpur on Monday the 8th day of January, 1968 at 10.00 o'clock in the forenoon on the hearing of the Originating Summons herein issued on the 26th day of October, 1967 and that if you do not attend in person or by solicitor at the time and place mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

Dated this 7th day of November, 1967.

(Sgd.) Shook Lin & Bok
Solicitors for the Applicants

(Sgd.) Ng Mann Sau
Senior Assistant Registrar, High Court, Kuala Lumpur.

To:
R.R. Chelliah Brothers
Cho-Tek Building (4th Floor)
135, Jalan Tuanku Abdul Rahman,
Kuala Lumpur, the Respondents abovenamed.

No. 4

Notes (undated) of Submissions, as Recorded by Raja Azlan Shah, J., made on 12th February 1968

No. 4

NOTES (UNDATED) OF SUBMISSIONS, AS RECORDED BY RAJA AZLAN SHAH, J., MADE ON 12th FEBRUARY 1968

Robert Hoh for appellants.

R.R. Chelliah for respondents.

R. Hoh addresses:

(1) Para. (2) of First Schedule.
Proviso, construction of.
Natural and ordinary meaning of.

In the High Court in Malaya

No. 4

Notes (undated) of Submissions, as Recorded by Raja Azlan Shah, J., made on 12th February 1968 (continued)

No ambiguity of natural and ordinary meaning.

No external aid is necessary.

Cites (1932) A.C. 676, 682.

"Has become liable" and "at any time".

(2) Intention of legislature.

Financial provision.

Old age of employees.

Sect.13, E.P.F.Ordinance.

(a) To establish a permanent link between employee and Fund.

(b) History of Act. In 1951, meaning of "employee". Change in wording of proviso, intended to widen the scope of the proviso.

Chelliah Addresses:

(1) Never an "employee" of respondent within E.P.F. Ordinance.

(2) In any event Kirpal Singh was not liable to contribute to Fund while being an employee of respondents. For certain type of work - to provide security for lower income group.

National Insurance Act (U.K.) 1946, p.713.

Purpose of Act is different from E.P.F.Ordinance.

No parallel between these two legislations.

Sect. 7, E.P.F.Ordinance.

First Schedule.

Definition of "employee" -

"any person" - "same employer".

"employee" in (2) First Schedule.

Reasons:

(1) Relation of employer and employee must exist before proviso can operate.

In original Bill, "person" used in proviso.

(2) Even if proviso applies - relationship of employer and employee exists - Kirpal Singh

not liable to contribute.
"Only" reason.

R. Hoh replies:

"Only" reason.
Under $500/-.

C. A. V.

(Sgd.) RAJA AZLAN SHAH
JUDGE
HIGH COURT.

In the High Court in Malaya

No. 4

Notes (undated) of Submissions, as Recorded by Raja Azlan Shah, J., made on 12th February 1968 (continued)

No. 5

JUDGMENT OF RAJA AZLAN SHAH, J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
ORIGINATING SUMMONS NO. 227 of 1967

Between

Employees Provident Fund Board ... Applicants

And

R.R. Chelliah Bros. Respondents

No. 5

Judgment of Raja Azlan Shah, J.

23rd May 1968

JUDGMENT OF RAJA AZLAN SHAH, J.

This is an application by the Employees Provident Fund Board for (a) a declaration that Kirpal Singh Brar was an employee of the respondents within the meaning of the Employees Provident Fund Ordinance 1951 as amended, and (b) for an order that the defendants do pay arrears of contribution amounting to $800/- and interest.

Insofar as the facts of the case are concerned they are not in dispute. From 16.6.1957 to August

In the High Court in Malaya

No. 5

Judgment of Raja Azlan Shah, J.

23rd May 1968 (continued)

1960 Kirpal Singh Brar was an employee of the Malaysian Government on contract as an Inspector of Police, during which time he was a member of the Fund. He resigned from Government service in August 1960, and in April 1961 he left for London to read law. He qualified in February 1964 and returned to read as a pupil in the respondents' chambers. He was admitted to the Bar as an Advocate and Solicitor of the High Court on 10.9.1964, after which he was employed as an assistant by the respondent from 1.9.1964 at a salary of $501/- per month which was increased to $601.00 per month in September 1965. He resigned from the respondents' employ on 31.1.1966 to start a practice of his own.

The preliminary point here is to consider whether Kirpal Singh Brar was an employee of the respondents within the meaning of the Ordinance, i.e. any person "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," and one who is not "specified in the First Schedule "to this Ordinance". Paragraph (2) of the First Schedule, with which we are concerned, states: "Any "person whose wages exceed five hundred dollars a "month" would not be an employee within the meaning of the Ordinance and therefore would not be liable to contribute to the Fund. However, the proviso to the said paragraph has given rise to some doubts as to its interpretation and is now the subject of the present point in controversy. It states: "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/- "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/- per month;.....".

The point for determination is whether Kirpal Singh Brar is caught by this proviso. When he was in the Police Force he was a member of the Fund as his salary was less than $500/- per month. There

was a clear break in August 1960 when he resigned from the Police Force and ceased to contribute to the Fund. Sect.13 sets out the circumstances in which withdrawals can be made from the Fund. Sub-section (2) of the same section goes further to state: "When a member of the Fund withdraws any "money standing to his credit in the Fund, he shall "not thereafter be treated as an employee", notwithstanding that but for the provisions of this "subsection he would be an employee, for the "purposes of this Ordinance". It is clear from this sub-section that once a person has ceased to be an employee within the meaning of this Ordinance he shall not thereafter be treated as an "employee". It may be argued that this sub-section applies only to cases of withdrawals. That may be so. On the other hand, as the rest of the Ordinance is silent on this point I must take this sub-section and reconsider it in the light of the whole Ordinance. It might therefore be referred to the present case, to conclude that once a person has ceased to be such an employee he would not be treated as an employee for the purposes of this Ordinance. There is nothing to prevent him from putting himself in circumstances where he would again be termed as "employee" within the meaning of the Ordinance.

Counsel for the applicants submitted that the proviso to paragraph 2 of the First Schedule re-imposes the liability on Kirpal Singh Brar to contribute to the Fund for the period from October 1964 to January 1966 as it is the ordinary and natural meaning of the proviso. It is not disputed that it would certainly apply in cases of continuous employment where the employee's wages are increased to exceed $500/- a month. Certainly it will also apply to cases where there are breaks in employment and the employee is re-employed at a wage of $500/- or below. But to go further and say that it must also apply to the present case where there was a clear break when the person ceased to be an employee within the meaning of the Ordinance and re-employment at a salary of over $500/- (circumstances under which a person would not be an "employee" within the meaning of the Ordinance) is stretching the interpretation of the proviso to an extravagant length. So far as this Court is concerned, its function is to ascertain the true meaning and effect of the words as expressed in the statute.

In the High Court in Malaya

No. 5

Judgment of Raja Azlan Shah, J.

23rd May 1968 (continued)

There is certainly an ambiguity as to the interpretation of the meaning behind the proviso, and where there is such an ambiguity it is not sufficient merely to hack the sentences down to a few words and hang on those words as being the natural meaning of the section. One must look at the Ordinance as a whole to ascertain its true and natural meaning and the intention or purpose of the Ordinance. As I have stated in Reddy's case,(1) the purpose or intention of this Ordinance is to ensure financial security to an employee in his old age. I would go further to say that it was certainly intended for those in the lower income group as a compulsory saving either for their old age or for future disability should it arise, especially where there appears to be no other alternative or compulsory saving made by the employer or employee. Counsel's contention that "once a contributor always a contributor ..... "however unjust, arbitrary or inconvenient the "meaning conveyed may be", would certainly lead to a great deal of absurdity. The inconvenience created would most certainly be undesirable. As was crisply put in a familiar passage from the judgment of Jessel, M.R. in Bottomley's case,(2) "the argument of inconvenience is a very strong "argument where the construction of a document is "ambiguous - where it is fairly open to two "constructions. Then the argument of inconven- "ience, like the argument of absurdity, may be used "with great force."

