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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 7 of 1977

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :-

SOUTH EAST ASIA FIRE BRICKS SDN. BHD Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION

2. (a) TAN LEN KBOW
(b) YAP CHUK YOOK
(c) LOO YOK HO
(d) YAP AH KIAT
(e) YAP CHOON HOO
(f) TEH YOKE TOH
(g) TAN YEW
(h) ANUAR bin ABDUL
(i) CHOON AH SOO
(j) LEE KIM YAN
(k) SITI ZAIBIDAH binte MAON

represented by the Union Respondents

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellants

HATCHETT JONES & KIDGELL,
8/9 Crescent,
London, EC3N 3NA.

Solicitors for the Respondents.

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENT TRANSMITTED TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL BUT NOT REPRODUCED

Description of Document	Date
Order granting Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong	28th June 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL — No. 7 of 1977

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represented by the Union — Respondents

RECORD OF PROCEEDINGS

No. 1.

In the High Court

No. 1

Statement of Case and Exhibits thereto
21st March 1974

STATEMENT OF CASE AND EXHIBITS THERETO

IN THE MATTER OF INDUSTRIAL COURT CASE NO: 15 OF 1974

Between
South East Asia Fire Bricks Sendirian Berhad
And
Non-Metallic Mineral Products Manufacturing Employees Union.

STATEMENT OF CASE

1. The parties to the dispute are the Non-Metallic

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Mineral Products Manufacturing Employees' Union (hereinafter referred to as "the Union") and Messrs. South East Asia Fire Bricks Industrial Sendirian Berhad (hereinafter referred to as "the Company").

2. The dispute is over the Company's action in declaring a lock-out of 73 workers of the said Company with effect from 16.2.1974. A list containing the names of the workers so locked out are annexed hereto and marked "Union 1".

3. The circumstances leading to the lockout are as follows :-

4. On 21.2.1973 the Honourable Minister for Labour ordered the Company to accord recognition to the Union w.e.f. 5th September, 1972. Copy of the said letter is annexed hereto and marked "Union 2".

5. On 2nd October, 1973 the Union submitted its proposals for a Collective Agreement on terms and conditions of employment of its workers and invited the Company to commence negotiations. Copy of the covering letter forwarding the proposals is annexed hereto and marked "Union 3".

6. As the Union did not receive even an acknowledgment for its letter of 2nd October, 1973 the Union sent a reminder on 6th November, 1973 and requested the Company to commence negotiations without any further delay. On the same day the Union requested the Company to grant a cost of living allowance of 20% of the salary to all its workers. Copies of the said letters are annexed herewith and marked "Union 4 and 5".

7. Having received no response or acknowledgment from the Company, on 12.12.73 the Union wrote to the Honourable Minister for Labour and Manpower complaining about the adamant attitude of the Company and seeking his good offices for an early commencement of negotiations. Copy of the said letter is annexed herewith and marked "Union 6".

8. On 31.12.1974 by letter, the Union gave notice to the Company that unless the Company commenced negotiations with the Union by 14th January, 1974 the Union will have to resort to industrial action. Copy of the said letter is annexed hereto and marked "Union 7".

9. On 31st December, 1973 the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor & Pahang) (hereinafter referred to as the "Pangarah") wrote to the Union requesting the Union representatives to attend a meeting at his office on 22.1.1974 to discuss the Collective Agreement proposals. Copy of the said letter is annexed hereto and marked "Union 8".

10. The Union representatives presented themselves at the office of the Pengarah but the Company's representatives did not turn up.

11. On 22.1.1974 the Pengarah wrote to the Company expressing his regret over the Company's failure to attend the meeting on 22.1.1974 and suggested a further date 31.1.1974 for a meeting. Copy of the said letter is annexed hereto and marked "Union 9".

12. The workers went on strike on 4.2.1974.

13. On 4th February, 1974 the Company through its Solicitors, Ranjit, Thomas & Kula caused notices to be sent to the striking workers informing them that their services will be terminated unless they resumed work within a period of 48 hours from the said date. Copy of the letter is annexed herewith and marked "Union 10". The Union will contend that the said notices are bad in law. The Union will further contend that the Company's action in causing the said notices to be sent to the strikers through its Solicitors is an act calculated to strike terror into their hearts and thus break the strike. The Union will submit that the Company's action was an unfair labour practice.

14. On 12th February, 1974 the Honourable Minister for Labour & Manpower referred the dispute on Collective Agreement to the Industrial Court under Section 23(2) of the Industrial Relations Act, 1967. Copy of the letter is annexed herewith and marked "Union 11".

15. The Union on receipt of the communication of the Hon'ble Minister that the said dispute on Collective Agreement has been referred to the Industrial Court instructed its members to call off the strike and report for work on 16th February, 1974.

16. The members reported to work on 16.2.1974 but the Company refused to allow them to resume work and declared a lock-out. The said workers till to date

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continued

are being locked out by the Company illegally and in contravention of the provision of the Industrial Relations Act, 1967.

17. The Union will contend that the strike was not only legal but also justifiable and the Company's action in dismissing them is both illegal and contrary to the well settled precepts of industrial law.

18. The Union will further contend that since the strike was both legal and justifiable the strike of the said workers did not have the effect of severing the relationship of employee-employer with the Company as indicated by its letter dated 4.2.1974.

19. The Union will further contend that the Company's illegal lockout is an act of belligerency calculated as a reprisal against the said workers and aimed as an instrument of coercion and in the premises an unfair labour practice which must be struck down by the Court as such.

20. The Union prays that the Honourable Court doth make an award

(a) that the action of the Company in refusing to allow the said workers to resume work on 16.2.74 as a lockout under the provision of the Industrial Relations Act, 1967.

(b) That such lockout is an illegal lockout under the provisions of the law;

(c) That the Court doth order that the said workers be taken back by the Company.

(d) That all wages and other allowances calculated from the date of the illegal lock-out up to the date of their resumption of duties be calculated and the Company pay such wages and allowances to the said workers without loss of any of their former privileges.

Sgd:
XAVIER & VADIVELOO
Solicitors for the Union.

Kuala Lumpur
21st March, 1974.

This Statement of Case is filed by Messrs.

Xavier & Vadiveloo, Advocates & Solicitors No: 6, Jalan Klyne Kuala Lumpur, Solicitors for the abovenamed Union.

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MARKED "UNION 1"

	Name	I/C. No.
1.	Jainon Bin Haji Junos	
2.	Mat Sidin Bin Saari.	
3.	Abdul Hamid bin Idris	
4.	Shom Bt. Timin.	
5.	Nadesan s/o Palanisamy.	
6.	Letchme d/o Sadayan.	
7.	A. Subra Maniam.	
8.	Neenachi d/o Ramasamy.	
9.	Valliamah d/o Mookan.	
10.	Abu Bakar bin Mat Nordin.	
11.	Adnan Bin Sukur.	
12.	Md. Ahyar Bin Sudar.	
13.	Mak Pol Bin Sudar.	
14.	Krishnasamy s/o Veerapan	
15.	Sinnappan s/o Kulantai.	
16.	Subbulakami d/o Munusamy.	
17.	Suppamah d/o Nagamuthu.	
18.	Kamala d/o Sinnappan.	
19.	Parameswary d/o P. Rajoo	
20.	Juresinggam s/o Ponniah.	
21.	Md. Ali Bin Yazit.	

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continued

MARKED "UNION 1"
continued

	Name	I/C. No.
22.	Wong Seng Chpo	
23.	Yap Lee Fa.	
24.	Yap Suwe Nee.	
25.	Mathawan s/o Krishnan.	
26.	Sunthar Moorthy s/o Subramaniam.	
27.	Nuthamah d/o Thandabani.	
28.	Kutty Raman.	
29.	Yap Kim Eng.	
30.	Tan Chui Pin.	
31.	Loo Yoke Pah.	
32.	Chong Sin Woon.	
33.	Yap Chan Mooi.	
34.	Gopi s/o Sekaran.	
35.	Muthiah s/o Palaniandy.	
36.	Choong Kwee Hoong.	
37.	Lee Hoong Sang.	
38.	Lee Kang.	
39.	Lokman Bin Md. Ali.	
40.	Mohamed Bin Rati.	
41.	Jabaai Bin Alang.	
42.	Loong Kai Sing.	
43.	Kumarasamy s/o Kanapathy.	
44.	Lim Lai Sing.	
45.	Joseph s/o Anthonisamy.	
46.	Muniandy s/o Suppiah.	

	Name	I/C. No.
47.	Siti Jamilah bt. Mat Sarikh.	
48.	Ismail bin Tahir.	
49.	Jusiah bt. Abdul Raub.	
50.	Misam bt. Buyong.	
51.	Nasrah bt. Tudam.	
52.	Zaharah bt. Sahar.	
53.	Mangamah d/o Gopal.	
54.	Anjali d/o Kali	
55.	Teh Yoke Beng	
56.	Murugan s/o Govindan.	
57.	Kamaiah s/o Pitchayamuthu.	
58.	Krishnan s/o Arjunan.	
59.	Aminah bt. Jantan.	
60.	Basnah bt. Jalaludin.	
61.	Adnan bin Dorso.	
62.	Maimon Bt. Abu.	

List of Employees who have joined in the Strike but not members of the Union

	Name
1.	Tan Len Keow.
2.	Yap Chu Yook.
3.	Loo Yok Ho.
4.	Yap Ah Kiat.
5.	Yap Choon Hoo.
6.	Toh Yoke Toh.

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continued

MARKED "UNION 1"

continued

Name

7. Tan Yew.

8. Anuar Bin. Abdul.

9. Choong Ah Soo.

10. Lee Kim Yan.

11. Siti Zaibidah bte. Maon.

EXHIBIT

MARKED "UNION 2"

KEMENTERIAN BURUH

Jabatan Buruh dan Per-
Hubungan Perusahaan,
Jalan Raja,
Kuala Lumpur.

21hb. Februari, 1973.

Bil: (18)dlm.Buruh MB.1/10/189/18.

POS BERDAFTAR A.R.
Pengurus,
South East Asia Fire Bricks Industries Sdn.Bhd.,
314, Batu $2\frac{1}{2}$,
Jalan Ipoh,
KUALA LUMPUR

Tuan,

Akta Perhubungan Perusahaan 1967
Tuntutan Pengiktirafan oleh Kesatuan Pekerja-pekerja Perkilangan Keluaran Galian Bukan Logam.

Adalah saya di arah merujuk kapada perkara yang tersebut di atas dan dimaklumkan bahawa kesatuan itu telah pun melapurkan perkara pengiktirafan kepada Y.B. Menteri Buruh dan Tenaga Rakyat di bawah seksyen 8(4) Akta Perhubungan Perusahaan, 1967.

2. Adalah juga dimaklumkan bahawa pemeriksaan keahlian kesatuan oleh Pwndaftar Kesatuan Sekerja, Malaysia, menunjukkan 55% pekerja-pekerja yang di gaji oleh syarikat tuan sudahpun menjadi ahli-ahli kesatuan tersebut pada tarikh tuntutan pengiktirafan,iaitu 5.9.72.

3. Memandangkan dengan itu, saya adalah di arah menyampaikan kepada tuan keputusan Y.B. Menteri Buruh dan Tenaga Rakyat di bawah seksyen 8(5) Akta Perhubungan

Perusahaan, 1967 saperti berikut:-

"BAHAWA SOUTH EAST ASIA FIRE BRICKS INDUSTRIES SDN. BHD. mengiktirafkan KESATUAN PEKERJA-PEKERJA PERKILANGAN KELUARAN GALIAN BUKAN LOGAM m.d.p. 5hb. September, 1972 dan seterusnya dibenarkan mewakili pekerja-pekerja yang di gaji oleh syarikat itu kecuali pekerja-pekerja pengurusan iksekutif (executive); sulit dan keselamatan."

Sekian dimaklumkan.

Saya yang menurut perentah,
sd:
(A.T. RAJAH).
Ketua Pengarah Hal Ehwal,
Perhubungan Perusahaan,
Malaysia.

s.k.
Presiden,
Kesatuan Pekerja-pekarja Perkilangan Keluarkan Galian Bukan Logam.

EXHIBIT
MARKED "UNION 3"

KESATUAN PEKERJA2 PERKILANGAN KELUARKAN GALIAN BUKAN LOGAM
NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES' UNION.
No. 19 Jalan Barat, Petaling Jaya, Selangor, Malaysia
Our Ref: NMMPMEU/17A/73/1

2nd October, 1973.

The Manager,
S.E.A. Fire Bricks Industries Sdn. Bhd.,
9th Mile, Ipoh Road,
KUALA LUMPUR.

Dear Sir,

re: Proposals on Conditions and Terms of Employment

We enclose herewith our proposals on Conditions and Terms of Employment for your study and comments, if any.

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EXHIBIT
MARKED "UNION 3"
continued

We would appreciate if you would arrange an early date to meet us and start negotiation.

Thank you.

Yours faithfully,
NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION,
sd: Illegible.

c.c.
Regional Industrial Relations Officer,
Secretary, MTUC.,
Works Committee Secretary.

AFFILIATED TO: INTERNATIONAL FEDERATION OF CHEMICAL AND GENERAL WORKERS' UNION, THE MALAYSIA TRADES UNION CONGRESS.

EXHIBIT
MARKED "UNION 4"

KESATUAN PERKERJA2 PERKILANGAN KELUARAN BUKAN LOGAM
Non-Metallic Mineral Products. Manufacturing Emp. Union
No. 19 Jalan Barat, Petaling Jaya, Selangor, Malaysia.

Our Ref: NMMPMEU/17A/73/3.

6th November, 1973.

The Manager,
South East Asia Fire Bricks
Industries Sendirian Berhad,
9th Mile, Ipoh Road,
KUALA LUMPUR.

Dear Sir,

We are disappointed in your failure to communicate with us in connection with our Proposals on Conditions and Terms of Employment sent to you on 2nd October, 1973. We take this opportunity to inform you that we wish good employer/employees relationship and we trust your intentions are the same.

We must stress here that your continued silence will not be conducive to solving any issue and we may have to refer the matter to the Hon'ble Prime Minister if further delay is caused.

We urge you to get in touch with us at the

shortest time.

In the meantime please let us know if we could discuss the membership scope before commencing negotiations on the Collective Agreement.

Yours faithfully,
sd: illegible.

c.c. The Regional Director of Industrial Relations
The Secretary General Malaysian Trade Union Congress
The Secretary Works Committee

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EXHIBIT
MARKED "UNION 4"
continued

EXHIBIT
MARKED "UNION 5"

Kesatuan Pekerja2 Perkilangan Keluarkan Galian Bukan Logam
Non-Metallic Mineral Products Manufacturing Employees Union
No. 19 Jalan Barat, Petaling Jaya, Selangor, Malaysia.

Our Ref: NMMPMEU/17A/73/2

6th November, 1973.

The Manager,
South East Asia Fire Bricks
Industries Sendirian Berhad,
9th Mile, Ipoh Road,
Kuala Lumpur.

Dear Sir,

re: Cost of Living Allowance

We have been requested by all the South East Fire Bricks Industries Sendirian Berhad Employees to bring to your attention to serious problems they are facing due to the great increase in the cost of essential commodities and request the Company to give an additional 20% of the salary as a cost of living allowance to all the employees.

As you are well aware of the facts relating to price increase we sincerely hope you would give favourable consideration to our request and favour

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continued

us with an early reply.

Thanking you.

Yours faithfully,
NON-METALLIC MINERAL
PRODUCTS MANUFACTURING
EMPLOYEES UNION.

sd. Illegible.
Executive Secretary.

c.c. The Secretary Works Committee.

EXHIBIT
MARKED "UNION 5"
continued

EXHIBIT
MARKED "UNION 6"

KESATUAN PEKERJA2 PERKILANGAN KELUARAN GALIAN BUKAN LOGAM
Non-Metallic Mineral Products Manufacturing Employees Union.
No. 19, Jalan Barat, Petaling Jaya, Selangor, Malaysia.

Our Ref: NMMPMEU/17A/73/4

12th December, 1973.

The Hon'ble Minister of Labour & Manpower,
Ministry of Labour,
Jalan Raja,
KUALA LUMPUR

Dear Sir,

We submitted the Proposals on Conditions and Terms of Employment to Messrs. South East Asia Fire Bricks Industries Sdn. Bhd., 9th Mile, Ipoh Road, Kuala Lumpur on 2nd October, 1973 and to date the Company has not communicate with us. The Company is also adamant and refuses to recognise our Union in spite of your order for recognition dated 2nd February, 1973 ref: (18)dlm. Buruh MB. 1/10/189/18 and (20) dlm. Buruh MB. 1/10/189/18 dated 19th March, 1973.

The Management's attitude has caused considerable difficulties to the employees and we most respectfully request your honour to order the Company to arrange to meet us to commence negotiation.

Thank you.

Yours faithfully,
Non-Metallic Mineral Products
Manufacturing Employees Union,
sd: Illegible.
Executive Secretary.

c.c. Director General of Industrial Relations.
Secretary - Works Committee
Secretary General MTUC.

EXHIBIT

MARKED "UNION 6"
continued

KESATUAN PEKERJA2 PERKILANGAN KELUARAN GALIAN BUKAN LOGAM
Non-Metallic Mineral Products Manufacturing Employees Union
No. 19 Jalan Barat, Petaling Jaya, Selangor,
Malaysia.

EXHIBIT.

MARKED "UNION 7"

Our Ref: NMMPMEU/17A/73/5

31.12.1973

The Manager,
South East Asia Fire Bricks Sdn. Bhd.,
9th Mile, Jalan Ipoh,
Kuala Lumpur.

Dear Sir,

Ref: Recognition & Collective Agreement

We write this letter to you to express our indignation and annoyance over your adamant attitude towards our union. You have deliberately and regardlessly ignored the Hon'ble Minister's letter ordering you to accord recognition to our union. You have also created an undesirable atmosphere by not replying any of our letters. You will understand all these issues have been in the scene for well over a year now and we are very sure you cannot be justified in any excuse you may fabricate.

It has been our desire to establish good employer/union relationship which we feel is of utmost importance in maintaining harmony but you seem to have no respect for this principle. You will also realise harmony between us is very vital for Industrial Peace.

In the High Court

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EXHIBIT
MARKED "UNION 7"
continued

In conclusion we say that the union's limit for hope and patience has since surpassed and if by 14th January, 1974 you fail to write to us your official letter according recognition and express your desire to commence negotiation we will revert to Industrial Action and take note that this will be complete cessation of work.

Yours truly,
Non-Metallic Mineral Products
Manufacturing Employees Union

sd: Illegible.
President.

c.c. Regional Industrial Relations Officer,
Director General Industrial Relations,
Ministry of Labour, K.L.
Secretary General MTUC.

EXHIBIT
MARKED "UNION 8"

KEMENTERIAN BURUH DAN TENAGA RAAYAT

Jabatan Buruh dan Perhubungan
Perusahaan,
Tingkat 5, Bangunan Syarikat
Polis,
No. 1, Jalan Sulaiman, K.L.

31hb. Disember, 1974.

Surat Kita: T/SEL/PP/905 (30).

Setiausaha,
Kesatuan Pekerja-pekerja,
Perkilangan Bukan Logam,
19, Jalan Barat,
Petaling Jaya.

Tuan,

Conditions and Terms of Employment

Dengan hormatnya adalah dimaklumkan bahawa suatu mesyuarat bersama diantara pihak tuan dan pihak Syarikat South East Asia Fire Bricks Industries Sdn. Bhd. akan diadakan pada 22.1.1974 jam 10.00 pagi bertempat di Pejabat ini untuk membincangkan perkara tersebut di atas.

Saya yang menurut perintah,
sd: Illegible.
(Puat Nelson b.Hj.Mohd.Sam)
b.p. Pengarah Hal Ehwal Perhubungan
Perusahaan (Selangor & Pahang)

PMMS/MZA.

In the High Court

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continued

EXHIBIT

MARKED "UNION 9"

KEMENTERIAN BURUH & TENAGA RAKYAT

Pejabat Perhubungan Perusahaan
(Selangor & Pahang),
Bangunan Syarikat Polis,
No. 1 Jalan Suleiman,
Kuala Lumpur. 01-33

Bil. Surat Kamai: T/SEL/PP/903 (34)

22hb. Januari, 1974.

A.R. REGISTERED.

Pengarus,
South East Asia Fire Bricks Industries Sdn. Bhd.,
314, Batu 2½ Jalan Ipoh,
Kuala Lumpur.

Tuan,

Mesyuarat Bersama atas perkara
"Condition and Terms of Employment".

Bengan hormatnya saya sangat dukacita kerana tuan telah gagal hadir di pejabat ini pada 22.11.1974 untuk suata mesyuarat bersama dengan pihak Kesatuan Pekerja-Pekerja Perkilangan Keluaran Galian Bukan Logam untuk membincangkan perkara dersebut diatas. Saya, walaubagaimana meminta tuan datang sekali lagi di Pejabat ini pada 31.1.1974 jam 10.00 pagi untuk tujuan yang sama.

2. Kerjasama tuan dalam perkara ini sangatlah diperlukan untuk menjamin perhubungan yang harmoni.

Saya yang menurut perintah,
sd:
(Puat Nelson binHj.Mohd.Sam)
b.p. Pengarah Hal Ehwal Perhubungan
Perusahaan (Selangor &
Pahang).

PNMS/zan

s.k. Setiausaha,
Kesatuan Pekerja-pekerja,
Perkilangan Keluaran
Galian Bukan Logam,
19 Jalan Barat,
Petaling Jaya.
Perbincangan diantara pihak tuan/saya pada 22.1.73 di pejabat ini berkenaan.

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continued

EXHIBIT

MARKED "UNION 1O"

RANJIT, THOMAS & KULA,
ADVOCATES & SOLICITORS,

Wing On Life Building,
Room 72, Seventh Floor,
Jalan Silang, Kuala Lumpur.

Surat Kamil K/6569/74

4th February, 1974.

.....
.....
.....

Dear Sir,

We act for South East Asia Fire Bricks Industries Sdn. Bhd. of No. 314, 2½ m.s. Jalan Ipoh, Kuala Lumpur.

We are instructed by our client to write to you as follows :-

1. That you have wilfully refused to carry out your duties as an employee of the company as from this morning by indulging in a sudden wild-cat strike;

2. That the said strike is unlawful and amounts to a breach of your contract of service with the Company;

3. That you have in addition thereto continued picketting the company's factory premises at the 9th milestone Rawang, Road Segambut but in the course of which picketting you have indulged in further unlawful activities by jointly together with the other strikers;

   (a) preventing or attempting to prevent other non-striking employment from working by means of threats and intimidation;

   (b) preventing or attempting to prevent vehicles from passing in and out of the Company's factory premises.

In the circumstances, therefore, we are instructed by our clients to give you notice, which we hereby do, without prejudice to the matters set out hereinabove, that if you fail to resume your duties immediately and in any event within 48 hours

calculated from the time when you should have commenced your work this morning your services would then be deemed to have terminated without further reference to you.

Yours faithfully,

c.c.
The Director General of
Industrial Relations.

The Regional Industrial Relations Officer,
Department of Industrial Relations,
Kuala Lumpur.

Messrs. South East Asia Fire Bricks Industries
Sendirian Berhad.

EXHIBIT

MARKED "UNION 11"

KEMENTERIAN BURUJ DAN TENAGA RAKYAT, MALAYSIA

Jalan Raja,
Kuala Lumpur.

Bil. Surat Kita (9) dlm KB & TR 14/1/67/1

12hb. February, 1974.

Yang DiPertua,
Mahkamah Perusahaan,
Bangunan Wing On Life,
No. , Jalan Silang,
Kuala Lumpur

Tuan,

Pertikalan antara S.E.A. Fire Bricks Industries Sdn. Bhd. Kuala Lumpur dng. Kesatuan Pekerja Pekerja Perkilangan Keluaran Galian Bukan Logam

Adalah saya diarah merujuk kapada perkara tersebut diatas dan memaklumkan bahawa walaupun beberapa perundingan telah diadakan untuk menyelesaikan pertikaian itu, namun tiada mencapai perdamanian. Olih itu Y.B. Menteri Buruh dan Tenaga Rakyat telah memutuskan supaya merujukkan pertikaian tersebut ke Mahkamah Perusahaan dibawah Seksyen 23(2) Akta Perhubungan Perusahaan 1967.

In the High Court

No. 1
Statement of Case and Exhibits thereto
21st March 1974
continued
EXHIBIT MARKED "UNION 11"
continued

Perkara perkara yang dipertikaian itu adalah mengenai soal gaji dan syarat syarat pekerjaan.

Sekian dimaklumkan.

Saya yang menurut perintah
sd:
(Fatimah bti. Mohd. Hashim)
b.p. Ketua Setiasaha,
Kementerian Buruh dan
Tenaga Rakyat/

s.k.
Setiasaha
Mahkamah Perusahaan,
Bangunan Wing On Life,
Kuala Lumpur.

Kesatuan pekerja-pekerja perkilangan
Keluaran Galan Bukan Logam,
No. 19, Jalan Barat B. Jaya.

Pengurus,
South East Asia Fire Bricks Sdn. Bhd.,
314, Batu 2½ Jalan Ipoh, K.L.

Ketua Pengarah,
Hal Ehwal Perhubungan Perusahaan.

In the High Court

No. 2
Statement of Reply
3rd April 1974

IN THE INDUSTRIAL COURT

IN THE MATTER OF INDUSTRIAL COURT CASE NO: 15 OF 1974

Between

South East Asia Fire Bricks Sendirian Berhad

And

Non-Metallic Mineral Products Manufacturing Employees Union.

STATEMENT OF REPLY

1. The Company disputes that the parties to the disputes are the Non-Metallic Mineral Products Manufacturing Employees Union (hereinafter referred to as "the Union") and the Company.

The Company contends instead that the parties are the ex-employees of the Company on the one hand and the Company on the other.

2. Answering paragraphs 2 to 16 of the Statement of Case the Company states that at no time was a lock-out declared. Instead what transpired is as set out below :

(a) On or about the 15th day of January, 1974 the Company had put up a notice on its Board regarding the transfer of about 8 or so employees who were then working in the tunnel kiln section effective 1st February, 1974.

The Transfer was necessitated by reason of the fact that these 8 or so employees had refused to comply with the company's requirements to work on a rotation basis which would have enabled the company to keep the tunnel kiln section functioning effectively at maximum efficiency.

The refusal of the 8 or so employees to so comply severely reduced their usefulness in the tunnel kiln section which is why the company had to transfer them as per the said notice. In spite of the notice these 8 or so workers refused to go on transfer as instructed.

(b) Subsequently on the morning of the 4th February, 1974 a group of the Company's employees including the said 8 or so workers unlawfully and without prior warning suddenly went on strike.

They failed to commence their duties as required by their contract of service that morning.

(c) Instead they gathered along the approach road to the factory and while so gathered committed various unlawful acts by way of intimidating and threatening other workers who were desirous of proceeding to work.

(d) They also obstructed access to and egress from the factory to vehicles.

(e) In addition the striking employees hurled abuse and insult at passers-by to and from the factory.

In the High Court

No. 2
Statement of
Reply
3rd April 1974
continued

(f) Subsequently on the same morning the Company instructed its Solicitors to issue notices to the striking employees to the effect that what they were doing was unlawful and that however, without prejudice to their unlawful activities if they fail to resume their duties immediately and in any event within 48 hours from the time when they should have commenced work that morning their services would then be deemed to have been terminated.

(Copy of the said notice is attached to the Union's Statement of Case as Exhibit "Union 10").

(g) Subsequently the following day 5th February, 1974 the Company caused to be issued through its Solicitors a further notice warning the striking employees that they should return to work within the 48 hours period.

(A copy of the said notice is attached hereto and marked "A").

(h) Both these notices i.e. of 4th February, 1974 and 5th February, 1974 were not merely ignored by the striking employees but compliance therewith was wilfully refused.

(i) At the expiry of the 48 hour period the striking employees failed to resume work as they ought to have done.

(j) The Company had to immediately make arrangements for alternative labour to take the place of the striking employees who had wilfully terminated their contract of service in spite of the 2 warning notices of 4th February, 1974 and 5th February, 1974 referred to above.

This the Company has done and from about the 10th February, 1974 all vacancies created by the termination of their services by the striking employees have been filled.

(k) It would become apparent from the foregoing that the strike was motivated not by the

Company's failure to accord recognition and to commence negotiations with the Union but by the Company's transfer of the 8 or so employees as aforesaid.

In the event assuming that the company had without any justification wilfully refused to accord recognition and commence negotiations on the amount to justification in law for the said strike. The provisions of the Industrial Relations Act are such as to enable an aggrieved party to seek recourse through legal means for its grievance, if any, by way of reference to the Court.

Taking the averments in paragraphs 4 to 12 of the Statement of Case at their face value and assuming same to be correct, which is not the case, the matters disclosed therein by themselves would not amount to justification in law for the strike. The Union had reported the matter to Honourable Minister of Labour and Manpower as provided for by law and it would only be a matter of time before the dispute, if any, was referred to the Industrial Court. Therefore in going on strike as they did the employee were acting prematurely and ultra vires the Industrial Relations act. They were in other words taking the law into their own hands in spite of being fully aware that their grievances, if any, can and would be adjudicated upon in a proper lawful manner by reference to the Court.

(1) Again referring to paragraphs 4 to 12 of the Statement of Case the Company states that it has refused to accord the Union recognition because it has contended from the outset that the Union did not represent a majority of its employees and accordingly therefore has not been agreeable to negotiate with the Union on the issue of wages, terms and conditions of service. In any event the Company has pioneer status under the Investments Incentives Act and in the circumstances therefore Section 13A of the Industrial Relations Act, 1967 applies. The Union's claims are contrary to Section 13A ibid.

3. The said strike of 4th February, 1974 was illegal

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Statement of
Reply
3rd April 1974
continued

by reason of the contravention of Section 13A, 36, 37, 38, 40, 41 and 42 of the Industrial Relations Act, 1967 and the provisions of the Trade Unions Ordinance, 1959.

4. The Company without prejudice to the foregoing contends that the reference to this Honourable Court is wrong and accordingly its jurisdiction affected by reason that :

(a) The Union ought not to be a party;

(b) If as is claimed in paragraph 17 of the Statement of Case the employees were dismissed then the appropriate remedy under the Act has not been pursued and accordingly therefore the Court has not been seized with jurisdiction to hear and determine the dispute;

(c) In any event the striking employees had of their own accord terminated their contracts of service with the Company so that as at the time of complaint, if any, by the Union to the Minister of Labour and Manpower, they were not the Company's employees and accordingly therefore both the complaint and the reference to this Court based thereupon become invalid.

5. The said strike has caused severe loss, damage and expense to the Company.

6. The Company further and in the alternative states without prejudice to the foregoing that the nature of the strike was such as to cause not merely a severe financial loss to the company but such loss of confidence good faith, and trust as is to be expected between employer and employee as to make it impossible for the company, apart from other considerations, to have the same employees working in the establishment of the company and to this extent section 27(4) of The Industrial Relations Act, 1967 is material. It would be impossible in the context of what has transpired for industrial peace and harmony to prevail in the company if these same employees were to work in the company.

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No. 2
Statement of Reply
3rd April 1974
continued

Wherefore the company prays that this claim be dismissed.

Dated this 3rd day of April, 1974.

Solicitors for South East Asia
Fire Bricks Sendirian Berhad

This Statement of Reply is filed on behalf of South East Asia Fire Bricks Sendirian Berhad by its Solicitors, Messrs: Ranjit, Thomas & Kula of 7th Floor, Wing On Life Building Jalan Silang, Kuala Lumpur.

"A"

NOTICE TO STRIKING EMPLOYEES

The Company attempted to serve letters on the striking employees through a member of the staff of the Company's Solicitors in the course of yesterday afternoon at about 4.45 p.m.

The striking employees refused to accept the said letters. These letters are presently with the Management of the Company. A sample of the letter is exhibited together with this Notice for the general information of the striking employees. Although the striking employees have refused to accept the said letters the Company is prepared without prejudice to the said refusal to hand over the respective letters to each of the striking employees on request.

Dated this 5th day of February, 1974.

The Management,
South East Asia Fire
Bricks Industries Sdn. Bhd.

In the High Court

No. 3
Award
No. 39/74
(Case No. 15 of 1974)
8th August 1974

No. 3

AWARD No. 39/74 (Case No. 15 of 1974)

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 15 OF 1974

Between

South East Asia Fire Bricks Sendirian Berhad
(hereinafter mentioned as the "Company" or 'Co.')

And

In the High Court

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Award
No. 39/74
(Case No. 15 of 1974)
8th August 1974
continued

Non-Metallic Mineral Products Manufacturing Employees Union
(hereinafter mentioned as 'Union' or 'U') 1st Party

And

1. Tan Len Keow	)	
2. Yap Chu Yook	)	
3. Loo Yok Ho	)	
4. Yap Ah Kiat	)	
5. Yap Choon Hoo	)	
6. Teh Yoke Toh	)	represented by the Union
7. Tan Yew	)	
8. Anuar bin Adbul	)	
9. Choong Ah Loo	)	
10. Lee Kim Yan	)	
11. Siti Zaibidah bte. Maon	)	2nd Party

(The original title was amended as above by a Ruling of the Court dated 9th April, 1974, Appendix 'A'.)

AWARD NO: 39/74

Before: Encik K. Somasundram - Chairman.
Y.B. Encik Tan Seng Toon - Independant Panel Member.
Encik Mohd. bin Zain - Employers Panel Member.
Encik Abdul Aziz b. Ismail - Workers Panel Member.

Venue: Industrial Court, Kuala Lumpur.

Dates of Hearing:

4th, 9th, 10th & 29th April; 22nd, 23rd & 24th May: 17th, 18th & 19th June; 1st, 2nd, 3rd, 4th, 5th and 6th July, 1974.

As noted above, the hearing took 16 full days including the last day, a Saturday till 6.30 p.m., spreading over 3 months because of unavoidable adjournments granted to suit all parties concerned. The 3 Members were present throughout, except 29th April Encik Abdul Aziz bin Ismail was absent unavoidably away abroad and on the last day of submissions by Counsel for each side, prolonged as

they were, took 2 whole days.

Representation at Hearing:

Encik S. Kulasegaran, Counsel for the Company.

Encik D.P. Xavier, Counsel for the Union as 1st Party and on behalf of the Union for the 11 workers as 2nd Party.

Reference:

The dispute referred to the Court on 6th March, 1974 by the Minister under Section 23(2) is whether or not there was a lock-out on the part of the Company against its employees.

