

No.5 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)

B E T W E E N :

MAHAN SINGH S/O MANGAL SINGH Appellant

- and -

THE GOVERNMENT OF MALAYSIA Respondent

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CASE FOR THE RESPONDENT

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1. This is an appeal from the judgment of the Federal Court of Malaysia (Suffian L.T.; Lee Hun Hoe C.J. Borneo; and Ong Hock Sim F.J.) allowing an appeal by the Respondent against the judgment of Narain Sharma J. on 3rd May 1974 granting a declaration that the termination of the service of the Appellant in the office of the Special Commissioners of Income Tax was null and void, and that the Appellant still continued in the service of the Respondent, and was entitled to all arrears of salary from the date of his purported termination subject to deduction of the pension so far received by him.

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2. The facts are not in dispute. The Appellant joined Government Service on the 15th February 1947 as a clerk and Punjabi interpreter. On 1st October 1949 he was put on the "permanent establishment" and from 1st April 1961 to 30th November 1969 served as Registrar of the Sessions Court. On 1st December 1969 he was transferred to the Office of the Special Commissioners of Income Tax at Kuala Lumpur.

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Some five weeks later a report dated 3rd January 1970 upon his conduct and work was received by the Director of Public Services Department from the Secretary to the Ministry of Justice under Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Cap.D) Regulations, 1969, published on 29th July 1969 as P.U. (A) 273, hereinafter referred to as Cap. D. The said report being privileged under Section 123 of the Evidence Act no copy was ever supplied to the Appellant. The Secretary to the Ministry of Justice was head of the Department in which the Appellant had served immediately prior to his transfer to the office of the Special Commissioners. The report was referred to the Director of Operations who agreed to the termination of the Appellant's service under Regulation 44 of Cap. D. On 20th March 1970 a letter was written by the Director of the Public Services Department to the Appellant informing him that his service would be terminated under the said Regulation as soon as he had taken all the leave for which he was eligible and that his pension would be worked out according to the Pensions Ordinance 1951. At that time the Appellant was not yet 49, whereas normally under the Pensions Ordinance he could have worked until aged 55 when he would have retired with a larger pension. He wished to do so and therefore appealed to the Director of Public Services, Malaysia by letter dated 3rd April 1970. Nevertheless the decision of the Government remained unchanged and by letter dated 29th July 1970 the Secretary to the Ministry of Justice was informed by the Director of Public Services that the Yang diPertuan Agong had approved the grant of pension benefits to the Appellant subject to a deduction of 10% as if he had retired on the ground of his health. On 29th December 1971 the Appellant therefore brought a suit in the High Court at Ipoh against the Respondent claiming that he had not been informed the reason for termination of his service; that he had been given no opportunity to defend himself; that he had been condemned unheard; and in the alternative that Regulation 44 of Cap. D. was null and void and ultra vires the provisions of Ordinance No.1 of 1969 and Article 150 of the Federal Constitution.

3. The issues which arise upon this appeal are as follows :-

- (i) Whether or not the Appellant had a right to his post on the permanent establishment.
- (ii) Whether the termination of the Appellant's service by letter dated 20th March 1970 constituted a lawful retirement pursuant to Section 10(d) of the Pensions Ordinance 1951 and Regulation 44 of Cap. D. 135
- 10 (iii) Whether the said termination in fact constituted a dismissal or punishment of the Appellant in circumstances where he had been no reasonable opportunity to be heard and was therefore void as being in breach of Article 135(2) of the Constitution.
- (iv) Whether the said letter of termination was void as being contrary to the rules of natural justice.
- 20 (v) Whether as the Appellant contends Regulation 44 of Cap. D is of no effect on the grounds that it is ultra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution.
- (vi) Whether the Appellant's action was statute barred by Section 2(a) of the Public Authorities Protection Ordinance 1948.

30 4. The statutory provisions and General Orders which have been considered relevant in the Court below are as follows :-

CONSTITUTION

CHAPTER X

Art. 132 (1) For the purposes of this Constitution, the public services are :

- (a) the Armed Forces;
- (b) the Judicial and Legal Service;
- (c) the General Public Service of the Federation...

40 Art. 132(2)(a) Except as expressly provided by this Constitution every person who is a member

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of any of the services mentioned in paragraphs (a), (b), (c) ... of Clause 1 holds office during the pleasure of the Yang di-Pertuan Agong, and except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Governor.

Art. 135(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

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Art. 150(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency shall be invalid on the ground of inconsistency with any provision of this Constitution ...

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Art. 176(1) Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day.

PENSIONS ORDINANCE NO. 1 1951

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5(1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance, nor shall anything in this Ordinance contained limit the right of the Federal Government or, as the case may be, of the Government of any State or settlement to dismiss any officer without compensation.

10. It shall be lawful for the Yang di-Pertuan Agong in the case of a Federal officer... to require any officer to retire from the public service in the Federation

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(a) who, in the case of a male officer in the public service in the Federation at the commencement of this Ordinance has attained the age of 55 years, and in

any other case has attained the age of 50 years if a man or 45 if a woman; or

- (b) ...
- (c) who appears to the Yang di-Pertuan Agong or the Ruler, as the case may be, to be incapable, by reason of some infirmity of mind or body likely to be permanent of discharging the duties of his office; or
- 10 (d) on the termination of his employment in the public interest; or
- (e) ...
- (f) on the abolition of his office; or
- (g) for the purpose of facilitating improvement in the organisation of the Department to which he belongs by which greater efficiency or economy may be effected; or
- (h) on the ground of national interest.