I will dismiss the application with costs.

RAJA AZLAN SHAH

(RAJA AZLAN SHAH)
JUDGE
HIGH COURT.

Kuala Lumpur,
23rd May, 1968.

Mr. R. Hoh of Messrs. Shook Lin & Bok for applicants.
Mr. R.R. Chelliah of R.R. Chelliah Bros. for respondents.

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(1) (1967) 2 M.L.J. 82

(2) (1880) Ch. D. 686

No. 6

In the High Court in Malaya

No. 6

Order of the High Court

23rd May 1968

ORDER OF THE HIGH COURT

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 227 of 1967

Between

Employees Provident Fund Board — Applicants

And

R.R. Chelliah Brothers — Respondents

BEFORE THE HONOURABLE MR. JUSTICE RAJA AZLAN SHAH, JUDGE, MALAYA

IN OPEN COURT

This 23rd day of May 1968

THIS APPLICATION coming on for hearing on the 8th day of January, 1968 in the presence of Mr.V.C. George of Counsel for the Applicants and Mr. R.R. Chelliah of Counsel for the Respondents IT WAS ORDERED that this application do stand adjourned to open Court and the same coming on for hearing in open Court on the 12th day of February 1968 in the presence of Mr. Robert Hoh of Counsel for the Applicants and Mr. R.R. Chelliah of Counsel for the Respondents IT WAS ORDERED that this application do stand adjourned for judgment and the same coming on for judgment this day in the presence of Mr. V.C. George of Counsel for the Applicants and Mr. R.R. Chelliah of Counsel for the Respondents IT IS ORDERED that this application be and is hereby dismissed AND IT IS ORDERED that the Applicants do pay to the Respondents the costs of this application as taxed by a proper officer of this Court.

GIVEN under my hand and the seal of the Court this 23rd day of May 1968.

(Sgd.) Illegible

Senior Assistant Registrar,
High Court, Kuala Lumpur.

In the Federal Court in Malaysia

No. 7

Notice of Appeal

24th May 1968

No. 7

NOTICE OF APPEAL

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: X42 of 1968

BETWEEN

Employees Provident Fund Board — Appellants

And

R.R. Chelliah Brothers — Respondents

(In the Matter of Kuala Lumpur Originating Summons No. 227 of 1967

Between

Employees Provident Fund Board — Applicants

And

R.R. Chelliah Brothers — Respondents)

TAKE NOTICE that the Employees Provident Fund Board, the Appellants above-named being dissatisfied with the decision of the Honourable Mr. Justice Raja Azlan Shah given at Kuala Lumpur on the 23rd day of May, 1968 appeal to the Federal Court against the whole of the said decision.

Dated this 24th day of May, 1968.

(Sgd.) Shook Lin & Bok.

Solicitors for the Appellants.

To:

1. The Registrar,
   Federal Court,
   Kuala Lumpur.

2. Messrs. R.R. Chelliah Brothers,
   Solicitors for the Respondents,
   4th Floor (Room 401)
   Bangunan Cho Tek,
   Jalan Tuanku Abdul Rahman,
   Kuala Lumpur.

The address for service of the Appellants is care of Messrs. Shook Lin & Bok, Nos. 801-809, Lee Wah Bank Building, Medan Pasar, Kuala Lumpur.

No. 8

In the Federal Court in Malaysia

No. 8

Memorandum of Appeal

28th June 1968

MEMORANDUM OF APPEAL

1. The learned Judge was wrong in holding that Kirpal Singh Brar was not an employee of the Respondents within the meaning of the Employees Provident Fund Ordinance 1951.

2. The learned Judge erred in law by misconstruing the effect of Section 13(2) of the Employees Provident Fund Ordinance 1951 and by reason thereof wrongly held that the provisions of Section 13(2) were applicable to circumstances where an employee had not withdrawn any money from the Fund.

3. The learned Judge erred in law in holding that a person may be an employee again within the meaning of the Employees Provident Fund Ordinance after he has withdrawn the money standing to his credit in the Fund under the provisions of Section 13(2) of the said Ordinance.

4. The learned Judge erred in law in construing that the proviso to paragraph (2) of the First Schedule was restricted to continuous employment only.

5. The learned Judge ought to have held that upon a natural construction the effect of the said proviso was that once a person has become liable to pay, he is "an employee who has become liable" even if his wages at any time exceed $500/- a month.

Dated this 28th day of June, 1968.

(Sgd.) Shook Lin & Bok
Solicitors for the Appellants

To:

The Chief Registrar,
Federal Court,
Kuala Lumpur.

Messrs. R.R. Chelliah Brothers,
4th Floor, Room 401,
Bangunan Cho Tek,
Jalan Tuanku Abdul Rahman,
Kuala Lumpur.

The address for service of the Appellants is care of Messrs. Shook Lin & Bok, Nos. 801-809, Lee Wah Bank Building, Medan Pasar, Kuala Lumpur.

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968

No. 9

WRITTEN SUBMISSION ENTITLED "CASE FOR APPELLANT" MADE AT HEARING OF APPEAL ON 29th October 1968

Statement of the Case

1. This is an appeal against the judgment of Raja Azlan Shah J., of 23rd May 1968 dismissing with costs the application of the Appellant for a declaration that Kirpal Singh Brar, who was an employee of the Respondent, was also an employee within the meaning of section 2 of the Employees Provident Fund Ordinance 1951, for the period from 1st September 1964 to 31st January 1966, and for the consequential order that the Respondent pay the arrears of contribution.

2. The application was made by way of an Originating Summons pursuant to the provisions of Order 54A Rule 1A of the Rules of the Supreme Court. The Originating Motion was filed on the 26th October 1967 and it was supported by an affidavit affirmed on the same day by the Appellant's deputy manager, Mr. E.M. Stanley. The Respondent did not file any affidavit in answer to the application. The summons was fixed for hearing in Chambers before Raja Azlan Shah J., on 8th January 1968, when it was adjourned for argument in open court.

3. The summons was tried in open court on 12th February 1968 on the appellant's affidavit only. There were no exhibits and there was also no oral evidence nor any cross examination. The circumstances appearing therefrom, and so far as material to this Appeal, are set out shortly in the next following paragraphs.

4. The Appellant is a body corporate established under sub-section 3 of section 3 of the Employees Provident Fund Ordinance 1951. The Respondent is a firm of advocates and solicitors of the High Court States of Malaya.

5. Kirpal Singh Brar was employed by the Respondent between the period 1st September 1964 to 31st January 1966. Prior to September 1964, that is, from June 1957 to August 1960, Kirpal Singh Brar was employed by the Malaysian Government. During

this period, under the provisions of the Employees Provident Fund 1951, he had to and, in fact, did contribute to the Employees Provident Fund. Thus, he became a member of the Fund and was an employee within the meaning of the Ordinance. Between August 1960 to early in 1964, Kirpal Singh Brar, was in London reading for the English Bar, to which he was called.

6. These facts were not disputed by the Respondent and the issue before Raja Azlan Shah, J. turned on the construction of the definition of the word "employee" as provided by section 2 of the Employees Provident Fund Ordinance 1951 read with the proviso to paragraph (2) of the First Schedule of the Ordinance. At the hearing the Appellant contended that Kirpal Singh Brar, during the period of employment with the Respondent from 1st September 1964 to 31st January 1966 fell within the definition of "employee" as provided by section 2 of the Employees Provident Fund Ordinance 1951 read together with the proviso to paragraph (2) of the First Schedule of the same Ordinance. It was also contended that as Kirpal Singh Brar "has become liable" to contribute to the Employees Provident Fund when he was employed by the Malaysian Government, then the ordinary and natural meaning of the proviso to paragraph (2) of the First Schedule of the Ordinance reimposed liability under the Ordinance in respect of Kirpal Singh Brar was (sic, ? while) he was employed by the Respondent. On the other hand the Respondent contended that while Kirpal Singh Brar was employed by the Respondent he was not an employee within the meaning of the Ordinance because he was earning over $500/- a month.