The issues are mainly:

I. Whether or not the strike of the 73 employees, as shown in Lists I & II attached to the Statement of Case, preceding the alleged lock-out was illegal because:

(a) It is a wild-cat strike. The notice given to the management is not in proper form and so not valid, contravening Section 40 of the Industrial Relations Act, 1967 (or I.R. Act hereinafter mentioned).

(b) It further contravenes Sections 13A, 36, 37, 38, 41 and 42 of the I.R. Act and certain provisions of the Trade Union Ordinance, 1959 (or T.U. Ord. hereinafter mentioned).

II. (a) Whether or not by going on strike from 4th to 15th Feb. 1974, the 73 employees were deemed to have terminated their contracts of employment by absence from work for more than 2 days, contravening Sections 13(2) and 15(2) of the Employment Ordinance, 1955 (or Emp. Ord. hereinafter mentioned).

(b) Is there a right as such for an employee to go on strike in breach of contract when nowhere is it provided in law for a 'legal' strike; if there is, is it justified to resort to strike causing much loss, disruption and dislocation, when adjudication to this Court was available upon reference of the dispute by the Minister.

(The issues raised at the outset of the

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hearing on 4th April 1974 over the validity of the Minister's reference affecting the Court's jurisdiction and over the right for a worker to go on strike giving him a 'reasonable excuse' for absence from work for more than 2 days and the question about the relationship of master and servant in a trade dispute are briefly dealt with in the said Ruling, Appendix 'A'.)

The facts and findings:

I. (a) Do the facts show a wild-cat or lightning strike? The Company's Manager Tan Kim Seng (Tan for short, Co.W1) knows that "by wild-cat strike is meant that the Company was not informed" and says that he was not informed of the particular date of the strike. The Union had informed the Company that the workers would stop work after 14th January, 1974, as shown in their letter of 31st December, 1973 (U.7) addressed to the management. Tan admits that he received the Union's letter giving notice of 'industrial action' to include 'complete cessation of work'. (U.7 attached to the Statement of Case) and that he brought it to the attention of the Board of Directors and that the Board said nothing. In the Court's view of contents of the notice letter, 'complete cessation of work' or going on strike or not depended on the management's failure or not to reply officially the said notice-letter so that no date for the strike could possibly be fixed.

The Court notes from the said letter that the Union had lost its hope and patience by the management silence to all its letters 'for well over a year', even its ignoring the Minister's letter ordering recognition of the Union. Section 8(5) of the I.R. Act means that, once the Minister decides on recognition to be accorded to a Union, the decision is 'final and binding' on the employer. The Court finds that the Minister gave such a decision binding on the Company by the letter dated 21st February, 1973 (U.2 attached to Statement of Case) to be effective from 9th September 1972, after satisfying himself on the check made by the T.U. Registrar on 5th September, 1972 that the majority of its workmen as members of the Union was 55%. Whether this majority was slim and whether Tan was present at the check do not matter to the Court.

The Court cannot accept, as did the Minister in regard to the Company's letter dated 2nd November, 1972 (Co.12), that there was not a majority of the Company's workmen as members of the Union at that material time. The Court cannot also accept that many of them were on "trial basis" or probation without proof of contractual terms. Besides, the Union Rule Book (U.17) does not exclude probationers from being members, though Veerasamy (U.W.1) and Basir (U.W.2)may differ on this point. It appears to the Court incredibly strange that Tan, in writing to the Ministry on 25th November, 1972 should attach a list of workmen (Co.6A & 6B) giving their names, nature of occupation, i/c. number and date of commencement of work but no mention at all of any workman on probation. It was pointless for Tan to put in at the hearing the list of workmen (both in ink and type, Co.6C & 6D) showing most of the workmen on 25th November 1972 as probationers. The Court views the list (Co.6B) supplied at the material time in November 1972 to the Industrial Relations Office of the Ministry as the best evidence showing the total number then working in the Company to find therein no workman shown as probationer.

The Company's Counsel submits that the Company comes under the 2nd category of the schedule to the I.R. Act as :-

> "any section of a Government or industrial establishment, on the working of which the safety of the establishment or the workman employed therein depends".

and that therefore the said letter giving notice of strike (U.7) is not in conformity with the prescribed formed and procedure under Industrial Relations (Notice of Strikes and Lock-outs) Regulations 1967, P.U.370 and so not proper and valid. Besides, he submits that this informal notice-letter was written before the Union obtained the majority of the votes of the workmen in favour of the strike, so that the majority votes obtained by the Union at the meeting of the workmen in Batu Caves Community Hall on 3rd February, 1974 is an act of 'fait accompli'.

The Union's Counsel submits that the tunnel kiln, described by Tan as costing a million dollars, was one of several sections and so not a vital section on the working of which the safety of the establishment or the workman depends, so that the Company is not a

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public utility service. He agrees that it may be a costly structure, being built sensitive to high and low temperature. The facts show that the temperature is controlled by 2 trained firemen rotating in 3 shifts a day working under the Company's kiln supervisor to ensure that the correct temperature-readings are maintained and recorded by the firemen. He submits further that, by the nature of its business to produce fire-bricks, the Company has not shown itself a public utility service to be of the same kind (ejusdem generis) as the other categories under the schedule to the I.R. Act. The Court considers this further submission as untenable because, in construing the Legislature's intention, the 2nd category mentioned above is not as absurd as it appears for inclusion among the other categories under the said schedule. The Court has to be guided by the facts before it comes to a safe conclusion.

Tan regards the tunnel-kiln section as the biggest single item "which is the heart of the factory". He admits that there are 3 other "main" sections, the production, the grinding and the down-draught section, all requiring supervisors to see to the different stages of producing fire-bricks, the whole process being "a sophisticated and complicated one". The Company's metallurgist Answell (Co.W.2) gave his technical opinion that the sensitivity of the machinery is due to 3 factors - temperature, rate of speed of material passing through the kiln, and the load of the material. He said in examination-in-chief; "there must therefore be continuous supervision for the 3 factors to remain efficiently operated". If not, there can be serious consequences saying:

> "If the tunnel-kiln is unattended, there can be the possibility of a fire, and the material in the kiln can melt and seriously damage the kiln. The fire can light the fuel-tank and through the lines can spread to the whole premises."

In cross-examination he said:

"There were no complaints about the performance of work till 4th February ..... There was no damage caused to the kiln after the firemen went on strike."

This last statement leads the Court to believe that 2

firemen, Muniandy and Abu Bakar, reduced and controlled the temperature before they left on strike, as told to a supervisor named Kong Nam Fat. On 4th February, when Answell went to office, he said:

> "I was informed half the workers had gone on strike, including the firemen. The kiln was naturally left unattended, which I saw was serious. Fortunately we had a furnace operator from Singapore, just engaged having had previous.(Sic) He was employed 2 days before as a trainee fireman. He was given the duties of inspection of the kiln on the 4th. He alone stayed at the job for more than 36 hours."

The expert Eccles, a Polytechnic graduate (Co.W.16), gave his opinion out of his limited experience, gained from producing not firebricks but ceramic-tiles, that there was the need for constant checking of the barometer, saying "all tunnel-kilns should be under careful supervision". He qualified this opinion by stating that, "in spite of proper maintenance and supervision", there was the instance of his own Ceramics Company in Petaling Jaya suffering a collapse of the tiles in the kiln, causing the kiln to be closed down and be completely cleaned up. According to him, a similar instance happened 2 years ago in 'Modern Clay Products' in Sepang, where the fire was caused by oil-leaks which was detected in time by a fireman in attendance. These instances to the Court's mind are therefore nothing unusual as can happen in factories having a boiler-section for motive-power or a furnace-section as vital for melting metal or baking pottery. Next day about his visits to the Company's factory, Eccles said, in cross-examination, he made 3 visits.

> "The first time I visited out of curiosity last year. The second visit was recently for purchasing SK 35 bricks. The last visit was on the Company's urgent request to look inside the wrecking side of the tunnel-kiln quite recently almost 5 weeks ago (i.e. end of May 1974).....
> I was not asked to estimate any damage as a result of the strike".

In cross-examination, the said Tan (Co.W.2) admitted:

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"there was no physical damage caused to the factory or property by the strike."

The reason, the Court finds, is that the tunnel-kiln section was under the constant check on the firemen's temperature-readings by the kiln and insulation supervisors, who are seen in the list (Co.6B) to be part of the managerial staff of the Company - not the mixing and grinding supervisor, Kulanthai. It is to be noted therein that the supervisors, by the nature of their duties and responsibilities, can belong either to the managerial or the workman-category. The said expert Eccles admitted that "it is the management's responsibility to minimise risks, let alone the fireman's". The Court agrees with this view that, as regards a safe system of work, the management is more responsible than the workman. Where a system or mode of operation is said to be 'complicated and dangerous' involving a number of men at different types of work as in this case, the liability for the system to become unsafe, even though caused by a workman's neglect of duty, lies vicariously upon the management.

Nothing was before the court as to whether or not the provisions of the Factories & Machinery Act 1967 was applicable to the Company's factory and 'machinery' and, if applicable, whether the safety precautions taken under Part II thereof can fail to prevent a 'dangerous occurrence', as defined therein, to arise from the working of any particular section that is likely to endanger the whole establishment. The Court sees on the facts that there was nothing unusual shown about the tunnel-kiln section or any other section on the working of which the safety of the establishment or the workman employed therein depends. The Court holds therefore that the Company is not a public utility service and that the Union's letter giving notice (U.7) is quite regular and valid in relation to a non-public utility service, thus not contravening Section 40 of the I.R. Act.

On the point of 'fait accompli', the Court sees that the notice-letter (U.7) discloses no decision of the Union to call out the workmen on strike except expresses the hope that the Company will reply officially its willingness to 'commence negotiations'. According to the Union's rules (U.7), the consent of the majority of 2/3 of the workmen as members affected

has to be obtained by secret ballot under at least 2 scrutineers before resorting to strike. This was done, as seen in the Form 'U' sent enclosed with a letter to the Registrar of Trade Union (Ct. 2A & 2B), at the meeting on 3rd February, 1974 when the workmen unanimously gave their consent to go on strike, as a result of the Company's refusal to commence collective bargaining. The resolution to take industrial action which did include 'complete cessation of work' (as seen in Ct. 3) was sanctioned subsequently by the Union's Executive Council as shown in the minutes of the Emergency Meeting held on the same day (Ct.1). It is to be noted that the number voting was 62, not 65, an error that is admitted. The Court finds, on the facts as presented, no act of 'fait accompli' in the observance of Union procedure on the 3rd February meeting.

I. (b) It is admitted that the Company enjoys pioneer status having been granted pioneer certificate under Section 5 of the Investment Incentives Act, 1968. It is admitted by Veerasamy (U.W.1) that certain proposals for collective agreement were in excess of that allowed under Part XII of the Emp. Ord. as stated in Section 13A of the I.R. Act. This Section 13A, has a proviso for the Minister to amend or modify the proposals before approval and so the Court finds that there was nothing illegal or even irregular in making excessive proposals, thereby not contravening Section 13A. Because of this proviso the Court can see no relevance about the contravention or not of Section 13A, unless Section 41(d) is contemplated to show the strike as illegal. But this Section 41(d), the Court finds, is not applicable because no collective agreement was taken cognizance of by the Court. The Court saw no point in Company's Counsel's application for requiring the said Veerasamy (U.W.1) to produce a copy of the draft agreement while the Company itself had in its own possession the original draft sent to it by the Union.

As for Sections 36, 37 and 38, these are punitive sections applicable to individuals who contravene them. The Court is inclined to agree that there were incidents as related by witnesses on both sides during the period of strike when tempers get heated, as is bound to happen when the parties have forlorn hopes in each other. The common ground is that there were police-men during the period of strike at the picketing site by the main-road at the junction of the road-way towards the Company's factory uphill with its gate about 100 yards away. In addition there were security guards

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engaged by the Company soon after the strike on 4th February, 1974. The Court sees no police investigation having resulted from any of the reports made of the incidents. The undisputed fact is that no incident was serious enough to warrant arrest of any individual to be subsequently charged. There was admittedly no damage to the Company's factory or property by the strike. The Court therefore finds that the facts do not show a contravention of sections 36, 37 and 38 of the I.R. Act.

As for Section 41, Company's Counsel relies for its contravention on (e) thereof i.e. 'in respect of any of the matters covered under sub-section (3) of Section 12', under which (b) concerning the matter of transfer is relied upon as being relevant to the Company's case. It is Company's Counsel's contention that the strike was illegal because of the workmen's refusal to go on transfer as notified by the management. Let us examine all the relevant evidence relating to this matter of transfer.

Veerasamy (U.W.1) the Union's executive Secretary said in cross-examination,

> "The workers keep me informed of their grievances. No one reported to me on the transfer from one section to another around the 15th January, 1974. I did not come to know of such transfers subsequently. I did not hear of any .....
> .....
> I do not know of their having had notice of transfer dated 15th January effective from 1st February nor of their refusal".

Nadesan (U.W.3), the Secretary of the Works Committee and a senior fireman of the Company said in examination-in-chief:-

> 'In January 1974 I do not know of any transfers in my section. I was not told to go on transfer in the month of January. I had no knowledge of any complaint from others of transfer from my section. If they have any grievances, they will come to report to me as Secretary. I deny that the 8 or so workers were asked to go on transfer from my section in January 1974. I was not told to go on

transfer any time prior to 4th February 1974 or at any time."

On the other hand, the Company manager, Tan (Co.W.1) said of the notice of transfer (Co.2) in examination-in-chief:-

'This notice of transfer (Co.2) of 15th January 1974 is signed by me. I am in charge of the administration of the Company .....
.....
According to this notice, these 11 workers were to be transferred from 1st February 1974. This notice was put on the notice-board and the supervisor Lim Hoh Pow was instructed to inform the workers about the transfer on the same day ..... I believe the supervisor did inform because he told me so."

Later in cross-examination, he said :-

"The Statement in Reply (dated 3rd April 1974) was prepared by my Solicitor on my instructions. In para. 2(a) therein the number of employees transferred should be 11 not '8 or so'. I had the notice (Co.2) in my possession at the time of giving instructions to Counsel. I cannot remember giving it to Counsel, and told Counsel '8 or so' though I had the notice with me. I gave the figure as a guide. I deny that this notice was prepared for the purpose of this case. It is not a lie. I decided on transfer on the recommendation of the supervisor, Lim Hoh Pow. He made this recommendation one or two weeks before 15th January 1974. We do not maintain record of transfer except this notice. The workers did not like to work on a roster system. The other reason is that the workers refuse to work on festival days. This notice of transfer was in the English Language. On the same day of 15th February the supervisor told the workers orally. No letter was given to them. Normally we give 2 weeks' notice for transfer. I do not know whether the workers agreed. The supervisor did not tell me anything. On February 1st morning I knew the workers were not going on transfer. The Company took no action, though the refusal to obey lawful orders is gross insubordination...
.....
I gave the supervisor Lim to put the notice on the

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board. I might have forgotten to inform the wages-clerk Chen. (Chen Chin Poh)."

Chen said in examination-in-chief:

"I recognise the list of 11 workers on transfer. I put it on the notice-board, notifying the 11 to go on transfer from 1st February. I put it up on 15th January 1974, the date of the notice. These workers always take leave on festival days .....
.....
These 11 were to go on contract-system and, if, they refuse, they will be transferred to other sections. Lim Hoh Pow is the supervisor with whom I discussed the transfer matter 2 or 3 times, the first time in December last year, the second and third occasions were in the earlier and latter part of January 1974."

In cross-examination he said :-

"The manager Tan Kim Seng (Co.W.1) decided the contract-system. I do not know when he decided. It was sometime in December. I knew after discussion with the staff. I was given to put the notice of transfer on 15th January 1974.....
.....
I was instructed by Tan Kim San (not a witness) the Director of the Company and factory manager to go and discuss with the supervisor Lim on the 1st occasion. The Manager Tan (Co.W.1) told me that, if the workers do not accept the contract-system, they will be transferred".

After the 3 meetings with the supervisor Lim (Co.W.6), Chen found out about the progress of the talks with the workers that "there was no result". Chen said later in cross-examination:

"To my knowledge there were other instances of transfers. The workers are personally informed, not in this manner of a notice of transfer."

The supervisor Lim (Co.W.6) had this to say on transfer, in examination-in-chief:

"I know of transfers of men from my action. Some of these men took leave for Chinese festivals. So the Company decided to turn them

into a contract-system.....
.....
On 15th January 1974, I was informed of a notice put up concerning these workers. If they did not accept the contract-system, they would be transferred from 1st February 1974 to another section. If they wanted the contract-system, they ought to report to the office with their names; those not wanting will be transferred to another section."

In cross-examination Lim said:

"I am in charge of these 11 workers. Tan Kim San, a Director, and Tan King Seng, the manager decided about either the contract-system or the transfer."

As regards the evidence on punch cards (Co.4) which has a bearing on the matter of transfer, the Manager Tan said in cross-examination that they were prepared "before the beginning of the month. Every 15 days there will be change of cards". It is agreed that there is a significant number for each section, the tunnel-section being 'No.1'. Mrs. Tan or Yap (Co.W3), the wife of Tan (Co.W.1), was the supervisor of the tunnel-kiln section from October 1973, working in the same office as the wages-clerk Chen (Co. W.4) from whom she said she learnt of the transfer in December 1973, besides seeing the notice on the notice-board. It was surprising for the Court to hear her say that the matter of transfer of "about 11 from the tunnel-kiln" had "no relation" to her work as supervisor. It was also surprising to hear that she was even not familiar with the punch-cards.

According to Chen (Co.W4) he did not remember when he prepared the cards until he recollected in cross-examination to say:

"I prepared the cards before 15th January 1974. There was another set of cards prepared from 16th to 31st January. I prepared 2 sets, one for the latter part of January and one for the first part of February till 15th. Now I remember I prepared the February cards about 15th January 1974. The Company had then not decided to transfer them or not".

It is to be noted that the manager Tan produced only 6 punch-cards (Co.4A to F) and Chen produced the other 5

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on request by the Court, all stamped with No. 1 denoting the tunnel-kiln section, from 1st to 15th February 1974.

Examining the above mass of relevant evidence, several contradictions and uncertainties appeared quite material to the Court's mind as follows :-

(1) The Court can see no reason why the manager Tan who decided the transfer on 15th January, 1974 should have failed to instruct his Counsel the exact number of 11 workmen involved, not '8 or so' as stated in the Statement in Reply; and again failed to mention the matter of transfer as the cause of the strike in Counsel's letter of 4th February 1974 (U.10 attached to the Statement of Case),

(2) The Court cannot understand why the manager Tan made no mention of the contract-system in the notice of transfer itself (Co.2) and above all why was there no word on the contract-system in the Statement in Reply or in his evidence during examination-in-chief. Even when he spoke of the 17 contractors who were supposed to have signed contracts (Co.9(A) to (Q)) in early January and February, 1974 with the Company, yet he himself did not remember nor was he questioned in Court about the contract-system offered to the 11 workmen as an alternative to transfer.

(3) The excuse for the transfer for the 11 workmen (3 of whom said to be Indians and 1 Malay, the rest Chinese) on festival days is a fact admitted to be not unusual of workmen in other sections. The excuse that they did not like to work on roster is strange because the 11 workmen had not worked on roster at all, their time of work being between 8.00 a.m. and 5.00 p.m. and after 5.00 p.m. the firemen do the job for the 11 workmen.

(4) No satisfactory reason was given for the change of procedure from the former practice of informing the workers personally about the transfer into the present instance

of posting a notice of transfer on the notice board. It is not sure that Lim recommended the transfer, as he mentions nothing of it in his evidence.

(5) There was no purpose in putting the notice in the English language without ensuring that the workmen understood it, let alone the wages-clerk Chen (Co.W.4) and supervisor Lim (Co.W.6) It is not certain which one of them put the notice up on the notice board on 15th January 1974; and there was no necessity for it, as personal discussion with the 11 workmen by Lim and already commenced before. (sic)

(6) It is also not certain as to whether the Company manager Tan (Co.W.2) or his brother Tan Kim San (not a witness) as factory manager wanted either the contract-system or the transfer of the 11 workmen. Whoever wanted it did not matter so much as why one of them did not matter so much(sic) as why one of them did not talk direct to the workmen on their rounds instead of desiring Chen and Lim to discuss with them.

(7) It was very strange for the 11 punch-cards to be prepared for the period from 1st to 15th February stamped No. 1, because the 11 workmen were expected by the manager Tan and Chen to be either on contract-system or on transfer out of the tunnel-kiln section No. 1 from 1st February onwards.

By these above unexplained contradictions and uncertainties, the whole of the question of transfer and contract-system was put in much doubt for a reasonable man to believe. Tan admits not taking disciplinary action on the workmen for their refusal, as he said "to work in the down-draught section" (which was stamped with another Number), except not to pay them wages for 2nd February 1974 for their "walking out and abandoning their employment". The fact is, as admitted by Chen and manager Tan on seeing the 6 punch cards (Co.4A to F), that the workmen came to work on 2nd February 1974 (1st February being a holiday) and their time clocked as 7.47 morning under column "IN" of the punch-cards, stamped No. 1 for the tunnel-kiln section. From this admitted fact in the context of other facts and circumstances the Court unanimously concludes that the workmen came to work on 2nd February 1974 simply because they were never aware of the transfer or the contract-system. The

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Court regrettably agrees with the view of the Union's Counsel that the matter of transfer was purely an "after-thought" and the contract-system was adduced "to plug the holes in the leakages" of the Company's case. The Court can therefore find no contravention on the part of the workmen of S41(e) read with S.12 (3)(b) of the I.R. Act. It must be remembered that S.12(3)(b) does not avail an employer who uses his right of transfer within the organisation to mean and change of a monthly paid worker into a contractor, a change that can be destrimental to the workman in his terms of employment.

II. (a) The Company's Counsel contends strongly that the 73 workers by going to strike, which admittedly took place from 4th to 15th February 1974, were absent from work for more than 2 days and thereby were deemed to have terminated their contracts of employment - referring to Wong Fook v. Wong Yin and 3 others 14 MLJ. 1968 @ p.41. In Wong Mook's case, 4 rubber tappers along with other went on strike on 12th July, 1947 in protest against a cut made in their wages. They ignored the employer's order to return to work and did not report back for work until 3 days later. In the meantime the employer had engaged other "labourers" and therefore refused to take them back. They appealed to the Labour Commissioner and the Commissioner decided that the strike was legal and so 'a reasonable excuse" for the labourers to be absent for more than one day, thereby not contravening S.53(iv)(a) of the then Labour Code (Cap.154 FMS Laws Vol.III) which reads :-

> "An Agreement shall be deemed to be broken by the labourer if he is continuously absent from work for more than one day ..... without leave from the employer or without reasonable excuse."

C.J. Willan in going against the Commissioner's decision held that the striking 'labourers' had contravened for 3 days for the purposes of strike provided no 'reasonable excuse'.

A subsequent application was made for leave to appeal to the Court of Appeal (p.164 of 14 M.L.J. 1948) but the leave was not granted, not on the ground that to go on strike amounts to a breach of contract but on the ground that the point raised

of the employer committing a prior breach in altering the contract by a cut made in the wages was not sufficiently covered nor proved before the High Court, which merely noted that point of its own. The decision of C.J. Willan therefore stands not upset to this day. The Gleneagle's Hotel case in Singapore (1956 M.L.J. p.37) and the local case of Nadchatiram Realties (1960) Ltd. v. Raman & others (1965 2 M.L.J. p.263), referred to by Company's Counsel, were decided entirely in different context from Wong Fook's case. In Gleneagle's case, there was evidence that those of the local hotel staff who went on strike had given 48 hours' notice; but the strike suddenly took place before the expiration of the period and therefore without sufficient information was held to have determined the contract of employment. In Nadchatiram's case, the evidence is that the "labourers" went on strike for the sole reason that another was not given work, which was held to render the strike illegal in breach of contract - even now so by virtue of S.41(e) read with S.12(3)(e) of the I.R. Act.

As observed in the said Ruling (Appendix 'A') for the Industrial Court as a Court of good conscience to follow the said C.J. Willan's decision 25 years ago is 'out of date' i.e. to put back the clock and go out of time in the march of progress in the context of the present labour laws of this country which mean to give the workman or labourer of today an opportunity to live in social security and decency. The T.O. Ord. of 1959 (substituted for T.U. Enactment of 1940 by the Reprint Commissioner) provides in the definition of a 'Trade Union' as having among its objects:

> "the promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out".

a provision similar to the definition as in 1940. The Company's Counsel referred to S.7 of the Emp. Ord. of 1955, which provides that no condition of any contract of service shall be contrary to the provisions therein and "any such condition shall be void and of no effect". This section is followed by a new section 7A (in Act A91/71) which reads:

> "Nothing in section 7 shall render invalid any term or condition of service under which a labourer is employed or any term or condition of service

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stipulated in any collective agreement or in any award of the Industrial Court which is more favourable than the provisions of this Ordinance other than sections 60G and 60H".

The next Section 8 provides:

"Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract -

(a) to join a registered trade union; or

(b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

(c) to associate with any other persons for the purpose of organising a trade union in accordance with the provisions of the Trade Unions Ordinance, 1959".

a provision that is more strongly stated in S.4(1) of the I.R. Act, 1967 (as amended by P.U.(A) 407/69 and shown in schedule to I.R. (amendment) Act A 92/71):

"No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join trade union and to participate in its lawful activities".

both these provisions very significantly absent 25 years ago in the Labour Code and in the Industrial Court Enactment No. 12 of 1940, and even in the Trade Dispute Ordinance No. 4/49. Had these provisions existed 25 years ago, C.J. Willan might have come to a different conclusion, as he was guided clearly by the provisions of the Labour Code in the light of Sections 20 and 54 (2) of the T.U. Enactment No. 11/40, which are similar to the present Sections 21 and 66(b) of the T.U. Ord. 1959.

To participate in a strike as a recognised trade union activity, over which right 'no person shall interfere', the court finds, is no neglect of duty on the part of the workmen to cause wilful breach of their contracts of employment. It must be observed that S.15(2) has been amended (under P.U. (A) 409/69) by inclusion of a new limb (b) to mean that no absent workman is deemed to have broken his

contract of employment so long as he had informed or attempted to inform his employer of the reasonable excuse for his absence. There is no doubt here that the Company was informed of the excuse to be strike by the (sic) Union's letter dated 31st December 1973 (U.7). So long as the strike here is lawful in the sense of complying with the local statutory provisions the workmen's participation in it is 'reasonable excuse' and so the contracts of employment are not deemed to have been terminated. Therefore, the Court finds that Sections 13 and 15(2) have not been contravened.

II. (b) About the right to strike, what is important for the Court to consider is in the context of the labour laws prevailing in this country and not in India or in England or elsewhere, though the cases cited by both Counsel may be of persuasive authority. The right to strike is recognised, though not expressly, in the provisions of our laws above-quoted; and for a workman to participate in it, either acting organised under a registered union or acting in good faith combined with others in the course of forming a union, to redress a justifiable grievance is not illegal. In the Company's Counsel's submission, nowhere in the law is provided what a 'legal' strike is, except by S.42 of the I.R. Act where a strike is deemed 'illegal' if:

> "It is declared or commenced or continued in contravention of any provision of section 40 of section 41 or of any provision of any other written law."

This is apparently so; but, where the Court has found as here that Sections 40 & 41 have not been contravened so far as the workmen were concerned, the strike is 'legal' in the sense that the workmen have so acted as to be immune from penalty under S.43(1) of the I.R. Act. In the Union's Counsel's submission, the right to strike, like giving a strike-notice, is something implied in the terms of contract. During the hearing, no proof of a written contract of employment was produced to know whether there was a no-strike clause therein to abrogate the right to strike. As long as the relationship in this case between the Company and the workmen is verbal based on implied terms, the Court is persuaded to agree with Lord Denning's view in Morgan v. Fry (1968 3 A.E.R. p.452) that the right to strike or giving a strike-notice is an implication read into the contract by the modern law as to trade disputes. The Union's Counsel's contention in that this right was exercised only as a last resort. It

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was not easy for the Union on behalf of the workmen to take such a step without realising well the consequences in damage, sometime irreparable, caused to both parties by loss in earnings, disruption in productivity and dislocated in the set-up. What is of most concern to the Court is the loss in man-days that can contribute to collapse in the national economy.

As regards the loss to the Company in this case, the Court was left to conjecture from an overall assessment of the lot of evidence leading to the Statement of Accounts (Co.11) as based on the Company's production and sales reports. No witness called by the Company was impressive enough to enlighten the Court on the exact financial loss in February 1974 because of the strike. The manager Tan himself said in cross-examination:-

> 'The loss of about $130,000 in 1973 is not due to the strike. There is loss due to the strike loss by low production, loss of sales and loss due to damage to bricks in kiln. Our own accountant Lai (Lai Tai Ken, Co.5) will give the figures.'

Tan's wife or Yap (Co.W.3) had this to say in answer to the Court's examination of two relevant documents exhibited (Co.16A to E relating to temperature-control from 4th to 8th February 1974 and Co.17 relating to fuel-consumption from 30th January to 5th February, 1974).

> 'I have not found the originals of these (Co.16). I cannot trace back the meter-readings for 4th and 5th February 1974. I cannot get the original of this (Co.17).'

The Court was then left to see the copies without being able to judge the real situation as to temperature-control and fuel consumption. To the surprise of Company's Counsel, the production reports in the files (C24 A-K) produced by the Company's accountant Lai (Co.W.5) were discovered in cross-examination to be an account relating not to 'burnt bricks' as shown on the heading (Co.22) but to 'unburnt' bricks as shown on the cover of the said files, as admitted by Lai, such a brick being of no market value like, as Eccles said 'an unbaked loaf of bread'. The said Lai,

on whom the manager Tan replied to show the Company's loan, admits that "the fall in sales was not due to the strike". The Company is said to make direct sales and also sales through its sales agents.

Mrs. Tan or Yap as supervisor said in cross examination:

> 'It is from 5th March the average of 16 to 18 car-loads in and out of the kiln was reached.'

Later, she admits:

> 'The average car-loads has been as low as 10 to 13, below the average of 16 to 18, even certain months before February, 1974.'

As a supervisor of the kiln, she described by a sketch (Ct.5) that the bricks fed into the kiln at one end come out of it at the other end as 'burnt' bricks after '80 hours', depending on the quality i.e. runner-bricks, SK 30, SK32 and SK 34. According to her the SK 30 bricks put in on 4th February came out of the kiln as 'over-burnt and cracked' bricks. She further said that the rejected bricks on 6th, 7th and 8th February could be used and not thrown away. These bricks 'can be grounded, processed and re-used' she said. According to the expert Eccles (Co.W.17), he said in answer to the Court:

> 'About 20% of the damaged bricks can be used again. If moderately over-burnt, all the bricks could be used.'

Eccles further said in cross-examination:

> 'Obviously, there is a difference in weight between green (unburnt) bricks and fired (burnt) bricks. The number of the bricks will be the same, except their size. Though the number will be the same, the weight will not be the same.

The Court was therefore left to conjecture the Loss to the Company resulting from over-burnt bricks from 4th February 1974 for the whole month without knowing their final weight and how far they were over-burnt, whether moderately or extensively.

Answell (Co.W.2) confirmed the said Mrs. Tan's view that the production was back as usual from March

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1974. He gave a good report in April 1974 to the 'Malaysian Business' magazine praising the workers to read thus:-

> 'They were extremely industrious and willing to learn and this has come as a surprise to me. Instructions are meticulously carried out and it is amazing how much progress they can make very rapidly. What amazes me most is the progress that has been made without outside assistance.'

As compared with above, he said in Court in cross-examination:-

> 'The quality has improved but production not to a great extent because of the strike. On the 6th (Feb. '74), all the vacancies were filled. The production has remained the same after the new workers were trained. It takes 2 months for the workers to be trained. Production was maintained at the same level. Production tends to improve when the workers were sufficiently trained.'

The reason for production 'not to a great extent' in February 1974 was due, as is admitted, to one shift only throughout that month (as seen in C.24H) instead of two shifts as in other months.

In connection with the loss caused to the Company for the month of February 1974, the Company's Counsel made an application that the Statement of Accounts (Co.11) was not relevant to show the Company's financial position for that month. As such, he contended that the Statement as audited should be accepted by the Court without being subject to cross-examination by the Court. This application appeared unusual and the Court had to reject it, as the Court did in two other applications, one for re-calling a witness without satisfactory reason and the other for wanting to put in an anonymous document as an exhibit - See Appendix B1, B2 and B3 (taken from Record).

Whether the Company recovered itself sooner or later after the strike the question still is whether the workmen in resorting so that the surrounding circumstances left the workmen no choice but to go on

strike, the right to strike is imperilled in that, if the strike materialises, it would be premature and unlawful and therefore affords no reasonable excuse for their absence from work to determine the contract of employment.

The following facts and circumstances leading to the strike remains unchallenged:

(1) The Minister on 21st February, 1973 ordered the Company to accord recognition to the Union with effect from 5th September, 1972 (U.2) on the date that the Registrar of Trade Union was satisfied by the check conducted by his office as to the majority of the Company's workmen as members of the Union. In this respect, the Manager Tan said in examination-in-chief:-

'Our letter of 25th November, 1972 to the Ministry shows the list of workers at that time (C6A and 6B) as September 1972. Of these workers, I have had to check how many were on probation.'

a fact not shown therein, as mentioned before, to the Ministry. Later he says in examination-in-chief:

'The total employees up to 89 in the list (C6B) is only 74, excluding the staff (managerial). On 31st August 1972, the total number is 74'

(2) The Union submitted its proposals for a collective agreement entered in a letter dated 2nd October, 1973 (U.3) and invited the Company to commence negotiations. The Union did not receive an acknowledgment of this letter and so sent a reminder on 6th November 1973 (U.4) requesting the Company to commence negotiations without further delay.

(3) Having received no response or acknowledgement from the Company, the Union wrote to the Minister the letter of 17th October, 1973 with a copy to the manager, seeking the Minister's good office for an early commencement of negotiations in compliance with S.8(4) of the I.R. Act. The Company manager wrote to the Minister on 2nd November 1972 referring to the said Union's letter as 'deliberate attempt to mislead', without a copy to the Union.

(4) The Union again wrote to the Minister in despair on 12th December 1973 (U.6); and then finally the Union

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gave notice to the Company on 31st December, 1973 (U.7) that unless the Company commence negotiations on 14th January 1974 the Union will have to resort to industrial action, giving a copy of the said letter to the Regional Industrial Relations Office.

(5) On the same date, the Industrial Relations Office wrote to both sides requesting for a meeting on 22nd January 1974 (U.8) to discuss the collective agreement proposals. As a consequence, the Union representatives presented themselves at the Industrial Relations Office but the Company's representatives did not turn up.

