4, 1971

31 OF 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N :-

R.R. CHELLIAH BROTHERS Appellants

- and -

EMPLOYEES PROVIDENT FUND BOARD Respondents

In the Federal Court of Malaysia

Case for the Appellants.

1. This is an Appeal by R.R. Chelliah Brothers (hereinafter called "the Appellants") from a Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) (Azmi, C.J., and MacIntyre, F.J., Ong Hock Thye, F.J. dissenting) dated the 24th day of January 1969 allowing with costs the Appeal of the Employees Provident Fund Board (hereinafter called "the Respondents") from a Judgment of the High Court at Kuala Lumpur (Raja Azlan Shah, J.) dated the 23rd day of May 1968 dismissing with costs the application of the Respondents for a declaration.

pp.45 & 46

p.11

2. The principal questions raised in this Appeal are:-

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

(ii) Whether upon its true construction, the proviso to paragraph (2) of the First Schedule of the Employees Provident Fund Ordinance 1951 as amended, applies to the said Kirpal Singh Brar, during the

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period from 1st September 1964 to 31st January 1966.

(iii) Whether the Appellants are liable for the arrears of contributions amounting to $800/- and interest thereon under the provision of the Employees Provident Fund Ordinance 1951, as amended, in respect of the employment of the said Kirpal Singh Brar for the period 1st September, 1964 to 31st January 1966.

pp. 1 & 2

3. By an Originating Summons dated the 26th day of October 1967 the Respondents applied to the High Court in Malaya for (a) a declaration that Kirpal Singh Brar was an employee of the Appellants within the meaning of the Employees Provident Fund Ordinance 1951 as amended, and (b) an order that the Appellants pay arrears of contribution amounting to $800/- and interest. The Originating Summons was supported by an Affidavit of one Edward

pp. 3 & 4

Max Stanley according to which he was the Deputy Manager of the Employees Provident Fund Board (the Respondents). The Appellants did not file any Affidavit in answer to the application.

4. The said Affidavit alleged the following facts:

p.3,ll.19-26

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

p.3,ll.27-34

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

p.4,ll.1-7

(iii) 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 1st September 1964 at the salary of $501/- per month, which was increased to $601/- per month in September 1965.

(iv) The employee continued in such employment until 31st January 1966 when he terminated his services with the Respondents and began to practise as an Advocate and Solicitor under his own name. p.4,ll.8-11

5. By reason of the above facts, the Respondents contended that, upon the true construction of the proviso to paragraph (2) of the First Schedule of the Ordinance, the employee continued to be an "employee" within the meaning of the Ordinance during his period of employment by the Respondents. Accordingly the employer was liable to pay contributions under the provisions of the Ordinance. p.4,ll.12-21

6. The Summons was tried in open Court on 12th day of February 1968 the only evidence being the Affidavit summarized above. p.5,l.23 to p.7,l.9

7. Judgment in the action was delivered by Raja Azlan Shah, J. on 23rd day of May 1968. pp.7-10

The learned Judge began by summarising the history of the employment of Kirpal Singh Brar from 16th June 1957 when he became employed by the Malaysian Government on contract as an Inspector of Police to 31st January 1966 when he started a law practice on his own account, these facts, said the learned Judge, were not in dispute. p.7,l.27 to p.8,l.15 p.8,ll.16-24

The learned Judge then considered that paragraph of Section 2 of the Employees Provident Fund Ordinance 1951 which deals with the meaning of "employee". It reads: "Employee" means 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 expressed or implied, to work for an employer" and "not being a person of the description specified in the First Schedule to this Ordinance".

Paragraph (2) of the First Schedule states: "Any person whose wages exceed $500 a month" would not be an employee within the Ordinance and p.8,ll.24-43

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therefore would not be liable to contribute to the Fund. However, the learned Judge continued, the proviso to the said paragraph (2), the interpretation of which is presently in dispute, 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/- a month".

p.8,ll.44 & 45 8. The learned trial Judge then considered whether Kirpal Singh Brar came within this proviso and held that he did not for the following reasons:

p.8,l.45 to p.9,l.3 (i) When he was in the Police Force he was a member of the Fund as his salary was less than $500/- a month, but there was a clear break in August 1960 when he resigned from the Police Force and ceased to contribute to the Fund;when he became re-employed on 1st September 1964 by the Appellants as an Assistant Advocate and Solicitor it was at a salary in excess of $500/- :- namely, $501, which was increased to $601/- in September 1965.

p.9,l.36-46 (ii) The proviso to paragraph (2) of the First Schedule would certainly apply in cases of continuous employment where the employee's wages are increased to exceed $500/- a month, or where there are breaks in employment and the employee is re-employed at a wage of $500/- or below, subsequently rising above $500/-, but it would be stretching the interpretation of the proviso too far to apply it 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 was re-employed at a salary over $500/-.

p.9,l.4-27 (iii) Section 13(2) of the Ordinance states: "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".