7. Judgment was reserved by Raja Azlan Shah J., to 23rd May 1968 when he dismissed the Summons and gave his written reasons in his "Judgment of Raja Azlan Shah J." He held that as Kirpal Singh Brar had ceased to contribute to the Employees Provident Fund, while he was reading for the Bar in London then following from this cessation to contribute, he was, by reason of section 13(2) of the Ordinance, no longer to be treated as an employee within the meaning of the Ordinance. He further held that, having ceased to be an employee in this manner, Kirpal Singh Brar's re-employment at a salary exceeding $500/- a month took him out of the Ordinance.

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

8. The formal order dismissing the application was made on the 23rd May 1968. The Appellant being dissatisfied with the said Judgment of the Court gave notice of appeal therefrom on 24th May 1968.

THE ISSUES PRESENTED ON APPEAL

9. The Memorandum of Appeal forming part of the Appeal Record was filed by the Appellant on the 28th June 1968. The grounds of Appeal are contained therein and they give rise to the following issues:

(1) Was the learned Judge wrong in his construction of Section 13(2) of the Employees Provident Fund Ordinance 1951.

(2) Was the learned Judge right to apply the provisions of Section 13(2) of the Ordinance when construing the provisions of the proviso to paragraph 2 of the First Schedule of the Ordinance.

(3) Whether, in its ordinary and natural meaning the proviso to paragraph (2) of the First Schedule of the Ordinance applied to Kirpal Singh Brar.

ARGUMENTS

10. Issue (2): The learned Judge was wrong to apply the provisions of section 13(2) of the Employees Provident Fund Ordinance 1951 to construe the proviso to paragraph (2) of the First Schedule of the Ordinance in respect of Kirpal Singh Brar.

11. The Judgment is not entirely clear and it is not easy to disentangle the learned Judge's reasoning in applying the provisions of section 13(2) of the Ordinance. He appears to begin with the position that when Kirpal Singh Brar resigned from the service of the Malaysian Government, he ceased to contribute to the Fund. From this, he reasoned that because he ceased to contribute to the Fund, then, under the provisions of section 13(2) he "ceased to be an employee within the meaning of this Ordinance." At pages 2 and 3 of the judgment he begins by making a mis-statement of the effect of section 13(2) of the Ordinance. He says:

"There was a clear break in August 1960 when he resigned from the Police Force and ceased to contribute to the Fund. Section 13 sets out the circumstances in which withdrawals can be made from the Fund. Sub-section (2) of the same section goes further to state: "When a member of the Fund withdraws any money 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." It is clear from this sub-section that once a person has ceased to be an employee within the meaning of this Ordinance he shall not thereafter be treated as an employee."

The last sentence is a mis-statement. The effect of section 13(2) is that, if a member withdraws the amount standing to his credit in the Fund, upon the happening of any of the events prescribed in Section 13(1), then he shall thereafter cease to be treated as an employee for the purposes of the Ordinance. In fact, by the word "thereafter", he cannot become an employee again for the purposes of the Ordinance. Section 13(2) of the Ordinance does not touch the position where a person ceases to contribute to the Fund. Upon a cessation to contribute, a person can still remain a member of the Fund and upon re-employment his liability arises again. It is submitted, with respect, that by reason of the mis-statement of the effect of section 13(2) by the learned Judge, his conclusion that Kirpal Singh Brar was no longer to be treated an employee but, he could, under other circumstances, put himself back again as an "employee" lacks any logical basis whatsoever.

12. The question before the Court was whether, on the facts, Kirpal Singh Brar fell within the definition of "employee" under the Ordinance read with the proviso of paragraph (2) of the First Schedule. The question was not whether Kirpal Singh Brar had ceased to contribute to or had withdrawn from the Fund or whether he had ceased to be an employee of the Malaysian Government. It is submitted, with respect, that the learned Judge by applying section 13(2) to the question had adopted the wrong approach. The learned Judge commenced by reasoning (wrongly) that Kirpal Singh

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

Brar was no longer to be treated as an employee under section 13(2) of the Ordinance. He then went on to conclude that his new circumstances do not convert him to be an employee again. This is a negative approach because the starting point is to say that Kirpal Singh Brar is not an employee. It is also an inconsistent approach. If Kirpal Singh Brar was not to be treated as an employee by reason of section 13(2) he could, in any event, never become an employee again for the purposes of the Ordinance. Thus, if Kirpal Singh Brar had put himself out of the Ordinance under section 13(2) he could never be brought in again. By this faulty approach, the learned Judge was compelled to reach a conclusion, without logical basis, that Kirpal Singh was not an employee. The proper approach would have been to look at the facts and to say whether the facts fell within the definition of an employee as provided by the Ordinance.

13. For these reasons, it is submitted that section 13(2) of the Ordinance has no relevance to the question before the Court. The Court should be concerned only with section 2 of the Ordinance and the proviso to paragraph (2) of the First Schedule.

14. Issue (1): The learned Judge had misconstrued section 13(2) of the Ordinance:

Section 13 of the Ordinance reads as follows:

> (1) No sum of money standing to the credit of a member of 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 -
>
> (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;
>
> (d) the member of the Fund is about to

leave Malaya with no intention of returning thereto.

(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.

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

Reading the words in their ordinary and natural meaning, it is submitted that the effect is that no money can be paid out by the Fund to a member without the authority of the Board. The Board is not to give such authority unless one of the events prescribed therein has occurred. Further, if a payment out is made by the Fund to a member under these conditions then, such a member shall not thereafter be treated as an employee within the meaning of the Ordinance, even if he may be an employee by other tests.

15. It is submitted, with respect, that the learned Judge has misconstrued the effect of sub-section (2) of section 13 of the Ordinance. He equated a cessation to contribute to the Fund to a withdrawal from the Fund. This is wrong. From this wrong basis he concluded that where a person ceases to contribute to the Fund, he ceased to be an employee within the meaning of the Ordinance. At page 2 of the Judgment he says:

"He resigned from the Police Force and ceased to contribute to the Fund".

He then deals with section 13(2) at page 3 of the Judgment he says:

"It is clear from this sub-section that once a person had ceased to be an employee within the meaning of this Ordinance he shall not thereafter be treated as an "employee" ..... There is nothing to prevent him from putting himself in circumstances where he would again be termed as "employee" within the meaning of the Ordinance."

It is submitted that both are wrong statements of the effect of sub-section (2) of section 13. The

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

proper position is that once a person has withdrawn his contributions from the Fund as provided by section 13(1), he shall then no longer be treated as an employee for the purposes of the Ordinance at any time thereafter, this means, he shall not be liable to make any contributions to the Fund in future. A person who has withdrawn his contributions cannot put himself back again as an employee for the purposes of the Ordinance.

16. Section 13(2) refers to a member of the Fund who has made a withdrawal. It does not refer to a person ceasing to make contributions. A person may cease to make contributions, e.g. starting his own business, yet, he remains a member of the Fund. There is a break in his contributions but, the liability to contribute will be revieved (sic, ? revived) if he subsequently is re-employed as an employee.

17. It is because of this wrong approach to section 13(2) which led the learned Judge to misconstrue the effect of the proviso to paragraph (2) of the First Schedule of the Ordinance. The proper course to have taken was to construe the proviso according to its ordinary and natural meaning.

18. Issue 3: The ordinary and natural meaning of the proviso to paragraph (2) of the First Schedule of the Ordinance applies also to a situation where there is a break in a person's employment.