(6) On 22nd January 1974, the Director of Industrial Relations Office wrote to the Company expressing his regret over the Company's failure to attend the meeting on that day and suggested the further date of 31st January 1974 for a meeting (U.9). This meeting too failed to take place because the Company's representatives did not turn up.

(7) The workers went on strike on 4th February 1974. On this date, the Company sent a notice-letter (U.10) to the striking workmen informing them that their services would be terminated unless they resumed work within 48 hours. The next day, the management sent another notice to the striking workmen stating that the notice-letter was available to the workmen on request, attaching a sample of it given the previous day.

(8) On 12th February 1974, the Minister referred the dispute to the court on collective agreement under Section 23(2) of the Industrial Relations Act, 1967 (Industrial Court Case No. 9 of 1974). The Union, on receipt of this communication, instructed its members to call off the strike and report for work on 16th February 1974. The workmen reported for work on 16th February but the Company refused to allow them to resume work.

Let us examine the relevant evidence in this regard of keeping out the workmen from work.

Veerasamy (U.W.1) said :-

'On 16th February I was present at the Company's premises @ 9th mile, Ipoh Road, K.L. I was among

the strikers. The Company did not take them back to work. I told the workers to report for duty and to be at the gate. The jaga was there and I told the jaga why we were there. The jaga took the workers to the manager. I told the workers to report for duty because the Union received the copy of the letter from the Ministry (U.11) on 16th February, 1974.

The gate was locked on the morning of 16th. So, we went back to the place of picketing. We went again to the Manager's office, namely, Abu Baker & myself with police assistance, Abu Baker was the Chairman of the Union's Works Committee in the Company. The Manager was the man seated in Court - Tan Kim Seng (left Court on Court's direction). He asked me what was my purpose of coming in. I referred to this letter (U.11) and said that the workers wished to come back to work. The Manager stated that he had to consult his lawyers and that he will inform me later. He talked to me in English. There was silence in the room. I asked him whether he had anything to say, and he said he had nothing to say and that I could leave the room. Both of us came back to the place of picketing.'

The Manager Tan said this in examination-in-chief:

'Our Company gave the workers notice on 4th February to return to work in 48 hours, but they did not.

On 16th February, the Secretary (W.sees him) of this Union and the worker came to see me about the return of the workers. I replied that the Company could not take back the workers.'

The explanation given by the manager Tan (Co. W.1) in cross-examination is this:

'I am positive that I did not receive the ministry's letter calling for a meeting on 22.1.74. I believe the Ministry called me on the phone a few days before the meeting. I knew about the meeting but I did not turn up.....
.....
I received this letter of 22nd January 1974 on 1st of February. The letter was sent to town office, and the stamp-chop of 1st February was done on it by the Factory Office. The registered town office received

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the letter before 31st January 1974. As the letter was received late by me, I did not ring up the Industrial Relations Office expressing my regret for inability to attend. I had no instructions from the Board to contact the Industrial Relations Office. Sometimes, I have instructions, sometimes no. I brought to the attention of the Board of Directors that there would be stoppage of work. The Board said nothing. It is not true that the Company's plan was to dismiss the workers when they stopped work.'

The above explanation for remaining silent even to neutral requests made by the Industrial Relations Office to open conciliation proceedings, the Court finds, is unreasonable of the Company's management. For the manager Tan to say on the Union's strike-notice (U.2):

> 'I did not write to the Union that we take up the matter with the Court on joint request.'

shows that the management failed even to move 'the ball laid at its feet' to save the situation from deteriorating by taking the final opportunity of going to Court on a joint request i.e. on a voluntary basis. Industrial relationship is nothing else but a matter of communication between the parties and the party at fault, the Court unanimously finds, is the Company's management. The court agrees with Union's Counsel that the Union had no other recourse but to call out the workers on strike on 4th February 1974, after informing the Ministry as well. The strike was therefore justified.

It must be remembered that by participating in such a strike the relationship of the workmen with the Company is not snapped to mean a 'severance' or 'abandonment of employment'; for such a meaning will render impotent the right to strike which, like the right to declare a lock-out, is an essential element in the principle of collective bargaining. By going on strike or by declaring a lock-out, the relationship is merely suspended and meant in no way to terminate or put an end to their contracts of employment. However, these rights to be 'inalienable' are to be exercised with great caution as not to abuse the purpose and spirit of the I.R. Act. The

Act in its bill-stage had for its 'objects and reasons' to seek to 'strengthen and continue the voluntary system of industrial relations'. As observed in the title to the Act, the purpose is to prevent, if not, to settle disputes arising from industrial relationship. The spirit throughout the Act is for both parties to take maximum advantage of consultation at industry-level between the subordinate and the superior by a grievance procedure or negotiation by some private machinery, or conciliation by the impartial efforts of a conciliator. To succeed at these various stages as envisaged by the Act, it is desirable that the parties should have no legal representation but be left alone to bargain on a give-and-take understanding so as to avoid lengthy proceedings which tend to drive the parties to opposing camps. It is only in an atmosphere of legal abstention can collective bargaining grow fruitfully. Up to the last, the parties should endeavour to act on a basis that what matters is not 'who is right' but 'what is right' rather than by mistrust or indifference bring about a situation where there is no alternative but to go to Court under compulsion by the Minister's reference 'of his own motion'. Even if the parties cannot help going to Court, they can yet by the need for further understanding appear not compulsorily but voluntarily i.e. by joint request for reference by the Minister. In the latter situation the parties, even if legally represented, are likely to feel content without embittered feelings to heal the rift between them and to abide by the resulting award of the Court. It must be realised that no party is on trial before the Industrial Court but what is on trial is 'industrial peace'.

In a situation where the strike is lawful and justified, for the Company's management to keep out the workmen participating in it from work on 16th February 1974 when they reported for work, in the Court's view, amounts to declaring a lock-out against them. The Court fails to see on the facts and circumstances of this case that the right to lock-out was exercised as a last resort by the Company's management. The management may have been hurt in that the workmen had shown ingratitude to its paternalism towards them, but this does not justify the lock-out. It is time employers realised that it is common human attitude to prefer to 'have a say' in poverty than remain speechless in wealth. The workmen here expect to resume work, as is normal today to expect security in service, from which

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they have not discontinued. The Court notes in wonder that the 17 contracts signed in January and February 1974 on stereo-typed forms (Co.9A to 9Q) have their dates altered in a peculiar manner (except 1 left unaltered as for back as 8th February 1973, not 1974 as in others). These contracts were not at all proved. If they were meant to show a change in organisation either entirely or to a certain extent, the Court ought to be satisfied that the change, made after the strike-notice dated 31st December 1973 should not amount to an 'unfair labour practice' so as to affect adversely the 73 workmen. The Court finds that the Company's place of business is still closed or locked against the 73 workmen, though the business itself is not closed. The lock-out therefore still continues in contravention of S.41(b) of the Industrial Relations Act and is thereby deemed illegal under S.42(1). Whether the penalty under S.43(2) should be a consequence is a matter for the consent of the Public Prosecutor.

A W A R D

(1) The 73 workmen are to be taken back by the Company as from 16th February, 1974, the date of the lock-out, as resuming work in the same previous positions, on their reporting for duty in a week's time i.e. on 15th instant.

(2) The Company is to accord the same terms and conditions as before, paying wages and allowances without loss of benefits and privileges as from 16th February, 1974.

HANDED DOWN AND DATED THIS 8TH DAY OF AUGUST, 1974.

sd: (K. Somasundram)
Chairman.

In the High Court

Appendix "A" to Award
No. 39/74
Ruling on preliminary issue
9th April 1974

APPENDIX "A" TO AWARD No. 39/74
RULING ON PRELIMINARY ISSUE

INDUSTRIAL COURT OF MALAYSIA
CASE NO: 15 OF 1974

Between

South East Asia Fire Bricks Sendirian Berhad

And

In the High Court

Appendix "A" to Award No. 39/74 Ruling on preliminary issue 9th April 1974

Non-Metallic Mineral Products Manufacturing Employees Union.

RULING ON PRELIMINARY ISSUE.

Before: Encik K. Somasundram - Chairman

Encik Tan Seng Toon - Independent Panel.

Encik Mohd. bin Zain - Employers' Panel.

Encik Abdul Aziz bin Ismail - Workers' Panel.

Venue of Hearing: Industrial Court, Kuala Lumpur.

Date of Hearing: 9th April, 1974

Representation at Hearing:

Encik S. Kulasegaran, Counsel for South East Asia Fire Bricks Sendirian Berhad.

Encik D.P. Xavier, Counsel for Non-Metallic Mineral Products Manufacturing Employees Union.

The Company's Counsel Encik S. Kulasegaran submitted that, though paragraphs 1 and 4 of the Statement in Reply raised the question of this court's jurisdiction, he did not raise it as a preliminary objection for the case to proceed. This appeared to the Court as a strange submission, because the question raised is an issue on which depend whether or not the Court can proceed to hear all the other issues raised. The Court, therefore, called upon the Company's Counsel to satisfy first the Court of its jurisdiction to hear the case, which was referred by the Minister under Section 23(2) of the Industrial Relations Act, 1967 on 6th March 1974. Encik Kulasegaran surprised the Court that he was not prepared to go on with legal arguments on the question of jurisdiction, though he was ready to submit 'off the cuff', as he said.

I. It was his contention regarding paragraph 1 of the Statement on Reply:

(1) that the employees named in the first list (Nos.

In the High Court

Appendix "A" to Award No. 39/74 Ruling on preliminary issue 9th April 1974 continued

20, 36 and 37) and those employees named in the second list (Nos. 1, 2, 4, 5, 7 and 10) should not be included as Claimants because on 4th February 1974 they were either ex-employees as dismissed workers. So, a complaint made by those no longer or not in the employment of the Company has no valid basis for the Minister to act on for reference to the Industrial Court, thereby depriving this Court of its jurisdiction;

(2) that this was not a claim concerning wages and conditions of service but a claim alleging lock-out. The alleged lock-out is not against the Union but against the employees so that the complainants should be the affected employees and not the Union; and

(3) that the Company has no knowledge as to who are members of the Union. The Union cannot be a principal party, and if appearing in a representative capacity, the Union cannot appear as principal for the workmen who are not members.

As regards paragraph 4 of the Statement in Reply, his contention was:

(1) that paragraph 17 of the Statement of Case avers Company's dismissal of the workmen; and, if so, the proper procedure should have been under Section 16A, of the Act. The Minister's reference under Section 23(2) is, therefore, wrong and so robs this Court of its jurisdiction;

(2) that the strike on 4th Feb. amounts to a breach of contract of employment, giving the legal right to the Management to terminate the services of those absent from work for 48 hours because of the strike. He quoted Civil Appeal No. 12 of 1947 between Wong Mook v Wong Yin & 3 others were C.J. Willan held that by absenting from work for 3 days continuously the workmen had broken tneir agreement with the employer because 'the fact that on their own volition absented themselves for the purpose of the strike cannot be held to come within the words 'reasonable excuse'. This decision has not been upset and so remains still valid; and

(3) that the definition of 'strike' gives no right to strike to employees nor does the Act anywhere confer the right to strike, and that a 'workman' does not include a dismissed workman.

II. The Union Counsel, Encik Xavier submitted in reply:

(1) that no argument was put forward by the Company's Counsel to attack the jurisdiction of this Court. Only the jurisdiction of the Minister was being questioned before this Court's jurisdiction is affected. This question ought to be taken up not in this court but in another. The Minister, in referring the dispute to the Court, has been satisfied that there is a pure and simple trade dispute as to whether or not there is a lock-out. The Minister need not show grounds why he is satisfied, so long as he finds it reasonable and expedient for reference to the Industrial Court to decide. Upon reference, this Court is seized with jurisdiction and is obliged to hear the dispute, and not to sit in judgment over the Minister's exercise of discretion. He cited several authorities, particularly two local cases:

(i) in Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Another (1971 MLJ. Vol. 1 at page 38) the High Court decided in dismissing the action for an order for certiorari that:

'as soon as the dispute over the non-recognition of the Union by the Company was referred by the Minister under Section 8(4) of the Industrial Relations Act, 1967 to the Industrial Court, the latter is seized with power under Section 27 to hear the dispute and make its award relating to all or any of the issues in dispute.'

(ii) In Sri Jaya Transport Workers' Union v. Industrial Court and others (1970 MLJ. Vol.I at page 81) the Federal Court supported the High Court's view above.

(2) that the Union is a principal party acting on behalf of its members in List 1 and representing the others

In the High Court

Appendix "A" to Award No. 39/74 Ruling on preliminary issue 9th April 1974 continued

in List 2 who have since become members. He cited in support the Privy Council case of Beetham and Another v. Trinidad Cement, Ltd. (1960 Vol. I A.E.L.R. at page 274) to say that the Union was there as a party acting on behalf of its members;

(3) that the lock-out is apparently not against the union but against the employees. But the Union is affected in so far as the employees as complainants are and have become members who reported for duty but were kept out by the Management, which is the issue in dispute before the Court;

(4) that Section 16A provides for individual workers who are dismissed, but here the workers dismissed were a group acting in concert and also those belonging to the Union. The word 'trade dispute' is so wide as to embrace the dismissal of a workman in relation to his employment. He referred to the definition of a 'workman' as including a dismissed worker, provided the dismissal is connected with the trade dispute in question. He cited the Privy Council case United Engineering Union v. Devanayagam (1967 Vol. 2 A.E.I.R. at page 371) which decided that:

> 'An industrial dispute may arise over a number of matters connected with employment. In many cases, it may be the majority of cases, the dispute will be over wage rates and matters connected therewith. In other cases it may be over the dismissal of a workman or workmen, and it is clear that an industrial dispute within the meaning of the Act of 1950 may arise even though the employer has done no more than exercise his legal rights. Satisfactory provision for the settlement of industrial disputes whether they arise over wages or on account of the dismissal of a workman or for other causes.'

(5) that, as for the right to strike, he quoted the title of our Industrial Relations Act as providing for 'the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any

difference or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.' In the definition therein of a 'strike' a lock-out' there are restrictions and prohibitions imposed, thereby presuming the right to strike and the right to declare lock-out without the specific word 'right' mentioned. The First Schedule to our Trade Unions Ordinance stipulated that a registered Trade Union ought to provide for the taking of decision by secret ballot on matters like those relating to strikes and lock-outs. So, a Trade Union is presumed to have the right to call out its members to go on strike but within limits prescribed by the laws; and

(6) that the question of Master and Servant relationship is not important for this Court to consider in determining the industrial dispute referred by the Minister as existing between the employer and the employees.

Ruling:

After hearing these submissions the Court comes to rule as follows:-

(1) that there is some substance in the submission of Company's Counsel that the proper parties must appear before the Court, and so acting under Section 26 the Court orders the title of the case to be amended as follows, where the Union is shown the 1st Party as principal represented by Counsel and where the group of 11 workmen is shown the 2nd Party represented by the Union through the same Counsel:

Between

South-East Asia Fire Bricks Sendirian Berhad

And

Non-Metallic Mineral Products Manufacturing Employees Union. 1st Party.

And

1. Tan Len Keow
2. Tap Chu Yook

In the High Court

Appendix "A" to Award No. 39/74 Ruling on preliminary issue 9th April 1974 continued

3. Loo Yok Ho
4. Yap Ah Kiat
5. Yap Choon Hoo
6. Teh Yoke Toh
7. Tan Yew
8. Anuar bin Abdul
9. Choong Ah Soo
10. Lee Kim Yan
11. Siti Zaibidah binti Maon 2nd Party

(2) that there is no substance in Encik Kulasegaran's submission that the alleged lock-out is not against the Union but against the workmen and, therefore, those workmen affected should be the complaining party. Most of the workmen were members of the Union and some have become members since, so that the Union is an affected party as much as the workmen. If any workman has been found on the merits of the case to be wrongly included as a complainant, the Company will not suffer since the workman will not have the benefit of the Award;

(3) that it is groundless to argue that the 73 workmen on strike stood dismissed by the Management's exercise of its legal right to deem their services terminated for absence from work for 48 hours and that, as such, these workmen were not in the employment of the Company at the time of the Minister's reference and, therefore, such reference was wrong so as 'to rob this Court of its jurisdiction'. This argument is rejected as strangely out of date that the dismissal of a workman, even if lawful cannot be the subject of a trade dispute. Where the dismissal is connected with the trade dispute in question, the word 'workman' includes a former workman under a contract of employment, as meant by its definition in the Act. Agreeing with Mr. Xavier, Section 16A is construed correctly to apply to an individual workman who is dismissed but not to a group of dismissed workmen who can act in combination, just as organised workmen, in furtherance of a trade dispute. The definition of 'trade dispute' is our Act covers all disputes whether arising over wages or conditions of service or even out of the dismissal of a workman. The Minister has acted under Section 23(2) using

his discretion, and as held in the above-mentioned Federal Court decision of the learned J. Suffian: 'once a dispute of this nature has been referred by the Minister to the Industrial Court, the Court is at once invested.';

(4) that, as for the right to strike, it was well said in Crofter Handwooven Harry Tweed Co. v. Veitch (1942 A.C. at 463) that 'the rights of the employer are conditioned by the rights of the workmen to give or withhold their labour'. It is time that employers today recognised that no workman will give up what he has gained so far by hard struggle upward from serfdom for dignity and status in labour and that for a workman to surrender his right to strike is to lose his manhood and freedom. The workman's right to strike as well as the employer's right to lock-out are now essential in the principle of collective bargaining. It must be recognised that the limits set to these rights in our present labour laws are a test of strength to bring both parties to the bargaining table. The strength of the workmen, whether organised or acting in combination in furtherance of a trade dispute, is bound to be related to their right to withdraw their labour so long as any semblance of collective bargaining survives. The recent spate of local labour legislation has brought about gradual but sure changes that have removed all restraint in the workman's right to strike or the employer's right to lock-out, subject to the observance in the public interest of certain restrictions and prohibitions to render the strike or lock-out lawful;

(5) that, in spite of these considerable changes, to argue that 'the breaking of a contract of employment' is the same as in 1947 is to be blind to the social policy of the present time. A workman to-day is in as much a strong position as the employer upon entering into a contract of employment, unlike 25 years ago. The parties are now equal in their ability to seek their relief in law. The said C.J. Willan's decision in 1947 is so out-dated to be followed in the Industrial Court, as much out-dated as the fact that the remedy of damages is only available in the Common Law Courts for wrongful dismissal of a workman, not the remedy of re-instatement as granted by the Industrial Court in deserving cases.

In the High Court

Appendix "A" to Award No. 39/74 Ruling on preliminary issue 9th April 1974 continued

The law in regard to a breach of contract of employment is somewhat different today in that Section 15(2) of the Employment Ordinance, 1955 has a new limb to say that a workman cannot be deemed to have broken his contract if he himself or in combination or through his Union had informed or attempted to inform his employer of the excuse for his absence from work for more than 2 days; and

(6) that this Court does not agree with the submission of Encik Xavier that the relationship of 'master and servant' is not of vital consideration for this Court in determining an industrial or trade dispute. Modern usage has gradually displaced the terms of 'master and servant' with the more egalitarian terms 'employer and employee', a relationship based also on a contract of employment. As was held by the Privy Council case of Bird & Others v. O'Neal & Anor. (1960 A.E.L.R. Vol.3 at page 260) 'the relationship of master and servant did not exist between the individual appellants and the pickets' and so 'the appellants (the employers) were not vicariously liable for the acts of the pickets on such a ground', a view with which this Court agrees.

In view of the above ruling, this Court has the power under Section 27 to proceed to hear the dispute 'referred to it by the Minister in respect of all the other issues raised between the parties.'

(K. Somasundram)
Chairman.

In the High Court

Appendix "B1" to Award No. 39/74

APPENDIX "B1" TO AWARD No. 39/74

Co's Counsel applies for a document from some 'Work Action Committee dated 14th March, 1974 to be exhibited.

U's Counsel: The Union denies any knowledge of this document. There is no such Committee. The document is not signed and therefore inadmissible.

Co's Counsel: It bears a shop 'works Action Committee' and was being distributed to the public. The company manager (Co.W.1) came by this, the contents of which

show matters relevant to the case. It is normal to enable both parties to produce evidence relevant to the case so as to ascertain the true situation. It must have come to the possession of the management around March 1974, but it does not matter at what stage this document is produced in Court, either at the beginning or at the end. The Union had submitted that there is a 'Works Committee', a legitimate organ of the Union on the Company's sites. If the Union denies that it is not their 'Works Committee', the company will go to the extent of showing the authenticity. There can be no suggestion that the Company brought out the document suddenly as a frame-up.

Court: No such suggestion can arise on a document that is not produced so far. Even if it is not disputed that the document originated from some 'Works Action Committee', yet the authorship of it must be established.

Co's Counsel: No party can produce a document unless it has a bearing on the case.

U's Counsel: The admissibility of the document is in question.

Co's Counsel: Whether admissible or not, the relevance of the contents must be considered.

(Co's Counsel Kulasegaran attempts to read but is stopped by the Court).

U's Counsel: The document itself is an anonymous circular sent by some 'Works Action Committee' which remains unknown. The document is not admissible because it is anonymous.

Co's Counsel: Apart from admissibility or not, the relevance of the documents is essential. The document should have been known to the workers. The management came by it in March 1974, admittedly before this case commenced, but can produce it at my stage of the proceedings.

U's Counsel: No reference was made to it even in examination-in-chief of the company manager (Co.W.1) nor in cross-examination of Nadesan (U.W.3).

Court: The Court rules that the document is inadmissible being anonymous i.e. the document cannot be proved without knowing the identity of the author. The Court

In the High Court

Appendix "B1" to Award No. 39/74 continued

does not permit questions at this stage of re-examination pertaining to matters entirely new and of doubtful source but permits questions to clear matters raised in cross-examination.

Co's Counsel: submits that he had no questions on re-examination other than questions on this document just ruled out as inadmissible though it contains the matter of transfers.

Court: The Court sees no reason why the document was not put in by Counsel, if he thought it admissible, at the proper time i.e. during examination-in-chief of the manager who already and the document in his possession. The document has been held inadmissible for its anonymity, though it is alleged to contain the matter of transfers.

In the High Court

Appendix "B2" to Award No. 39/74

APPENDIX "B2" TO AWARD NO. 39/74

Co's Counsel applies to recall Co's W.1. Tan Kim Seng. The reason is that the last witness Heng (Co's W.12) handed the document to Tan in March 1974 and for Co's W.1 to identify the document as the one received by him.

U's Counsel objects to recalling the witness for this reason because the document is said to have come into his possession in March 1974. Objects further to this way of Counsel plugging holes in the leakages of the Company's case.

U's Counsel: The hearing commenced on 1st April 1974 and followed on subsequently. If this document dated 4th March 1974 is of such relevance to make this application to recall the Co.W.1 now, it raises the question why the document was not produced when he gave evidence for 2 full days. Why was there no mention of this document during the examination-in-chief of the witness at the first moment? The document is therefore open to much doubt and suspicion. It was handed to W.12 by outsiders who have been assumed by him to be the workers because all were grouped along the picket-line.

Co's Counsel: The existence of this document came to me after this Co's W.1. gave his evidence last in Court. So I had to call Heng (Co.W.12) as a witness

to show how Co's W.1. came by the document, admittedly sometime in March 1974. I am unable to say why it did not strike this witness to instruct me about the document in time. If Heng did not say about it was the one similar to the document handed out to him at the picket-line. I would not have thought of recalling this witness.

Court: The document can be produced, but it cannot be identified being similar to the one handed over by Heng (Co.W.12) to Tan (Co.W.1). The Court sees no purpose in producing a document when the author of it is not known to prove its contents. The Court views it as a piece of Chinese paper produced by Co. W.12. (translated) with a chop below it as 'Works Action Committee' which is not shown to be the same as the 'Works Committee' of the workers. Besides, the Court does not allow the recalling of Co.W.1. Tan Kim Seng for nothing unforeseen by him or unexpected, relating to a document of the case. The Court wonders why he failed to instruct Counsel in time on a document known to him as relevant to the Company's case.

The Court unanimously believes the fact that the document did not emanate from the 'Works Committee' of the workers. The Court seeing no good reason rejects Co's Counsel's application to recall Co.W.1 just to identify it as the one received by him from Co.W.12 without any purpose.

APPENDIX "B3" TO AWARD

4.6.74

The Court constituted as before.

Counsel as before.

Co's Counsel: applies that the Court should not so further to examine the Statement of Accounts (Co.11) because it has no relevance to the Company's financial position on 4th February 1974. 'If the Court accepts the accounts as audited, that is the end of the matter' he contended.

U's Counsel: 'There is no aspersion case of the fact that there are audited accounts for 1972 and 1973 (C.11). The accounts are given by the Company's

In the High Court

Appendix "B3" to Award continued

Secretaries (Co.W.12) assisted by the Company's accountant (Co.W.5). The reports on sales and production are not for February 1974 but from July 1973 to May 1974. It is not gospel truth to accept the contents i.e. the profit and loss accounts based on the sales and production reports without being tested in cross-examination.

If the Statement of Accounts (Co.11) is put in evidence, even though found irrelevant for February 1974 neither the Court nor the Union can be shut out for examining the accounts further.'

Co's Counsel: The Court is inquiring into a matter in February 1974. The accounts are meant to confirm the evidence of the manager and nothing more. There is no further relevance to inquire or examine the accounts for determining the financial position of the Company in February 1974.

If the claim is for wages, then there is point in going into the Company's worth to know the state of its trading accounts'

Court: The court rules that what is before the Court tendered as evidence, documentary or otherwise is subject to cross-examination and also to examination by the Court to test its veracity and assess its weight. The Company's Counsel must realise what he is putting in as an exhibit in Court - whether it will lead to evidence that is relevant or not.

In the High Court

No. 4
Statement of Applicant
18th September 1974

NO. 4

STATEMENT OF APPLICANT

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 73 OF 1974

In the Matter of an Application by South East Asia Fire Bricks Sdn. Berhad for leave to apply for an Order of Certiorari

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August

1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Fire Bricks Sdn. Bhd. Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chu Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah bte. Maon
represented by the Union Respondents

STATEMENT

1. The name and description of the Applicant is South East Asia Fire Bricks Sendirian Berhad a private limited company incorporated in the States of Malaya and having its registered office at No. 314, 2½ m.s. Jalan Ipoh, Kuala Lumpur.

2. The relief sought is:

(a) An Order of Certiorari to remove into this Court and quash Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974 whereby the said Industrial Court made the following orders:

(i) The 73 workmen are to be taken back by the Company as from 16th February, 1974 the date of the lock-out as resuming work in the same previous positions on their reporting for duty in a week's time i.e. on 15th instant.

(ii) The Company is to accord the same terms and conditions as before paying wages and allowances

In the High Court

No. 4
Statement of Applicant
18th September 1974
continued

without loss of benefits and privileges as from 16th February, 1974.

(b) That all necessary and consequential directions be given.

3. The Grounds on which the said relief is sought are as follows:

(a) The said Award was wrong in law;

(b) (i) The Industrial Court erred in law in failing to consider the question of whether those named in the second list as Numbers 1, 2, 4, 5, 7 and 10 were employees or not;

(ii) The workers in the second list hearing Numbers 1, 2, 4, 5, 7 and 10 were contract workers (contractors) and as such were not the employees of the Applicant.

(c) The Industrial Court was wrong in law in holding:

(i) That the strike of the 73 workers on the 4th day of February 1974 was legal;

(ii) That the Union's letter dated 31st December 1973 (U.7) to the Applicant was a strike notice and that it was regular and valid;

(iii) That the contravention or not of Section 13A of the Industrial Relations Act, 1967 was of no relevance;

(iv) That there was no contravention of sections 36, 37 or 38 of the Industrial Relations Act, 1967 by any of the strikers as there was no arrest or prosecution by the Police.

(d) The Industrial Court erred in law in refusing to admit relevant evidence;

(e) The said strike was illegal;

(f) The Industrial Court was wrong in law in holding:

(i) that going on strike was a reasonable excuse for being absent from work;

(ii) that by going on strike and continuously

absenting from work for more than two days the said workers had not broken their contract of service with the Applicant.

(iii) that the Applicant had declared a lock-out on the 16th day of February, 1974.

(g) The said workers did not give to the Applicant any lawful strike notice;

(h) By going on strike on the 4th day of February, 1974 the said workers had committed a breach of contract of service;

(i) The said workers had broken their contract of service with the Applicant and had themselves terminated their services with the Applicant by going on strike and by being continuously absent from work for more than two days;

(j) Going on strike is not a reasonable excuse for being absent from work;

(k) The Industrial Court acted in excess of its jurisdiction in ordering the applicant:

(i) to take back the said Workers; and

(ii) to pay to the said workers wages and allowances as from the 16th February 1974.

(l) The Applicant has since the said strike re-organised its business and is no longer employing direct labour.

The work is now being carried out by contractors.

Dated this 18th day of September, 1974.

sd: Ranjit, Thomas & Kula
Solicitors for the Applicant.

This Statement is filed on behalf of the Applicant by its Solicitors, Messrs: Ranjit, Thomas & Kula of 7th Floor, Wing on Life Building, Jalan Silang, Kuala Lumpur.

In the High Court

No. 5
Affidavit of
Tan Kim Seng
in support of
No. 4
18th September 1974

No. 5

AFFIDAVIT OF TAN KIM SENG IN SUPPORT OF NO. 4

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO: 73 OF 1974

In the Matter of an application by South East Asia Fire Bricks Sendirian Berhad for leave to apply for an Order of Certiorari.

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Asia Fire Bricks Sendirian Berhad — Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union.

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Kew
(h) Anuar bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon
represented by the Union — Respondents

A F F I D A V I T

I, TAN KIM SENG of care of South East Asia Fire Bricks Sendirian Berhad of No. 314, $2\frac{1}{2}$ m.s. Jalan Ipoh

Kuala Lumpur being of full age do solemnly, sincerely and truly affirm and say as follows :-

1. I am the Manager of the Applicant Company and am duly authorised to make this Affidavit on its behalf.

2. By a letter dated the 6th March, 1974 the Honourable Minister of Labour and Manpower in the purported exercise of his powers under Section 23(2) of The Industrial Relations Act, 1967 referred the matter of whether or not there was a lock-out on the part of the Applicant Company against its employees to the Industrial Court.

3. (a) In pursuance of the said reference the said employees by the Non-Metallic Mineral Products Manufacturing Employees Union, the First Respondent herein, filed a Statement of Case, a photostat copy of which is annexed hereto and marked "A" and the Applicant Company filed a Statement in Reply, a copy of which is annexed hereto and marked "B".

(b) The Industrial Court dealt with the matter in proceedings known as Industrial Court Case No. 15 of 1974 and on the 8th day of August, 1974 made an Award known as Award No. 39/74 a photostat copy of which Award is annexed hereto and marked "C".

The said Award called upon the Company to:

(i) Take back the 73 workmen as from 16th February, 1974 the date of the lock-out as resuming work in the same previous positions, on their reporting for duty in a week's time i.e. on 15th instant.

(ii) The Company is to accord the same terms and conditions as before, paying wages and allowances without loss of benefits and privileges as from 16th February, 1974.

4. I am advised and verily believe :

(a) The said Award was wrong in law;

In the High Court

No. 5
Affidavit of
Tan Kim Seng
in support of
No. 4
18th September 1974
continued

(b) (i) The Industrial Court erred in law in failing to consider the question of whether those named in the second list as Numbers 1, 2, 4, 5, 7 and 10 were employees or not;

(ii) The workers in the second list bearing Numbers 1, 2, 4, 5, 7 and 10 were contract workers (contractors) and as such were not the employees of the Applicant.

(c) The Industrial Court was wrong in law in holding:

(i) That the strike of the 73 workers on the 4th day of February, 1974 was legal;

(ii) That the Union's letter dated 31st December, 1973 (U.7) to the Applicant was a strike notice and that it was regular and valid;

(iii) That the contravention or not of Section 13A of the Industrial Relations Act, 1967 was of no relevance;

(iv) That there was no contravention of sections 36, 37 or 38 of the Industrial Relations Act, 1967 by any of the strikers as there was no arrest or prosecution by the Police;

(d) The Industrial Court erred in law in refusing to admit relevant evidence;

(e) The said strike was illegal;

(f) The Industrial Court was wrong in law in holding:

(i) that going on strike was a reasonable excuse for being absent from work;

(ii) that by going on strike and continuously absenting from work for more than two days the said workers had not broken their contract of service with the Applicant;

(iii) That the Applicant had declared a lock-out

on the 16th day of February, 1974.

(g) The said workers did not give to the Applicant any lawful strike notice;

(h) By going on strike on the 4th day of February, 1974 the said workers had committed a breach of contract of service;

(i) The said workers had broken their contract of service with the Applicant and had themselves terminated their services with the Applicant by going on strike and by being continuously absent from work for more than two days;

(j) Going on strike is not a reasonable excuse for being absent from work;

(k) The Industrial Court acted in excess of its jurisdiction in ordering the Applicant:

(i) to take back the said workers; and

(ii) to pay to the said workers wages and allowance as from the 16th February, 1974.

(l) The Applicant has since the said strike reorganised its business and is no longer employing direct labour. The work is now being carried out by contractors.

5. Wherefore I pray for an Order in Terms of the Application herein.

AFFIRMED at KUALA LUMPUR)
by the abovenamed TAN KIM)
SENG on the 18th day of) Sd: Tan Kim Seng
September, 1974 at 3.10)
p.m.)

Before me:
sd: Sar Chiew Lim

A Commissioner for Oaths

This Affidavit is filed on behalf of the Applicant Company by its Solicitors, Messrs. Ranjit, Thomas and Kula of 7th Floor, Wing On Life Building, Jalan Silang, Kuala Lumpur.

In the High Court

No. 6

No. 6
Notice of Motion for an Order of Certiorari
20th September 1974

NOTICE OF MOTION FOR AN ORDER OF CERTIORARI

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO: 73 OF 1974

In the Matter of an application by South East Asia Fire Bricks Sendirian Berhad for leave to apply for an Order of Certiorari

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Asia Fire Bricks Sendirian Berhad — Applicant.

And

1. Non-Metallic Mineral Products Manufacturing Employees Union.

2. (a) Tan Len Keow
(b) Yap Chu Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon

represented by the Union — Respondents.

EX-PARTE NOTICE OF MOTION

TAKE NOTICE that on Monday the 4th day of November, 1974 at the hour of 11.00 o'clock in the forenoon or as soon thereafter as they can be heard

In the High Court

No. 6
Notice of Motion for an Order of Certiorari
20th September 1974
continued

Mr. R. R. Chelliah and Mr. S. Kulasegaran of Counsel for the abovenamed Applicant will move the Court for an Order:

1. That the Applicant be granted leave to apply for an Order of Certiorari to remove into this Court for the purposes of it being quashed Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974

2. That all proceedings on the said Award be stayed until after the determination of the Application for an Order of Certiorari or further order.