The learned trial Judge said: "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 . . . I must take this sub-section and reconsider it in the light of the whole Ordinance." He concluded that in the context of the present case 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.

(iv) The ambiguity in the proviso to paragraph 2 of the First Schedule can only be resolved by looking at the Ordinance as a whole to ascertain its true and natural meaning and the intention or purpose of the Ordinance. p.10,l.1-10

(v) The purpose of the Ordinance is to ensure financial security to an employee in his old age; and specifically to those in the lower income group as a compulsory saving. p.10,l.10-19

(vi) Enforcement of the principle "once a contributor always a contributor" would lead to absurdity and considerable inconvenience. p.10,ll.19-23

It is respectfully submitted that the learned Judge correctly interpreted the relevant provisions of the Employees Provident Fund Ordinance 1951, as amended, and that he came to the correct conclusion

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in holding that, following the true and natural meaning of the Ordinance as a whole, Kirpal Singh Brar ceased to be an "employee" within the meaning of the Ordinance as from August 1960 when he ceased to contribute to the Fund, and, therefore came to a correct conclusion in law in dismissing the application of the Respondents.

p.12

9. The Respondents then gave Notice of Appeal dated the 24th day of May 1968 to the Federal Court in Malaysia (Appellate Jurisdiction). The grounds of their Appeal are contained in their Memorandum of Appeal dated the 28th day of June 1968, and were as follows:

p.13

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.

pp.25-32

The Appeal was heard on the 29th day of October 1968 in the Federal Court (Azmi, C.J.,

Ong Hock Thye, F.J. and McIntyre, F.J.). The Respondents made a Written Submission (entitled 'Case for Appellant') to the Court, the principal arguments of which were as follows:

(i) The learned Judge wrongly applied the provisions of Section 13(2) of the Employees Provident Fund Ordinance 1951 to construe the proviso to paragraph (2) of the First Schedule to the Ordinance in respect of Kirpal Singh Brar. The true 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. Section 13(2) does not apply to the position where a person ceases to contribute to the Fund, as is the case with Kirpal Singh Brar. Upon cessation to contribute, a person can still remain a member of the Fund and upon re-employment his liability arises again. It was by reason of this mis-statement of the effect of Section 13(2) that the learned Judge concluded that Kirpal Singh Brar was no longer to be treated as an employee but that he could "put himself in circumstances where he would again be termed an 'employee' within the meaning of the Ordinance." The proper position was 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, and his contributions ceased. Moreover, a person who has withdrawn his contributions cannot put himself back again as an employee for the purposes of the Ordinance.

p.16,ll.23-28

p.17,l.17 to p.18,l.19

(ii) The learned Judge was wrong in suggesting that the purpose of the Ordinance was to provide for those in the lower income group, since it would be easy for the legislature to say that any person whose wages exceed $500/- is no longer an

p.21,ll.10-19

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employee within the Ordinance. And if the proviso to paragraph (2) of the First Schedule is not to be considered mere surplusage, it should be construed ut res magis valeat quam pereat so that some persons in the higher income bracket (i.e. those earning over $500/- a month), will in certain circumstances fall within the intention of the Ordinance.

p.22,l.44 to p.23,l.5

(iii) The anomalies which exist if a break in employment affects the operation of the proviso to paragraph (2) of the First Schedule are, 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. 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.

p.24,ll.18-34

(iv) In the initial definition contained in the proviso to paragraph (2) of the First Schedule of the 1951 Ordinance the words 'becomes liable' and 'wages . . . are increased' are used. This would appear to apply to situations where the employment is not continuous. The present language as amended in 1963 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. The Respondents contended that these amendments were intended to widen the scope of the proviso to cover all those, including those whose wages exceed $500/-, who had a break in their employment.

p.24,l.35 to p.25,l.5

(v) A distinction must be drawn between the meaning of 'employee' in the contractual sense of employer and employee, and the sense in which it is used in the Ordinance. Thus Kirpal Singh Brar remained an

employee in the meaning of the Ordinance during the period from August 1960 to 1st September 1964 though he certainly was not an employee in the contractual sense.