At page 3 of the Judgment the learned Judge says:

> "It is not disputed that it would certainly apply in cases of continuous employment where the employee's wages are increased to exceed $500/- a month. Certainly it would also apply to cases where there are breaks in employment and the employee is re-employed at a wage of $500/- or below. But to go further and say that it must also apply to the present case where there was a clear break when the person ceased to be an employee within the meaning of the Ordinance and re-employment at a salary of over $500/- (circumstances under which a person would not be an "employee" within the meaning of the Ordinance) is stretching the interpretation of the proviso to an extravagant length."

Before coming to the main argument on this issue there are two short points which may be quickly disposed of. First, as submitted earlier, if a person has ceased to be treated as an employee under section 13(2) of the Ordinance he shall cease to be so treated thereafter. It is submitted, with respect, that the learned Judge's statement that such a person could become an employee again for the purposes of the Ordinance is wrong in law. Second, the learned Judge has suggested that the purpose or intention of the Ordinance is to ensure financial security to an employee in his old age. He also went further and suggested that it was certainly intended for those in the lower income group. With respect, this cannot be so, for otherwise, the proviso to paragraph (2) of the First Schedule would be a surplusage. It would be easy for the legislature to say that any person whose wages exceed $500/- is no longer an employee for the purposes of the Ordinance. The proviso should, therefore, be construed ut res magis valeat quam pereat, and that some persons in the higher income bracket, i.e. those earning over $500/- a month, will in certain circumstances, fall within the intention and object of the Ordinance.

19. The learned Judge has accepted that the proviso applied to the case where the employment was continuous and the employee's wages are increased to exceed $500/- a month. He also accepted that the proviso will also apply where there is a break in the employee's employment provided that upon re-employment his wages do not exceed $500/- a month. It would appear that the only point in issue is whether the proviso will apply where there is a break in employment and re-employment takes place at a wage in excess of $500/- a month. Does the difference in the salary only take the employee out of the Ordinance? It is submitted it does not.

20. Kirpal Singh Brar was formerly an employee within the meaning of section 2 of the Ordinance and contributed to the Fund. During his period of study in England he ceased to be liable to make contributions to the fund. The question raised by the facts of his case is whether the proviso to paragraph (2) of the First Schedule only applies where the employee is in continuous employment, or

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

whether it also covers a person who has a break in his employment and then recommences work at a wage in excess of $500/- a month. It may be helpful to take two extreme examples:-

(i) A student follows employment at a wage less than $500 a month for two months before going up to University. Upon leaving University, he starts his real working life at a salary in excess of $500/- a month.

(ii) A person changes employments. He leaves one job at a salary less than $500/- to go to another at a salary in excess of that sum. He has a period of a fortnight in between jobs in which he is not employed at all and thus, for all practical purposes there was no break in his employment.

The first example suggests the anomaly which may arise if the proviso to paragraph (2) of the First Schedule is to operate irrespective of a break in employment. The second example indicates the anomaly which could arise if the existence of a break, however short, is to prevent the proviso taking effect. There would be a haphazard difference between two persons who followed identical employment patterns except that one did, and the other did not, have a break.

21. A further illustration may be afforded by paragraph (1)(a) of the First Schedule. It is submitted the effect of this paragraph is to mean that a person who changes employments within a month is exempt from the definition of employee, and consequently from the liability to contribute to the fund, during the first month of his new employment unless he and his employer agree to the contrary. If his new wage exceeded $500/- a month, he would thereby become exempt from liability to contribute if the proviso to paragraph (2) of the First Schedule were construed so as to demand continuous employment. Again, there would be haphazard differences dependent on whether the employer agreed to make payments from the start of the new employment. Whether or not my submission is right of the effect of paragraph (1) of the First Schedule, the anomalies which exist if a break in

employment affects the operation of the proviso are, in my submission, contrary to the view of the learned Judge, greater than those which would exist if the proviso operates for ever once a person has first become an employee.

22. The scheme of the legislation is to ensure financial provision for an employee. The circumstances in which withdrawals can be made are contained in section 13. A living person who has not permanently left Malaya can only withdraw money standing to his credit if he is incapacited for further work or has reached the age of 55. Thus from the first day upon which a contribution becomes payable there is intended to be a nexus between the employee and the fund for his working life. This is in accordance with the usual contemplation of similar social legislation. For example, section 1 of the National Insurance Act, 1946, expressly provides that a person who becomes insured shall "thereafter continue throughout his life to be so insured". It is conceded that as there is a specific provision, the further language of this Act in relation to liability cannot be relied upon to assist in the construction of the Employees Provident Fund Ordinance in which there is no specific provision as to continuance. It is nevertheless reasonable to argue from consideration of the intent of the Ordinance and analogous legislation that once a relationship with the fund is created it is presumed, in the absence of express contrary words, to continue. Only where there has never been such a relationship does paragraph (2) of the First Schedule of the Ordinance apply to prevent one arising.

23. The initial provision relating to the $500/- limit was contained in section 2 of the Ordinance. In 1951 section 2 of the Ordinance provided:

> "(d) "Employee" means any person whose wages do not exceed $400 a month. Provided that where, after an employee becomes liable to pay contributions as provided in section 7 of this Ordinance, the wages of such employee are increased and exceed $400/- a month, such employee shall not, by reason only of such increase, cease to be an employee, but his wages shall, for all purposes of this Ordinance, be deemed to be $400/- a month."

In the Federal Court in Malaysia

No. 9

Written Submission entitled "Case for Appellant" made at Hearing of Appeal on 29th October 1968 (continued)

The present definition read with the proviso to paragraph (2) of the First Schedule of the Ordinance is as follows:-

> "Employee" means any person whose wages do not exceed $500/- 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/- 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/- a month....."

In the initial definition the words "becomes liable" which could cover two employments, and "wages..... are increased" are used. This would appear to apply to situations where the employment is continuous and less certainly to include a person whose employment is not continuous. The present language uses the words "has become liable" which is in the past tense, and "at any time exceed $500/-" rather than the word "increased". It must be presumed that the legislature used the words "has become liable" and "at any time exceed" deliberately. It is, therefore, submitted that in making these amendments the legislature had intended to widen the scope of the proviso to paragraph (2) of the First Schedule to cover all those, including those whose wages exceed $500/-, who had a break in their employment.

24. For the Respondent, it can be argued, when employment ceases the person is no longer an employee and his future position must be considered de novo as if he had not been an employee. Therefore, when he starts work again he falls immediately within paragraph (2) of the First Schedule. It may be said that the proviso to paragraph (2) cannot apply because, at this point in time, he is not an "employee" because he is one of the classes exempted by the First Schedule. The answer to this is that such an argument has regard only to the meaning of an employee in a contractual sense, in the sense of employer and employee. It

disregards the special definition of an employee as defined by the Ordinance. By reason of the definition in the Ordinance a person may be an employee in the contractual sense and, yet, not be an employee within the meaning of the Ordinance.

25. In the last analysis, this point is a matter of construction upon which there are few aids either inside or outside the legislation. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible at their meaning without, in the first place, reference to cases". (Barrell vs. Fordree (1932) A.C.676 at p.682). Once the meaning of the words are clear then however unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect (Ornamental Pyrographic Woodwork Co. vs. Brown (1863) 2 H & C 63; (1863) 159 E.R. 27). Taking the ordinary and natural meaning of the words of the proviso, it is submitted they do not require such a limited construction. Once a person "has become liable" to pay, he is upon a natural construction "an employee who has become liable" and whose wages "at any time" exceed $500/- a month, and such employee shall not by reason only of paragraph (2) of the First Schedule be deemed to have become excluded from the provisions of this Ordinance.

No. 10

NOTES OF ARGUMENT RECORDED BY AZMI, CHIEF JUSTICE, MALAYA

Coram: Azmi, Chief Justice, Malaya,
Ong Hock Thye, Federal Judge,
McIntyre, Federal Judge.