3. That the costs of and incidental to this Application be costs in the cause.

Dated this 20th day of September, 1974.

sd.
Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Ex-Parte Notice of Motion will be supported by the Affidavit of Tan Kim Seng affirmed on the 18th day of September, 1974 and filed herein.

This Ex-Parte Notice of Motion is not intended to be served on any party.

This Ex-Parte Notice of Motion is taken out on behalf of the Applicant by its Solicitors, Messrs: Ranjit, Thomas and Kula of 7th Floor, Wing On Life Building, Jalan Silang, Kuala Lumpur.

No. 7

In the High Court

No. 7
Order
4th November 1974

ORDER

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO: 73 OF 1974

In the Matter of an application by South East Asia Fire Bricks Sendirian Berhad for leave to apply for an Order of Certiorari

And

In the High Court

No. 7
Order
4th November 1974
continued

In the matter of Award No. 39 of 1974 made on the 8th day of August 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Fire Bricks Sendirian Berhad Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chu Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Kew
(h) Anuar bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binto Maon
represented by the Union Respondents

BEFORE THE HONOURABLE MR. JUSTICE ABDUL HAMID

THIS 4TH DAY OF NOVEMBER, 1974. IN OPEN COURT

O R D E R

UPON HEARING Mr. R.R. Chelliah and Mr. S. Kulasegaran of Counsel for the abovenamed Applicant AND UPON READING the Ex-Parte Notice of Motion dated the 20th day of September, 1974; the Affidavit of Tan Kim Seng affirmed on the 18th day of September, 1974; and the Statement dated the 18th day of September, 1974 all filed herein IT IS ORDERED that the Applicant be and is hereby granted leave to apply for an Order of Certiorari to remove into this Court for the purpose of it being quashed the Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974 AND IT IS ORDERED that the costs of and

incidental to this application be costs in the cause.

In the High Court

No. 7
Order
4th November 1974
continued

GIVEN under my hand and the Seal of the Court this 4th day of November, 1974.

sd: Illegible.
(L.S.) SENIOR ASSISTANT REGISTRAR,
HIGH COURT,
KUALA LUMPUR.

This Order is filed on behalf of the Applicant by its Solicitors Messrs: Ranjit, Thomas and Kula of 7th Floor Wing On Life Building, Jalan Silang, Kuala Lumpur.

In the High Court

No. 8
Notice of Motion
14th November 1974

NO. 8

NOTICE OF MOTION

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO: 73 OF 1974

In the Matter of an application by South East Asia Fire Bricks Sdn. Bhd. for leave to apply for an Order of Certiorari.

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Asia Fire Bricks Sdn. Bhd. Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union.

2. (a) Tan Len Keow
   (b) Yap Chu Yook
   (c) Loo Yok Ho

In the High Court

No. 8
Notice of Motion
14th November 1974
continued

(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon
represented by the Union Respondents

NOTICE OF MOTION

TAKE NOTICE that pursuant to the leave of the Honourable Mr. Justice Abdul Hamid given on the 4th day of November, 1974 this Court will be moved on Tuesday the 27th day of May, 1975 at the hour of 9.30 o'clock in the forenoon or soon thereafter as Counsel can be heard on behalf of the Applicant for an Order of Certiorari to remove this Court for the purposes of it being quashed Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974 upon the grounds set forth in the copy Statement served herewith used on the application for leave to issue this Notice of Motion.

And that the costs of and occasioned by this Motion be paid by the Respondents to the Applicant.

AND TAKE NOTICE that upon the hearing of the said Motion the said Applicant will use the Affidavit of Tan Kim Seng affirmed on the 18th day of September, 1974 and filed herein.

Dated this 14th day of November, 1974.

sd: Ranjit Thomas & Kula
Solicitors for the Applicant

Dated this 14th day of November, 1974.

sd: Illegible.
Senior Assistant Registrar
High Court, Kuala Lumpur.

To: (1) The Industrial Court, Malaysia, Kuala Lumpur.

(2) The abovenamed Respondents.

This Notice of Motion is taken out on behalf

of the Applicant by its Solicitors, Messrs: Ranjit, Thomas & Kula whose address for service is 7th Floor, Wing On Life Building, Jalan Silang, Kuala Lumpur.

In the High Court

No. 8
Notice of Motion
14th November 1974
continued

In the High Court

No. 9
Award No. 12/75
(Case No. 64 of 1974)
24th March 1975

No. 9

AWARD NO. 12/75 (CASE NO. 64 of 1974)

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 64 OF 1974

BETWEEN

SOUTH EAST ASIA FIRE BRICKS SENDIRIAN BERHAD
(hereinafter mentioned as Company)

AND

NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION
(hereinafter mentioned as Union)

AWARD NO. 12/75

Before: Encik K. Somasundram - Chairman
Encik S. Govindaraj - Independant Panel Member.
Datuk V.M. Hutson - Employers' Panel Member.
Encik Abdul Aziz Ismail - Workers' Panel Member.

Venue: Industrial Court, Kuala Lumpur.

Hearing: 7th, 8th and 12th November, 1974;
30th and 31st December, 1974; and
6th January, 1975.

Representation at Hearing:

Encik S. Kulasegaran, Counsel for the Company
Encik D.P. Xavier, Counsel for the Union

Reference:

This is a case of non-compliance by the Company with

In the High Court

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Award No. 12/75
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24th March 1975
continued

the terms of Award No. 39/74 made in Industrial Court Case No. 15 of 1974 and was referred by the Minister under Section 53(3) of the Industrial Relations Act, 1967 (hereinafter mentioned as the Act).

Facts and Circumstances, with Findings:

1. After the close of Case No. 15 of 1974, the Court made in the consequent Award No. 39/74 these observations:

> 'The Court notes in conder that the 17 contracts signed in January and February 1974 on stereo-typed and typed forms (Co.9A to 9Q) have their dates altered in a peculiar manner (except 1 left unaltered as far back as 8th February, 1973 not 1974 as in others). These contracts were not at all proved. If they were meant to show a change in organisation either entirely or to a certain extent, the Court ought to be satisfied that the change, made after the strike-notices dated 31st December, 1973 should not amount to an 'unfair labour practice' so as to affect adversely the 73 workmen.'

In the Award, it was ordered that :-

> (1) The 73 workmen are to be taken back by the Company as from 16th February, 1974, the date of the lock-out, as resuming work in the same previous positions on their reporting for duty in a week's time i.e. on 15th instant.
>
> (2) The Company is to accord the same terms and conditions as before, paying wages and allowances without loss of benefits and privileges as from 16th February, 1974.

These workmen, except one, reported for work at the Company's premises on 15th August, 1974 as expected, but the Company's management refused to take them back in accordance with the said Award. The management gave its reasons for non-compliance as:-

> (i) challenging the said Award which it felt as unsatisfactory
>
> and (ii) the need arose for the Company's work to be reorganised on contract system.

2. If an Award of this Court is challenged, it is because of a legal grievance arising usually from a point of error in law on the record or on a question of wrongful exercise of the Court's jurisdiction or contravening rules of natural justice; otherwise, the decision in the Award is final and conclusive. Barring such a legal grievance, the parties for the sake of preserving industrial peace and harmony normally abide by the terms of the deciding Award - a decision, however impartial, may be wrong and yet, as was held by Lord Reid in Anisminic v. Foreign Compensation Commission (1969)1 A.E.R. 208, it is 'equally valid whether it is right or wrong'.

In Foh Hup's case (I.C.18 of 1972), the decision of the Minister, deemed by the Act to be final and not to be questioned in any Court, was challenged by a Writ for certiorari in the High Court and failed. The Employer further challenged the decision in the Federal Court and failed there too. Not content with the repeated failure, the Employer applied to obtain leave to go to Privy Council and again failed. Not stopping at this end, the Employer applied further to obtain special leave of the Privy Council and was there finally rejected and dismissed. However, the time taken between the decision of the Minister and that of Privy Council was long enough for the Employer to gain his end i.e. by the tortuous and protracted passage the industrial dispute had to be settled without prejudice to the outcome of the Privy Council's decision. This decision was made known in October 1974 i.e. after about 2 years of the commencement of the case by the Minister's reference in April, 1972. Such a long delay did frustrate the workers by compelling them to wait almost indefinitely to taste the fruits of the improved terms and conditions of employment which had been bargained and won for them.

If the motive of the present Company is also to cause delay, not for a genuine but for a supposed legal grievance, so as to gain his end of frustrating the workers in their expectation for security of tenure, a motive that can easily infect unconscionable Employers, then this must be struck down by a timely amendment in the Act to state that no Award be challenged by being subject to Writs of certiorari, prohibition, mandamus or injunction in any Court on any account. Such an amendment will make effective the finality and conclusiveness of the Award and thus contribute much towards the attainment of harmony in

In the High Court

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continued

industrial relations. If any question of law arises to affect the exercise of the Court's powers conferred under the Act in relation to a trade dispute or matter, there is the provision therein for the question to be referred to the Attorney-General for his considered opinion, with which this Court will accord in deference.

This Court is not a judicial but an arbitral tribunal holding the scales to decide, as in a Court of Equity, which party before it has come up with clean hands i.e. which party has acted with a sense of social responsibility. The party found to be in default has to accept the deciding Award in good grace so as to respect the cause of 'industrial peace' that was put on trial. To delay in implementing the terms of the Award is to keep apart the parties from reconciling and adjusting their conflicting claims to understand each other early and restore harmonious relationship between them.

The Company's management decided not to comply with the Court's Award within a week of its delivery, as evidenced in Counsel's letter (U.2) dated 14th August, 1974 as follows :-

'(a) Our clients are challenging the Award;

(b) They have given us instructions to file appropriate proceedings in the High Court for this purpose;

(c) In the meantime therefore, they are not prepared to comply with the said Award.'

The Court finds it surprising that even by mid-August the management failed to ensure that Counsel be instructed to mention therein the need for a 'fundamental change' into contract-system as an additional reason for non-compliance. Such a failure gives rise to doubt whether the contract-system contemplated by the management did involve a fundamental change i.e. whether the contractors said to be engaged by the Company on the basis of the contracts produced in Court were not like employees but were of an independent character.

The first written mention of the urgent need to make 'a fundamental change' showing the manage-

ment's inability to take back the workers is observed in the Statement in Reply dated 15th October 1974, presumably after a course of instructions to Counsel since mid-August, to read as follows:

(i) On the date of the strike the Company had in hand a number of commitments to meet with its customers and such work had to be completed without the slightest delay in order to avoid any breach of contract which would have resulted in loss and damages. Further in view of the high sensitivity of the operation of the tunnel kiln and in order to meet the commitments the Company had to make immediate arrangements for all works undertaken by the Company to be performed by various sub-contractors.

(ii) All works in the Company have been performed and are being performed by sub-contractors as from about the middle of February, 1974.

(It is to be noted that the deletion of 'sub' was made at the close of the case by Counsel in his final submission in order to accord with the evidence heard in Court).

(iii) As from about the middle of February, 1974 the Company has employed no workmen except for:

(a) clerical and managerial staff and;

(b) security staff.

None of the 73 workmen concerned herein come within the abovementioned categories of work.

(iv) As a result of the said fundamental change in the system of work and operational structure the Company does not need any labour force and does not intend to have any.

The Manager Tan Kim Seng (Co.W.1), to substantiate the above statements, says in examination-in-chief:

'The Company is not in a position to take back the workers. The Company had re-organised the work-system in a manner that all works in the factory would be carried by the contractors from mid February, 1974. The position still remains the same. The

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> Company have no intention to employ any labour at present or in near future. As a matter of fact, the Company has not employed any labour or factory worker since mid February 1974 until now. The Company has engaged clerical and management staff since then, 2 or 3 in all together.'

and later in cross-examination:

> 'The fundamental change in the set-up is that the Company having had commitments with clients had to complete them without delay; and because the tunnel-kiln is a highly sensitive portion, I had decided to carry out the commitments with the help of contractors. This is an important decision made after the strike on 4th February 1974. There was a Board meeting and a resolution was passed.'

The Company's board of Directors, the said Manager said, at a meeting held on 9th February soon after the strike resolved upon the Company's reorganisation of its works on a contract-system so as to meet its outstanding commitments without delay. The record of the relevant minutes of the meeting produced as Co. 4 reads as follows :-

> 'The Board discussed the matter (of the strike) at length and in view of the urgency of keeping the machinery working the Board unanimously decided to take in new employees to replace the strikers.'

The Court wonders why no mention was made therein of the Company having had to meet outstanding commitments on time. 'Keeping the machinery going' obviously means what it says and nothing more to give an interpretation as desired by the Manager to mean as 'fulfilling outstanding commitments'. There is no latent ambiguity therein to require such interpretation by extringic evidence. It simply means (sic) that the machines and other sections of the factory had to go on and so be manned by 'new employees' engaged after the strike. With regard to the Company's list of commitments (produced as Co.6A) it is admitted that no purchase-order (produced as a set Co.6B) has had an express penalty-clause. No evidence was adduced to show that any purchase-order had been cancelled for late delivery after a reasonable time. The Court therefore finds that the

time of delivery is not the 'essence' of the agreement under the purchase-orders (the date being shown in some of Co. 6B but not in others) so that no urgency arose soon after the strike for the Company to reorganise its works on a contract-system just to meet the then commitments without delay.

None of the produced contracts as agreements between the Company and the Contractors is observed as stamped, as required by the Stamp Ord. 1949. The said Manager, in spite of his experience in business, states 'we never stamp our contract-agreements'. Nevertheless, the agreements were received in evidence to ascertain the nature of relationship between the Company and the Contractors. Counsel submitted that the Company's management undertook to have them stamped. Each of these contracts has a partnership agreement appended to it, entered into between the Contractor and a few others named therein as partners. Even the partnership is not seen to be registered as required by the Registrar of Business Ord., 1956. The said Manager did not seem to be concerned about the offence of the Contractor failing to register.

These contracts were proved by the said Manager who was able to identify them, admitting his own signature in all except two (1E and 1F) which bear the signature of his brother (Tan Kim San, the Works-Manager), with whose signature he was familiar. Some are on cyclostyled forms, wherein each Contractor appears to have agreed with the Company to offer his services at piece-rate in different sections or on separate machines, and others are on typed forms wherein each Contractor appears to have agreed with the Company to be taken also on piece-rate work.

All these contracts are found dated mostly in February 1974, none dated before January 1974 i.e. all of them appeared to be executed after the strike-notice of 31st December, 1973. If there was the pressing need from January 1974 for re-organisation on this contract-system, the Court finds no reason why the Company's Board of Directors 'unanimously decided' on 9th February 1974 to take in 'new employees' and not 'Contractors'. It was apparently too late for the said Manager at the present hearing to convince the Court that the Board of Directors meant that the 'new employees' were 'the contractors' to replace the strikers. The Court finds that words so explicit as in the Board's minutes cannot be twisted to mean something else than the ordinary meaning, just to be wise

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after the event.

The Company's Counsel elected to call no other witness than the Manager Tan. The Court was thus put in the invidious position of having to call two of the Company's Contractors, namely Ng Two (Ct.W.1) and Lim Hoh Piow (Ct.W.2) and also the Company's clerk, Kang Lam Fatt (Ct. W.3) in order to ascertain the true nature of the relationship of the Contractors with the Company.

Ng Two's contract is itself questionable. The said Manager stated that the contract dated 8th February, 1974 was the wrong one but another contract said to be the original, was the correct one, dated 1st February, 1974. When this original was produced as Co.11, it was noted that the blanks were filled not in ink but in type except that the blank for the place of work was not filled in. The Manager was not sure which was the first contract but he remembered that he signed the contract dated 1st February, 1974. Ng Two (Ct.W.1) was heard to say:

> 'This is the contract (Co.11) I left behind at home. The Company's clerk read this to me. I entered into the contract after the strike. I signed one contract only and the Manager's copy after the strike. The date of signing cannot be before the strike. I did not sign another contract that month.'

The strike admittedly took place not on 1st February but on 4th February 1974. Such a material discrepancy left the Court in doubt whether there was ever a true contract executed between the said Manager and Ng Two.

The contract relating to Lim Hoh Piow (Lim, Ct.W.2) a former employee, said to be dated in February 1973, is admitted by him to be wrong stating that the date should be corrected into February, 1974. It is admitted that 6 of the 15 Contractors were former employees. The said Lim, according to the Manager Tan, resigned after the strike and then taken back as a Contractor on 8th February 1974. When the Union's Counsel referred Lim to the Manager's letter to him on 29th May, 1974 (U.4) addressing him as supervisor, he seemed amazed and immediately corrected himself to say that he became a Contractor at the end of May 1974. The Manager, on being

recalled to explain this letter (U.4), admitted that he signed it requesting Lim as supervisor of the crushing section to take in the Indian watchman, Murugan and Palaniappan, into that section. He said:

> 'I addressed him as 'supervisor' though the correct term should be 'contractor'. There was nobody then in charge of the crushing section. I did not think of the correct term. He is not old to supervise the crushing section.'

Lim said earlier that he was told he was too old to move about as a supervisor to see to the loading and unloading of bricks and so was given the bagging section to do the easy work of packing powder into bags. Thus the description given by the Manager of Lim's position is so distorted as no reasonable person can believe that Lim was a real Contractor in the sense of being not a servant of the Company.

It is noteworthy that most of the contracts on typed forms, like some on cyclostyled forms, show the rate and the nature of work different from that shown in the partnership-agreement entered into respectively by the Contractors and his fellow-workers. For instance, Ng Ah Sing was expected to do work @ 4 different rates for 2 types of sleeves, for runner-bricks and for nozzles, and Lim Kee Chooi to do work at the rate of 6.82 cts. each for runner-bricks, numbers 5 & 6 (night-shift). These are shown on their respective contracts but in both their partnership-agreements the rate and the nature of work are shown @ .0115 cts. per piece and for making fire-bricks. Many of the fellow-workers were women, said to work in partnership, but no one was produced to clear the Court's mind as to whether they were partners or not and as to the difference in the rate and in the nature of work performed from that contracted for. The Court observed the absence of concern of the manager Tan in his indifference when he said:

> 'I did not ask for the partners of the contractors. They said that those associated with each are partners. I did not ask them why each did not employ workers as stated in the contract. I would not agree that this is an important deviation. I did not clarify the position of those working with the contractors, whether they were partner or workers.'

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The Court was therefore unanimously inclined to regard these partnership-agreements in support of the contracts as 'framed up' for the purposes of showing that each Contractor is supposed to have undertaken work at piece-rate with others as partners. The apparent difference in rate and nature of work shown between the Contract and the so-called partnership-agreement is clear proof to the Court that there were no partners but workers serving under the Contractors. The Court finds that the partnership-agreement was thought of as a clever device for the Contractor to evade payment for E.P.F. and SOCSO contributions and to escape granting holiday-pay, sick-pay and other legitimate benefits. The Court takes great exception to the fact that the Company's management has somehow been allowed to evade the obligations under the labour-laws, in spite of the alleged visits made by Labour-Enforcement officers. Such a situation cannot be left tolerated.

On an examination of the contracts produced, what strikes unusual to the Court is that there are several alterations made in ink, admittedly by the Manager himself (Co.W.1) all apparently done in haste, as some blanks are found not filled in with particulars. On the cyclostyled forms, the Company is referred to as also the 'Employer', which seems justified by these clauses wherever underlined by the Court, taking Co.1A (relating to Ng Two) as an example:

Clause 1 - The Contractor shall <u>subject to the consent of the Employer</u> employ workers to 'work' in the tunnel kiln.

Clause 2 - It is expressly agreed that the rate of pay of the said workers shall be M$4.20 per kiln car bricks.

Clause 3 - It is also agreed that the Contractor shall be paid half-monthly (in accordance with the number of kiln cars).

Clause 4 - In the event of any default on the part of the Contractor in carrying out the said Works and/or his services are found not satisfactory, the <u>Company shall be entitled to employ and pay</u>

other persons or person to carry out the same and all expenses consequent thereon or incidental thereto shall be borne and paid by the Contractor and shall be recoverable from him by the Employer or may be deducted by the Employer from any monies due or may become due to the Contractor. The Employer may terminate the services of the Contractor by giving seven (7) days written notice without attributing any reason whatsoever and no compensation shall be payable to the Contractor. Upon the expiry of the notice the Contractor shall peacefully vacate premises of the Employer taking with him only his belongings.

Clause 5 - If the Contractor wishes to terminate his services, he shall give one week's notice in advance to the Employer.

Clause 6 - The Contractor shall be responsible for the payment of the costs of E.P.F. salary, wages, allowances and all other benefits entitled by the workers employed by the Contractor and shall keep the Employer indemnified in respect thereof.

Clause 7 - The Contractor shall be liable and responsible for the payment in respect of any damages or compensation payable at law in respect or in consequent of any accident or injury to any workmen or to any other person in the employment of the Contractor or any Sub-Contractor and shall indemnify and keep indemnified the Employer against all claims, proceedings, costs, charges, and expenses whatsoever in respect thereof or in relation thereto.

Clause 8 - The Contractor shall be responsible for his workers' misconduct, negligence, mischief or commit a breach or fault at the factory and in such event the Company reserves the right to instruct the Contractor to dismiss the particular worker or workers and the Contractor shall not fail to carry out the instructions given by the Employer.

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Clause 9 - The Contractor shall be solely responsible to comply with the existing laws and regulations with regard to the employment of labourers and shall keep the Employer indemnified in respect of any claims arising from any breach by him.

Clause 10 - This agreement is agreed and made by both parties and will be valid from the date hereof.

From the underlined portions of the above clauses, the Court finds that none of the Contractors like Ng Two had offered services independent of control by the Company's management in the selection of the workers or even in their dismissal for misconduct.

The evidence of the Company's clerk (Kang Lam Fatt) is important to show whether the Contractors engaged were independent of control in the manner of performance of their work by the Company's management. The clerk was admittedly in-charge of the Daily Cards, kept in respect of the Contractors. Therein the quantum of production is not only noted but also the details of hours and total payment of wages by hours. Such details appeared to the Court as inconsistent with the work of Contractors on piece-rates and paid by the total production. The whole of the day's work was under the supervision of the Company's clerk who signed his name in the last column of the Cards. The clerk admits that he made all the entries in the other columns himself. What he said of his supervision over 14 Contractors during day-shift is worthy of observation as regards piece-rate work:

> 'The hour-rate is noted for runner-bricks which are difficult to print. Their production is less and so we do not go by piece-rate. For those easier to print, we go by piece-rate. This is the Manager's instruction.'

In answer to a question by the Court about the Contractor Tan Tun Key, he said:-

> 'He is taken on piece-rate in the contract but these 3 cards (Nos. 58, 59, & 60) do not show work on the basis of the contract. His work is for abnormal bricks, quite difficult to make and so not contracted for.'

The Court finds therefore that the Contractors like Tan Tun Key were not following the terms of the contract but were doing work according to the supervisor's directions.

Even in the payment of wages twice a month there appears no independence shown for the Contractors by the Company. A particular Contractor is made to pay for workers got from elsewhere into his section, who are said to work with his consent. According to the same clerk, deductions were made for sums paid to these workers moved over from another Contractor or to odd-workers moved out from being idle at broken-down machines. By such moves, the Court finds that these workers were just casual and were made to work under any one of the Contractors without his choice. Also, deductions were admittedly made for sums borrowed by Contractors like Tan Tun Key, a conclusive fact to show that the Contractor had not sufficient funds to carry out the work assigned but had to be dependent on money advanced by the Company. The Court is of the view that no indigent Contractor can hope to serve as an independant Contractor. Above all, it is not denied that the tools and materials used by the Contractors belong to the Company. In all these circumstances, the Court is convinced that the whole contract-system created by the Company was not of an independent character but subject to the command or directions of its supervisor. This conviction is confirmed by the fact, as admitted by the clerk, that each Contractor understood from his Con -? only the rate of payment and his total wages paid twice a month. It is relevant to observe that Ng Two speaks of his rate of payment at $4.20 per day per worker as 'enough for 3 meals a day.' He said:-

> 'Only the figure $4.20 was discussed with the Company. No other terms were discussed. I do not know the rest of the terms in the contract, except $4.20. Nobody told me what terms the other terms were. The Company's clerk read to me but I cannot remember. After having been read in Hokkien, the agreement or contract was signed by me.'

and later he said:-

> 'I did not employ any worker. I cannot remember that I was expected to employ workers. I do not know that if I wanted to employ workers

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I must get the Company's consent. I remember that payment is made twice a month. I do not know that I am responsible for the conduct etc., if I employ workers. We work in partnership. I do not know all this about E.P.F. allowance and other obligations, I do not know of this liability in damages, I do not know about conforming to laws and regulations. I cannot remember what was read to me about giving one week's notice before termination. The clerk read the contents and we agreed. We entered as a kongsi. Everytime I received payment I signed it. We share equally the money as partners. I do not obtain receipts from the partners.'

It appeared strange for the Court to observe that the clerk, knowing only Hakka, could interpret the contract from English and explain its contents in Hokkien. In fact, he admitted at the end:

'At the time I was asked to read the contract, I emphasised the part relating to payment. It may be a mistake to say that I interpreted the contract.'

Furthermore, the Court was left to wonder how the rate of $4.20, sufficient for 3 meals a day, could give rise to profits for sharing between partners.

Next, Lim Hoh Piow, after stating that he understood the contents of the contract and then strangely signed it blank, had this to say:-

'I do not know who prepared the partnership agreement. It was already prepared with the main agreement. I do not know the obligations. The clerk read only the rate and the half-monthly payment. I realise now that I have to engage workers, not partners and pay E.P.F. etc. I realise also that if I get workers I have to obtain consent of the Company. I realise that if the Company's management orders that a worker be dismissed, I have to do so. If I do not want the contract, I know that we have to give 7 days' notice either way. I signed the agreement without knowing its contents. When I signed it, the manager was present.'

On the above statements, the Court holds unanimously

that these Contractors did not know what they were signing for, and so finds that the Contracts were all just contrived for the purpose of providing an excuse for the Company to speak of re-organisation as justifying its refusal to take back the workers who went on strike, besides providing a device of absolving itself of any legal obligation or liability.

The said Manager, in stating that the Company was not in a position to take back the striking workers because of its re-organisation into contract-system from mid-February, 1974, stated further in cross-examination:-

> 'There is no need for workers to be taken as by mid-February all vacancies had been filled. I did not make any attempt to recruit any labour.'

thus confirming his earlier statement that the Company had not employed any labour or factory workers since mid-February 'until now' i.e. the date of this hearing on 7th November, 1974. When he was confronted with the following Press advertisement in the Sin Chew Jit Poh dated 8th August 1974 to read:-

> Employment Notice
>
> 'Our factory is expanding its business. Intends to employ additional personnel as below:-
>
> (1) Personnel for control of kiln matters. To be responsible for all matters concerning tunnel kilns, angle kilns and burning kilns. Applicants should be graduates from the Taiwan University Technical College or having experience in the actual management of kilns for over 3 years.
>
> (2) One draughtsman to be responsible for drawing and designing of brick moulds. He should possess specialised college qualification or practical experience.
>
> (3) Several persons as workers in tunnel kilns. Must work in shifts, able to stand hard work, and possess secondary education.
>
> (4) A female telephone operator, must be able to type and have working experience.
>
> Interested applicants in (1) and (2) are requested

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to apply with own handwriting stating qualifications, enclosing copies of certificates and testimonials and addressed to the manager of our factory. Applicants for (3) and (4) are requested to come in person to be interviewed by the manager.

he explained that the advertisement was meant for clerical and supervisory staff and not for workers. He did not speak of any managerial or security staff required. When he was questioned by the Court about (3) above, relating to 'several persons as workers in tunnel-kilns', he asserted what was meant was not 'several' but '2 persons' to be interviewed for work in shifts. The Court could not accept this unashamed assertion to suit his fancy that 'several persons' meant only '2 persons', whereas to the ordinary man what was meant was clearly many more than'2 persons able to stand hard work'. No mention is made in (3) above that the workers in the tunnel-kilns were to work with Contractors, for the simple reason, as found by the Court, that no contract-system of an independant character was contemplated or created by the Company's management from the time to the strike of 4th February 1974 until the time of the advertisement i.e. 8th August, 1974, the very date of the Award. The whole system to show re-organisation has no doubt been an after-thought i.e. devised after the date of the Award and has been so designed as a camouflage to mislead this Court.

In this connection, it is an opportune moment to express here that no Counsel should accept a brief before ensuring that his client gives full and frank instructions for him to have an insight as to the merits and demerits of the case. It is then that he can serve faithfully, as in this Court, the cause of social justice. The Court finds it unfortunate that the Manager Tan concealed much from his Counsel both at the former hearing (in case No. 15/74) and also at the present hearing. In the former, for example, for the Court to take account of the Company's production, the reports tendered in were expected to relate to valuable 'burnt' bricks whereas they turned out to relate to useless 'unburnt' bricks, much to the surprise of the Company's Counsel. In the present hearing, the same Manager admits not having disclosed to his Counsel about the Company's advertisement for workers required in the tunnel-kilns soon after the date of the Award. Every Counsel has to remember that

his interest in the client should never conflict with his duty to the Court as its Officer i.e. not to mislead, or even made to mislead as transpired in this case, any Court in serving the cause of justice. The Court feels strongly that the relationship here between the client and Counsel has not as fiduciary as it ought to be. (sic) Consequently, the Company's Counsel during the presentation of the case, both at its former hearing and now, appeared not to uncover vital facts but to discover them. The said Manager as the main witness throughout the case was not truthful at all by the many twists and distortions he made during his whole testimony just to fabricate a set of circumstances which, in the unanimous view of the Court, was found not the real situation). Though the Company's management is entitled to exercise its right to re-organise, the Court finds here that this right has been badly abused in its resorting to devious ways of engaging so-called 'independent contractors', which contract-system involved no 'fundamental change' in its organisation.

The Court is reminded of a similar case of so-called 'independent contractors' that happened in India, namely D.M. Sahib & Sons, Proprietors of a bidis' Firm v. Union of United Bidi Workers (A.I.R. 1966 S.C. 370, as referred to by Union's Counsel.

The modus operandi in manufacturing bidis was thus :-

(1) The contractors took the tobacco-leaves from the firm and employed workmen for manufacturing bidis.

(2) The workmen, after cutting the leaves in their homes, process them in the contractors' premises.

(3) The contractors took the manufactured bidis from the workmen and delivered to the firm.

(4) The contractors were paid by the firm a certain price for the manufactured bidis, after deducting therefrom the cost of the tobacco-leaves already fixed.

(5) The balance was paid to the contractors, who in their turn paid the wages to the workmen who rolled the bidis at piece-rate.

Held by the Indian Court:-

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(1) The contractors were not independent of control by the firm's management but acted as its agents who were in all respects indigent persons.

(2) The sale of the tobacco-leaves and the re-sale of the manufactured bidis was a mere camouflage.

(3) The contractors were dependent on the firm for the supply of materials for which they did not pay.

(4) The workmen were really those of the firm, being employed through its agents.

(5) There was no supervision by the contractors over the manner of work so that the firm accepted whatever was manufactured by the workmen at different prices.

Thus, the relationship of 'master and servant' subsisted between the workers and the firm, and not between the workers and the Contractors a view with which this Court respectfully agrees.

The local case of E.P.F. Board v Bata Shoe Company (1 M.L.J. 1968 p. 236), which was referred to by the Company's Counsel, is not similar because the Company had nothing to do with how the work was done by the salesmen in the retail shops, which were under the control of their manager. There was certainly no relationship of 'master and servant' between the Company and the salesmen, as the Federal Court properly held confirming the High Court's decision. The position is succinctly stated in the American Jurisprudence (27 Amr.Jur. p.485) re Independent Contracts like this:

> 'It is the element of control of the work that distinguishes the relationship of master and servant from the independant contract relationship. The most important test in determining whether one employed to do certain work is an independent contractor or a mere servant is the control over the work.'

The Law has developed further, because of modern

industrial conditions with the accention division of (sic) functions and extreme specialisation, to take a modified view of the factor of control. The position now is that though control is obviously an important factor, sometimes a decisive factor, yet it is at times not a determinative factor. In cases of men of professional or particular skill there can be no question of the Employer telling them how to do their work, and therefore the absence of control and direction can be of little, if any, use as a test. It is not the physical control but the right to control that matters. In Whittaker v. Minister of Pensions and National Insurance (1967, 1QB. p. 156) the Court hold:

> 'To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power not only of directing what work is to be done but also of controlling the manner of the work done. If a person can be overlooked and directed in regard to the manner of doing his work, that person is not a contractor.'

In the present case the Court finds that, by the said Company's clerk having close supervision of the work done by the Contractors and those supposed to work as partners, the Company was having major control over their manner of performing the work. They were definitely found to be under the superintendence of the Company's management as under 'a contract of service' by these facts: (i) the calculation of hours (ii) the payment of wages according to hours - both being recorded in the Cards (Co.10), and particularly (iii) all materials for the various sections supplied not by any Contractor but by the Company, in addition to (vi) its readiness to advance money to needy (sic) Contractors. Nowhere does the Court find that there was any discretion left to the Contractors because of the ostensible authority of the Company by virtue of its high degree of control. The Contractors are found to be set up not merely as 'new employees' but also as pure and simple agents to engage other employees to work with them. They were all found to be mere servants paid by the hour-rate for the works assigned by the Company without any attention given to the piece-rate contracted for. In the light of all the factors governing their relationship with the Company, they were all without question not offering services under 'contracts for services' but by intention were contractual servants of the Company. The Court

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therefore came to the unanimous conclusion that the Company stood, in its relationship with the Contractors and their workers together, as 'master and servant'. They were all found employed soon after the strike of 4th February as its 'new employees'. The Company as the employer is thus vicariously liable for the payment of E.P.F. contributions and for other benefits aforementioned due to and from these employees.

The Company's management continues to show its defiance to its former workers who went on a justifiable strike by refusing their return to work in accordance with the 'terms of the Court's Award'. By being financially able to resort to further action by writ of certiorari the management has pinned its hopes to wear out the workers to make them wait almost indefinitely to know the result of the action. The workers have been compelled to find some means of livelihood to alleviate their present plight in the meanwhile. Even upon this temporary livelihood the management now depends for mitigation of its liability imposed by the Award. According to the reports of the investigator, Lawrence, of the Federal Adjustment Syarikat taken on 4th, 8th and 16th October (Co. 2 and Co.2A), most of the 50 workers interviewed were noted therein as unemployed, some on odd-jobs or seasonal jobs and others on contract-labour in Selayang Baru Housing Estate for a limited period of 5 to 8 months. These reports were again qualified by the manager Tan (As Co.3 & Co.3A) by adding a further month to bring the position up-to-date till the month of September 1974. The Court could not agree with his calculation of total wages earned on the presumption that there was work every day without his knowing the number of days actually worked. No account could be taken by the Court for the money earned by any worker after the date of the Award because of the Company's refusal to comply with its terms i.e. to allow the workers back into the Company to earn as before from 15th August 1974. Until the date of the Award in the former Case No. 15 of 1974, the Court was not made aware of any alternative employment of the workers and so the Company was ordered to grant them, dating from 16th February 1974, the same terms and conditions as prevailed before their strike. The Court can now find no cause shown for mitigation to deviate from the terms of the said Award.