(vi) Once a person "has become liable" to pay he is, upon a natural construction of the proviso, "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 the Ordinance. p.25,ll.21-28

10. The Judgment of the Court (Azmi, C.J., Ong Hock Thye, F.J. and McIntyre, F.J.) was delivered on 24th January 1969. The first Judgment was delivered by Azmi, C.J. (as he then was) who after reciting the facts and history of the litigation referred to the substance of the grounds of Appeal. pp.33-36

11. The learned Chief Justice held

(i) That the problem of interpreting the relevant provisions of the Employees Provident Fund Ordinance 1951, as amended, should be solved by the application of the principles laid down by Turner, L.J. in Hawkins v. Gathercole, 6 D.M. & G.1 and cited with approval by Lord Wrenbury in The Viscountess Rhondda's Claim, /1922/ 2 A.C.339 at page 397 as follows:- p.34,l.24 to p.35

"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, 6 D.M. & G.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

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the Act with another; and, thirdly (and this is the most indefinite) sometimes by foreign (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, Plowd, 205, 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."

p.35,l.11 to p.36,l.5

(ii) That the primary object of the 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. After the employee has paid his contribution according to the procedure laid down in Sections 7 and 8 of the Ordinance, 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 allowed to withdraw from the Fund all money standing to his credit in circumstances described in Section 13. It is notable also 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.

p.36,ll.6-10

(iii) 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.

p.36,ll.14-18

(iv) 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.

p.36,ll.19-24

12. The learned Chief Justice accordingly upheld the Appeal of the Respondents and made an order in

the terms of the prayers in the Respondents' originating Summons dated the 26th day of October 1967.

13. The second Judgment was delivered by Ong Hock Thye, F.J. (as he then was). The Learned Federal Judge dissented from the opinion of the majority for the following reasons:- pp.37-41

(i) The First Schedule to the Employees Provident Fund Ordinance 1951, as amended, lists those who are excepted from the definition of "employee" in Section 2 of the said Ordinance. Paragraph (2), with provisos, reads as follows. They include:- p.37,l.30 to p.38,l.15

"(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."

The object and purpose of the Ordinance must be borne in mind if it is to be truly workable; it was clear that a case such as Kirpal Singh Brar's could not p.40,ll.1-10

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have been within the contemplation of the Legislature, for the second proviso to paragraph (2), recited above, reveals by way of illustration afterthoughts in 1963, when it was inserted, with special reference to a profession which claims no privileged or preferential treatment over that of an Advocate and Solicitor.

p.39,ll.21-39 (ii) It is the words "shall not by reason only of this paragraph" to be found in the proviso to paragraph (2) of the First Schedule that really govern the construction of the proviso. They clearly imply that the paragraph itself is only one among other relevant factors to be taken into consideration. Neither the draftsman nor the Legislature could have foreseen and legislated for the infinite variety of circumstances. It was left to the discretion of the Board to use their good sense in each individual case. The proviso consequently refrained from drawing the boundaries of the Board's discretion.

p.40,ll.11-26 (iii) Kirpal Singh Brar's 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; if such a break and change of profession were not adequate grounds for holding that a man had ceased to be an 'employee' within the Ordinance, where was the line to be drawn? Pursued to its logical conclusions, the Board's argument must inevitably result in absurdities.

p.40,ll.26-34 (iv) Statutes imposing pecuniary burdens are subject to the rule of strict construction, and the Employees Provident Fund Ordinance is such a statute.

14. The learned Federal Judge having had the opportunity of reading the Judgments of Azmi, C.J. and MacIntyre, F.J., and after giving careful consideration to their majority opinion, further held as follows:-

p.41,ll.17-35 (v) In the proviso to paragraph (2) of the

First Schedule the words "such employee shall not by reason only of this paragraph be deemed to have become excluded from the provisions of this Ordinance, but . . . "mean that the paragraph alone without anything more does not exclude such employee, i.e., the employee who has become liable to pay contribution. If there were "anything more" which should prove to be cogent material facts in any particular case, and these facts were ignored, such a construction would seem to offend against the cardinal rule ut res magis valeat quam pereat.

