

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 :

SOUTH EAST ASIA FIRE BRICKS SDN. BHD Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION

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- 2. (a) TAN LEN KEOW
- (b) YAP CHUK YOOK
- (c) LOO TOK HO
- (d) YAP AH KIAT
- (e) YAP CHOON HOO
- (f) TEH YOKE TOH
- (g) TAN YEW
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- (i) CHOON AH SOO
- (j) LEE KIM YAN
- (k) SITI ZAIBIDAH KINTE MOAH

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Represented by the Union Respondents

SUPPLEMENTAL CASE FOR THE APPELLANTS

Record

1. The Respondents have sought leave to amend their case to include the reason that "by virtue of the provisions of Sections 27 and 29 of the Industrial Relations Act, 1967 the award of the Industrial Court is not open to challenge" and therefore this appeal should not be allowed. It was ordered that each party lodge a Supplemental Case in respect of this new reason.

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2. The relevant provisions of Sections 27 and 29 of the Industrial Relations Act, 1967 are as follows:-

Section 27

"(1) The Court shall have power in relation to a trade dispute referred to it, to make an award (including an interim award) relating to all or any of the issues in dispute.

(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

(6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute.

(9) The Court may rectify in any award any clerical error or mistake arising from any accidental slip or omission". 10

Section 29

"(3) (a) Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any Court of Law.

(b) No award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any Court of law. 20

(5) The expression "Court" for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under section 19 for the purpose."

3. The jurisdiction of the Malaysian High Courts is conferred by the Courts of Judicature Act, 1964 and the relevant provisions are as follows:-

Section 25

"(2) Without prejudice to the generality of the last preceding sub-section every High Court shall have the powers set out in the First Schedule to this Act: Provided that all such powers shall be exercised in accordance with any written law or Rules of Court relating to the same. 30

Section 28

(1) Subject to the provisions of this or any other written law, an appeal shall lie to the High Court from decision of a Subordinate Court in any civil cause or matter where the amount in dispute or the value of the subject matter exceeds one hundred dollars. 40

Section 32

Every High Court may call for and examine the record of any civil proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any decision recorded or passed, and as to the regularity of any proceedings of any such Subordinate Court.

Section 35

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(1) In addition to the powers conferred on High Courts by this or any other written law, every High Court shall have general supervisory and reversionary jurisdiction over all Subordinate Courts, and may in particular, but without prejudice to the generality of the foregoing provisions, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any Subordinate Court, call for the record thereof, and may remove the same into the High Court or may give such Subordinate Court such directions as to the further conduct of the same as justice may require.

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(2) Upon a High Court calling for any record as aforesaid all proceedings in the Subordinate Court in the matter in question shall be stayed pending further order of the High Court.

Section 3

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"Subordinate Court" means any inferior Court from the decisions of which by reason of any written law there is a right of appeal to any High Court and means in relation to any High Court any such Court as by any written law has jurisdiction within the local jurisdiction of such High Court.

FIRST SCHEDULE

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1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of any of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

4. The Courts of Judicature Act, 1964 confers very wide powers upon the High Court of Malaya and expressly provides for a supervisory and reversionary jurisdiction and

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certiorari. In the Appellants respectful submission it would require very clear words to oust such jurisdiction. The Appellants' case is that the Industrial Court decided wrongly that an employee on strike was not even in breach of his contract of employment and by so doing failed to consider properly whether or not the actions taken by the Appellants meant that the Respondent employees were no longer employed by the Appellants on the 16th February, 1974. Further, in the Appellants' case, the Industrial Court failed to consider whether the Appellants could be guilty of an illegal lock-out within the meaning of the Industrial Relations Act, 1967 if the Respondent employees were no longer employed by the Appellants on the 16th February, 1974. These errors vitiate the award of the Industrial Court and constitute errors on the face of the record. For these reasons the Appellants seek certiorari.

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5. In the Appellants' submission Section 29(3)(a) of the Industrial Relations Act, 1967 does not oust the jurisdiction of the High Court of Malaya to issue certiorari for any purpose.

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6. In the Appellants respectful submission there is a strong presumption against a statute ousting the jurisdiction of the Courts and that any clause or clauses that purport so to do or is or are to be given any reasonable construction which preserves the supervisory jurisdiction of the Courts. The ouster clause in Section 29 of the Industrial Relations Act, 1967 provides that the award of the Industrial Court shall be "final and conclusive" and then prohibits certain actions, namely, that "no award shall be challenged, appealed against, reviewed, quashed or called in question in any Court of law."

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The expression "final" has been considered a number of times and in R. v Medical Appeal Tribunal, Ex. parte Gilmore [1957] 1 Q.B. 574, the Court of Appeal quashed the decision of a Tribunal although it was expressed by statute to be "final". Further, obiter, Lord Denning, as he then was, at p. 588 clearly considered that the addition of the word "conclusive" would have made no difference. This was followed in Pearlman v. The Keeper and Governors of the Harrow School /1979/ 1 Q.B. 56, wherein it was held that the words "final and conclusive" did not exclude prerogative remedies and served only to exclude appeals on fact and possibly appeals on law. Accordingly, in the Appellants respectful submission the making of an award of the Industrial Court "final and conclusive", only excludes an appeal under Section 28 and possibly review under Sections 32 or 35 of the Courts of Judicature Act, 1964. It does not exclude the issue of

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certiorari under Section 25 of the Courts of Judicature Act, 1964.

10 7. The words "challenged" and "appealed against" can be, and should be, construed to exclude appeal on fact and law. The word "reviewed" is apt to describe an appeal or refer to the two Sections in the Courts of Judicature Act, 1964 conferring a power to review on the High Courts of Malaysia. The word "quashed" can describe an activity of an appeal court as in Hancock v. Prison Commissioners [1960] 1 Q.B. 117 as well as it described the remedy of certiorari and should be so construed. The words "called in question" could equally describe an appeal and therefore not refer to a prerogative remedy. Further, in the Appellants respectful submission, the words "called in question" in Section 29(3)(a) of the Industrial Relations Act, 1967 are to be construed ejusdem generis with the words "challenged, appealed against, reviewed, quashed", and accordingly do not extend to certiorari.

20 8. In the Appellants respectful submission Section 27 of the Industrial Relations Act, 1967 does not refer to any decision or determination of a trade dispute by the Industrial Court but deals with awards made consequent upon such decisions or determinations. It is not an invitation to that Court to disregard the Laws of Malaysia.

30 9. The Appellants respectfully submit that the High Court of Malaya, and accordingly the Appellate Courts, as accepted by The Federal Court of Malaysia, had jurisdiction to hear these proceedings and issue the prerogative writ of certiorari and that this appeal be allowed with costs, in any event in respect of the Respondents' amendment of their Case.

R E A S O N S

- 40 (1) BECAUSE Sections 29 and 27 of the Industrial Relations Act, 1967 do not exclude certiorari but only operate to oust rights of appeal and review which would otherwise exist.
- (2) BECAUSE Section 29(3)(a) of the Industrial Relations Act, 1967 only operates to oust "an award" of the Industrial Court and this award was no award within the meaning of the Act as it was a nullity or void.
- (3) BECAUSE even if Sections 29 and 27 oust the jurisdiction of the Malaysian Courts they have jurisdiction to issue certiorari by consent and the Respondents by failing to take this point in the Federal Court of

Record

Malaysia and before the Privy Council until the day of the hearing are estopped from denying that they have so consented.

GEOFFREY RIPPON

ALAN BISHOP

No. 7 of 1977

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