At this conclusive stage, what troubles the

mind of the Court is that this Company, enjoying as it does a pioneer status, has set a bad example of a privileged employer. As a business enterprise with various forms of tax-incentive and tariff protection, the Company's management should have learnt to allow the reflection of its expanding business to shine upon the workers by similar inducement and encouragement to meet their expectation of security in employment. The management here must learn to handle with care not only the valuable assets in the factory's machines and equipment but as well the human assets in its labour-force as being also a resource of wealth. Only the human touch is required to get the best out of this human resource. Monetary consideration alone does not motivate a man to work, but something more that can give him a sense of self-respect, self-recognition and self-fulfilment. To achieve this end, the Company ought to have an experienced Personnel Manager to advise on the methods of recruiting and retaining men with the necessary skills and to guide the management on the ways in which the best results can be obtained from the men and women within the organisation. Without such expert advice and guidance the Company is sure to descend, as happened here, to 'unfair labour practices' that can have unhealthy responses in industrial unrests to stall its progress as well as stifle the voice of labour. It is the fear of such malpractices that has led other countries like India to introduce legislation like 'Contract-Labour (Regulation & Abolition) Act, 1970 - Act 37 of 1970', meant to regulate the employment of contract labour in certain industries and to provide for its abolition in certain circumstances. It is relevant to endorse what has expressed in a recent Award of this Court in Case No. 44 of 1974, between Vengettasamy v. Luen Hoe Estate Sungei Patani Kedah:-

> 'If the works for which contract labour is employed are incidental to and clearly with the main activity of the industry and is of a perennial and permanent nature, the abolition of contract labour would be justified.'

following the case of Vegoils Pte. Ltd. and the Workmen reported in Labour Law Journal (1971) Vol. 2 p.567 where the learned Judges held as follows :-

> 'As the jobs were essentially connected with the day-to-day work of the company, and as they were continuous, the employment of a contractor for getting these types of work done is nothing but

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an unfair labour practice.....
.....
The labourers working under a contractor were at his mercy and were not getting the benefits which the permanent employees of the appellant company are normally entitled to. To avoid giving the benefit to such workmen, the company has adopted the device of having the work done by contract labour. The demand for abolition of contract labour is fair and reasonable and as such the demand has to be acceded to.'

It is interesting to take note of very recent cases showing a new development in the law, that is meant to curb the present growth in the number of 'independent contractors', especially in construction-industry entering into 'labour only' contracts, namely:-

(i) Construction Industry Training Board v. Labour Force Ltd. (1970) 3AER. p.225.

(ii) Global Plant v. Secretary of State for Health and Social Society (1972) 3 AER (sic) p. 385.

These cases show, as was observed in this Court's Award in Case No. 61 of 1973, that 'where self-employed persons in sub-contracting labour on their own terms appear to be independent Contractors, they are yet held to be servants of a third party, the building Contractor, because they have as hourly-rated men no opportunity in deploying their skills to make profit'.

For maintaining industrial peace, there must be mutual attentive communication just as in human relations. That is why during these times of inflation and recession emphasis is laid on a kind of social contract i.e. both management and labour to recognise the Code of Conduct for industrial harmony. The Company's management here has from the very outset been found to shun any form of dialogue with its workers, remaining throughout deliberately reluctant to understand whatever grievances between them for redress wherever possible. The management has been found solely responsible for the resulting industrial dispute to be referred compulsorily to this Court. The same management again is responsible

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continued

for the reference of this dispute of non-compliance and yet has shown no iota of satisfactory evidence to convince the Court of a 'fundamental change' in the organisation for its refusal to take back the workers on 16th August 1974. The Court has unanimously come to the finding that the Company has failed bitterly to substantiate any reasonable cause for non-compliance. As far as this Court is concerned, no Award without a genuine legal grievance shall by virtue of S.29(3)(a) of the Act 'be challenged, appealed against, reviewed, quashed or called into question in any Court of law' and further by S.(3)(b) thereof no Award for the 'reinstatement or re-employment of a workman shall be subject to any stay of proceedings in any Court of Law'.

The Court, therefore, in handing down the present Award, directs the Company to re-instate the 73 workers into its employment without further delay i.e. on or before the 1st day of April, 1975 complying with the terms of the previous Award of 8th August 1974 and to regard their service as continuous granting the same conditions and benefits as are due to them. The Company is to blame for bringing itself to this situation of having to disband the so-called 'independent contractors' in order to give way to those 73 workers. If any of these workers fail to report for work, whether due notice by the management is given or not, on 1st April, 1975, then he will lose the benefit of this Award. Failure by the Company to hereafter will entail its liability for an offence punishable (sic) under S.55, besides the continued offence of the illegal lock-out in contravention of S.41(b) punishable under s.43(2) of the Act.

HANDED DOWN ON & DATED THIS 24TH DAY OF MARCH, 1975.

sgd: K. Somasundram
Chairman.

In the High Court

No.10
Affidavit of Hamzah Bin Abu
23rd May 1975

No. 10

AFFIDAVIT OF HAMZAH BIN ABU

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO: 73 OF 1974

In the Matter of an application by
South East Asia Fire Bricks

In the High Court

No. 10
Affidavit of
Hamzah Bin Abu
23rd May 1975
continued

Sendirian Berhad for leave to apply for an Order of Certiorari

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974

Between

South East Asia Fire Bricks Snd. Bhd. Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon
represented by the Union Respondents

A F F I D A V I T

I, HAMZAH BIN ABU (N.R.I.C. No. 2154871) of full age and residing at Batu 9, Jalan Cheras, Kajang Selangor do solemnly affirm and say as follows :-

1. I am the General Secretary of the Non-Metallic Mineral Products Manufacturing Employees Union (hereinafter referred to as the said 'Union').

2. I have read what purports to be a copy of the affidavit of the applicant sworn on 18th September, 1974 and filed herein. In reply thereto I am duly authorised by the Respondents to make this affidavit.

3. In reply to paragraph 4(a), (c), (d), (e), (f), (g), (h), (i), (j) and (k) I am advised and I

verily believe that averments of the applicant herein are misconceived lack bonafide and are wholly devoid of merit and hence be dismissed as such.

4. As regards paragraphs 4(b)(i)(ii) and 4(1) of the said affidavit I am advised and verily believe that in the Industrial Court Case No. 64 of 1974 (non-compliance) between the same parties, the Industrial Court enquired into the applicant's said claim that 'the applicant has since the said strike reorganised its business and is no longer employing direct labourers and that the work is now being carried out by contractors' and had made the following observations in Award No: 12 of 1975 handed down on 24th March, 1975.

Page 9 of the said Award

'The Court was therefore unanimously inclined to regard these partnership-agreements in support of the contracts as 'framed up' for the purpose of showing that each contractor is supposed to have undertaken work at piece-rate with others as partners. The apparent difference in rate and nature of work shown between the contract and the so-called partnership agreement is clear proof to the Court that there were no partners but workers serving under the contractors. The Court finds that the partnership-agreement was thought of as a clever device for the contractor to evade payment for E.P.F. and SOCSO contributions and to escape granting holiday-pay, sick pay, and other legitimate benefits. The Court takes great exception to the fact that the Company's management has somehow been allowed to evade the obligations under labour laws, inspite of the alleged visits made by the Labour-Enforcement Officers. Such a situation cannot be left tolerated.'

Page 12 of the said Award

'The Court is of the view that no indigent contractor can hope to serve as an independent contractor. Above all, it is not denied that the tools and materials used by the contractors belong to the Company. In all these circumstances, the Court is convinced that the whole contract-system created by the Company was not of an independent character but subject to the command or directions of its supervisor.'

In the High Court

No. 10
Affidavit of
Hamzah Bin Abu
23rd May 1975
continued

Page 14 of the said Award.

'On the above statement, the Court holds unanimously that these contractors did not know what they were signing for, and so finds that the contracts were all just contrived for the purpose of providing an excuse for the Company to speak of re-organisation as justifying its refusal to take back the workers who went on strike, besides providing a device of absolving itself of any legal obligation or liability.'

Page 15 of the said Award.

'The whole system to show reorganisation has no doubt been an after-thought i.e. devised after the date of the Award and has been so designed as a camouflage to mislead this Court.'

Page 16 of the said Award.

'The said Manager as the main witness through out the case was not truthful at all by the many twists and distortions he made during his whole testimony just to fabricate a set of circumstances which, in the unanimous view of the Court, was found not the real situation. Though the Company's management is entitled to exercise its right to re-organise the Court finds here that this right has been badly abused in its resorting to devious ways of engaging so-called 'independent contractors', which contract-system involved no 'fundamental change' in its organisation.'

Page 21 of the said Award.

'The same management again is responsible for the reference of this dispute of non-compliance and yet has shown no iota of satisfactory evidence to convince the Court of a 'fundamental change' in the organisation for its refusal to take back the workers on 16th August, 1974. The Court has unanimously come to the finding that the Company has failed bitterly to substantiate any reasonable cause for non-compliance.'

Copy of the said Award is annexed hereto and marked "U.A.1"

5. On 2.8.1974 the Company filed certiorari proceedings in the High Court for purposes of challenging the Honourable Minister for Labour's order dated 21.2.1973 directing the applicant to accord recognition to the union w.e.f. 5.9.72 and on 9.2.1974 had obtained leave. This the applicant did after a delay of 17 months. I am advised and verily believe that if the applicant's averments that it had since the date of the strike re-organised its business are true the application (Originating Motion 57 of 1974) challenging the Minister's order is wholly suspect and pointless and prosecuted mainly to frustrate the workers from enjoying the fruits of the said awards.

AFFIRMED at Kuala Lumpur)
by the abovenamed HAMZAH BIN ABU) Sgd: Illegible.
on the 23rd day of May, 1975 at)
2.30 p.m.)

Before Me

Sgd: Arshad b. Abdullah,
Commissioner for Oaths,
Kuala Lumpur.

C E R T I F I C A T E

I hereby certify that the above written affidavit was read, translated and explained in my presence to the deponent who seemed perfectly to understand it, declared to me that he did understand it and made his signature in my presence.

sgd: Illegible.

This affidavit is filed by Messrs: Xavier & Vadiveloo, Advocates & Solicitors, No. 6, Jalan Klyne, Kuala Lumpur, Solicitors for the Respondents above-named.

In the High Court

No. 11
Submission on behalf of the Respondents
27th May 1975

No.11

SUBMISSION ON BEHALF OF THE RESPONDENTS

Limitation of the Jurisdiction of the High Court in Issuing A writ of Certiorari

(1) The High Court cannot sit in appeal over the findings recorded by a competent tribunal in a departmental enquiry so that if the High Court has purported to reappreciate the evidence for itself that would be outside its jurisdiction. However, if it is shown that the impugned findings recorded by the Administrative Tribunal are not supported by any evidence the High Court would be justified in setting aside the said findings. (Held that the High Court was not right in holding that there was no evidence in support of conclusions recorded by the Tribunal). The enquiry held by the Administrative Tribunal is not governed by the strict and technical rules of the Evidence Act. Rule 7(2) of the Rules provides that in conducting the enquiry the Tribunal shall be guided by rules of equity and natural Justice and shall not be bound by formal rules relating to procedure and evidence.

(State of Orissa vs. Murlidhar - A.I.R. 1963 S.C. P.404)

(2) Views of Lord Reid expressed in his judgment in the Anisminic case which were accepted by the majority in the House of Lords.

'It has sometime been said that it is only when a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction re enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have

given a decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly .... If it is entitled to enter or the enquiry and does not do any of those (sic) things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the course in certain circumstances to correct an error of law.'

(Anisminic vs. Foreign Compensation Commission & Another) (1969 (1) A.E.R. Page 208 @ 223 Letter B).

The Industrial Court in the instant case has not committed any of the above errors.

(3) 'The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt .... the jurisdiction to issue a writ of certiorari, is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if

In the High Court

No. 11
Submission on behalf of the Respondents 27th May 1975 continued

it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.

In dealing with this category of cases, however we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact drawn from the said findings are within the exclusive jurisdiction of the Tribunal and the said points cannot be agitated before a writ court. It is within these limits the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised.'

(Dicta of Gajendragadkar J. in Syed Yakoob v. Radhakrishna) (A.I.R. 1964 S.C. 477 @ 479

(4) Constitution of India, Art. 226 - Findings of fact of a Tribunal giving an award - Interference it and when justified: (sic)

'So long as the conclusions of the tribunal are based on a fair appreciation of the evidence available on record, interference by this Court with a finding of fact arrived at by the tribunal will not be justified under Art. 226 of the Constitution of India. The tribunal has given good reason for holding that the retrenchment had been resorted to by the management as a measure of victimisation and was therefore not bona fide. There are therefore no grounds for justifying interference by the High Court with the conclusions of the Tribunal.

(Thressia v. Kurian L.L.J. 1970 Vol.1 Page 511) - (Kerala High Court).

(5) 'The Industrial Tribunal on a consideration

of the facts in the light of the principles enunciated above, came to the conclusion that though certain features which are usually to be found in a contract of service were absent that was due to the nature of the industry and that on the whole the status of the agarias was that of workmen and not independent contractors. It was under the circumstances strenuously urged before us by the learned counsel for the respondents that the question as regards the relationship between the appellants and the agarias was a pure question of fact, that the Industrial Tribunal had jurisdiction to decide that question and had come to its own conclusion in regard thereto, that the High Court, exercising its jurisdiction under Arts. 226 and 227 of the constitution, was not competent to set aside the finding of fact recorded by the Industrial Tribunal and that we, here, entertaining an appeal from the decision of the High Court, should also not interfere with that finding of fact.'

Reliance was placed on the observations of Mahajan, J., as he then was, in Ebrahim Aboobakar v. Custodian General of Evacuee Property:-

'It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice... But once it is held that the Court had jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right in as much as a court has jurisdiction to decide rightly as well as wrongly.'

(Dharangadhara Chemical Works Ltd. v. State of Saurashtra) (1957 S.C.R. Page 152 @ 161)

May it please your Lordship

The main ground on which the said award is challenged

In the High Court

No. 11
Submission on behalf of the Respondents
27th May 1975
continued

both in the Industrial Court and here is that Section 15(2)(a) of the 'Employment Ordinance 1955 applies in the instant case. Section 15(2)(a) reads as follows:-

> 'A labourer shall be deemed to have broken his contract of service with the employer if he had been continuously absent from work for more than two days -
>
> (a) without prior leave from his employer or without reasonable excuse; or
>
> (b) without informing or attempting to inform his employer of the excuse for such absence.'

Invoking the above provisions the Applicant served notice on the workers stating that the workers would be 'deemed to have terminated their services' if they did not return to work on 6.2.1974 (Exhibit 10 Statement of Case). In effect the Applicant contends that the workers had dismissed themselves with effect from 6.2.1974 by being absent from work for more than two days on account of their participation in a strike.

In coming to this conclusion the Applicant had then relied on and now also relies on the case of Wong Mook & 3 Others v. Wong Yin (1948 M.L.J. 41) where Mr. Justice Willan in construing the provisions of Section 53(iv) of the Labour Code (Cap. 154) which in essential particulars are similar to the provisions of Section 53(iv) of the Labour Code (Cap.154) which in essential particulars are similar (sic) to the provisions of Section 15(2)(a) of the Employment Ordinance, 1955 held that absence from work on account of participation in a strike is not a reasonable excuse for such absence.

Willan's judgment is based on the construction of Section 20 and 54(2) of the Trade Union Enactment 1940 and of Section 53(iv) of the Labour Code. The Sections read as follows:-

Trade Union Enactment 1940

Section 20

'No suit or other legal proceeding shall be

maintainable in any civil court against any registered trade union or any officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induce some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills'

Section 54 (2)

'This enactment shall not affect

(1) .....

(2) Any agreement between an employer and those employed by him as to such employment; or

(3) .....'

Labour Code (Cap. 154)

Section 53(iv)

'An agreement shall be deemed to have been broken -

(a) by a labourer if he is continuously absent for more than one day exclusive of any day on which the employer is not bound under sub-section (iii) to provide work without leave from the employer or without reasonable excuse.'

Mr. Justice Willan held that, although Section 20 indicated that it was not illegal in certain circumstances to break a contract of service, Section 54 (2) indicated that the exercise of any right under the Enactment did not affect the agreement of employment. The Learned Judge also held that since the agreement of employment was regulated by the Labour Code and Section 53(iv) of the Code specifically declared that continuous absence from work without leave or reasonable excuse for more than a day shall be deemed a breach of the agreement of employment, the workers concerned had broken the agreement and were rightly refused employment. He held further that, since absence while

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on strike would result in absence for an indefinite period of time, it did not constitute a 'reasonable excuse' within the meaning of that phrase in Section 53(iv).

It is true that Sections 20 and 54(2) of the Trade Union Enactment 1940 are in pari materia with Sections 21 and 66(b), respectively, of the Trade Union Ordinance, 1959 which is in force at the present time and that Section 53(iv) of the Labour Code is substantially the same as Section 15(2)(a) of the Employment Ordinance, 1955.

Section 54(2) of the Trade Union Enactment 1940 was construed by Mr. Justice Willan as meaning that the terms and conditions of employment under an agreement of employment superceded the rights of organised labour under the Trade Union Enactment. He then went on to say that he had to look into the provisions of the Labour Code to determine the rights of the parties and held that under Section 53(iv) of the Labour Code the labourers had broken their contract of service. However, the Employment Ordinance must be construed in the light of certain new provisions of the said Ordinance namely Sections 8 and 15(2)(a) of the said Employment Ordinance that are in force today and which were absent in the former Labour Code. Section 8 of the Employment Ordinance reads as follows :-

> 'Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract -
>
> (a) to join a registered trade union; or
>
> (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or
>
> (c) to associate with any other person for the purpose of organising a trade union in accordance with the provisions of the Trade Unions Ordinance, 1959.'

The effect of the above section is:

(1) to safeguard the right, inter alia, of a workman to participate in the activities of a

registered trade union which according to its definition in Section 2 of the Trade Unions Ordinance 1959 include the right to promote or organise or finance strikes; and

(2) to ensure that these rights are read into every agreement of employment.

Besides Section 8, the said Ordinance also contains a new provision in Section 15(2)(b) to the effect that a labourer shall not be deemed to have broken his contract of service if he is absent after informing the employer or attempting to inform the employer of the reason for his absence. This provision was also absent in the Labour Code. Under the provisions of the Industrial Relations Act, 1967 it is not necessary to give notice of intention to go on strike except in the case of a strike in a public utility service as defined in Section 40 thereof. The industry in the instant case the Court found is not a public utility service but the union, nevertheless, did give advance notice of its intention to take industrial action. In view of the above mentioned provisions of law which did not exist in 1947, it would be absurd to apply Willan's Judgment and to hold that absence on account of participation in a lawful strike is not a reasonable excuse for such absence.

Employment Ordinance 1955 and Right to Strike

The essential difference in the provisions of Labour Code (Cap.154) and Employment Ordinance 1955 in relation to right to strike may be summarised thus. Section 54(ii) of the Trade Union Enactment 1940 and Section 66(b) of the Trade Union Ordinance 1959 declare that the rights of organised labour under these statutes shall not affect any agreement between an employer and those employed by him as to such employment. In other words, the rights and privileges gained by organised labour under the Trade Union statutes are to be exercised subject to the terms and conditions of service under the agreement of employment. Again, Section 53 (iv) of the Labour Code and Section 15(2)(a) of the Employment Ordinance declare that a contract of employment shall be deemed broken if a labourer absents himself continuously for a specified number of days without reasonable excuse. On the basis of the law as it then existed under the Trade Union Enactment 1940 and the Labour Code, Chief Justice

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continued

Willan held in 1947 that absence from duty of a labourer who had absented himself from work by reason of his participation in a strike organised in accordance with the Trade Union Enactment for a longer period than prescribed under Section 53 (iv) of the Labour Code was not a reasonable excuse and that he had, therefore, broken his contract of service. The situation today is, however, different. Section 8 of the Employment Ordinance declares that nothing in a contract of service shall in any way restrict the right of a registered trade union. In other words, the right should be read into the contract of service, and thereby rendering innocuous the provisions of section 66(b) of the Trade Union Ordinance 1959. In other words, if the contract of employment permits a labourer to participate in a strike organised by a registered trade union, then participation in a strike so organised should be deemed a "reasonable excuse" under Section 15(2)(a) of the Employment Ordinance.

The Industrial Court considered the effect of section 8 of the instant case and held at page 19 of its award that 'to participate in a strike as a recognised trade union activity over which right 'no person shall interfere', the Court finds is no neglect of duty on the part of the workman to cause wilful breach of their contracts of employment.

Gleneagles Hotel Ltd. v. Wong Jue Whee and Others (1956) MLJ. 37 and Nadchatiram Realties (1960) v. V. Raman & Others 1965 M.L.J. 263

In the former case, the law applied was under the provisions of the Singapore Labour Ordinance (Cap. 6A) and the law in Singapore was similar to the provisions of our Labour Code (Cap. 154). The provisions of the Employment Ordinance 1955 had not come into force then since it became effective only w.e.f. 1.6.1957 See (L.N. 228).

In the latter case although the labourers claimed that they had gone on strike in furtherance of a trade dispute, Ismail Khan J. found as follows:-

> It is clear from the evidence that the evidence that the labourers went on strike

for the sole reason that P.W. 7 was not given any work. There is no evidence that the strike was over the change in the muster time or over the refusal of the labourers' demands for improved conditions of service. At the meeting on the 5th October, 1964 no decision was arrived at regarding any strike action. Instead the labourers were advised by the Union officials to continue to negotiate a fresh with the management.

Section 8 of the Employment Ordinance was not considered in this case, since the strike was not organised by a registered trade union. The effect of Section 8 was never considered in the two cases. I therefore respectfully submit that Willan's judgment is not applicable today since the law in force today is different.

sd: XAVIER & VADIVELOO.

27/5/75.

No. 12

PROCEEDINGS

In the High Court in Malaya at Kuala Lumpur.

In Open Court,

Before Abdul Hamid, J.,

This 27th day of May, 1975.

ORIGINATING MOTION NO. 73/74:

Mr. R.R. Chelliah with Mr. S. Kulasegaran for Applicants.

Mr. D.P. Xavier with Mr. G. Vadiveloo for Respondents.

Mr. Chelliah submits:

Refers to facts from page 3 of the award (39/74) - Company is the holder of pioneer status under the

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continued

Investment Incentive Act, 1968 (p.9).

First respondent is a union.

Second respondents are workers of the applicants.

The dispute arose in 1973 over non-recognition of respondent union.

By letter of 21.2.73, the Minister of Labour decided that the union be recognized - 'Union 2.' The applicant company disputed saying there was nothing in the Act to compel them to recognize the union at that stage.

On 31.12.73 the union wrote to the company - (see 'Union 7').

On 15.1.74 the applicants transferred some of their workers from one section to another. Eight workers refused to go. (See Statement of Reply paragraph 2).

On 4.2.74 the workers went on strike. (See Statement of Case paragraph 12).

On the same day the Company sent notices to the workers stating that if they did not commence work within 48 hours, their services would be deemed to be terminated- (see 'Union 10').

The strikers did not resume work at the expiry of 48 hours.

On 12.2.74 the Minister of Labour referred the dispute to the Industrial Court. On 16.2.74 the 73 workers tried to resume work. The company refused to take them back as their services had already been terminated on failure to resume work within 48 hours.

The dispute was heard by the Industrial Court. The parties filed the Statement of Case (referred). (Counsel refers to Statement of Reply).

Award:

(1) Held that the workers did not terminate their contract of service etc.;

(2) Court refused to be bound by the decision of Willan C.J.;

(3) Subsequent cases - The Gleneagles Hotel Singapore (1956 M.L.J. p.37) and Nadchatiram Realties (1960) Ltd. v. Raman & Others (1965 2 M.L.J. p.263) were decided in different context;

(4) After dismissing the said workers, the Company in refusing the workers to go back on 16.2.74 had declared the lock-out on 16.2.74; and

(5) The company did not come within the meaning of public utility service and the strike was legal.

The Company's contention is that all these findings are wrong in law.

The present application is to quash the award on ground of errors of law on the face of the record.

Refers to s.29(3)(a) of the Industrial Relations Act. It is now settled law that if there is error of law, certiorari will lie. Refers to Lian Yit Engineering Works Sendirian Berhad v. Low Ah Fun & Others (1974) 2 M.L.J. p.41.

First error:

That the company did not terminate contract of service by continuously being absent from work, etc. The workers did go on strike and were absent from 4.2.74 to 16.2.74 - 12 days.

Refers to Employment Ordinance 1955 - s.13(2) - termination of contract without notice. Section 15(2) - deemed to have broken contract for continually absent from work for 2 days, etc.

Refers to Willan J's judgment in Wong Yin & 3 Ors. v. Wong Mook (1948) M.L.J. p.41; The Gleneagles Hotel Singapore (1956) M.L.J. p.37.

In Gleneagles' case whether notice is given or not is immaterial.

Refers to Nadchatiram Realties (1960) Ltd. v. Raman & Others (1965) 2 M.L.J. p.263 at p.266 Ismail

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Proceedings
27th May 1975
continued

Khan J - by going on strike defendants committed a breach of contract.

Refers to page 16 of the award paragraph II(a)and says that a subordinate tribunal is bound by the decision of a higher tribunal.

Refers to Alfred Ibins' 1968 Employees' Misconduct p. 449.

Submits that Industrial Court misdirected itself as to the basis effect and meaning of the judgment. It did not direct its mind to the judgment.

Refers to Edwards (Inspector of Taxes) v. Bairstow and Another (1955) 3 A.E.R. p.48 at p.57 - (as to what is error of law).

Second error:

Finding at p. 29 of award. Notice was given by the company to the workers. The company was within its right to give notice. See Denaby And Cadeby Main Collieries, Limited. v. Yorkshire Miners' Association And Others (1906) A.C. p.384. At p.398 - '... the appellants were perfectly within their right in electing to treat the absence of the men from work since June 29 as a rescission of their contracts of service before resuming work.'

The union in paragraph 13 of the Statement of Case was informed that the services of the employees were terminated. By paragraph 17 it was stated that the company dismissed the workers.

For the word 'lockout' see Industrial Relations Act s.2. The word also appears in the Indian Industrial Disputes Act, 1947. The question is whether the dismissal is lawful or unlawful. Refers to A.I.R. (1960) S.C. 363 at 367 paragraph 21 - 'It, therefore ..... in conflict with another.'

Subsequent refusal after proper and lawful dismissal is no lockout. Submits the Industrial Court did not take into account there had been a dismissal. It erred in law.

Third ground - error of law:

The company did come within the meaning of

public utilities service. See s.2 Industrial Relations Act (ii). In the Industrial Court evidence was adduced - See page 5 of award

The Industrial Court had the evidence of Tan, Eccles, etc. The Industrial Court disregarded the evidence on grounds that -

(a) No actual damages had taken place. This is not a question in issue and it is irrelevant;

(b) A safe system of work is the responsibility of the management; and

(c) Other factories had similar boiler section, etc.

The Industrial Court took into consideration irrelevant matters.

If the Industrial Court came to its decision by taking irrelevant matters certiorari will lie. See R. v. Fulham (1953) 2 A.E.R. p.4 at p.6. Refers to Edwards v. Bairstow (1955) 3 A.E.R. p.57 See also Re Gilmore's Application (1957) 1 A.E.R. 796 at p. 800.

Refers to R. v. Birmingham Compensation Appeal Tribunal (1952) 2 A.E.R. p.100 at p.101.

If the application comes under definition 2 public utility service - s.40(1)(a)(b) of the Industrial Relations Act will apply. There has to be notice of not less than 14 days' duration. The strike notice has to be in form - I.R. (notice of strike and lockout) 1967 - Form A. The date of strike has to be specified. If proper notice is not given under s.40 then s.42 - the strike is deemed illegal. Then the Industrial Court's finding that the strike was legal is another error of law. See page 20 Award

Mr. Chelliah refers to R. v. Agricultural Land Tribunal (1960) 2 A.E.R. p.518 - (only that part on extraneous matters).

Mr. Xavier submits:

The ground is an indirect attack on the reference by the Minister on 12.2.74. There was a dispute in

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continued

1973 over non-recognition. Refers to s.8(5) of Industrial Relations Act.

The company on receipt of letter from the Minister did nothing to challenge the Minister's decision of recognition.

Refers to page 4 of affidavit of Hamzah bin Abu - 'On 2.8.1974 the Company .... enjoying the fruits of the said awards.'

Certiorari is extraordinary remedy. The conduct of the persons who come to this Court is also very relevant. Those who come for equity must come with clean hands.

It is common ground that the company refused to accord recognition notwithstanding the Minister's order - took 17 months. The company was not prepared to negotiate with the union.

Philosophy of strike and lockout is given by law. Certain strikes are presumed to be illegal.

The Industrial Court found the strike legal and justified.

Limitation on jurisdiction of the Court - marked 'A'.

As to paragraph (1) - refers to s.27(4) and (6).

Refers to paragraph 2 of 'A'.

Refers to paragraph 3 of 'A'.

Refers to paragraph 4 of 'A'.

Refers to paragraph 5 of 'A'.

Refers to the affidavit of Tan - p3 paragraph 4 (b) (i) and (ii).

Written reference to certain cases - marked 'B'.

Refers to s.5 of Employment Ordinance - effect on other written laws.

It is clear the the Industrial Relations Act gives certain rights to a worker. No provision in the Employment Ordinance should be construed to take away certain rights of a worker. (Employment Ordinance came into effect in 1957).

Submits that workers had a just and reasonable excuse when they reported for work. Refers to s.41 (b). Refusal to give the workers work was a lockout. The respondents obeyed the law. The company flouted the law.

Section 15(2)(b) of the Employment Ordinance is referred. The company was informed on 31.12.73 and did nothing.

Refers to Feroz Din's case - the definition of lockout is not in pari materia. Out Act says 'in furtherance of a trade dispute.' There was a trade dispute in this case.

In Feroz 'Din's case (1960) A.I.R. S.C. 363 the workers refused to go back to work and were therefore justly dismissed. There is no lockout in such an instance.

In the present case, they reported for work. Feroz Din's case was a criminal appeal - not certiorari.

Whether the company is a public utility or not is a question of fact - not of law.

Submits the ejusdem generis rule will apply if the Industrial Court has held otherwise. All factories which have a boiler section will come under definition 2 - public utilities. No damage was done. The Industrial Court is bound to take into account whether damage is done or not. Submits that there is no error of law.

One final point - the Industrial Court though an inferior tribunal, has certain differences - it only adjudicates or arbitrates - it does not propound general principles of law.

(Reserve judgment).

Sgd: ABDUL HAMID
JUDGE
HIGH COURT,
MALAYSIA. KUALA LUMPUR.

In the High Court

No. 13
Judgment
18th June 1975

No. 13

JUDGMENT

ORIGINATING MOTION NO. 73/74

The applicants, South East Asia Fire Bricks Sendirian Berhad is seeking, by writ of certiorari, to remove into this Court for purposes of it being quashed Industrial Court Award No. 39/74 made on August 8, 1974 (Case No. 15/74).

2. The applicants are relying on the grounds set out in the affidavit of Tan Kim Seng, Manager of the applicant company. En. R.R. Chelliah with En. S. Kulasegaran counsel for the applicants, however, proceeded only on the grounds that the Industrial Court (I shall call 'the Court') erred in law when the Court held -

(1) That the workers did not terminate their contracts of service;

(2) That they were not bound by the decision of Willan, C.J.;

(3) That the subsequent cases - The Gleneagles Hotel Singapore (1) (1956) M.L.J. p.37 and Nadchatiram Realties (1960) Ltd. v. Raman & Others (2) (1965) 2 M.L.J. p.263 were decided in different context;

(4) That after dismissing the said workers the company in refusing the workers to go back on 16.2.74 had declared a lock-out; and

(5) That the company did not come within the meaning of public utility service and the strike was legal.

3. Basically the facts are not in dispute. Briefly, they are as follows - A disagreement arose in 1973 between the first respondent (I shall call 'the Union') and the applicants over non-recognition of the Union. By letter dated February 21, 1973, the Minister of Labour directed the applicants to accord recognition. On October 2, 1973, the Union submitted its proposals for a collective agreement on terms and conditions of

employment of its workers and invited the applicants to commence negotiations. The Union did not receive any acknowledgement. A reminder was sent but no response or acknowledgement was received. The Union wrote to the Minister of Labour and Man Power complaining about the adamant attitude of the applicants and seeking his good offices for early commencement of the negotiations.

4. By letter dated December 31, 1973, the Union told the applicants that unless they commenced negotiations by January 14, 1973, the Union would have to resort to industrial action and there would be complete cessation of work. On the same date, the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor dan Pahang) of the Labour Department wrote to the Union requesting the Union representatives to attend a meeting at his office on January 22nd, 1974 to discuss collective agreement proposals. The Union representatives presented themselves but the applicants' representatives did not turn up. Another letter was sent by the Labour Department fixing a meeting for January 31st, 1974. No meeting took place. The workers went on strike on February 4th, 1974.

5. By reason of sub-section (7) of section 12 of the Industrial Relations Act, 1967 (I shall call 'the Act') a trade dispute therefore arose.

6. On February 4, 1974, the day the workers went on strike, the applicants, through their solicitors, caused notice to be issued to the striking workers informing them that their services would be terminated unless they resumed work within a period of 48 hours from that day. On February 5, 1974, the applicants caused to be issued a further notice warning the striking employees that they should return to work within a 48 hour period. The workers did not return but went on strike for 12 days. On February 16, 1974, they wanted to resume work but the applicants refused to accept them.

7. The Union contended that the notices were bad in law and the applicants' action in issuing the notices was calculated to strike terror into the hearts of the workers to break the strike, an unfair labour practice. The applicants argued that the workers wilfully refused to comply with the notices and failed to resume work and they therefore

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had to make arrangements for alternative labour in place of the striking workers who wilfully terminated their contracts of service.

8. The applicants also argued that even assuming the applicants, without justification, wilfully refused to accord recognition and commence negotiations, that by itself, could not amount to justification in law for the strike. Under the provisions of the Act, reference could be made to the Industrial Court.