(vi) The Board's seeking the ruling of the Court that they have no discretion whatsoever, is an abnegation of statutory powers which deserves no judicial support. p.41,ll.39-42

It is respectfully submitted that the learned Federal Judge correctly interpreted the provisions of the Ordinance referred to and came to the correct conclusion in upholding the decision of the learned Judge, in the High Court of Malaya.

15. The third Judgment in the Appeal was delivered by MacIntyre, F.J. After reciting the facts of the case, he proceeded to examine the relevant sections of the Ordinance, viz., Section 2 and paragraph (2) and its provisos of the First Schedule. As regards the said provisions the learned Federal Judge held as follows:- pp.42-45

(i) Paragraph (2), subject to the proviso, excludes all wage-earners from being employees for the purposes of the Ordinance if the wage exceeds $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 in excess of $500/-. p.43,ll.8-15

(ii) The argument that a person ceases to be an "employee" for the purposes of the Ordinance where, having been in receipt of a salary of less than $500/-, he takes up a new appointment after a period of unemployment at a salary in excess of p.43,ll.32-38

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Case for the Appellants, (Contd.)

$500/- a month, is untenable, not only because it is illogical but because of the provisions of Section 13(2) which makes 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.

p.43,ll.39-42 (iii) Kirpal Singh Brar was still a member of the Fund, and as such must be deemed to be an "employee" for the purposes of the Ordinance during the period he worked for the Appellants.

p.43,l.43 to p.44,l.9 (iv) A narrow construction of paragraph (2) of the First Schedule would not result in injustice to the employer. Since the Ordinance is a social legislation enacted to benefit employees (a point which is made clear in the definition of "approved fund" in Section 2 of the Ordinance) the proper approach in construing the Ordinance is to ensure that an employee is not deprived of his rights under the Ordinance.

16. The learned Federal Judge subsequently had the opportunity of reading the addendum to the Judgment of Ong Hock Thye, F.J. (as he then was) and made the following observations in relation to

p.44,ll.25-46 the latter's interpretations of the 23 words in the proviso quoted by him: "The argument is based purely on the meaning of the word 'only' as defined in the Shorter Oxford Dictionary. In interpreting the meaning of a word, one must also look at the context in which it is used. "If the sentence in which the word 'only' occurs had read:" . . . such employee <u>shall not only by reason</u> of this paragraph be deemed to have become excluded from the provisions of the Ordinance . . . " the proviso could rightly be deemed to imply that an employee could be exempted for other reasons. But the relevant part of the sentence in fact reads "<u>shall not by reason only</u> . . . " The proviso therefore says 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 who 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 a salary in excess of $500/- a month." Accordingly he would allow the Appeal.

17. Judgment was therefore entered for the Respondents on 24th January 1969 and the Appeal allowed with consequential directions as to payment of arrears of contributions and costs. pp.45 & 46

18. On the 8th day of September 1969 the Federal Court in Malaysia (Appellate Jurisdiction) at Kuala Lumpur granted upon the Motion of the Appellants, final Leave to Appeal to His Majesty The Yang Di-Pertuan Agong. pp.47 & 48

19. The Appellants humbly submit that the Judgment and Order of the Federal Court in Malaysia (Appellate Jurisdiction) dated the 24th day of January 1969 should be set aside and the Judgment and Order of the High Court in Malaya dated the 23rd day of May 1968 be restored and that this Appeal ought to be allowed with costs throughout for the following (amongst other)

R E A S O N S

1. BECAUSE the Judgment of the High Court in Malaya and the dissenting Judgment in the Federal Court in Malaysia (Appellate Jurisdiction) were correct in law.

2. BECAUSE the majority Judgments of the Federal Court in Malaysia (Appellate Jurisdiction) were in error in holding that Kirpal Singh Brar was an employee within the meaning of Section 2 of the Employees Provident Fund Ordinance 1951, as amended, of the Appellants during the period from 1st September 1964 to 31st January 1966.

3. BECAUSE the majority Judgments of the Federal Court in Malaysia (Appellate Jurisdiction) were in error in holding that the proviso to paragraph (2) of the Ordinance applied to Kirpal Singh Brar.

John A. Baker.

31 OF 1969

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

BETWEEN :-

R.R. CHELLIAH BROTHERS
Appellants

- and -

EMPLOYEES PROVIDENT FUND
BOARD Respondents

CASE FOR THE APPELLANTS

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