Kuala Lumpur, 29th October, 1968

V.C. George for Appellants

R.R. Chelliah for Respondents

George: I submit written submission.

Document No.9

In the Federal Court in Malaysia

No. 10

Notes of Argument recorded by Azmi, Chief Justice, Malaya

29th October 1968 (continued)

Page 5 - 2nd issue - Whether Judge wrong to apply sec. 13(2).

13(2) has no application.

Kirpal Singh did not withdraw his money.

Short Adjournment.

(Sgd.) Azmi

George: Discretion - para.(2) of Provisions of 1st Schedule.

In my submission Board has no discretion.

Board could not make him a member.

If conceded Board has discretion.

English Insurance Act 1946 - analogous legislation.

1951 Ordinance - sec. 2 page 126.

The amendment in 1954 made it stronger.

Present case - no reason to treat it differently.

In its natural meaning sec. 2 read with proviso - employer was liable to pay.

Chelliah: Judge was right nct employee of the respondent within meaning of word in the Ordinance therefore not liable to contribute.

To remember object of Ordinance - to provide security for workers of lower income group i.e. earning less than $500/- p.m. See sec. 7.

Sec. 2 - definition of employer - "Contract" Employee . essential factor - contract of service.

First Schedule -

(1) (a) ..... same employer.

(b) .....

In proviso - note word is "employee".

Submit reason for use of word "employee" therefore whether position of employing an employee had come into existence.

Therefore K. Singh would be caught only if he continued in same service.

Slogan held by Appellant "Once one contributes, he must go on contributing."

Therefore K. Singh continues to be employee..... "by reason only"

If only for reason other than by income of wages - no liability to contribute.

If mala fides charge.

If other charges then meaning pay over $500 no discretion.

In 1957 K.Singh employed by Government - contributed.

In 1960 resigned.

Studied law.

September 1964 employed as Assistant at salary $501 p.m.

Refer: The Employees Provident Fund Board v. Bata Shoe Co. Ltd. (1968) M.L.J. 236

Page 237 F right "I now turn to the Ordinance ..... the essential feature is a "contract of service."

Page 238 C - D right.

Refers ground 2 of grounds of appeal.

Sec.13(2) - once money withdrawn, ceases to be contributor.

Judge cited 13(2) as an example how wrong

In the Federal Court in Malaysia

No. 10

Notes of Argument recorded by Azmi, Chief Justice, Malaya

29th October 1968 (continued)

to say "once a contributor always a contributor" at page 14 C of Record of Appeal where Judge says "It is clear ..... employee."

Page 15 top "But to go further and say that it must also apply to the present case where there was a clear break ..... the true meaning and effect of the words as expressed in the statute."

Page 15 - F 2. "Counsel's contention that "once a contributor always a contributor ..... of absurdity."

Ground 3 - submit Judge right at page 14 - C X.

Ground 4 - See page 14 F "It is not disputed .....

See page 14 G to Page 15A.

K.Singh was never employee of Respondent.

Azmi

No Reply.

C.A.V. Azmi.

24th January 1969

24th January, 1969

Coram: Azmi, Lord President, Malaysia.
Ong Hock Thye, Chief Justice, Malaya.
McIntyre, Federal Judge.

V. George for Appellant.

R.R. Chelliah for Respondents.

Appeal allowed with costs. (Chief Justice Malaya dissenting*). Deposit back to Appellant.

Azmi.

* then Ong Hock Thye, C.J.

No. 11

In the Federal Court in Malaysia

No. 11

Notes of argument recorded by Ong Hock Thye, F.J.

29th October 1968

NOTES OF ARGUMENT RECORDED BY ONG HOCK THYE, F.J.

29th October 1968

V.C. George for E.P.F., appellants

R.R. Chelliah for respts.

George: hands in written submission "A"

S 13(2) does not, cannot, apply.

Discretion - submit "shall not by reason only" - confers no discretion

E. National Insurance Act 1946

Amendment - S 2

R. Chelliah:

(1) Brar never "employee" within S2 - object of Ordinance to provide for security of low income group - i.e. those earning $500 or less

- S7

- S 2 definition of "employer", "employee"

- essential feature is "contract of service"

- First Sch. (para.(1))

"any person"

"any employee" in proviso - means relation of employer and employee must be in existence when increase of wages takes place.

(2) "only" - "by reason only" in the proviso.

(a) no discretion if other grounds exist.

(b) if discretion exists, that discretion is exercisable in dubious and mala fide cases.

In instant case - originally police officer earning less than $500 p.m.

In the Federal Court in Malaysia

No. 11

Notes of argument recorded by Ong Hock Thye, F.J.

29th October 1968

- break of 4 years in U.K.

change when he was employed by resp't. - not case of rise in wages only.

E.P.F. v. Bata Shoe (1968) 1 M.L.J. 236 @ 237, 238.

Grd. 2 re S 16 judgment in this connection was in answer to argument of E.P.F. "once a contributor always a contributor" - not true, as shown by S 16.

p.14 l. C.1
F.4
p.15 - A-B; F.2

Grd. 3 agree - a person can be an "employee but shall not be "treated as" such.

cf. p.14 B.4 - C.2.

p.14 D.1

Para. 4 grds. of appeal:

Cf. p.14 F.4 (judgment).

C.A.V.

No. 12

No. 12

Notes of argument recorded by MacIntyre, F.J.

29th October 1968

NOTES OF ARGUMENT RECORDED BY MACINTYRE, F.J.

Kuala Lumpur, 29th October, 1968.

V.C. George for Appellants.

R.R. Chelliah for Respondents.

Document No.9

George hands over written submission -

Section 13(2) has no application.

Page 14 of record - line 4 (G).

Section 13(2) does not apply to this case.

Proviso to Ordinance -

English National Insurance Act of 1946 - analogous legislation. Section 1 of that Act.

Amendment to 1951 Ordinance. Section 2 was amended in 1954.

Section 2 read with the proviso says once a person has become liable to pay, he has to continue to pay unless reasons are given as to why he should not pay.

Chelliah addresses:

(1) Kirpal Singh was not an employee within the meaning of the Ordinance. Trial Judge was correct.

Object of Ordinance is to provide social security for workers of lower income group.

Those earning more than $500 are excluded.

See section 7(1).

See section 2 for defintion of employer - contract of service.

Employee also must be employed under a contract of service.

See first schedule - of persons who are not employees.

See para (1).

See para (2).

In all cases - the word 'person' is used.

There is a reason why they switched and the word 'employee' is used and not "person". The reason is that the proviso comes in operation after employment.

See Bata Shoe Company case - (1968) M.L.J. 236 (237-F). See page 238 - right hand column - C.

In the Federal Court in Malaysia

No. 12

Notes of argument recorded by MacIntyre, F.J.

29th October 1968 (continued)

(2) Ground 2 of appeal - re section 13(2).

This illustrates "Once a contributor always a contributor" is not true.

(3) Section 3(2) - "treated" as an employee.

(4) Page 14 line F4.

(5) Opposite of ground (1).

Kirpal Singh was an employee within the meaning of the Ordinance.

No reply.

24th January 1969

Kuala Lumpur, 24th January, 1969

Coram: Azmi, Lord President.
Ong Hock Thye, Chief Justice, Malaya.
MacIntyre, Judge, Federal Court.

V.C. George for Appellants.

R.R. Chelliah for Respondents.

Ong C.J. reads his minority judgment.

*L.P. reads judgment.

I read my judgment supporting judgment of L.P.

Appeal allowed with costs.

Deposit to be returned.

S.C.M.

* Lord President, then Azmi, L.P.