9. In reply to the statement of the case filed by the Union, the applicants maintained that the strike was motivated not by their failure to accord recognition and commence negotiations with the Union, but by their transfer of eight employees to another section. En. Chelliah did not pursue the point. Even if he did, I do not think he could have succeeded in satisfying me that the question was not otherwise one of fact. It was therefore essentially a question for the Industrial Court to determine and make its finding.

10. At this juncture, it seems appropriate to discuss, firstly, the limits of this Court's jurisdiction to issue a writ of certiorari in regard to the award of the Industrial Court. There are authorities to show that certiorari will lie to quash the order of an inferior tribunal where there is an error of law apparent on the face of the record. In India certiorari is issued under Article 226 of the Constitution of India. Article 226 is substantially in pari materia with paragraph 1 of the First Schedule, made under section 25, of the Courts of Judicature Act, 1964.

11. I have in the particular instant case drawn my attention to sub-section (3) of section 29 of the Act which says that 'an award of the Industrial Court shall be final and conclusive, and that no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law.'

12. The Industrial Disputes Law in Malaysia by C.P. Mills at page 203 referring to sub-section (3) of section 29 made the following observations -

> 'The provision that an award of the Court is 'final and conclusive' will not preclude the

remedy of certiorari;only the clearest and most explicit words will have that effect: Mohamed v. Commissioner of Lands & Mines Trengganu (3) (1968) 1 M.L.J. 227. It is doubtful whether the further words of this section are sufficient, especially in view of the facts that the Industrial Court is primarily an arbitral body, not a judicial one:'

In Mohamed v. Commissioner of Lands and Mines, Trengganu (supra), a Federal Court, case, Ismail Khan J. giving the judgment of the Federal Court speaking of the writ of certiorari said at page 228 -

'The writ of certiorari is an ancient remedy and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. This control over such bodies in exercise not in an appellate but in a supervisory capacity. The judgment of Denning L.J. in R. v. Northumberland Compensation Appeal Tribunal (4) (1952)1 All E.R. 122 contains an interesting account of the development of this procedure of certiorari and its application in respect of conviction by magistrates, the orders of justices in civil matters, awards of arbitrators and statutory tribunals. More use is made of such remedy especially where in the case of some of these it is provided that their decision is final.'

13. The learned Judge proceeded to quote a passage in Re Gilmore's Application (5) (1957) 1 All E.R. 796 where at p.808 Romer L.J. said -

'...it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law.'

14. Ismail Khan, J. then pointed out that the effect of the words that the decision of a statutory tribunal 'shall be final' was considered in that case. He went on to quote the observation of Denning, L.J. in Re Gilmore's Application (supra) at page 801 as follows:

'Do those words preclude the court of Queen's Bench from issuing a certiorari to bring up the

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decision? This is a question which we did not discuss in R. v. Northumberland Compensation Appeal Tribunal because it did not there arise. It does arise here, and on looking again into the old books, I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final' certiorari can still issue for excess of jurisdiction or for error of law on the face of the record.'

15. It would seem clear that certiorari is pre-eminently a special revisionary discretionary remedy and in exercising the discretion, the High Court must, therefore, act upon recognized and established judicial principles. En. Xavier has drawn my attention to, indeed I fully subscribe with, the views expressed by Gajendragadkar, J. in Syed Yakoob v. Radkrishnan (6) A.T.K. (1964) 477 S.C. at page 479 as follows -

'... the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ of proceedings. An error of law which is apparent on the fact of the record can be corrected by a writ, but not an error of fact however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this

category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jursidiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised.' (See also (1969) 1 A.E.R. 208 at p.223).

16. En. Xavier also drew my attention to the case of State of Orissa v. Murlindhar (7) A.I.R. (1963) S.C. p.404 where it is stated that an enquiry by 'the Administrative Tribunal is not governed by the strict and technical rules of the Evidence Act. Rule 7 (2) of the Rules provides that in conducting the enquiry the Tribunal shall be guided by rules of equity and natural Justice and shall not be bound by formal rules relating to procedure and evidence.'

17. En. Xavier then invited me to consider that the Industrial Court only adjudicates or arbitrates and it does not propound general principles of law. With respect, I entirely agree with him, and, looking at the Act, it seems clear that the Court is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form - (section 27 (5) of the Act).

18. Speaking of equity or equitable principles, it may be of academic interest to note that -

'early authorities refer to 'conscience' 'reason', and 'good faith' as the principles which guide the Court of Chancery, and the term 'equity' implies a system of law which is more consonant than the ordinary law with opinion current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society'. (Words and Phrases Legally Defined, Vol. II p. 173).

19. It would seem that 'from the beginning, the Court of Chancery acted on the maxim that "equity follows the laws"

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and in cases where the analogy clearly applied the ruling of law was adopted, however harsh it might be.'

20. However, the present position appears to be as stated by Lord Cowper, L.C. in Dudley (Lord v. Dudley (8), (1705) Prec. Ch. 241 at page 244 as follows -

> 'Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilities, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remedies; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.'

21. Speaking of substantial merits of the case without regard to technicalities and legal form, I am inclined to think that while the Court need not be concerned with technicalities and legal form, it should not, however, be construed that the Court is free to act in disobedience to the law and established principles. To echo what Lord Cowper in Dudley (Lord) v. Dudley (supra) said, 'Equity... does not destroy the law, nor create it, but assist it.'

22. Now, to begin with, I shall proceed to determine whether the Court's finding that the applicants did not come within the meaning of public utility service disclosed an error of law apparent on the face of the record. In this regard the Court clearly arrived at the conclusion that it did after considering the facts before it. The Court dealt quite at length with matters related to or connected with tunnel kiln or furnace section of the factory. On these facts, the Court found that there was nothing unusual of the tunnel kiln section or any other section on the working of which

the safety of the establishment or the workmen employed therein depended and held that the applicants were not a public utility service. With respect, this Court finds no valid ground to interfere with the Court's finding of fact. There were facts upon which the Court could arrive at such a finding.

23. I shall now refer to the applicants' contention that there was no error of law on the face of the record when the Court held that, in refusing to accept the workers when they wanted to resume work on February 16, 1974, the applicants had declared a lock-out. The answer to this question will depend on whether or not there was error of law apparent on the face of the record when the Court held that by going on strike they were not without reasonable excuse and they did not therefore terminate their contracts of service.

24. The Court found that the strike was not illegal. Such finding was made after considering the effect of certain provisions of the Act. The Court had not erred in law in arriving at such finding. Section 40 of the Act impose certain restrictions on strikes in public utility service and section 41 of the Act prohibits strikes under the circumstances provided in paragraphs (a) to (e). A strike in violation of either section is deemed to be illegal under section 42. Although the Act has not provided any specific provision sanctioning strike by workmen, it is abundantly clear from the provisions of the Act read in the light of the Trade Union Ordinance and section 8 of the Employment Ordinance that under the law in force in this country today, the workers have inherent rights to go on strike so long as they do not violate either section 40 or section 41 of the Act. Where there is a violation of either section, a strike is deemed to be illegal under section 42. The inherent rights of the workers to go on strike is clearly acknowledged by section 4 of the Act which confers rights upon workers to participate in lawful activities of a union one of which is to organise strikes in furtherance of a trade dispute.

25. In the present case, the applicants do not, however, dispute that, under the Act, a worker is invested with such right. They do not even contend that the strike was illegal. What is really in issue here is whether a workman, by absenting himself continuously for more than 2 days for purposes of going on strike, legal though such strike may be, is deemed in law by reason of section

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continued

15(2) of the Employment Ordinance (I shall call 'the Ordinance'), to have broken his contract of service. It is the applicants' contention that the workers by so absenting, committed a wilful breach of the conditions of their contracts of service and they were therefore entitled to terminate their services.

26. The relevant part of the Court's award in that regard reads -

> 'To participate in a strike as a recognised trade union activity, over which right 'no person shall interfere', the Court finds, is no neglect of duty on the part of the workmen to cause wilful breach of their contract of employment. It must be observed that section 15(2) has been amended (under P.U.(A)409/69) by inclusion of a new limb (b) to mean that no absent workman is deemed to have broken his contract so long as he has informed or attempted to inform his employer of the reasonable excuse for his absence. There is no doubt here that the company was informed of the excuse to be the strike by the Union's letter dated 31st December, 1973 (U.7). So long as the strike here is lawful in the sense of complying with the local statutory provisions the workmen's participation in it is 'reasonable excuse' and so the contracts of employment are not deemed to have been terminated. Therefore, the Court finds that sections 16 and 15 (2) have not been contravened.'

27. On careful analysis of the Court's finding I form the view that what the court in effect concluded was that (a) the workmen were entitled to cause wilful breach of their contracts since participation in a strike organised by a recognised trade union and in respect of which rights no person shall interfere constituted no neglect of duty on their part; (b) that the applicants were informed of the excuse for the absence and (c) that as the strike was lawful in the sense that it complied with local statutory provisions the workmen's participation in it was a reasonable excuse.

28. Before I embark upon a detailed examination of the true effect of the Court's finding, let me pause

for a moment to consider Willan's judgment in Wong Mook (9), (1948) M.L.J. p.41. It is conceded by En. Xavier that sections 20 and 54(2) of the Trade Union Enactment, 1940, the provisions Willan, C.J. considered in his judgment, are in pari materia with sections 21 and 66(b) respectively of the Trade Union Ordinance, 1959. He also conceded that section 53(iv) of the Labour Code is substantially similar to section 15(2)(a) of the Employment Ordinance, 1955. En. Xavier however, argued that there was then no provision in the Employment Ordinance similar to section 8 of the Ordinance which reads - 'Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract to participate in the activities of a registered trade union.'

29. To my mind, the true effect, indeed the purpose of section 8 of the Ordinance, is to prohibit any form of restriction to be embodied in the workman's contract of service. Fundamentally, it operates as a further acknowledgment of the inherent right of a workman to strike. I fail to see how it can be construed to mean that the right to strike is so unrestricted that under no circumstances can he be held to commit a breach of his contract of service. There is nothing in Willan's judgment to say that a workman had then no right to strike or participate in a strike organised by a trade union. The question of restriction in the contract of service of the workers was not in issue. Even if there had been provision similar to section 8 of the Ordinance then, it did not seem to be pertinent to the issue considered by Willan J. The learned Judge did not determine the case on the basis that a labourer had no right to strike. The decision was in fact founded upon the basis that the strike was legal. At page 43 of the judgment, the learned Judge, after referring to sections 20 and 54(2) of the Trade Union Enactment said -

> 'This clearly lays down that the provision of the local law relating to trade unions do not affect the agreements between complainants and respondents and the defendant/appellant in this case. Accordingly it is to the Labour Code that one must look to see what is the law regarding the breaking of such agreements.'

30. In my view, the position is still the same today. The reason the learned Judge arrived at the

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Judgment
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continued

finding that he did is to be found at page 43 where he said -

> 'The fact that of their own volition they absented themselves for the purpose of a strike cannot be held to come within the words 'reasonable excuse', otherwise it would mean that labourers could absent themselves from work for however long a strike remained in progress and claim they have not broken their agreement.'

31. In my judgment, the position has not been altered by the presence of section 8 of the Ordinance which, as I said earlier, is intended to prohibit or 'restrict the inclusion of some provisions that may produce the effects set out in (a), (b) and (c).'

32. For this reason, I form the view that the judgment of Willan cannot be said to be outdated. It may, however, be distinguished from the present case.

32a. In the instant case, it is my considered opinion that section 66(1)(b) of the Trade Union Ordinance operates and in the result this Court shall have to examine the effect of section 15(2) of the Ordinance.

33. After careful analysis of section 15(2) of the Ordinance, it is, I think, elementary construction that where a labourer is, under the law, deemed to have broken his contract of service if he continuously absents himself for more than two days, all the relevant evidence shall have to be looked at to determine whether he comes within the exception, that in so absenting, he had either done so with leave of the employer or with reasonable excuse or had informed or attempted to inform his employer of the excuse of such absence. In making a finding, it is incumbent upon the Court to take into account all relevant facts and the surrounding circumstances pertinent to the issue.

34. Section 15(2) has three limbs - two in section 15(2)(a) and one in section 15(2)(b). The first limb in section 15(2)(a), namely, leave of the employer is not relevant for purposes of this case. Before I proceed to consider the second limb, I

propose to direct my mind to the Court's finding that the applicants were informed of the excuse by the Union's letter dated 31st December, 1973 which stated that - 'if by 14th January 1974 you fail to write to us your official letter according recognition and express your desire to commence negotiations, we will revert to industrial action and take note that this will be complete cessation of work.'

35. First and foremost, it is pertinent to observe that the letter to the applicants was sent by the Union and not by the workers. Section 15(2)(b) of the Ordinance must, I think, be construed to mean that the act of informing or attempting to inform must come from the labourer with whom the applicants have a contract of service. Even assuming I am wrong and it can be construed as sufficient information or attempt to transmit information where, as in the instant case the Union had written a letter and it was done on behalf of the workers, I still fail to see how the Court could possibly hold that the workers informed or attempted to inform of 'absence' within the meaning of section 15(2)(b). The letter made no disclosure on behalf of which workers the Union was informing or attempting to inform the applicants. Furthermore, no reference was made which 'such absence' the Union was referring to. If at all, the letter amounted to nothing more than mere expression of indefinite intention.

36. The letter was sent some five weeks before the strike and it is revealed that the workers went on strike some three weeks after January 14, 1974. There was no reference specific or otherwise as to which of the applicants' labourer or labourers would cease work. If the letter was intended to refer to 'such absence' within the meaning of section 15 of the Ordinance, it did not seem to contain any such thing. It lacked clarity. It was so vague that the applicants could not reasonably be expected, expressly or impliedly to know how many of their workers would cease work and for what length of time the worker or workers would stay away. On the grounds stated in the award, it is my considered finding that there was disclosed an error of law on the face of the record. The question before the court was not essentially a question of fact but of mixed fact and law. It was an error of law, I think, to rely on irrelevant evidence or on no evidence. The letter from the Union upon which the court deemed to have placed reliance,

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had been wrongly construed as to its effect and implications.

37. The view is, I think, strengthened by the presence of the words 'such absence' in section 15(2)(b) which, in my view, signifies that the absence referred to must necessarily relate to and definite some certain specific absence for a (sic) duration of more than two days continuously by a particular labourer, with whom the employer has a contract of service. An information given or attempted to be given which merely sets out an intention at some future date of some workers whose identities are unknown to cease work for an indefinite duration of time, cannot, I think, in law, constitute the giving of information or attempt to giving of information within the meaning of section 15(2)(b) of the Ordinance.

38. With reference to the Court's finding that it is no neglect of duty on the part of the workmen to cause wilful breach of their contracts of employment, En. Xavier submitted that in view of section 8 of the Ordinance, the rights should be read into the contracts of service so as to render innocuous the provisions of section 66(b) of the Trade Union Ordinance, 1959. In other words, if the contract of employment permits a labourer to participate in a strike organised by a registered trade Union, then participation in a strike so organised should be deemed 'a reasonable excuse' under section 15(2)(a) of the Employment Ordinance. With all due respect, I am unable to see any merit in the argument. There was clearly an error of law on the face of the record. The Court's finding in effect, amounts to providing complete immunity to workers from any form of disciplinary measure by the employer in the event of their causing wilful breach of their contracts of service. It means that the workers may go on strike whenever and for whatever duration of time they choose to, whether or not with reference to a particular employer of industry as they are merely exercising their rights over which no person shall interfere and do not therefore cause wilful breach of their contracts.

39. The Court's finding that, so long as the strike is lawful in compliance with local statutory provisions, the workmen's participation in it is reasonable excuse and so the contracts of employment

are not deemed to have been terminated, reveals yet another error of law apparent on the face of the record. Such finding necessarily embraces the idea that so long as the strike is lawful in compliance with the law, the workmen's participation in it is a reasonable excuse and their contracts of service cannot be deemed to have been terminated. To my mind, the Court completely misdirected itself as to the true meaning, effect and implications of the relevant provisions. Whilst it is clear from the provisions of the Act, the Trade Union Ordinance and section 8 of the Ordinance that fundamentally the workmen have the right to strike so long as the strike does not contravene section 40 or section 41 of the Act, it cannot be said that the Court can overlook the provisions of section 66(1)(b) of the Trade Union Ordinance and section 15(2) of the Ordinance in regard to contract of service between a labourer and his employer.

40. At this juncture, I pause to examine the meaning of the words 'reasonable excuse'. To my mind, it is an excuse which can be deemed by the Court to be reasonable in the sense that a reasonable man would regard as an excuse, consistent with a reasonable standard of conduct according to reason. In Re A Solicitor (10), (1945) K.B. 368 (C.A.) per cur., at p.371 it was said that - 'The word 'reasonable' has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, know or ought to know.'

41. In Rex v. Archdall & Roskruge, Ex p. Carrigan & Ex p. Brown (11), (1928), 41 C.L.R. 128, per cur., at pp.136, 137 it is stated that - 'Reasonableness is relative, and must be proportioned to the circumstances of the case considered as a whole. The position cannot in broad principle be better stated than it was by Romer, L.J. in Glamorgan Coal Co. v. South Wales Miners' Federation (12) (1903) 2 K.B. 545 in relation to a contract broken, in these words: 'I respectfully agree with what Bowen, L.J., said in the Mogul case (Mogul S.S. Co. v. McGregor, Gow & Co. (13) (1889), 23, Q.B.D. 598, C.A.) when considering the difficulty that might arise whether there was sufficient justification or not; "The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell."'.

42. Latham, C.J. in Opera House Investment Pty. Ltd.

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continued

v. Devon Building Pty. Ltd. (14), (1936) 55 C.L.R. 110 at p.116 speaking of the word 'reasonable' said "the word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case'. The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transactions".

43. Looking at the relevant part of the Court's award, I would therefore state what I hope to be the true legal position that the Court ought, in the present case, to have proceeded to determine after finding that the strike was legal whether having regard to all the circumstances of this particular case - the strike was justified and that in the circumstances it constituted a reasonable excuse within the meaning of section 15(2)(a); or (b) whether a labourer had informed or attempted to inform his employer of the excuse for such absence.

44. I have dealt with (b). As for (a) above, it is apparent that the Court not only erred in law in their approach but had misconstrued the proper effect and meaning of the law. Whether a strike was justified so as to constitute a reasonable excuse within the meaning of section 15(2)(a) is a mixed question of fact and law.

45. In S. Textile Mills Ltd. v. Workmen of Sadul Textile Mills And Another (15), A.I.R. (1958) (Raj.) 202, it was held that the question whether a strike in a mill was justified or not is not a mere question of fact. It is a mixed question of fact and law. In that case, the High Court found that the Industrial Tribunal did not consider all its implications in considering justifiability of the strike. The High Court proceeded to hold that if there was an apparent error of law on the face of the record that would justify interference under Article 226 of the Constitution.

46. At the outset, the Court correctly found that the workers' rights to strike had to be read into the contract of service and no person shall interfere with such rights and that the strike was legal but having made such finding, the Court failed to consider whether the strike was justified having regard to all the relevant facts and circumstances.

47. In the instant case, it cannot be disputed that on the face of the record, there is clear evidence that the conduct of the applicants has left much to be desired. It failed to accord recognition and it also failed to commence negotiations. Nonetheless, the matter had already been referred to the appropriate Ministry. The Ministry was fully aware of the whole history and background and indeed of the fact a trade dispute had existed. The Ministry could not therefore have failed to appreciate the legal implications and indeed must be assumed to know that consequently the Union and the workers might resort to industrial action and in all probability go on strike. As such the Union could reasonably anticipate, that not a mere possibility but in all probability, that the Ministry shall exercise the power under the Act to refer the dispute to the Court. The Union, therefore, had no reason whatever to doubt the inevitability of such reference by the Minister. The Court, however, failed to take into account this fact in its determination whether there was any justification for the workers to go on strike at that juncture. There was seemingly adequate provision in the Act for the Union to seek recourse through legal means to resolve the dispute.

48. At this juncture, I take the liberty to refer to footnote 51 in Employees' Misconduct by Alfred Avins 1968 a quotation from a case which I have not been able to trace from the Library which reads -

> 'Smith, Stanis, Street & Co. v. Smith S.S. Workers' U., 1953 Lab. App. Cas. 31,38, (1953)1 Lab. L.J. 67 (Lab. App.Tri.Ind.). See Vithabai Nana v. Bombay Fine Worsted Mfg., 1956 Lab. App. Case.386, 391 (Lab. App.Tri.Ind.): It is now well recognised that the use of the weapon of strike which is now regarded as a legitimate weapon in the armoury of labour, is likely to lead to serious consequences, which may adversely affect not only the particular industry concerned, including labour, but also the interests of the country; and in this respect it makes no difference to the dangers involved, whether the strike resorted to is technically rendered illegal by law or otherwise. The use of the weapon of strike has, therefore, been generally deprecated,

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continued

except when such use is forced on labour when they have a bona fide grievance and have no other effective method open to them to have their grievance remedied.'

49. In consideration, it is my view that before making the award, it was not only essential for the Court to consider the workers' rights to strike, the legality of such strike but it must also determine whether in fact there was justification for the strike taking into account, amongst other things, the public interest, the financial implications, the interest of the industry, the effect of such award on the economy of the country and the safety of the industry or the factory concerned. The Court might have had good reason to say that for the applicants to give notice to the workers to resume work within a period of 48 hours otherwise their services would be terminated was an unfair labour practice, nonetheless it failed to consider the fact that the applicants, faced with a strike for an indefinite period, did not seem to have any other alternative but to act speedily and do something to protect the industry and the safety of its property and equipment. It is in this respect that the question of the nature of the industry, the equipment used, the presence of the tunnel kiln which could endanger those who were still working if not properly and adequately attended to, shall have to be considered. Even though the court quite correctly held that the industry did not come within the meaning of public utility service, nevertheless, there was evidence before the Court to the effect that the tunnel kiln, sensitive to high and low temperatures, had to be controlled by properly trained firemen rotating in three shifts a day working under the applicants' kiln supervisors to ensure right temperature reading. The tunnel kiln section was the heart of the factory. Apart from that, there were three other main sections all requiring supervisors to see the different stages of producing fire bricks and the whole process was sophisticated and complicated. Due to sudden stoppage of work by so many workers, it became evident that the various equipment could not be adequately attended to and might therefore lead to danger that could effect the safety not only of the workers therein but also the whole equipment. The applicants, therefore, acted lawfully when they gave notice to the striking workers to return to work or else their services would be terminated. In that event, they

were right in refusing to accept the workers when they wanted to resume work.

50. The fact that the Court had not considered the full effect and implications of the various factors and the relevant circumstances surrounding the strike shows that they had erred in law. The error apparent on the fact of the record justifying interference by (sic) this Court.

51. I would therefore allow the application and order that the award of the court be removed to this court and I do hereby quash the Courts award.

52. As regards costs, I am firmly of the view that the dispute was substantially attributable to the conduct of the applicants in their dealings with the respondents prior to the strike. I do not, therefore, consider it appropriate that they should be awarded costs. In my judgment each party shall bear its own costs in these proceedings.

(ABDUL HAMID)
JUDGE,
HIGH COURT, MALAYA,
KUALA LUMPUR.

Dated this 18th day of June, 1975.

En. R.R. Chelliah with Mr. S. Kulasegaran of Messrs: R.R. Chelliah Brothers and Ranjit, Thomas & Kula Kuala Lumpur for applicants.
En. D.P. Xavier with En. G. Vadiveloo of Messrs: Xavier & Vadiveloo, Kuala Lumpur for respondents.

No. 14

ORDER

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 73 OF 1974

In the Matter of an application by South East Asia Fire Bricks Snd., Bhd., for leave to apply for an Order of Certiorari

And

In the High Court

No. 14
Order
18th June 1975
continued

In the Matter of Award No. 39 of 1974 made on the 8th day of August 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

South East Asia Fire Bricks Sdn. Bhd. Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Tap Chu Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah Binti Maon
represented by the Union Respondents

BEFORE THE HONOURABLE MR. JUSTICE ABDUL HAMID,

THIS 18TH DAY OF JUNE, 1975

IN OPEN COURT

O R D E R

THIS MOTION coming up for hearing the 27th day of May, 1975 in the presence of Mr. R.R. Chelliah and Mr. S. Kulasegaran with him of Counsel for the Applicant and Mr. Xavier and Mr. Vadiveloo with him of Counsel for the Respondents AND UPON READING the Notice of Motion dated the 14th day of November, 1974 the Affidavit of Tan Kim Seng affirmed on the 18th day of September, 1974; the Statement dated the 18th day of September, 1974 and the Affidavit of Hamzah bin Abu affirmed on the 23rd day of May, 1975 and filed herein AND UPON HEARING Counsel as aforesaid IT WAS ORDERED that this matter do stand adjourned and the same coming up for Judgment this day in the presence of Mr. R.R. Chelliah and Miss.

In the High Court

No. 14
Order
18th June 1975
continued

U. Ratnasingam of Counsel for the Applicant and Mr. Xavier of Counsel for the Respondents IT IS ORDERED that Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974 be removed into this Honourable Court and that the Chairman of the Industrial Court do send forthwith the said Award to the Senior Assistant Registrar of this Honourable Court AND IT IS ORDERED that the said Award be and is hereby quashed AND IT IS ORDERED that each party do bear its own costs.

GIVEN under my hand and the Seal of the Court this 18th day of June. 1975.

sd: illegible.
SENIOR ASSISTANT REGISTRAR,
HIGH COURT, KUALA LUMPUR.

This Order is filed on behalf of the Applicant by its Solicitors Messrs: Ranjit Thomas & Kula of 7th Floor, Wing On Life Building, Jalan Silang, Kuala Lumpur.

In the Federal Court

No. 15
Memorandum of Appeal
2nd August 1975

No. 15

MEMORANDUM OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 87 OF 1975

In the Matter of an application by South East Asia Fire Bricks Sdn. Bhd. for leave to apply for an Order of Certiorari

And

In the Matter of Award No. 39 of 1974 on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

Between

1. Non-Metallic Mineral Products Manufacturing Employees Union.

In the Federal Court

No. 15
Memorandum of Appeal
2nd August 1975
continued

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon
represented by the Union Appellant

And

South East Asia Fire Bricks Sdn. Bhd. Respondent

(In the Matter of Originating Motion No. 73 of 1974 In the High Court in Malaya at Kuala Lumpur).

Between

South East Asia Fire Bricks Sdn. Bhd. Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choong Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah Binti Maon
represented by the Union Respondents

MEMORANDUM OF APPEAL

The Honourable abovenamed appeal to the Federal

In the Federal Court

No. 15
Memorandum of Appeal
2nd August 1975
continued

Court against the whole of the decision of the Honourable Datuk Justice Abdul Hamid given on 18th day of June, 1975 on the following grounds:-

1. The Learned Judge erred in law in holding that the workmen who went on strike had of their own volition terminated their contract of employment by contravening the provisions of Section 15(2) of the Employment Ordinance.

2. The Learned Judge erred in law or failed to appreciate or failed to sufficiently distinguish between participation of a worker in a legal strike as against participation in an illegal strike. The Learned Judge further erred in law in holding that participation in a legal strike is not deemed 'a reasonable excuse' under Section 15(2)(a) of the Employment Act.

3. The Learned Judge erred in law in holding that the judgment of Willan J. in Wong Mok vs. Wong Yu & 3 Others (1948) MLJ. 41 cannot be said to be outdated and that the question of restriction of the contract of service was not in issue in that case.

4. The Learned Judge erred in law in misconstruing the true effect and purpose of Section 8 of the Employment Ordinance 1955.

5. The Learned Judge erred in law when he held that the construction of the letter dated 31.12.73 was not essentially a question of fact but of mixed fact and law.

6. The Learned Judge erred in law and/or fact in misconstruing the effect and import of the letter dated 31.12.73 written by the Union to the Company intimating the Company of the Union's intention to commence industrial action on any date after 14.1.74. The Learned Judge erred in law in holding that the letter dated 31.12.73 did not inform or attempt to inform the Company of such absence within the meaning of Section 15(2)(i) of the Employment Ordinance and that accordingly the Court had considered irrelevant evidence and/or acted on no evidence.

In the Federal Court

No. 15
Memorandum of Appeal
2nd August 1975
continued

7. The Learned Judge erred in law in considering the question whether the strike was justified when the respondents had not relied or argued this point at the High Court.

8. The Learned Judge erred in law when he held that the Industrial Court ought to have but failed to consider whether or not the strike was justified so as to constitute reasonable excuse within the meaning of Section 15(2) of the Employment Ordinance 1955 when he had earlier held that the workers had an inherent right to go on strike 'so long as they do not violate either Section 40 or Section 41 of the Act.'

9. In any case, the Learned Judge erred in law and fact in holding that the strike was not justified after holding that the dispute was substantially attributable to the conduct of the respondents in their dealings with the appellants prior to the strike. In particular, the Learned Judge erred in law and/or fact when he held that the Union had no reason whatever to doubt the inevitability of the dispute being referred to the Industrial Court by the Minister and that accordingly the appellants had recourse through legal means to resolve the dispute.

10. The Learned Judge erred in law in holding that the Industrial Court before making the award must consider the workers' right to strike, the legality of the strike and also whether in fact there was justification for the strike 'taking into account, among other things, the public interest, the financial implications, the interest of the industry, the effect of such award in the economy of the country and the safety of the industry or the factory concerned.'

11. The Learned Judge erred in law when, after holding that 'the Court might have had good reason to say that ... to give notice to the workers to resume work within a period of 48 hours ... was an unfair labour practice' and further holding that the Court correctly held that the industry did not come within the meaning of public utility, it held that

nevertheless the Court must consider the nature of the industry, the equipment used and the safety of the remaining workers in determining the question whether the Company acted lawfully in giving the said notice.

12. The Learned Judge erred in law in holding that the Court had not considered the full effect and implications of the various factors and the relevant circumstances surrounding the strike.

Dated this 2nd day of August, 1975.

Xavier & Vadiveloo
Solicitors for the Appellant.

To:- The Chief Registrar,
Federal Court,
Malaysia,
KUALA LUMPUR.

The Senior Assistant Registrar,
High Court,
KUALA LUMPUR.

The Respondents abovenamed or
their Solicitors,
Messrs. Ranjit, Thomas & Kula
Advocates & Solicitors,
KUALA LUMPUR.

The address for service of the Appellant above-named is care of Messrs: Xavier & Vadiveloo of No. 6, Jalan Klyne, Kuala Lumpur.

No. 16

WRITTEN SUBMISSION OF THE RESPONDENTS

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

FEDERAL COURT CIVIL APPEAL NO.: 87 OF 1975
(K. Lumpur High Court Originating Motion No. 73/74)

Between

Non-Metallic Mineral Products Manufacturing Employees Union and others) Pehak Meraya (Appellants)

And

In the Federal Court

No. 16
Written Submission of the Respondents 29th February 1976 continued

South East Asia Fire Bricks Sdn. Bhd.) Pehak Mentang (Respondent)

SUBMISSION

1. The facts of the case are not in dispute and are set out in the Judgment of Mr. Justice Datuk Abdul Hamid at pages 165 to 167 of the Record.

2. But briefly the facts are as follows:-

(a) By a letter dated the 21st February, 1973 (Ex. "Union-2" - see p.22) the Honourable Minister of Labour and Manpower ordered the Respondents to accord recognition to the Union under Section 8(5) of the Industrial Relations Act 1967.

(b) By a letter dated the 2nd October, 1973 (Ex. "Union-3" - see p.23) the Union submitted its proposals to the Respondents for a Collective Agreement on the terms and conditions of employment of its workers.

(c) The Respondents did not respond to this letter.

(d) By a letter dated the 12th December, 1973 (Ex. "Union-6" - see p.26) the Union complained to the Honourable Minister of Labour and Manpower with a view to obtaining the Ministry's assistance in commencing negotiations.

(e) By a letter dated the 31st December, 1973 (Ex. "Union-7" - see p.27) the Union informed the Respondents that unless they commence negotiations by January the 14th they will revert to Industrial action which will be, "complete cessation of work."

(f) On the same day the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor dan Pahang) wrote to the Union requesting the Union's representative to attend a meeting at his office on the 22nd January to discuss Collective Agreement proposals (see Ex. "Union-8" at p.28). It would appear that that letter was not carbon copied to the Respondents. In any event the Respondents

did not attend that meeting.

(g) A further letter was forwarded by the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor) dated the 22nd January, 1974 addressed to the Respondents with carbon copy to the Union and fixing a meeting at his office at 10.00 a.m. on the 31st January. (See Ex. "Union-9" at p.29) This meeting did not materialise. (P.166; F-4)

(h) The workers went on strike from the 4th February, 1974.

(i) On the same day the Respondents, through their Solicitors, caused a notice to be issued to the striking workers informing them that their services would be terminated unless they resumed work within a period of 48 hours from the time of the commencement of the strike (see Ex. "Union-10" at p.30). This notice went on to state:-

> ".....", if you fail to resume your duties immediately and in any event within 48 hours calculated from the time when you should have commenced your work this morning your services would then be deemed to have terminated without reference to you."

This notice was carbon copied to the Director-General of Industrial Relations and to the Regional Industrial Relations Officer of the Department of Industrial Relations, Kuala Lumpur.

(j) On the 5th February, 1974 the Respondents issued a further notice warning the striking employees that they should return to work within the 48 hours period (see p.167; 6-B)

(k) The workers did not return to work but continued the strike for twelve days. On February the 16th, 1974, they wanted to resume work but the Respondents refused to accept them.

3. (i) On the basis of all the facts and after considering

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all the facts and after considering the laws applicable in the circumstances of this case, his Lordship came to the conclusion that there were errors of law on the face of the record. He therefore proceeded to quash the award of the Industrial Court.

(ii) Against this decision the Appellants now appeal to this Honourable Court.

(iii) It is submitted with all due respect, on behalf of the Respondents that his Lordship's findings must not be disturbed for the following reasons:

4. (i) It is, and at all times was, the Respondents' case that the workers by remaining absent from work from the 4th February, 1974, despite the written instructions of the Respondents to report for duty, were in wilful breach of their contracts of employment and had under Section 15(2) of the Employment Ordinance 1955 terminated their own contracts of service.

(ii) It is an admitted fact that the workers downed their tools from the 4th February and did not attempt to return to work until the 16th February, 1974 - a period of absence of twelve days.

(iii) It is also admitted that by virtue of Section 12(7) of the Industrial Relations Act 1967 there was then a trade dispute.

