

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

GOVERNMENT OF MALAYSIA

Appellant

- and -

LEE HOCK NING

Respondent

CASE FOR THE APPELLANT

Record

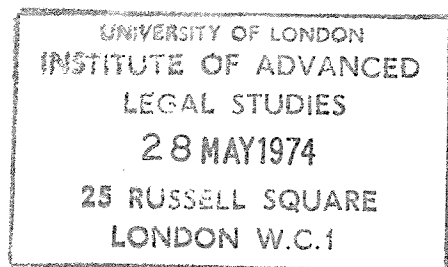
10 1. This is an Appeal by the Appellant, the Government of Malaysia, from an Order of the Federal Court of Malaysia (Ong.C.J., Gill and Ong Hock Sim F.J.J.) made on the 23rd March 1972 allowing an Appeal from Mr. Justice Pawan Ahmad Pin Ibrahim Rashid dated the 2nd May 1970 and accordingly setting aside the judgment of the Learned Judge in favour of the Respondent for the sum of \$1749.75 and ordering judgment for the Respondent in the sum of \$14,589.75.

p.63

p.31

20 2. The sole issue in this Appeal is whether the claim of the Respondent for the difference between the sum for which the Learned Judge had ordered judgment and the sum for which the Federal Court of Malaysia ordered judgment was barred by S.2 of the Public Authorities Protection Ordinance 1948. S.2 provides:-

Where, after the coming into force of this Ordinance any suit, action, prosecution or other proceeding is commenced in the Federation against any person for



Record

any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provision shall have effect -

- (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof. 10

The Appellant is entitled to any protection afforded by this section by reason of S.38 of the Government Proceedings Ordinance 1956.

pp.71-91 3. The Respondent's claims arose under three building contract (214/63; 227/63 and 232/63) under each of which he agreed to carry out school building works for the Appellant. He commenced two actions, which were consolidated prior to trial, in which he claimed the following sums:- 20

p.1 (i) Under contract 214/63, \$1184 as retention money which had become due under the terms of the agreement (action 221/65).

(ii) Under contract 227/63, the entire contract price of \$11,315 together with \$565.75 paid by the Respondent as a security deposit in respect of the works carried out under the agreement (action 221/65). 30

p.14 (iii) Under contract 232/63, the return of the security deposit of \$1525 paid by him to the Appellant in respect of the works to be carried out under the agreement (action 222/65).

The Appellant did not dispute that the first two contracts had been satisfactorily completed, but claimed to be entitled to set-off damage suffered in consequence of an alleged breach of contract by the Respondent in failing to perform the third 40

contract. The Learned Judge found that this claim to a set-off failed and there was no appeal against this finding. The Appellant further contended that, except in regard to \$1184 being the retention money under the first contract and \$565 under the second contract, the claim by the Respondent was barred under S.2 of the Public Authorities Protection Ordinance in that payments had fallen due more than twelve months prior to the issue of the Writ. At trial, the Counsel for the Respondent accepted that the section applied and conceded that the claim in action 222/65 under the third contract was statute barred. He contended that proceedings in action 221/65 under the first two contracts were brought within the limitation period on the ground that time only began to run after a demand for payment. The Learned Judge rejected this contention, and held that the cause of action arose when payment became due and that except in respect of the two sums of \$1184 and \$565 conceded by the Appellant, the Respondent's claim was barred by S.2.

p.36

pages
34 & 35

4. The sole issue argued before the Federal Court was whether S.2 applied to the non-payment by the Appellant of money due pursuant to a contract. The Appellant contended that the contract related to the building of a school in performance of a public duty and, accordingly, that both the agreement and any acts done or omitted pursuant thereto were in performance or execution of such public duty. The Respondent accepted that S.2 could apply to certain agreements, but drew a distinction between contracts entered into for the discharge of a public duty and contracts entered into for the doing of an act which the authority was merely authorised to carry out. The Federal Court unanimously held that the claim for non-payment of money under the contract was not statute-barred. Ong C.J. held that the contracts were entered into in execution of a public duty, but that the refusal to pay moneys due under the contract did not constitute an act or default in performance or execution of such a duty. Gill F.J. held that it was immaterial whether the contract might have been entered into for the purpose of performing a statutory duty. If the act complained of was a breach of a contract, the statutory protection of the Ordinance could not be invoked on the ground that the contract was entered into for the purpose of

pp.45-47

p.45

p.46

p.52

p.56

carrying out duties imposed by statute. He further held that the protection of section 2 could not apply when the act complained of was purely a breach of agreement. Ong Hock Sim F.J. concurred. The Federal Court relied particularly on the decisions in Bradford Corporation v. Myers (1916) A.C.242; Griffiths v. Smith (1941) A.C.170; Sharpington v. Fulham Guardians (1904) 2 Ch.449; and Midland Railways Company v. Withington Local Board (1883) 11 Q.B.D. 788.

10

5. The principal submission of the Appellant is that the section is applicable to actions brought pursuant to contracts or for breach thereof provided that the contract was entered into, as were the contracts in the instant case, in pursuance or execution of a public duty. The object of the section was to give protection to public authorities. Such protection should properly apply to contracts entered into in the execution of a public duty as well as to non-contractual claims. If the section does apply to contracts, its effect would be nugatory unless it consequently applied to claims made pursuant to or for breach of the contract concerned. In support of this submission, the Appellant relied upon Compton v. Council of the County Borough of West Ham (1939) 1 Ch. 771 and Firestone Tyre and Rubber Co. (S.S.) Ltd. v. Singapore Harbour Board (1952) A.C.452. Both these decisions indicate that the protection of a section similar to S.2 can apply to claims arising out of a contract entered into by an authority in the execution of its duty. The Appellant further submits in respect of the authorities relied upon by the Federal Court that:-

20

30

(i) Bradford Corporation v. Myers, referred to in Griffiths v. Smith (Supra), is distinguishable in that the action arose out of a private bargain into which the authority was not obliged to enter for the purpose of performing its public duty.

40

(ii) In so far as Sharpington v. Fulham Guardians (supra) decided that claims arising out of a contract entered into in order to execute a public duty could never be the subject of limitation under section 1 of the Public Authorities

Protection Act, 1893, the terms whereof were similar to section 2, such decision is inconsistent with the cases relied upon by the Appellant and should not be followed.

10 (iii) Midland Railway Company v. Local Board for the District of Withington (supra) was concerned with limitation in respect of claims arising out of the execution of duties in respect of the highway under the Public Health Act, 1875, and the decision is of no assistance in determining the effect of S.2 of the Ordinance.

6. The Appellant therefore submits that this Appeal should be allowed and the Order of the Learned Judge restored for the following amongst other

R E A S O N S

- 20 (1) BECAUSE S.2 of the Public Authorities Protection Ordinance applies to claims arising out of contracts entered into in the performance or execution of a public duty.
- (2) BECAUSE the claim in the instant case arose out of such a contract.
- (3) BECAUSE the decision of Learned Judge was right and ought to be restored.

ROBERT ALEXANDER

No.27 of 1972

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

GOVERNMENT OF MALAYSIA Appellant

-and-

LEE HOCK NING Respondent

CASE FOR THE APPELLANT

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS.

Ref: 35/20

Appellants' Solicitors