No. 13

In the Federal Court in Malaysia

No. 13

Judgment of Azmi, Lord President, Malaysia

24th January 1969

JUDGMENT OF AZMI, LORD PRESIDENT, MALAYSIA

Coram: Azmi, Chief Justice, Malaya (now Lord President)
Ong Hock Thye, Judge, Federal Court (now Chief Justice)
MacIntyre, Judge, Federal Court.

This is an appeal against the judgment of the High Court at Kuala Lumpur. The facts are not disputed and may be briefly stated as follows.

One Kirpal Singh Brar was employed by the Malaysian Government as a police officer from June 1957 to August 1960. During this period as an employee of the Government he contributed to the Employees Provident Fund under the provisions of the Employees Provident Fund Ordinance 1951 and so became a member of the fund.

In August 1960 he resigned from his service 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 Messrs. Chelliah Brothers, the respondents in this appeal. On 10th September 1964, he was duly admitted to practise as an Advocate and Solicitor of the High Court of Malaya and with effect from 1st September of that year was employed as an assistant advocate and solicitor in the respondent's chambers at a salary of $501/- a month. His salary was subsequently increased to $601/- in September 1965. On 31st January 1966 he left respondents' chambers to practise on his own.

The Employees Provident Fund Board to whom I shall refer hereinafter as "the Board" contended that Mr. Brar on becoming employed by respondents continued to be an employee within the meaning of the Ordinance. This was apparently disputed by the respondents. So the Board applied to the High Court by way of originating summons for the following declarations:-

(1) that Mr. Brar was an employee within the meaning of section 2 of the Employees Provident Fund

In the Federal Court in Malaysia

No. 13

Judgment of Azmi, Lord President, Malaysia

24th January 1969 (continued)

Ordinance 1951 of the respondents during the period 1st September 1964 to 31st January 1966,

(2) that upon its true construction the proviso to paragraph (2) of the First Schedule of the Employees Provident Fund Ordinance 1951 applies to Mr. Brar during the period from 1st September 1964 to 31st January 1966,

(3) that the respondents are liable for arrears of contributions amounting to $800/- and interest thereon under the provisions of the Employees Provident Fund Ordinance 1951 in respect of the employment of Mr. Brar for the period 1st September 1964 to 31st January 1966.

The learned Judge held that there was a break in the service and Mr. Brar ceased to contribute to the fund when he resigned in August 1960 and by reason of the provisions of sec. 13(2) of the Ordinance he was no longer to be treated as an employee within the meaning of the Ordinance and his re-employment by the respondents at a salary exceeding $500/- a month, had excluded him from the provisions of the Ordinance.

In my view, the problem before us should be solved by the application of the principles laid down by Turner L.J. in Hawkins v. Gathercole (1) and cited with approval by Lord Wranbury in the Viscountess Rhondda's claim (2) at page 397 as follows:-

"In construing the Act, (i.e. The Sex Disqualifications (Removal) Act 1919) however, it must, of course, be borne in mind that complete generality is not necessarily to be attributed to general words. The limitations upon a proposition of that kind are best found, I think, in the masterly judgment of Turner L.J. in Hawkins v. Gathercole (1). The dominant purpose in construing a statute is to ascertain the intent of the Legislature, and this may be done in any one of three ways. First, by considering the cause and necessity of the Act; secondly, by comparing one part of the Act with another; and, Thirdly (and this is the most indefinite) sometimes by foreign

(1) 6 D.M. & G. 1
(2) 1922 2 A.C. 339

(meaning extraneous) aids "so far as they can justly be considered to throw light upon the subject." All of these, according to the language in Stradling v. Morgan (3), are governed by the words "so that they (the Judges) have ever been guided by the intent of the Legislature which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

It is agreed by all concerned that the primary object of the Employees Provident Fund Ordinance is to provide for the economic future of all wage earners whose monthly income is $500/- or less, by compulsory contributions by the employee from his wages and contribution by the employers. Now section 7 provides that every employee and employer shall be liable to contribute at the rate set out in the third schedule and such contribution to be paid monthly or at intervals of 3 months as the case may be. Section 8 imposes on the employer a duty to pay both contributions first but gives him the right, however, to recover from the employee the amount of any contributions payable on behalf of the employee. These contributions would be paid to the Board whose duty it is to pay such contributions into a fund known as the Employees Provident Fund. After the employee has paid his contributions, and so long as he has to his credit any amount in the fund, he remains a member of the fund, and he ceases to be a member only when he dies, or is a allowed to withdraw from the fund all money standing to his credit in circumstances described in section 13.

The Ordinance apparently applies to all wage earners except those described in the First Schedule and those for whom an approved fund has been established under section 16 including any scheme in respect of persons in a pensionable employment with the Government of the Federation or of the State. It also would apply to all types of employees whether his wages are agreed to be paid monthly, weekly, daily or otherwise and to cover all employment of any length of service exceeding one month.

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(3) Plowd. 205.

In the Federal Court in Malaysia

No. 13

Judgment of Azmi, Lord President, Malaysia

24th January 1969 (continued)

There is another notable thing that though there is a provision in section 13, for the withdrawal of contributions from the fund, there is no provision for the resignation of a member of the fund.

In the circumstances, in my view, that once an employee commenced to contribute and so became a member, his subsequent unemployment does not affect his status as a member though his liability to contribute would only arise when he is an employee and earning wages. In other words, once he is a member he will always be a member. In the light of these observations I would therefore say that the proviso to paragraph (2) of the First Schedule would apply irrespective of whether the increase of his wages above $500 a month occurred during his employment with the same or with another subsequent employer.

I would therefore hold that Mr. Brar was liable to contribute on his re-employment by the respondents. There will be therefore, an order in terms of the prayers in the originating summons dated 26th October 1967. The appeal is allowed with costs.

(Sgd.) Azmi bin Haji Mohamed
Lord President,
Malaysia.

Kuala Lumpur

Date: 24th January, 1969

V.C. George for Appellants

R.R. Chelliah for Respondents.

No. 14

In the Federal Court in Malaysia

No. 14

Judgment of Ong Hock Thye, Chief Justice, Malaya

24th January 1969

JUDGMENT OF ONG HOCK THYE, CHIEF JUSTICE, MALAYA

From June 1957 Mr. Kirpal Singh Brar was a member of the Employees Provident Fund, as an Inspector of Police employed by the Government, until he resigned in August 1960. In April 1961 he proceeded to London to read law. Returning to Malaya in 1964, after call to the Bar, he was admitted to practise as an Advocate and Solicitor on September 10, 1964. He was thereupon employed by Chelliah Brothers as an assistant in the firm with effect from September 1, 1964 at a monthly salary of $501/-, which was increased to $601 twelve months later. He continued in such employment till January 31, 1966, when he resigned to set up practice on his own.

Upon an application by the Employees Provident Fund Board to the Court for a declaration (a) that Mr. Brar was an "employee" within the meaning of section 2 of the Employees Provident Fund Ordinance 1951 and (b) that the first proviso to paragraph (2) of the First Schedule to the Ordinance was applicable to him during the period of his employment by Chelliah Brothers, an Order was sought to make the employers liable for the sum of $800, with interest, as arrears of contribution to the Employees Provident Fund. The claim was dismissed and against that decision the Board now appeals to this Court.

The issue in this case is the proper interpretation of the proviso in question. The first Schedule to the Ordinance lists in ten categories those who are excepted from the definition in section 2 of the "employee". Paragraph (2), with provisos, reads as follows:-

> "(2) Any person whose wages exceed five hundred 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

In the Federal Court in Malaysia

No. 14

Judgment of Ong Hock Thye, Chief Justice, Malaya

24th January 1969 (continued)

exceed five hundred 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 five hundred dollars a month:

Provided that a person engaged in employment in a resident medical capacity in approved hospitals or institutions with a view to registration under the Medical Registration Ordinance, 1952, shall not be deemed to be an employee for the purposes of this Ordinance during the period of such employment."