5. (i) Before proceeding to consider the grounds of appeal it would be pertinent to study the legal position of "strikes" in our country. Section 2 of the Trade Union Ordinance 1959 defined strikes as follows:-

> "Strike means the cessation of work by a body of persons employed in any industry acting in combination, or concerted refusal or a refusal under a common understanding of a number of persons who are or who have been so employed to continue to work or to accept employment, and includes any

act or omission by a body of workmen employed in any industry acting in combination or under a common undertaking, which is intended to or does result in any limitation or restriction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment."

(ii) The same definition appears under Section 2 of the Industrial Relations Act 1967.

6. (i) Under the Trade Union Ordinance 1959 Sec. 2 the objects of a Trade Union may include:

"2.(c)(iii). The promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out."

(ii) It will be seen that the promotion or organisation or financing of strikes are lawful activities of a Trade Union.

(iii) However Sec. 40 of the Industrial Relations Act imposes certain restrictions on strikes in public utility services and Sec. 41 of the Act prohibits strikes in circumstances enumerated thereunder in subsections (a) to (e) of that section.

(iv) By Section 42 of the Act any strike in violation of Section 40 to 41 are deemed to be illegal.

7. (i) Neither the Industrial Relations Act nor the Trade Union Ordinance expressly provides the circumstances in which strikes may be deemed to be lawful. However, it would appear that the workers have an inherent right to strike under the statutory laws of our country.

(ii) Section 4(1) of the Industrial Relations Act declares:-

"No person shall interfere or restrain or coerce a workman or an employer in the exercise of his rights to form and

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assist in the formation of and join a trade union and to participate in its lawful activities."

(iii) Again under Section 5(1)(d) of the Act no employer shall "dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employments or alter or threaten to alter his position to his prejudice by reason that the workman -

(1) is or proposes to become, or seeks to persuade any other person to become a member or officer of a trade union; or

(2) participates in the promotion, formation of activities of a trade union; or....."

8. What then are the effects of these provisions?
(i) It is submitted that the law recognise and indeed provide for the right of workmen to join trade unions and participate in its lawful activities. These rights may not be abridged or abrogated under a contract of employment.

(ii) By Section 8 of the Employment Ordinance 1955, nothing in the contract of service shall in any manner restrict the right of the workmen to join a trade union or participate in its activities.

(iii) On the basis of the above His Lordship held (see at p.175: C-14):-

"Although the Act has not provided any specific provision sanctioning strike by workmen, it is abundantly clear from the provisions of the act read in the light of the Trade Union Ordinance and Section 8 of the Employment Ordinance that under the law in force in this country today, the workers have inherent rights to go on strike so long as they do not violate either Section 40 or Section 41 of the Act. Where there is a violation of either section, a strike is deemed to be illegal under Section 42."

His Lordship then goes on to state (p.175; F-5):-

> "In the present case, the applicants do not, however, dispute that, under the act, a worker is invested with such right. They did not even contend that the strike was illegal. What is really in issue here is whether a workman, by absenting himself continuously for more than two days for the purposes of going on strike, legal though such strike may be, is deemed in law by reason of Section 15(2) of the Employment Ordinance, to have broken his contract of service."

9. (i) Section 15(2) of the Employment Ordinance reads as follows:-

> "A labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days -
>
> (a) without prior leave from his employer or without reasonable excuse; or
>
> (b) without informing or attempting to inform his employer of the excuse for such absence."

(ii) It will be noted that Section 15(2) has three limbs - two in Section 15(2)(a) and one in Section 15(2)(b). A labourer is deemed to have broken his contract of service if he has been continuously absent from work for more than two days -

> (i) without prior leave from his employer; or
>
> (ii) without reasonable excuse; or
>
> (iii) without informing or attempting to inform his employers of the excuse for such absence.

(i) above is not relevant for the purposes of this case for admittedly there was no prior leave.

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(iii) In regard to (iii) above, it was argued that the letter from the Union addressed to the Respondents and dated the 31st December, 1973 was information to the employer of the excuse for the absence. Could this be so?

(a) It is submitted that the letter dated 31st December, 1973 (Ex. U-7 at page 27) was nothing more than "an expression of indefinite intention" to use the words of His Lordship.

(b) At page 181 of the Record, B-5, His Lordship states:-

> "The Letter was sent some five weeks before the strike and it revealed that the workers went on strike some three weeks after 14th January, 1974. There was no reference specific or otherwise as to which of the applicants' labourer or labourers would cease work. If the letter was intended to refer to "such absence" within the meaning of Section 15 of the Ordinance, it did not seem to contain any such thing. It lacked clarity. It was so vague that the applicants cannot reasonably be expected, expressly or impliedly to know how many of their workers would cease work and for what length of time the worker or workers would stay away."

(c) "Such absence" within the meaning of Section 15(2) must necessarily refer to a specific absence which can be identified by the employer by a reference to the date of commencement and duration of the absence and the worker or workers who would be so absent. Unless these particulars were available the employer cannot possibly regulate and plan his operations. He would not be in a position to know which of the workers have obtained leave of absence and which of them have left to secure better prospects.

(d) It would be noted that Section 15(2) expressly refers to "a labourer" and "his employer". It is submitted that it is the labourer who should inform or attempt to inform his employer of the excuse of such absence. A personal communication is contemplated by the said sub-section.

The intention is manifestly clear. If the worker wants to remain absent, and yet maintain his contract of service with the employer, the burden is cast upon him to ensure that the employer is made aware of his absence from work and the reasons for such absence thus ensuring that the employer does not consider that he had abandoned his employment.

(e) The letter dated 31st December, 1973 (Ex. U-7; p.27) was written by the Union's President. On the day the letter was written the Union had no mandate to take strike action. No strike ballot had been taken. Indeed the workers were not aware that a strike was even contemplated. The strike ballot was not taken until about five weeks later on the 3rd February, 1974.

In the circumstances was this letter intended to be information to the employer that the workers would be absent in pursuance of a strike? As the strike would be illegal unless a secret ballot had been taken prior thereto, it is submitted that this letter was not even notice of intention of the strike. At best the letter amounted to an intention to call for a strike ballot.

It would also be noted that the letter specifies a date within which the company was requested to respond, such date being the 14th January, 1974. But no action was taken on the 14th or immediately thereafter.

(f) The learned Chairman of the Industrial Court has this to say about U-7 (see p.49;D).

"On the point of fait accompli, the

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Court sees that the notice-letter (U-7) discloses no decision of the Union to call out the workmen on strike except expresses the hope that the company will reply officially its willingness to "commence negotiations". According to the Union's rules, the consent of the majority of 2/3 of the workmen as members affected has to be obtained by secret ballot under at least two scrutineers before resorting to strike. This was done ....., at the meeting on 3rd February, 1974....."

10. (i) It is submitted that the decision of His Lordship in this regard was in keeping with the above findings of the learned Chairman of the Industrial Court. The question whether the letter can be construed as, "informing or attempting to inform his employer of the excuse of such absence", was clearly not one of fact but of mixed fact and law.

(ii) After making the above findings, the learned Chairman of the Industrial Court erred in law and in fact, in arriving at the conclusion (p.64; A-4):

> "It must be observed that S.15(2) has been amended (under P.U.(A) 409/69) by inclusion of a new limb (b) to mean that no absent workman is deemed to have broken his contract of employment so long as he has informed or attempted to inform his employer of the reasonable excuse for his absence. <u>There is no doubt here that the Company was informed of the excuse to be the strike by the Union's letter dated 31st December 1973 (U-7)</u>".

(iii) With all due respect to the learned Chairman of the Industrial Court, it is submitted that this conclusion is not only inconsistent with his earlier findings of fact (p.49;D) but also based on no evidence or irrelevant evidence.

In any event the letter had been wrongly construed as to its effect and implication.

11. (i) Was there "reasonable excuse" for the absence from work under limb (ii) of Section 15(2)?

(ii) It is contended on behalf of the Appellants that participation in a strike which is not illegal under Section 42 of the Industrial Relations Act is reasonable excuse for the absence from work.

(iii) Although as stated earlier at the outset, it would appear that workers have a legal right to participate in the lawful activities of their trade union, it is submitted that such right is not so wide as to permit them an unrestricted right to flout the lawful authority of their employers or to be in breach of their contracts of employment.

12. (i) In Wong Mook v. Wong Yin & 3 Others (1948) MLJ 41, four workers who had absented themselves from work continuously for three days for the purposes of participating in a strike were refused employment on the ground that their absence from work was without prior leave or reasonable excuse. Willan C.J. held that since going on strike implied an absence for an indefinite period, it was not reasonable excuse.

(ii) In arriving at this decision the Learned Chief Justice had to construe Section 20 and 54 (2) of the Trade Union's Enactment 1940 which are in pari materia with Sections 21 and 66(b) respectively of the Trade Union's Ordinance 1959. Section 53(iv) of the Labour Code (Cap. 154) on which the case rested is in essential particulars similar to Section 15(ii) of the Employment Ordinance 1955.

(iii) Sec. 20 of the Trade Union Enactment 1940, provided as follows:-

> "No suit or other legal proceedings shall be maintainable in any Civil Court against any registered trade union or any officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party <u>on the ground only that such act induced some other person to break</u>

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> a contract of employment, or that it is in interferance with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills."

It was held that the words underlined contemplate that a person going on strike, even though the strike is not illegal, may break his contract of employment.

(iv) Sec. 54(2) of the Trade Union Enactment 1940, provided:

> "This Enactment shall not affect -
> .....
> (2) Any agreement between an employer and those employed by him as to such employment;....."

13. (i) It is now submitted on behalf of the Appellants that as Section 8 of the Employment Ordinance is not found in the former Labour Code (Cap.154) a material change has occurred in the law and as such the WILLAN Judgment must be construed to be outdated.

(ii) It is submitted that this is not the case. Section 8 merely prohibits any form of restriction in the contract of employment of the right of workmen to join or participate in the activities of a trade union. It could not possibly have the effect of giving the workers an unrestricted right to absent themselves from work for any length of time they chose under a guise of lawful trade union activity, be it attendance at a lawful strike or participation in a week long trade union seminar. Can it be said that the workers may leave their place of work or absent themselves from work without prior information to or permission from their employers just because their union had called a lawful general meeting of all its members during working hours. If such wide interpretation is given to Section 8, the effect would be to not only undermine the authority of the employer, but also would have the effect of indiscipline in industry.

(iii) Be that as it may, it is submitted, that there is nothing in the WILLAN Judgment to indicate that there was a restriction on the right to strike or to participate in a strike under the contract of employment.

(iv) At page 43, the Learned Chief Justice states in his Judgment, referring to Sections 20 and 54(2) of the Trade Union's Enactment:-

> "This clearly lays down that the provision of the local law relating to trade unions do not affect the agreements between the Complainants-Respondents and the Defendant-Appellant in this case. Accordingly it is to the Labour Court that one must look to see what is the law regarding the breaking of such agreements."

The Learned Chief Justice then went on to hold (see at page 43):-

> "The fact that of their own violation they (sic) absented themselves for the purposes of a strike cannot be held to come within the words "reasonable excuse", otherwise it would mean that labourers could absent themselves from work for however long a strike remain in progress and claim that they had not broken their agreements."

(v) It would be noted that the decision was not based on any alleged restriction in the contract of employment. The question for determination was, was there a reasonable excuse? In the event His Lordship held that absence on strike was not reasonable excuse.

14. (i) It is submitted that the judgment of WILLAN C.J. is still good law.

(ii) WILLAN's judgment was followed in Gleneagles Hotel Ltd. v. Wong Jue Whee & Ors. (1956) 22 MLJ 37.

(iii) In: Nadchatiram Realities (1960) Ltd. v.(sic) Raman & Ors. (1965) 2 MLG 263 (see head note at p.264). The Plaintiffs were the owners of a rubber estate and the Defendants were employed as labourers, and allowed to occupy labourers'

quarters on the estate. There was a trade dispute between the Plaintiffs and the Defendants and the Defendants absented themselves from work. The Defendants however continued to occupy the quarters and also used some tents and sheds in the estates for the purpose of picketing. The Plaintiffs claimed that the Defendants' continued occupation of the quarters and occupation of the grounds of the estate constituted acts of trespass and they asked for an order for ejectment, damages and injunctions.

Ismail Khan J. (as he then was) held, inter alia, that the Defendants had no reasonable excuse when they stopped work and therefore they were in breach of their contract of employment.

In so holding, he cited with approval the passage in the judgement of WHITTON J. in Gleneagles' Case at page 38:

> "..... if the defendants did give notice they clearly terminated their contract since termination of contract is what notice essentially implied, whereas if they did not give notice their cessation of work was, I think, whether immediately or not, a determination of it by breach."

It is true that the latter part of his Lordship's observation which I have underlined is obiter, but I respectfully concur with it.

15. (i) As to the meaning of the word "reasonable" it was said in RE: A SOLICITOR (1945) KB 368 (CA) at page 371:-

> "The word "reasonable" has in law the prima facie meaning of reasonable in regard to this existing circumstances (sic) of which the actor called on to act reasonably, knew or ought to know."

(ii) In OPERA HOUSE INVESTMENT PTY. LTD. v. DEVON BUILDING PTY. LTD. (1936) 55 CLR

110 at page 116, LATHAM C.J. had this to say of the word "reasonable":-

> "The word "reasonable" has often been declared to mean "reasonable in all the circumstances of the case". The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction."

16. (i) Was the absence from work by reason of the strike "a reasonable excuse" in all the circumstances of this case?

(ii) In the instant case, no attempt whatsoever was made by the workers, and indeed the trade union, to inform the Respondents that they had taken a strike ballot and that they proposed to go on strike. The secret ballot to strike was taken on the 3rd February 1974, a Sunday and on Monday the 4th February 1974, the strike commenced.

(iii) It is conceded by the Appellants that at that time the Industrial Relations Department of the Ministry of Labour and Manpower was seeking to conciliate in the dispute. A meeting of both parties had been called for the 31st January 1974 but for reasons not apparent in the record that meeting did not take place (see p.166; F-2). There is also no evidence that the Ministry was informed of the decision to strike before the strike commenced. In view of the undue haste, strike ballot on Sunday and a strike on Monday morning, there was little that the Ministry could have done at that stage to prevent the strike. But there were procedures available for the settlement of the dispute under the Industrial Relations Act and such procedures had not been exhausted.

(iv) It is submitted that there was no justification for the strike at that point in time. By virtue of Section 23 of the Industrial Relations Act where a trade dispute is not otherwise resolved the Minister of Labour and Manpower is vested with powers to refer the dispute to the Industrial Court either of his

own motion, if it is expedient so to do, or on the joint request of the parties. The meeting called for Thursday the 31st January, 1974 having not materialised, the Union was in undue haste to call for the strike ballot two days later, without first affording an opportunity to the Minister to act.

As subsequent events proved, the dispute was in fact referred to the Industrial Court by the Minister on or about the 12th February, 1974 (see p.27; C-5).

(v) In any event conciliation proceedings were pending at that time. Intervention of the Ministry was called for by the Union and the Ministry did intervene. But before any positive action could be taken by the Ministry, through the Industrial Relations Department, precipitate action had been taken by the Union. It is submitted that such action was unjustified in the circumstances.

17. (i) In SADUL TEXTILE MILLS LTD. v. WORKMEN OF S.T. MILLS & ANOR AIR. (1958) Raj. 202 at 204 K.N. WANCHOO C.J. held:-

> "The question whether the strike was justified or not is not a mere question of fact. It is a mixed question of fact and law and if there is an apparent error of law in the judgement of the Tribunal in coming to the conclusion that the strike was justified, this Court would interfere in a case like this."

(ii) Can a strike be said to be justified when it is resorted to, whilst conciliation proceedings had been commenced with the intervention of the Ministry of Labour and Manpower and the strike action was begun within 24 hours of a strike ballot being taken?

In CHANDRAMALAI ESTATE v. ITS WORKMEN 1960 11 LLJ 243 at 246 (SC); AIR 1960 (SC) 902, K.C. (and at p.247, MALHOTRA on THE LAW OF INDUSTRIAL DISPUTES, 2nd Ed. Vol 1) DAS GUPTA J. had this to say:-

"While on the one hand it has to be remembered that strike is a legitimate and sometime unavoidable weapon in the hand of labour, it is equally important to remember that indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for labour to think that for any kind of demand a strike can be commenced with impunity without exhausting reasonable avenues for peaceful achievements of their objects. There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect labour to wait till after asking the Government to make a reference. In such cases, strike even before such a request has been made, may wholly be justified."

18. MALHOTRA on the LAW OF INDUSTRIAL DISPUTES 2ND ED. VOL. 1 p.247 states:-

"Thus where after the failure of conciliation efforts, the workman would have waited to ask the Government to make a reference before starting a strike, the strike was held to be unjustified. Likewise, where the circumstances clearly showed that the demand of the workmen regarding ex-gratia bonus could not be considered to be of an urgent and serious nature, the launching of the strike was held to be unjustified."

19. At p. 186 of the Record, B-5, the Learned Judge has this to say:-

"Nonetheless, the matter had already been referred to the appropriate Ministry. The Ministry was fully aware of the whole history and background and indeed of the fact a trade dispute had existed. The Ministry cannot therefore have failed to appreciate the legal implications and indeed must be assumed to know that consequently the Union and the workers might resort to industrial action and in all probability go on strike. As such the Union could reasonably anticipate that not a mere possibility but in all probability, that the

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Ministry shall exercise the power under the Act to refer the dispute to the Court."

20. (i) It is submitted, with due respect, that His Lordship was right in so holding not only with reference to the particular facts and circumstances of this case, but also by reason of the provisions of the Industrial Relations Act 1967.

(ii) Under Sec. 23 of the Act a trade dispute may be referred to the Industrial Court by the Minister:

(a) on the joint application of the parties to the dispute; or

(b) of his own motion when it is expedient so to do.

(iii) Even if the parties to the trade dispute are reluctant, the Minister may of his own violation, with a view to preventing disputes (sic) refer the matter to the Industrial Court. Whilst the Act is silent as to the circumstances in which the Minister may exercise his powers, the objectives of the Act can be discerned from the preamble to the Act, which reads:-

"An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."

(iv) In ATTN. GENERAL v. H.R.H. PRINCE ERNEST AUGUSTUS of HANOVER (1957) AC 436 at p.467, 468, LORD NORMAND said:-

"When there is a preamble it is generally, in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions."

(v) Under the provisions of the act, that the dispute would have been referred to the Industrial

Court by the Minister unless sooner settled, was inevitable. In taking unilateral action to strike, the Union acted in haste and unreasonably. Even if the Union was justified in taking the strike ballot on the 3rd February, the strike as from the 4th February was unjustified and unreasonable.

21. (i) In the final para. of his Judgment (p.189; C-52) his Lordship states:-

> "As regards costs, I am firmly of the view that the dispute was substantially attributable to the conduct of the applicants in their dealings with the respondent prior to the strike."

(ii) The Appellants now urge this Court that this finding lends support to their claim that the absence from work on strike was justified.

(iii) It is submitted that such an inference would be a violation of not only the ordinary and natural meaning of the language of the Judgement but also of the discretion exercised under O.65 of the Rules of the Supreme Court.

22. It is submitted that in view of the provisions of Sec. 13(2) and Sec. 15(2) of the Employment Ordinance 1955 and Sec. 27(4) of the Industrial Relations Act 1967, the Industrial Court had of need to consider the legality and/or justification for the strike; the effect its Award would have on the economy of the country and on the industry concerned; the financial implications; the public interest and the probable effect in related or similar industries. In failing to do so, the Court erred in law.

Wherefore the Respondents pray that this Appeal be dismissed with costs.

Dated this 29th day of February, 1976.

.....
SOLICITORS FOR THE
RESPONDENTS.
MESSRS. SHEARN DELAMORE
& CO.,
AND DREW & NAPIER,
NO. 2, BENTENG,
KUALA LUMPUR.

In the Federal Court

No. 17
Written Submission
for Appellants
1st March 1976

WRITTEN SUBMISSION FOR APPELLANTS.

May it please your Lordships

My Lords, this is an appeal against the judgment of Hamid J., In Originating Motion 73 of 1974. The brief facts are as follows:

A dispute arose in 1973 between the Appellants (hereinafter referred to as the Union) and the Respondents (hereinafter referred to as the Company). By letter dated February 21, 1973, the Minister of Labour directed the Company to accord recognition. On October 2, 1973, the Union submitted its proposals for a collective agreement on terms and conditions of employment of its workers and invited the company to commence negotiations. The Union did not receive any acknowledgment. A reminder was sent but no response or acknowledgment was received. The union wrote to the Minister of Labour and Manpower complaining about the adamant attitude of the applicants and seeking his good offices for early commencement of the negotiations.

By letter dated December 31, 1973, the union told the Company that unless it accorded recognition and expressed its desire to commence negotiations by January 14, 1973, the union would have to resort to industrial action and there would be complete cessation of work. (Exhibit 'Union 7' Page 27 of Appeal Record) on the same date, the Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor & Pahang) of the Labour Department wrote to the union requesting the union representatives to attend a meeting at his office on January 22, 1974 to discuss collective agreement proposals. The union representatives presented themselves but the Company's representatives did not turn up. Another letter was sent by the Labour Department fixing a meeting for January 31, 1974. No meeting took place. The workers went on strike on February 4, 1974.

The grounds of the present appeal are set out from pages 2 to 5 of the Appeal Record. My Lords, I shall first of all take Grounds 1, 2, 3 and deal with them together.

The Learned Judge allowed the application of the Company and quashed the award on the following grounds:-

(1) That the Company was justified in refusing to reinstate the workmen as the workmen had of their own volition terminated their contract of employment by absenting themselves from work continuously for more than two days in contravention of the provisions of Section 15(2)(a) and (b) of the Employment Ordinance, 1955 (Pages 176 to 179 of the Appeal Record).

(2) That the strike though lawful was not justified and accordingly could not be deemed reasonable excuse. (Pages 185-186 letters A-a).

In quashing the Award on the first ground, the Learned Judge relied on the judgment of Willan C.J. in Wong Mook vs. Wong Yin & 3 Others (1948, 14 M.L.J. 41). The facts of that case are more or less similar to the facts in the instant case. A number of workmen had absented themselves from work for three days as a result of a strike in furtherance of a trade dispute with their employer. The strike was organised by a registered trade union and was admittedly a lawful one. The workmen were served with notices by the employer to report for duty within a specified time and upon failure to do so were considered as having voluntarily terminated their employment and subsequently refused employment. In upholding the action taken by the employer Willan C.J. after considering the provisions of Section 20 and 54(2) of the Trade Union Enactment, 1940 held that the right to go on strike in breach of contract envisaged in Section 20 was subject to the conditions of the employment which are regulated by Section 53(iv)(a) of the then F.M.S. Labour Code (Cap. 154) and as such, the workmen should be deemed to have voluntarily terminated their employment by virtue of their absence from work without leave or reasonable excuse for more than one day. It is agreed by both sides that the provisions of Sections 20 and 54(2) of the Trade Union Enactment, 1940 are in pari materia with the provisions of Sections 21 and 66(b) of the Trade Union Ordinance, 1959, respectively, and that the provisions of Section 53(iv)(a) of the F.M.S. Labour Code (Cap.154) are substantially the same as the provisions of Section 15(2) (a) of the Employment Ordinance, 1955 as amended which is in force now.

The provisions of Sections 20 and 54(2) of the Trade Union Enactment, 1940 are as follows:-

"20. No suit or other legal proceedings shall be maintainable in any civil court against any registered trade union or any officer or members

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thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment, or that is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills."

"54. This Enactment shall not affect -

(1) .....

(2) any agreement between an employer and those employed by him as to such employment."

The provisions of Section 53(iv) of the F.M.S. Labour Code reads as follows:-

"53 (iv) An agreement shall be deemed to be broken -

(a) by a labourer if he is continuously absent from work for more than one day, inclusive of any day on which the employer is not bound under Section (iii) to provide work, without leave from the employer or without reasonable excuse."

Willan C.J. construed the above sections as having the following effect:

(a) that the words underlined by him in Section 20 of the Trade Union Enactment contemplate the right of labourer to go on strike in breach of contract;

(b) That by virtue of Section 54(2) of the Trade Union Enactment the right to strike in breach of contract is subject to the agreement of employment as governed by Section 53(iv) of the Labour Code;

(c) That accordingly a labourer who absents himself from work for more than a day without leave from his employer must be deemed to have terminated his employment irrespective of whether the absence was

due to participation in a lawful strike; and

(d) That absence from work without leave while on strike is not a "reasonable excuse" for such absence within the meaning of Section 53(iv)(a) of the Labour Code.

Canons of Interpretation

In construing the provisions of a statute, a court is obliged to follow certain fundamental principles. One such principle was enunciated by Martin B in Latham v. Lafone (1886, 14 L.R. 2Ex. 115, 121) as follows:-

> "I think the proper rule for construing this statute is to adhere to its words strictly; and it is my strong belief that by reasoning in long-drawn inferences and remote consequences, the Courts have pronounced many judgments affecting debts and actions in a manner that persons who originated and prepared the Act never dreamed of."

Another principle to be followed is that if two different interpretations are apparent, then the one to be followed is the one which is just, reasonable and sensible. In Holmes v. Bradfield R.D.C. (1942 K.B.1) Finnemore J. observed:

> "Of course the mere fact that the result of applying a statute may be just or absurd does not entitle this court to refuse to put it into operation. It is however, common practice that if, there are two reasonable interpretations, so far as grammar is concerned, of the words in an Act, the court adopt that which is just, reasonable and sensible than the one which is, or appears to them to be, none of these things."

The third principle to be followed is that the provisions of a statute should be construed as far as the words would permit to avoid absurdity, or repugnancy, or inconsistency with the rest of the statute and as far as possible to give effect to the intention of the Legislature. The golden rule of construction in this respect was laid down by Lord Wensleydale in Grey v. Pearson (6HL. Case 106) in the following words:

> "In construing wills and, indeed statutes and all

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written instruments, the grammatical and ordinary sense of the words is to be adhered, unless that would lead to some absurdity, or repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified as to avoid the absurdity and inconsistency and no further."

In this connection, the following passage from Maxwell on Interpretation of Statutes (p.228, 12th Ed.) is relevant:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put on it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, or by giving unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and the modifications made are mere corrections of careless language and really give the true meaning. Where the main objects and intention of a statute are clear, it must not be reduced to nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: 'the canons of construction are not so rigid as to prevent a realistic solution'."

In Kanpur Textile Finishing Mills v R.P.F. Commissioner (A.I.R. 1955 Punjab 130), Kapur J. after reviewing the law in relation to interpretation of statutes as expounded in Craies on Statute Law observed:

"As I have said the object of this act is to provide for a provident fund for workers and it is the duty of the Court to interpret the Act in such a manner as to give effect to the

intention of the Legislature and not to put a narrow construction which may defeat the object of the Act."

The interpretation of the provisions of a statute cannot be deemed reasonable if it offends against any one of the principles mentioned above unless the language used is intractable.

In judging the soundness or otherwise of the construction by Willan C.J. of section 54(2) of the Trade Union Enactment, 1940 that the right to strike in breach of contract is subject to the agreement of employment as governed by the Labour Code, it would be pertinent to consider whether:

(a) the construction is based strictly on the language of the statute; or

(b) if two interpretations are apparent, which of the two is just, reasonable and sensible; or

(c) the interpretation given is such as to lead to absurdity, inconsistency or repugnancy with the rest of the statute.

It is manifestly clear that in construing Section 54(2) of the Trade Union Enactment, 1940 Willan C.J. has not adhered strictly to the language of the Section. This is apparent from his judgment when he says with reference to that section:-

"This clearly lays down that the provisions of the local law relating to trade unions do not affect the agreement between the complainants-Respondents and the Defendant-Appellant in this case. Accordingly, it is to the Labour Code that one must look to see what is the law regarding the breaking of such agreements." (underlining mine)-Per Willan C.J. Page 43.

My Lords, the actual words of Section 54 are entirely different and are as follows:-

"This Enactment shall not affect ..... any agreement between an employer and those employed by him as to such employment." (Underlining Mine).

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These words do not convey the meaning that the provisions of the Enactment shall not affect the agreement of employment. On the contrary what it says is that the provisions of the Enactment shall not affect the employment as such under the agreement of employment. In other words, what the words of the section clearly imply is that a breach of contract by a workman occasioned by his participation in a lawful strike shall not in any way affect the existing contract of employment between the employer and employee.

Further, Willan C.J. failed to appreciate the scheme of S.53(iii) and (iv) which was to impose a minimum obligation on the employer, that is, to offer at least 24 days work in the month and as a complementary provision requires the labourer to be available for work during the month on the same number of days as the employer was required to provide work. To begin with, these subsections applied only to labourers employed "on agreement for a period of one month and paid according to the numbers of days work performed in such a month." But above all the failure of the labourer to attend any such day was deemed by the statute to be merely a breach of agreement and other sections of the Code gave the employer a pecuniary remedy against the labourer for such breach of agreement. Therefore the authors of the Labour Code had not the lightest intention that S.53(iii)(iv) should be (sic) used as the foundation for a right of the employer to dismiss a labourer for absence from work.

Section 15 in its present form is substantially the same but is much wider in scope than the old Labour Code provision. Nevertheless, it remains that 15(2) can have no purpose except in relation to an absence from work which does not otherwise constitute a breach of contract and the defaults which it describes are deemed to breaches of contract but no more. Again, there was no need to give that provision more than its literal meaning and there was no ground for reading that provision as implying that a breach by one party of any such obligation justified termination of the contract by the other party.

I therefore submit that the Willan, C.J. (sic) erred in law to read the words "deemed to have broken his contract of service" as meaning that

absence in such circumstances is deemed to terminate the contract. That section says nothing at all about termination of the contract.

My Lords, it should be remembered that Section 15 is only a "deeming" provision whereby certain actions are deemed by the section to constitute breaches of contract. This form of legislation is only necessary because such actions would (or might) not be breaches of contract in fact. It is a legal fiction created to consider something to be which it is not.

My Lords, I therefore respectfully submit that the construction by Willan C.J. is not based strictly on the language of the statute and accordingly cannot be deemed reasonable.

My Lords, even if the provisions of Section 54(2) of the Trade Union Enactment lend themselves to two constructions, namely, as construed by Willan C.J. to the effect that the Enactment shall not affect any agreement of employment, and as construed above as meaning that the Enactment shall not affect "the employment as such" under the agreement, the question to be considered is which of the two constructions is just, reasonable and sensible? Construing Section 20 of the Trade Union Enactment, Willan C.J. says that the language used therein "contemplate that a person going on strike, even though the strike is not an illegal one, may break his contract of employment". In other words what he says is that a workman who absents himself from work for more than a day without leave of absence from his employer or without reasonable excuse on account of participation in a lawful strike shall be deemed to have broken his contract of employment by virtue of the provisions of Section 53(iv)(a) of the Labour Code. As stated earlier the scheme of Section 53(iv)(a) was to impose a minimum obligation on the employer. And absence due to strike was never envisaged for the simple reason that the Trade Union Enactment giving the right to strike was promulgated after the Labour Code. In its present context Section 15(2) of the Employment Ordinance, the successor of Section 53(iv) of the old Labour Code appears to be (in substance if not in all its details) a survival from earlier times when the labour laws were designed

partly to provide simple, clear-cut rules for workers on plantations, workers generally having no very high standard of literacy and to provide employers with an instrument of discipline. Hence even in its present form Section 15(2) should not be construed too readily to mean that this subsection was meant that the labourer has terminated his contract or that the employer in such circumstances is entitled to dismiss the labourer without a notice. When the provisions of a statute declare that a person may go on a strike in breach of contract it must necessarily follow that a person can be absent from duty without leave and it is almost impossible to conceive in what manner the right of strike can be exercised other than by absence from duty without leave. The construction of Sections 20 and 54(2) by Willan C.J. are therefore inconsistent with each other. Nor can the construction of Section 54(2) be deemed just if its effect is to take away or nullify or render negatory the right to go on strike in furtherance of a trade dispute. On the other hand, the construction placed by me is such as to preserve the right to go on strike in breach of contract since the employment is not to be affected by the operation of any of the provisions of the Enactment.

Further, it is clear that if Section 54(2) of the Trade Union Enactment is construed to mean that Willan C.J. says then that construction will have the effect of defeating one of the principal objects for which a trade union is registered. A 'trade union' is defined in Section 2 of the Enactment and the Ordinance as having as one of its objects the "promotion or organisation or financing of strikes or lockouts in any trade or industry. My Lords, to put it briefly the question before the Court boils down to this:-

While Section 21 of the Trade Union Ordinance (formerly Section 20 of the Enactment) gives a person the right to strike in breach of contract, Section 15(2) of the Employment Ordinance (formerly Section 53(iv)(a) of Labour Code) provides that a person so absenting himself without leave will be deemed to have voluntarily terminated his employment. These two are inconsistent position. However(sic) Section 66(b) of the Trade Union Ordinance (formerly Section 54 of the Enactment) provides that the

statutory right of strike shall not affect any agreement between an employer and those employed by him as to such employment. Therefore what is the meaning of the words "shall not affect.... the agreement .... as to such employment? Does Section 66(b) provide an immunity to the person who exercises the right to strike against the rigours of Section 15(2) so as to continue his employment or does it mean that notwithstanding the right to strike, the contract of employment is terminated? What we submit is that whatever other effects a strike may have to the agreement between the parties, such as payment of wages, etc., the import of Section 66(b) is that it will not affect the agreement as to such employment. Accordingly, if the employment is not to be affected, it will be deemed to subsist and continue. It is clear that the legislature was contemplating that in certain circumstances a contract of employment should be deemed to continue even though the labourer was on strike.

(i) Morgan vs. Fry (1968) 3 A.E.R. 452.

(ii) Express Newspaper Private vs. Michael Mark (1963) 3 S.C.R. 405.

(iii) Rookes vs. Barnard (1964) 1 A.E.R. 367 at p. 381.

(iv) The Laws of Industrial Disputes by Rustamji, p. 621-631.

(v) The Laws of Industrial Disputes, Malhotra (2nd Edition - Vol 1 p. 249, para 10.

My Lords, it is my respectful submission that for the reasons stated hereinbefore the Willan Judgment should not be regarded as an authority for the purpose of construing those provisions of the Trade Union Ordinance, 1959 which are in pari-materia with the relevant provisions of the Trade Union Enactment, 1940.

Ground 4

My Lords, I now come to Ground 4 of the Appeal namely that the Learned Judge erred in law in misconstruing the true effect and purpose of Section 8 of the Employment Ordinance, 1955.

My Lords, whatever doubt that may have existed as

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to the real import of Section 54(2) of the Trade Union Enactment, 1940 (now Section 66(b) of the Trade Ordinance) I respectfully submit that Section 8 of the Employment Ordinance, 1955 has since removed such doubt and accordingly the legal position has been changed by reason of the said Section 8.