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GENERAL ORDERS

CHAPTER D

30 44(1) Notwithstanding these General Orders, where it is represented to or is found by the Government that it is desirable that any officer should be required to retire from the public service in the public interest or on grounds which cannot suitably be dealt with by the procedure laid down in these General Orders, the Government may call for a full report from Head of Department in which the officer is serving. The said report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

(2) Where the Government considers that it requires further clarification, it may cause to be communicated to the officer the complaints by reason of which the termination of his service is contemplated.

40 (3) If after considering the report or (in the case of the Government having communicated to the officer as in paragraph (2)) after

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giving the officer an opportunity of submitting a reply to the complaints, the Government is satisfied that having regard to the conditions of the services, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.

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(4) Where the Disciplinary Authority has recommended to the Government that an officer should be required to retire from the public service in the public interest, the Government may so terminate the service of the said officer.

(5) In every case of such termination of service of an officer under this General Order, the question of pension shall be dealt with in accordance with the law relating to pensions.

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77 5. Narain Sharma J. rightly held that the Cap. D Regulations were valid and not ultra vires either the Constitution or the Emergency (Essential Powers) Ordinance No. 1 of 1969 (P.U. (A.146/69). But the learned Judge went on to hold, following certain Indian decisions and in particular the case of P.L.Dhingra v. Union of India A.I.R. (1958) S.C.36 that because the Appellant was in the pensionable and therefore as he put it the permanent service of the Government he had a right to his post. He therefore held that termination pursuant to Regulation 44 of Cap. D must be regarded as a punishment and amounts to a dismissal for the purposes of Article 135 of the Constitution. He also held that in the circumstances such termination cast a stigma on the Appellant and therefore constituted a punishment. In consequence, he held that since the Appellant had been given no reasonable opportunity to be heard his dismissal was in breach of the requirements of Article 135(2) of the Constitution and therefore, null, void and of no effect. The learned Judge did not deal with the issue of whether the Appellant's action was time-barred.

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6. Upon appeal by the Respondent to the Federal Court of Malaysia Suffian I.T., with whose judgment Lee Hun Hoe C.J. Borneo and Ong Hock Sum F.J. agreed in concurring judgments, held, reversing the judgment of the learned

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10 Judge that a pensionable public officer had neither right, nor title to, nor lien upon his post; that Regulation 44 of Cap. D was perfectly valid; that the Government had power to terminate the Appellant's service in the public interest under that Regulation; that the Government's decision so to do did not involve punishing or penalising him; and that accordingly he had not been dismissed and was not therefore entitled to a reasonable opportunity of being heard under Article 135(2); nor was his letter of dismissal a contravention of the requirements of natural justice.

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20 7. The Respondent first submits that the Federal Court following its decision in Haji Ariffin v. Government of Penang (1969) 1 M.L.J. 6 rightly held that all pensionable officers in the public service nevertheless hold office during the pleasure of the State and do not have any "right" to their posts equivalent to that recognised by the Indian Courts in Dhingra's case (supra). Likewise although such public servants may have an expectation of a pension they have no right thereto.

30 8. The Respondent further submits that the Federal Court, following the decision of the Privy Council in Government of Malaysia v. Calister Lionel (1974) 1 M.L.J. 3, rightly drew a distinction between a dismissal and a mere termination of service pursuant to Regulation 44 of Cap. D; and rightly held that no inference that the Appellant had been dismissed or suffered any other stigma was to be drawn from the terms of the Respondent's letter of termination of 20th March 1970. The Federal Court rightly held that the said letter and the letter of 29th July 1970 should be read together and together made it clear that it was a decision not only of the Government but also of H.M. the Yang di-Pertuan Agong that the service of the Appellant should be terminated in the public interest but that such termination was to be regarded as a retirement under the said Regulations and Ordinance and that the Appellant should be entitled to a pension. The Respondent therefore submits that the termination of the Appellant was made pursuant to Section 10(1) of the Pensions Ordinance No. 1 1951 and Regulation 44 Cap. D and was perfectly valid.

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9. The Respondent finally submits as held by the Federal Court that Regulation 44 of Cap. D was perfectly valid having been lawfully made by the Director of Operations under the powers lawfully delegated to him by H.M. the Yang di-Pertuan Agong by Section 2(1) of the Emergency (Essential Powers) Ordinance No. 2 of 1969.

10. The Respondent submits that the judgment of the Federal Court of Malaysia (Appellate Division) was right, and should be affirmed for the following, amongst other,

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R E A S O N S

(1) BECAUSE the Appellant had no right to his post in the public service but merely held office during the pleasure.

(2) BECAUSE the Appellant was not dismissed but his service was lawfully terminated pursuant to Section 10(d) of the Pensions Ordinance No. 1 of 1951 and Regulation 44 of Cap. D, and Article 135 of the Constitution does not apply to such a termination.

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(3) BECAUSE Regulation 44 of Cap. D was validly made by the Director of Operations pursuant to powers validly delegated to him under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 2 of 1969.

(4) BECAUSE the judgment of the Federal Court of Malaysia (Appellate Division) was correct.

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NICHOLAS LYELL

IN THE JUDICIAL COMMITTEE OF THE
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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

MAHAN SINGH S/O MANGAL SINGH

Appellant

- and -

THE GOVERNMENT OF
MALAYSIA

Respondent

CASE FOR THE RESPONDENT

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