The contention of learned counsel for the Board, here and in the Court below, was "once a contributor, always a contributor, however unjust, arbitrary or inconvenient" the effect of the first proviso may be in special cases. As to the effect of a break in employment he quoted two extreme examples:-

(a) "A student follows employment at a wage less than $500 a month for two months before going up to University. Upon leaving University he starts his real working life at a salary in excess of $500 a month"

(b) "A person changes employments. He leaves one job at a salary of less than $500 to go to another at a salary in excess of that sum, with only a two-week break of unemployment between the two jobs".

Counsel conceded that the first example above is an anomaly which may arise if the proviso is to operate regardless of the break in employment. The second example, on the other hand, is equally anomalous if any kind of break in employment has the effect of making the proviso inoperative. I am afraid I have not been able to appreciate the merits of the solution, if it can be called a solution, offered by him, which must do less than justice in the one case in order to achieve the objects of the Ordinance in the other.

The employers' argument, as I understand it,

is that an inference is to be drawn from the use of the contrasting words in juxtaposition in the following phrases, namely, "Any person whose wages exceed five hundred dollars a month" and "provided that where after an employee etc." It was argued that "any person" refers to such person prior to employment, while "an employee" necessarily imports a "contract of service", so that, in this case Mr. Brar's contract of service being in respect of employment at a salary in excess of $500, he was not an "employee" within the meaning of the Ordinance. With respect, the distinction is so faint that I am unable to perceive it.

It is unnecessary to recite at length the grounds on which the learned judge held that Mr. Brar did not come within the purview of the first proviso. It is sufficient to state that, in my judgment, his decision was right because it must commend itself to all as just and fair instead of being so strait-laced as to work an injustice.

My own view is that the words "shall not by reason only of this paragraph" really govern the construction of the proviso. It clearly implies that the paragraph itself is only one among other relevant factors to be taken into consideration. What is relevant in the circumstances of each particular case depends, of course, on the special facts of that case. An infinite variety of circumstances cannot obviously be legislated for with particularity. Neither the draftsman nor the Legislature has the capacity of unlimited foresight. Wisely, therefore, it has been left to the discretion of the Board to use their good sense as each case comes for their determination. "Where discretion lies it should not be hide-bound by authority", said Sellers, L.J., in Merchandise Transport Ltd. v. British Transport Commission. (1) The proviso consequently refrained from drawing the boundaries of the Board's discretion. If the Board thought otherwise, they were wrong. By adopting the contrary view, as being armed with discretion, the two extremes of anomalous cases cited by counsel present no problem. "It is the intent of every statute which confers a discretionary power that the power should be used justly." So said Devlin, L.J., in Berry v. British Transport Commission. (2)

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(1) (1962) 2 Q.B. 173, 186
(2) (1961) 3 W.L.R. 450, 462

In the Federal Court in Malaysia

No. 14

Judgment of Ong Hock Thye, Chief Justice, Malaya

24th January 1969 (continued)

How is a statute to be truly workable, in the sense of achieving its objective, unless its object and purpose is borne in mind? Could a case such as Mr. Brar's have been within the contemplation and intendment of the draftsman and the Legislature? I think the answer clearly is no, for the second proviso reveals, by way of illustration, afterthoughts in 1963 with special reference to a profession which claim no privileged or preferential treatment over that of an advocate and solicitor.

For Mr. Kirpal Singh Brar, his cessation from active employment for 4 years was not something that happened in routine employment, nor was it a promotion in such employment or a mere break, but a change of profession altogether. It was a material fact and the learned Judge considered it so. With respect, I share his view. If a break of 4 years and a change of profession are not to be considered adequate grounds, what if the employment was interrupted for, say, 10 years followed by an appointment to a high executive position with appropriate emoluments? Where does one draw the line? Pursued to its logical conclusions, the Board's argument must inevitably result in absurdities. Furthermore, statutes imposing pecuniary burdens are subject to the rule of strict construction. "It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties". (see Maxwell on Interpretation of Statutes, 11th Ed., p.278). Should not this principle also be borne in mind in construing the Ordinance?

For the reasons above-stated, I am of opinion that the judgment of the learned trial Judge ought to be affirmed. I would dismiss the appeal with costs.

Since completion of the above judgment I have had the opportunity of reading the judgments to be delivered by the learned Chief Justice and MacIntyre, F.J. Having given the most careful consideration to the majority opinion and the ratio decidendi thereof I regret to say, with the utmost respect, that I have not been persuaded to change my mind. The essential difference between our views is that, in mine, the Board was by statute invested with a

discretion which they are at liberty to exercise or not as the justice of any particular case may require. The contrary view would seem to construe the first proviso as if 23 words therein were meaningless surplusage, so that it reads, in effect, as follows:-

> "Provided that where after an employee becomes 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 five hundred dollars a month ..... his wages shall for all the purposes of this Ordinance be deemed to be five hundred dollars a month:"

The 23 words omitted from the above read: "such employee shall not by reason only of this paragraph be deemed to have become excluded from the provisions of this Ordinance, but ...". Now, the word "only" means "by or of itself alone, without anything else" (see Shorter Oxford English Dictionary). Thus paraphrased, I think there can be nodoubt that the import of the phrase is as follows: "This paragraph alone, without anything more, does not exclude such employee", that is to say, the employee who has become liable to pay contributions. What if there be "anything more", which should prove to be cogent material facts in any particular case? Are these facts nonetheless to be ignored as non-existent? If so this construction would seem to ignore the cardinal rule ut res magis valeat quam pereat laying down that, if possible, the words of an Act must be construed so as to give a sensible meaning to them. It may well be that, in the instant case, the Board would not have decided to exercise their discretion in Mr. Brar's favour. I say nothing about that. But to seek the ruling of this Court that they have no discretion whatsoever is an abnegation of statutory powers which, in my judgment, deserves no judicial support.

(Sgd.) H.T. ONG
JUDGE,
FEDERAL COURT OF MALAYSIA.

Kuala Lumpur,
24 JAN 1969

V.C. George Esq. for appts.
R.R. Chelliah Esq. for respts.

In the Federal Court in Malaysia

No. 15

Judgment of MacIntyre, F.J.

24th January 1969

No. 15

JUDGMENT OF MACINTYRE, F.J.

I have read the judgments of the learned Chief Justice (now Lord President) and of Ong, F.J. (now the Chief Justice). They have come to opposite conclusions. It is, therefore, necessary for me to state my views as briefly and clearly as possible.

The facts are not in dispute. The simple issue is whether Mr. Kirpal Singh Brar, while employed by the respondent at a salary which exceeded $500 p.m., was liable as an employee to contribute to the Employees Provident Fund. If he was, the appellant would be entitled to the declaration sought for in the originating summons.

The word "employee" is defined in section 2 of the Employees Provident Fund Ordinance, 1951, as follows:-

> " '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 sixteen years and is employed under a contract of service or apprenticeship, whether written or oral and whether expressed or implied to work for an employer;"

Clause 2 of the First Schedule to the Ordinance reads:

> "(2) Any person whose wages exceed five hundred 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 five hundred 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 five hundred dollars a month:

Provided that a person engaged in employment in a resident medical capacity in approved hospitals or institutions with a view to registration under the Medical Registration Ordinance, 1952, shall not be deemed to be an employee for the purposes of this Ordinance during the period of such employment."

It is perfectly clear that clause (2), subject to the proviso, excludes all wage-earners from being employees for the purposes of the Ordinance if the wage paid exceed $500 a month. But the proviso makes an exception in the case of a wage-earner who is already an employee for the purposes of the Ordinance when he commences to draw a salary exceeding $500/-.

It is, I think, accepted in principle that an employee continues to remain an "employee" for the purposes of the Ordinance irrespective of whether he changes his employer, or the nature of his employment or there is an interval of unemployment, as long as his salary is less than $500 per mensem. It is also, I think, not disputed that a contributor to the Fund continues to be an employee even after he reaches, by virtue of periodic increments, a stage when his salary exceeds $500 per mensem. The point that was canvassed before us is that these principles cease to apply when a contributor who had been in receipt of a salary of less than $500/- takes up a new appointment after a period of unemployment at a salary exceeding $500 p.m. despite his continuance as a member of the Fund. On the very face of it, this argument appears illogical but I think it is also untenable by virtue of the provisions of section 13(2) of the Ordinance which make it clear that a member of the Fund shall not be treated as an employee for the purposes of the Ordinance only if he withdraws any sum standing to his credit.

Mr. Kirpal Singh Brar is still a member of the Fund and, therefore, as such, he must be deemed an "employee" for the purposes of the Ordinance during the period he worked for the respondent.

With regret, I cannot subscribe to the view that a narrow construction of clause (2) of the First Schedule might result in injustice to the employer. The Employees Provident Fund is

In the Federal Court in Malaysia

No. 15

Judgment of MacIntyre, F.J.

24th January 1969 (continued)

essentially a social legislation enacted to benefit employees. That point is made clear in the definition of "approved fund" in section 2 of the Ordinance. Therefore, in my opinion, the proper approach to be made in construing the meanings of words and phrases in the Ordinance should be to give effect to the purposes of the Ordinance, i.e. to ensure that an employee is not deprived of his rights under the Ordinance.

With respect, I agree with the judgment of the learned Lord President. The appeal must, therefore, be allowed with costs.

Since writing my judgment, I have read the addendum to his judgment by my brother Ong F.J. (as he then was). He has taken the point that if the 23 words in the proviso quoted by him are not a surplusage, then the proviso should be construed as conferring a discretion on the Board to exclude an employee from the provisions of the Ordinance for any reason other than only that he had been a contributor to the fund under section 7 or would have been but for the relevant provisions of section 16 of the Ordinance.

With the greatest of respect, I am unable to subscribe to this view. The argument is based purely on the meaning of the word 'only' as defined by the Shorter Oxford English Dictionary. I think that in interpreting the meaning of a word, one must also look to the context in which it is used. If the sentence in which the word 'only' occurs had read: "..... such employee shall not only by reason of this paragraph be deemed to have become excluded from the provisions of this Ordinance....", I would have been inclined to agree that the proviso implied that an employee could be exempted for other reasons. But the relevant part of the sentence does not read "shall not only by reason of this paragraph" but "shall not by reason only of this paragraph". What therefore the proviso says is not that an employee could be exempted from the provisions of the Ordinance for other reasons but that an employee who had been a contributor under section 7 or would have been one but for section 16, cannot be excluded from the provisions of the Ordinance by reason only that he is in receipt of wages exceeding $500/- per mensem.

With respect, therefore, my judgment supporting the judgment of the learned President of the Court must stand.

S. Chelvasingam MacIntyre

Kuala Lumpur,
24th January, 1969

JUDGE
FEDERAL COURT, Malaysia

V.C. George, Esq., for Appellants

R.R. Chelliah, Esq., for Respondents

In the Federal Court in Malaysia

No. 15

Judgment of MacIntyre, F.J.

24th January 1969
(continued)

No. 16

ORDER OF THE FEDERAL COURT

No. 16

Order of the Federal Court

24th January 1969

CORAM: AZMI
LORD PRESIDENT,
FEDERAL COURT, MALAYSIA.

ONG HOCK THYE
CHIEF JUSTICE,
HIGH COURT, MALAYA.

MACINTYRE
JUDGE, FEDERAL COURT,
MALAYSIA.

IN OPEN COURT

This 24th day of January, 1969

THIS APPEAL coming on for hearing on the 29th day of October, 1968 in the presence of Mr. V.C. George of Counsel for the Appellants abovenamed and Mr. R.R. Chelliah of Counsel for the Respondents abovenamed AND UPON READING the Record of Appeal filed herein AND UPON HEARING Counsel as aforesaid IT WAS ORDERED that this Appeal do stand adjourned for judgment AND the same coming for judgment this day in the presence of Counsel as aforesaid IT IS ORDERED that this Appeal be and is hereby allowed AND IT IS ORDERED AND DECLARED that:

In the Federal Court in Malaysia

No. 16

Order of the Federal Court

24th January 1969 (continued)

(1) Kirpal Singh Brar was an employee within the meaning of Section 2 of the Employees Provident Fund Ordinance 1951, as amended, of the Respondents during the period from the 1st day of September 1964 to the 31st day of January 1966.

(2) Upon its true construction, the proviso to paragraph 2 of the First Schedule of the Employees Provident Fund Ordinance 1951, as amended, applies to Kirpal Singh Brar during the period from the 1st day of September 1964 to the 31st day of January, 1966.

(3) The Respondents are liable for the arrears of contributions amounting to $800.00 and interest thereon under the provisions of the Employees Provident Fund Ordinance 1951, as amended, in respect of the employment of Kirpal Singh Brar for the period from 1st day of September 1964 to the 31st day of January, 1966.

AND IT IS ORDERED that the Respondents do pay to the Appellants the said arrears of contributions amounting to $800.00 together with interest thereon calculated in accordance with the provisions of Section 11 of the Employees Provident Fund Ordinance 1951, as amended AND IT IS FURTHER ORDERED that the Respondents do pay to the Appellants the costs of Originating Summons No. 227 of 1967 and the costs of the Appeal as taxed by the proper officer of the Court AND IT IS LASTLY ORDERED that the sum of $500.00 deposited by the Appellants in Court as security of costs of this Appeal be paid out to the Appellants.

GIVEN under my hand and the seal of the Court this 24th day of January, 1969.

(Sgd.) Au Ah Wah

CHIEF REGISTRAR,
FEDERAL COURT, MALAYSIA.

In the Federal Court in Malaysia

No. 17

Order of the Federal Court granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong

8th September 1969

No. 17

ORDER OF THE FEDERAL COURT GRANTING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. X.42 OF 1968

Between

Employees Provident Fund Board — Appellants

And

R.R. Chelliah Brothers — Respondents

(In the Matter of Originating Summons No.227 of 1967 in the High Court in Malaya at Kuala Lumpur.

Between

Employees Provident Fund Board — Applicants

And

R.R. Chelliah Brothers — Respondents)

CORAM: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT, MALAYA:
GILL, JUDGE, FEDERAL COURT, MALAYSIA:
ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

This 8th day of September, 1969

UPON MOTION made unto this Court this day by Mr. M.S. Naidu of Counsel for the Respondents abovenamed and in the absence of the Appellants though duly served with the Notice of Motion dated the 28th day of August, 1969 and the Affidavit of Robert Rajendram Chelliah affirmed on the 25th day of August, 1969 AND UPON HEARING the Notice of Motion dated the 28th day of August, 1969 and the Affidavit of Robert Rajendram Chelliah affirmed on

In the Federal Court in Malaysia

No. 17

Order of the Federal Court granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong

8th September 1969 (continued)

the 25th day of August, 1969 and filed herein in support of the Motion AND UPON HEARING Counsel as aforesaid IT IS ORDERED that the Respondents above-named be and is hereby granted final leave to Appeal to His Majesty the Yang di-Pertuan Agong from that part of the Judgment and Order of the Federal Court dated the 24th day of January, 1969:

AND IT IS ORDERED that the costs of this Motion be costs in the cause.

GIVEN under my hand and the seal of the Court this 8th day of September, 1969. 10

(L.S.)

(Sgd.) Au Ah Wah

CHIEF REGISTRAR,
FEDERAL COURT, MALAYSIA

No. 31 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN :

R.R. CHELLIAH BROTHERS — Appellants

- and -

EMPLOYEES PROVIDENT FUND BOARD — Respondents

RECORD OF PROCEEDINGS

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