Section 8 of the Employment Ordinance, 1955 reads as follows:-

> "Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract -
> (a) to join a registered trade union;
> (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or
> (c) to associate with any other persons for the purpose of organising a trade union in accordance with the provisions of the Trade Union Ordinance, 1959."

My Lords, in construing the effect of the provisions of section 15(2) in relation to a breach of contract by virtue of absence from work without leave by workmen participating in a lawful strike, the provisions of Section 8 which are conspicuous by their absence in the Labour Code have to be now considered. My Lords, it is my respectful submission that the Learned Judge erred in law in misconstruing the true effect and purpose of Section 8 of the Employment Ordinance and in holding that the provisions of Section 8 do not in any way affect the validity of the Willan judgment under the present day laws. He held further that the import of Section 8 is only to prohibit the inclusion of any clause in an agreement of employment restraining the rights of workmen to participate in the activities of registered trade union and nothing more, and that absence from work without leave or excuse even on account of a strike must result in the severance of contractual relations. With respect, the Learned Judge appears to have completely overlooked the effect of section 8 vis-a-vis 15(2) of the Employment Ordinance.

There is no reason for any confusion as to the import the provisions of Section 15(2) of the

Employment Ordinance relation to the right to strike in breach of contract after the introduction of Section 8 into that Ordinance. What in effect Section 8 says is that under no circumstances shall a contract of service be construed as denying the right of workmen to participate in the lawful activities of a registered trade union. Willan C.J. construed Section 20 of the Trade Union Enactment 1940 (which is the same as Section 21 of the Trade Union Ordinance 1959) as envisaging the right of workmen to go on strike in breach of contract. That right is now accorded recognition in the Employment Ordinance which regulates the conditions of employment in this country. In the circumstances, Section 15(2) of the Employment Ordinance has to be interpreted in the light of section i. A fundamental rule of construction is that two provisions of a statute should not be construed in a manner as to lead to a manifest contradiction unless the language is intractable. The language of Section 15(2) readily lends itself to accommodating the right to strike in breach of contract within the meaning of the words "reasonable excuse" in sub-section 2(a) thereof. The Learned Judge considers, however, that absence from duty on account of participation in a strike cannot be deemed a "reasonable excuse" under Section 15(2) of the Ordinance. His reason is that the section should not be construed as providing complete immunity from any form of disciplinary measure in the event of workmen causing a wilful breach of contract. With respect, the right to strike as envisaged in Section 20 of the Enactment (now Section 21 of the Trade Union Ordinance) is the right to wilfully break the contract of service by going on strike with complete immunity from being terminated/dismissed. If such a right is to be deemed as not spelt out in the provisions of both the Trade Union Ordinance and the Employment Ordinance then the so-called right to strike in breach of contract should be regarded as a silly joke played on the Trade Unions by the Legislature.

Grounds 5 & 6

My Lords, I shall next deal with Grounds 5 and 6 together. The Learned Judge has accepted the finding of the Industrial Court that the strike was lawful under the provisions of the Trade Union Ordinance and the Industrial Relations Act, 1967. The Learned Judge has also accepted the finding that the Company's industry is not a "public utility service" as defined

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in the Schedule to Section 2 of the Industrial Relations Act. Under such circumstances no strike notice need be given by the union to the Company since Section 40 of the Act relating to public utility services will not be applicable to the instant case. Notwithstanding this the Union chose to write the letter dated 31.12.1973 to the Company.

My Lords, the Learned Judge has erred in law in stating that the letter dated 31.12.1974 (sic) (Exhibit U7) did not inform or attempt to inform the Company of "such absence" within the meaning of Section 15(2)(b) of the Ordinance. The Learned Judge has taken great pains to give the following reasons why he came to such conclusion.

(a) that the said letter was not sent by the workers but by the union;

(b) that the said letter made no disclosure on behalf of which workers the Union was informing or attempting to inform and which of the Company's labourers would cease work and for what length of time they would stay away;

(c) that no reference was made which 'such absence' the union was referring to;

(d) that the said letter lacked clarity and amounted to nothing more than mere expression of indefinite intention;

My Lords, with due respects, it is a startling proposition in these days of collective bargaining to suggest that a strike notice should be sent only by the workers who have decided to go on strike and not by the union which represents such workers. My Lords, this has arisen out of an erronerous understanding of the purpose and object of a trade union as a collective body to represent the workers. The term 'trade union' is defined in the Trade Union Ordinance, 1959 as having among its objects "the representation of either workmen or employees in trade disputes" (Section 2). In the instant case, the union while writing the letter of 31st December, 1973 did so in a 'representative' capacity on behalf of the workers. It was entitled under the laws to do so.

My Lords the letter of 31st December, 1973 was clear enough as to which of the workers intended to go on strike. The Union represented all workers eligible under its rules to join the union. The Hon. Minister for Labour and Manpower had directed the Company to grant recognition to the union by letter dated 21.2.1973 w.e.f. 5th September, 1972 (Page 22 of Appeal Record). Hence it was within the knowledge of the Company as to which of the workers the Union represented since the Company had disputed the representative capacity of the union and had submitted its own list of workers to the Ministry of Labour during the dispute on recognition. (Page 44 letters B-C, Appeal Record).

As regards the duration of the strike, the said letter intimated the Company that 'if by 14th January, 1974 the Company fails to write officially according recognition to the union the union will take 'industrial action' which means 'complete cessation of work'. My Lords, on a plain reading of the said letter how can one say that this letter did not give sufficient details or lacked clarity. It gave the date and informed the Company that the members of the union will go on strike meaning thereby that there will be complete cessation of work. It also impliedly informed the Company that the duration of such strike will be till such demands as stated in the proposals of the collective agreement are met.

The Learned Judge has held that the said letter "lacked clarity" and that it "merely sets out an intention at some future date of some workers whose identities are unknown to cease work for an indefinite duration of time". I respectfully submit that even if the said letter was defective in some respects (which I submit it is not) it did intimate that there would be cessation of work. That in law is sufficient because all that Section 15(2)(b) requires is that the employer should be <u>informed of the excuse</u> and nothing more. Moreover, the Learned Judge has completely failed to direct his mind as to whether the said letter would in law constitute an attempt to inform the employer of the excuse. If a person merely "attempts" to inform it would imply that such information could not have been in fact received by the employer. Had he received, then it constitutes information and not mere "attempt". Therefore the question of particulars does not arise at all in the case of an "attempt". I therefore

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submit that even if the said letter did not constitute information to the employer of the excuse the workers had at least attempted to inform the employer of such excuse that is that they would be on strike. In any event Section 15(2) postulates an enquiry because whether there had been any attempt by the labourers to inform the Company or whether there was a "reasonable excuse" are questions which can be determined only after a due enquiry. Furthermore, in the instant case since the workers were picketting at the gate of the factory and since the Ministry also had written two letters to the Company inviting it to come for meetings to resolve the dispute, and since the Company had written letter dated 4.2.1974 (Page 30 of the Appeal Record) the Company must be deemed to have been informed of the excuse and also must deemed to have had knowledge (sic) of the excuse of such absence.

Grounds 7, 8 & 9

My Lords, I shall now deal with Grounds 7, 8 and 9 together as they deal with the issue of "justifiability" of the strike.

My Lords, at the High Court the Company did not rely on this point; neither did it argue the same. (See Affidavit of Tan Kim Seng - Pages 8 to 12 of the Appeal Record). There were five grounds but that the strike was not 'justified' was not one of them. (Page 157 Letter E to Page 158 Letter B). The Learned Judge has also recorded that the Counsel proceeded only on the five grounds. (Page 165 of the Appeal Record).

The Learned Judge has stated in his judgment thus:

> "Looking at the relevant part of the Court's award, I would therefore state that what I hope to be the true legal position that the Court ought, in the present case, to have proceeded to determine after finding that the strike was legal whether having regard to all the circumstances of this particular case - the strike was justified and that in the circumstances it constituted a reasonable excuse within the meaning of

> Section 15(2)(a); or (b) whether a labourer had informed or attempted to inform his employer of the excuse for such absence .... it is apparent that the Court not only erred in law in their approach but had misconstrued the proper effect and meaning of the law.

In effect what the Learned Judge has concluded is that if a strike (which is legal) is justified it constituted a reasonable excuse within the meaning of Section 15 (2)(a).

My Lords, the Industrial Court after finding that the strike was legal, did proceed to examine whether under the circumstances the strike was justified. The Industrial Court has in its award enumerated the facts and circumstances leading to the strike. The Industrial Court held that those facts were unchallenged. (See pages 69 Letter G to page 72 Letter D). The Industrial Court found as a fact that the Respondent's action in remaining silent even to neutral requests made by the Industrial Relations Office to open conciliation proceedings was unreasonable. (Page 74 Letter F). Tan Kin Seng, the Managing Director of the Company, admitted that he did not write to the Union that the matter be taken up with the Industrial Court on a joint request (Page 74-75 Letter G & A). The Industrial Court then unanimously found that the party at fault is the Company's management. This is a finding of fact which no Court can interfere with. It held that the Union had no other recourse but to call out the workers on strike on 4th February, 1974 as a last resort after informing the Ministry as well. Therefore it found that the strike was justified. (Page 75 letter B to C).

The Learned Judge while commenting on the conduct of the Company in its relations with the Union states:

> "In the instant case, it cannot be disputed that on the face of the record, there is clear evidence that the conduct of the applicants has left much to be desired. It failed to accord recognition and it also failed to commence negotiations." (Page 186 Letter B-C).

Later while denying costs to the Company the Learned Judge commented thus:

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"As regards costs, I am firmly of the view that the dispute was substantially attributable to the conduct of the applicants in their dealings with the respondents prior to the strike." (Page 189 Letter C-D).

However after passing such severe strictures on the conduct of the Company the Learned Judge held:

"... the Court failed to consider whether the strike was justified having regards to all the relevant facts and circumstances." (Page 186 letter A).

My Lords, I respectfully submit that the Learned Judge has totally misdirected himself in law and fact in holding that the Industrial Court failed to investigate and make a finding whether the strike was justified. On the contrary, the Industrial Court has addressed itself to all the facts and circumstances leading to the strike, in fact 9 pages of its award has been devoted to this (page 69 Letter G to page 75 Letter C) and it has made a clear finding that the strike was justified. (Page 75 Letters C and D).

The Learned Judge held that another error on the face of the record was the failure of the Industrial Court to take into account the "Inevitability" of the dispute being referred by the Minister. The Learned Judge observed as follows:-

"the Union could reasonably anticipate, that not a mere possibility but in all probability, that the Ministry shall exercise the powers under the Act to refer the dispute to the Court. The Union, therefore, had no reason whatever to doubt the inevitability of such reference by the Minister. The Court, however, failed to take into account this fact in its determination whether there was any justification for the workers to go on strike at that juncture. There was seemingly adequate provision in the Act for the union to seek recourse through legal means to resolve the dispute."

In effect the Judge held that the Industrial

Court had failed to direct its mind to the possibility or even the probability of references of the dispute for adjudication. However, I respectfully submit that the Learned Judge erred in this because the Industrial Court had in fact directed its mind to the provisions in the Act relating to conciliation and reference to the Industrial Court and held that the Company failed to save the situation and that the Union had no other recourse but to call out the workers on strike. The strike was therefore justified." (Page 75 of the Appeal Record LetterA-C).

I further submit that in any case, the adequacy or sufficiency of evidence led on a point and the inference of fact drawn from the said finding are within the exclusive jurisdiction of the Tribunal and the said points cannot be agitated before a writ court. (Gajendragadkar J. in Syed Yakoob v. Radhakrishna - A.I.R. 1964 S.C. 477 @ 479 (page 171 of Appeal Record.)

Further, my Lords, the Learned Judge misdirected himself seriously as to the construction of the relevant provision of the Act in relation to reference of Trade disputes to the Industrial Court.

The relevant section (Section 23 of the Act) reads thus:-

23. (1) "Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the Court on the joint request in writing to the Minister by the trade union representing the workmen who are parties to the dispute and the employer who is a party to the dispute or a trade union representing the employer.

(2) The Minister may of his own motion refer any trade dispute to the Court if he is satisfied that it is expedient so to do;

Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority, such reference shall not be made except with the consent of the Yang Di-Pertuan Agong or State Authority as the case may require.

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For the purpose of this section and section 41(c) the expression "statutory authority" shall mean an authority or body established, appointed or constituted under a Federal or "State Law".

Section 23 has to be read in conjunction with S.16 (1) and (2) which is as follows:-

16(1) "Where a trade dispute exists or is apprehended, that dispute, if not otherwise resolved, may be reported to the Minister by -

(a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute; or

(b) a trade union of workmen representing the workmen who are parties to the dispute.

(2) The Minister shall consider any dispute reported to him under sub-section (1) and take such steps as may be necessary or expedient for promoting an expeditious settlement thereof."

Under the provisions of Section 16(1) of the Industrial Act, an employer or a trade union of workmen <u>may</u> report the existence of a trade dispute to the Minister. This the Union did by letter dated 12th December, 1973 (Page 26 of Appeal Record). Upon receipt of such report the Minister is <u>enjoined</u> under Section 16(2) to consider the dispute and to take steps to promote an expeditious settlement. This, the Minister did by arranging for two meetings but the Company did not attend both meetings. Where all efforts to settle the dispute fails, the Minister <u>may</u> if a joint application is made by both parties refer the dispute to the Industrial Court, or may on his own motion refer a dispute if he is satisfied that it is expedient to do so. The power to refer the dispute to the Court is embodied in Section 23 of the Act.

The section makes it clear that the Minister

is not obliged to refer a dispute to the Court. There is no provision in the Act to enable a party to compel the Minister to refer a dispute to the Court. The reason given by the Learned Judge for the strike being unjustified is that the union 'had no reason whatever to doubt the inevitability of such reference by the Minister'. With respect, the Learned Judge has misdirected himself on the law on this point. He has construed section 23(2) as saying the Minister 'shall refer' instead of 'may refer' and by completely ignoring the words "... if he is satisfied that it is expedient to do so". There is nothing in the evidence to show that the Minister had at any time indicated his intention to refer the dispute to the Industrial Court. Indeed he did nothing after his effort at conciliation failed and the dispute was referred to the Industrial Court only after 12 days of the strike. Further, since the dispute was not in a public utility service or in a department of government or a statutory body as to affect public interest, it was highly probable that the dispute would not have been referred to the Industrial Court had not the strike taken place.

My Lords, the Learned Judge while commenting that there was "seemingly" adequate provision in the Act for the union to seek recourse through legal means to resolve the dispute was in fact flying at the face of evidence. The Union's action at every step was in conformity with the law. There was overwhelming evidence before the Industrial Court that the union kept the Director-General of Industrial Relations and its officers informed of every step it took to resolve the dispute through legal means. It extended to the Ministry copies of all correspondences to the Company (Pages 23, 24, 26 and 27 of the Appeal Record). Its letter dated 12th December, 1973 addressed to the Minister (page 26 of the Appeal Record) was a distinct step in accordance with the law namely, Section 16(1) of the Industrial Relations Act. In the face of this irrefutable evidence, how can it be said that the union did not seek recourse through legal means to resolve the dispute.

My Lords, if the 'inevitability' theory propounded by the Learned Judge is accepted, it is my humble submission that there could be no strike afortiori all trade disputes leading to strikes would have been inevitably referred to the Industrial Court. By the same token no strike could be 'justified' either.

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My Lords, the Learned Judge also failed to address himself to the fact that such recourse through legal means existed for the Company also but which it failed to avail of not only did it fail to avail itself of such recourse but also took an obstructuve and belligerent attitude towards the steps taken by the officials of the Ministry to resolve the dispute. Furthermore, when the union advised the workers to return to work soon after the dispute was referred to the Industrial Court in accordance with the law, the Company defied the law by locking out the workers.

My Lords, in regard to the question on whether the strike was justified, the Learned Judge relies on the decision in S. Textile Mills vs. Workmen etc. (A.I.R. 1958 Raj., 202) in which it was held that the question of whether a strike is justified or not is a mixed question of fact and law and, therefore, the Court can interfere with the finding of an Industrial Tribunal, if, an error of law said to be apparent on the face of the record. In that case there was a failure of the Tribunal to consider the implication of the workmen going on strike without giving 14 days notice of the intention to go on strike as required under a standing order in force in the establishment. Because of that failure on the part of the Tribunal, the Court held that the strike was not justified. However, in that case there was no refusal to reinstate the workers. In the instant case the error of law said to be apparent on the face of the record is the alleged failure on the part of the Industrial Court to take into consideration the "inevitability" of the Minister referring the dispute to the Industrial Court in which event the strike would have been unnecessary. With respect, there is no evidence to support this supposition. Thus the Indian case has no application in the instant case.

My Lords, it is my submission that if one accepts the argument of the Learned Judge that if the strike is to be justified, regard must be had to all the circumstances of the case including the 'inevitability' of the dispute being referred to the Industrial Court then it would do away with the right to strike in this Country as there will be no circumstances under which a labourer could go on strike.

My Lords, while on the subject of 'justifiability' what the Indian S.C. said in the case of Sivadeshi Industries Ltd. v. Workmen (F.L.R. 576 Supreme Court) is worthy of note. The S.C. observed that collective bargaining for securing improvement on matters like viz. basic pay, dearness allowance, bonus, provident fund and gratuity leave and holidays is the primary object of a trade union and when demands like that are put forward and thereafter strike is resorted to in an attempt to induce the Company to agree to the demand or at least to open negotiation the strike must, prima facie, be considered justified. The Company's conduct in such matters as implementation of any terms previously agreed may be important.

My Lords, in the instant case, the union did not embark on strike action at the 'drop of a hat'. It exhausted all possible avenues. It wrote letters, reminders all of which remained unacknowledged. The Company defied the Minister's order of recognition. The Company took no action either to accord recognition or to challenge the order. The union reported the matter to the Regional Director of Industrial Relations. That office arranged two meetings. The Company failed to turn up for both meetings while the union attended these meetings even after the Ministry's attempt have proved abortive. The Union went on strike only as a last resort.

I respectfully submit that on a strict interpretation of the law, the concept of justification has no relevance in relation to strike itself. Moreover, the justifiability of a strike should not be viewed from the standpoint of their exhausting all other legitimate means open to them for getting their demands fulfilled. (National Transport and General Co.Ltd. vs. Their workmen - 1OF.J.R. 411 quoted in page 121, Patels, Industrial Disputes Act, Second Edition).

Justifiability may be relevant while considering reliefs such as strike pay, compensation and punishment for participation in illegal strikes etc but not as to legality or otherwise of the strike itself. In any case, the Learned Judge erred in law in equating justifiability with reasonable excuse under Section 15(2)(a). Furthermore, the absence contemplated under the Labour Code is not absence as a result of concerted action or by common understanding but casual absence of individuals.

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Written Submission for Appellants
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continued

Ground 10

My Lords, the Learned Judge has stated in his judgment thus:

> "In consideration, it is my view that before making the award, it was not only essential for the Court to consider the worker's rights to strike, the legality of such strike but it must also determine whether in fact there was justification for the strike taking into account, amongst other things, the public interest, the financial implications, the interest of the industry, the effect of such award on the economy of the country and the safety of the industry or the factory concerned."

My Lords, that statement was an adaptation from Section 27(4) of the Industrial Relations Act which reads as follows:-

> "In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of such award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries".

The Learned Judge has erred in law as to the intention and purpose of this section.

My Lords, these matters are highly relevant for a decision in fixing wages and other conditions to be observed by employer in relation to the workmen employed by them, but it seems quite unreal to require that they should be taken into account in deciding whether a labourer has a reasonable excuse for his absence from work or whether such strike which caused this absence is justified.

Ground 11

My Lords, the Learned Judge erred in law when after holding that the Court might had had good reason to say that ... to give notice to the workers to resume work within a period of 48 hours, was an unfair labour practice and after further holding

that the Court correctly held that the industry did not come within the meaning of public utility, it held that nevertheless the Court must consider the nature of the industry, the equipment used and the safety of the remaining workers in determining the question whether the Company acted lawfully in giving the said notice.

My Lords, it is my submission that the Learned Judge has completely misdirected himself. The question whether the Company acted lawfully in giving the said notice to the workers does not depend on the "nature of the industry, the equipment used and the safety of the workers" but on the terms and conditions of the contract and the relevant law which I have dealt with earlier.

My Lords, the Court has considered the nature of the industry the equipment used and the safety of the remaining workers and has concluded that the industry did not come within the meaning of public utility. (Pages 44 Letter E to Page 49 Letter C). The High Court has not interfered with that finding being a question of fact.

My Lords, the Company's right to safeguard its property and factory was not the issue either before the Industrial Court or the High Court. It is my submission that the Learned Judge has wrongly directed himself to irrelevant issues.

Further, after holding that the Industrial Court had good reasons for its findings it would be illogical and contradiction in terms to hold that the Court must nevertheless consider other facts such as the nature of the industry the equipment used and the safety of the remaining workers. In this connection I reiterate my earlier submission that the High Court cannot interfere on finding of facts because of insufficiency or inadequacy of evidence.

My Lords, I therefore pray that the appeal be allowed with costs here and below.

Dated this 18th day of March, 1976.

XAVIER & VADIVELOO
SOLICITORS FOR THE APPELLANTS.

In the Federal Court

No. 18
Notes of Argument
of Gill, C.J.
1st March 1976

No. 18

NOTES OF ARGUMENT OF GILL, C.J.

Coram: Gill, Chief Justice, Malaya,
Ong Hock Sim, Judge, Federal Court,
Raja Azlan Shah, Judge, Federal Court.

NOTES OF EVIDENCE RECORDED BY GILL, CHIEF JUSTICE

Kuala Lumpur,
1st March 1976.
Encik D.P. Xavier with Encik G. Vadiveloo for Appellants.

Encik Ronald Khoo with Encik V.T. Nathan for Respondents.

Xavier:

I have prepared written submission, of which I deliver a copy to the Court. There are 12 grounds of appeal as shown in the record. I will be taking grounds 1, 2 and 3 together. Then I will be dealing with ground 4 separately, grounds 5 and 6 together, 7, 8 and 9 together, 10 and 11 together and I will have dealt with ground 12 in various other grounds.

Appeal against the judgment of Abdul Hamid J. in an Originating Motion. Facts are set out in pages 14 to 18 of the appeal record. Read written submission starting at page 2.

Grounds 1, 2 and 3 of appeal. Read submission at page 3 up to page 10. The right to dismiss or terminate the agreement arises from Section 54 and Section 57 of the Labour Code and not from Section 53(iv) of the Code. Under the Employment Ordinance, the right of termination of contract without notice arises under Section 13(1)(11) and for misconduct under Section 14. It is common ground that these sections were never invoked in this case. It is noteworthy that Section 13(ii) speaks of "wilful breach of a condition of the Contract of Service." In the instant case, the respondents relied on 15(2) of the Employment Ordinance, 1955 throughout.

Continue reading from page 10, para. 2. Refer

to Morgan v. Fry (1968) 3 All E.R. 452, 460 line C, 455 line F. 5: Rookes v. Barnard (1964) 1 A.E.R. 367, 381 line H. When a workman goes on strike he does not intend to terminate the contract. He does not abandon his contract of employment. Refer to Express Newspapers Private Ltd. v. Michael Mark (1963) 3 S.C.R. 405, 406. (Here the employees could have relied on sections 13 or 14 of Employment Ordinance, 1955). Refer to the Laws of Industrial Disputes by Rustomji, pages 621-631. The case of Smith Stenis Street referred to at page 622 is referred to the learned Judge in his judgment, at the foot of page 186. No rowdiness on the part of the strikers in this case. The test to be applied is, what is the dominant purpose of the strike. In this case, it was to invite the employer to negotiate. The learned Judge refer to footnote 51 in Employees' misconduct by Alfred Avins, 1968 but he overlooked the further footnote 52. Refer to the Laws of Industrial Disputes, Melhotra (2nd edition) Vol. 1, page 249, para. 10. Read para. 2 at page 13 of my written submission.

Come to ground 4. Read written submission at page 14. The question of discipline did not arise. Learned Judge referred to section 8 where he says: "At the outset ..... relevant facts and circumstances".

Deal with grounds 5 and 6. Read grounds and my submission.

I now come to grounds 7, 8 and 9. Read my submissions at page 19. Refer to page 48 of record to show that there were no damages to the factory and that the strike was peaceful and there were no prosecutions. Refer to page 51 as to no incidents. Again at page 61 on loss, page 68 (damage to bricks). By any standards the strike was peaceful and it caused no damage. Strike did not start until 5 weeks after letter of 31.12.73.

Ground 10. Read submission at page 28. Ground 11. Read submission at page 29. Appeal should be allowed.

Ronald Khoo:

I too have prepared written submission which

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1st March 1976
continued

I will deliver to the Court.

I will deal first with some of the points raised by the other side. It was said that section 13 of the Employment Ordinance was not considered at all. In fact section 13 was dealt with by counsel for Company. Refer to pages 41 and 42. Refer to page 177 where in lines A, section 16 should read section 13.

Not all the employees of the Company were Union members and not all the strikers were Union members. Refer to page 82, page 85.

The strike commenced on 4.2.1974. The Minister referred the matter on 12.4.1974. The workers presented themselves for work on 16.4.1974. Refer to page 72 of record.

Refer to my written submission. Facts not in dispute. The judgment at pages 168 to 174 deals entirely with the principles of certiorari.

Read from page 4 of my written submission up to page 18. Refer now to letters at pages 28 and 29 and page 74, which shows that letter of 22.1.74 was not sent to employer.

Refer to United Temiang (F.M.S.) Rubber Estate Ltd. v. Perumal (1973) 1 M.L.J. 209, 210.

In the facts of this particular case, the conduct of the employees was such that section 15(2) of the Employment Ordinance, 1955 was breached between them. I do not see any conflict between section 8 and section 15 of the Ordinance. I cannot see how it can be said that the workmen have an unbridled right to strike. In fact no notice of strike was received by the employer. It was necessary first to hold a strike ballot. The letter of 31.12.74 cannot be construed as a strike notice.

Refer also to section 7 of Employment Ordinance 1955.

Appeal should be dismissed.

Xavier (in reply)

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1st March 1976
continued

There is no legal requirement for a formal notice after the strike ballot except in the case of a public utility. Union were reasonable in that they did not take strike ballot until 3rd February 1974. It was not argued that the strike was illegal.

In the case of Gleneagles Hotel Ltd. v. Wong Jue Whee & ors. (1956) 22 M.L.J. 37 there was no evidence that strike was sponsored by a Trade Union. The workers gave 48 hours' notice and struck work before the 48 hours expired. It was a case of picketting inside the Hotel premises. Section 8 of the Employment Ordinance was not considered in that case. (Employment Ordinance came into effect on 1st June 1957). In Nadchitram's case, the strike was illegal. The workers did not listen to the Union in that case.

All the strikers were Union members, including the 11 members (cited as parties) who became members during the strike. Refer to pages 42 and 43 to show it was not a wild cat strike and the Board of Directors were indifferent to the situation.

Section 13 was referred to in the Industrial Court but not before the High Court where the Company relied entirely on section 15. The reference at page 177 of the record letter B was not a reference to section 13. (Mr. Khoo says that there is reference to section 13 at page 158).

C.A.V.

Sd. S.S. Gill

In the Federal Court

No. 19
Judgment of Raja Azlan Shah, F.J.
14th April 1976

No. 19

JUDGMENT OF RAJA AZLAN SHAH, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 87 OF 1975

In the Matter of an application by South East Asia Fire Bricks Sdn. Bhd. for leave to apply for an Order for Certiorari.

A N D

In the Federal Court

No. 19
Judgment of
Raja Azlan Shah,
F.J.
14th April 1976
continued

In the Matter of Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974.

BETWEEN

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binte Maon
represented by the Union Appellants

AND

South East Asia Fire Bricks Sdn.Bhd
Respondents

(In the Matter of Originating Motion No. 73 of 1974 in the High Court in Malaya at Kuala Lumpur)

BETWEEN

South East Asia Fire Bricks Sdn. Bhd
Applicant

AND

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh

(g) Tan Yew
(h) Anuar bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binti Maon
represented by the Union Respondents

Coram: Gill, C.J. Malaya,
H.S. Ong, F.J.,
Raja Azlan Shah, F.J.

JUDGMENT OF RAJA AZLAN SHAH, F.J.

This appeal is directed against the judgment of the High Court reported in (1975) 2 M.L.R. 250 setting aside the award of the Industrial Court made on August 8, 1974. The parties to the dispute are the South East Asia Fire Bricks Sdn. Bhd. ("the company") and the Non-Metallic Mineral Products Manufacturing Employees Union ("the union") and its members.

The relevant facts and circumstances giving rise to the appeal are set forth in the judgment. On February 4, 1974, 73 workers of the company stopped work. The stoppage ended on February 16, 1974 when the dispute was referred to the Industrial Court on February 12, 1974. They resolved to resume work on that day, i.e. February 16, but were locked-out. The apparent cause for the strike was that the management of the company had repeatedly ignored the requests for recognition and to commence negotiation for collective bargaining of terms and conditions of employment. The strike ballot was taken on February 3, 1974. On February 4 and 5 the management issued two warning notices to the strikers that the stoppage of work was a sudden wild-cat strike and was illegal and a break in service, and unless they returned to work within 48 hours their services would be deemed to have terminated.

It appears to me clear from the evidence, and, indeed, it cannot seriously be disputed that there was a trade dispute. See section 12(7) of the Industrial Relations Act, 1967, which reads:

"If after such steps, as aforesaid, have

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been taken, there is still refusal to commence collective bargaining, a trade dispute shall be deemed to exist upon the matters set out in the invitation."

The Industrial Court found that the workers, by going on strike, did not terminate their contracts of service; that the company in refusing to reinstate them had declared a lock-out; and that the strike was legal. It therefore made an award that the workmen were to be reinstated on the same terms and conditions of employment with effect from February 16, 1974.

The company took the matter to the High Court contending that the Industrial Court had erred in law in coming to those findings. The learned judge upheld the company's application and quashed the award. Hence this appeal by the union.

The learned judge's formulation that "certiorari is pre-eminently a special revisionary discretionary remedy to be acted upon recognised and established principles" is an accurate distillation of the authorities. For my part I would like to express it this way. Proceedings by way of certiorari with regard to industrial disputes are not as of right otherwise they may materially affect the fundamental basis of the decision of the Industrial Court under the Industrial Relations Act, 1967, namely, quicker solution to industrial dispute to achieve industrial peace. The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior

courts to keep inferior tribunals within the bounds of their authority. The supervisionary character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. As such it may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court is limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face on the record. It cannot arrogate the (sic) powers of a court of appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence.

Before dealing with the fact of this appeal, it is convenient to dispose of a point given a prominent place in the judgment of the High Court. The learned judge considered Wong Mook v. Wong Yin and 3 Others (1948) 14 M.L.J. 41 as not outdated and might be distinguished from the instant case. That case, in my mind, concerns the interpretation of the Labour Code - Cap. 154 only, in particular, section 53(iv)(a), regarding the breach of contracts of employment of 4 rubber tappers "along with other tappers" who of their own volition absented themselves for 3 continuous days for the purpose of a strike. Willan, C.J. found the element of reasonable excuse not present. He instanced illness and transport breakdown as two ready examples of reasonable excuse. My only comment is that the circumstances of that case are distinguished by one very important fact, that is, the strike was organised by an amorphous group of rubber tappers. In that context the learned Chief Justice was right when he took the view that the provisions of the Trade Union Enactment, 1940 was not affected; hence his pronouncement of section 20 of the Enactment that "a person going on strike, even though the strike is not an illegal one, may break his contract of employment" is, with respect, quite unnecessary to the decision, and is considered obiter. No guidance is more misleading than an obiter dictum.

The learned judge rightly held in the instant

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case that Wong Mook v. Wong Yin and 3 Others (supra) can be justified on the facts. Up to that point I am in complete agreement. A decided case is only an authority for the principle of law that it decides and courts are forever emphasising in the individuality of each case. But the learned judge went on to say that section 66(1)(b) of the Trade Union Ordinance, 1959 operates and in the result he has to examine the effect of section 15(2) of the Employment Ordinance, 1955. I think he missed a point there. After rightly distinguishing Wong Mook & Wong Yin, he adopted the same line of reasoning as that of Willan, C.J. in that case. That is not right. The law has not been standing still since then. A new section, i.e., section 8, has been added to the Ordinance. The relevant section reads:

> "8. Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract -
>
> (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise."

In interpreting a statute it is necessary to consider what the law was before the statute was passed, what the mischief was for which the previous law did not provide, and the remedy provided by the statute to correct that mischief. It is here that the learned judge went wrong. He has failed to give proper consideration to the provisions of that section which, in my opinion, is a saving clause for workmen. Workers' organisations cannot exist, if workers are not free to join them, to work for them and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspirations of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as freedom to strike. "The right of workmen to strike is an essential element in the principle of collective bargaining". (2) That is a truism. There can be no equilibrium in industrial

(2) per Lord Wright in Crofter Hand Woven Harris Tweed Company Limited and others V. Veitch and another (1942) A.C. 135,463.

relations today without freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.

In this country freedom to strike appears in the form of immunities from criminal prosecution and from civil action with labour relations and transformed them into privileges which confined them to acts done in contemplation or in furtherance of trade disputes (see section 21 of the Trade Union Ordinance, 1959). However, a strike can be illegal because of the purpose of the strike, e.g. better wages and conditions, recognition dispute, closed-shop dispute, sympathetic strike, or because of the method used, e.g. attacks on person or property, or defamation or trespass (see sections 40 and 41 of the Industrial Relations Act, 1967). In short, what I wish to stress here is that section 8 of the Employment Ordinance, 1955 has removed the provisions of Section 15 of the Employment Ordinance from the scene of trade disputes. We can safely overlook that provision when dealing with the activities of a registered trade union, such as a strike in contemplation or in furtherance of a trade dispute and is therefore protected.

With these considerations, I now approach this appeal which may conveniently be divided under two heads. The first and root question is to consider the Industrial Court's finding that there was a lawful strike, i.e., a concerted stoppage of work by the workmen employed in an industry. That is a question of fact (see Conway v. Wade) (1909) A.C. 506, 513. The Industrial Court found that the workmen had in fact gone on strike, and furthermore that its manifest purpose was to further their trade dispute in regard to union recognition and collective bargaining. That tribunal was charged with finding of facts, and, unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact. In my opinion, all the necessary ingredients of the definition of strike exist in the present case and the stoppage of work on February 4, 1974

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amounted to a strike. This was not a case of an individual worker's failure to turn up for work as was decided in Wong Mook v. Wong Yin, but a concerted action on the part of a large number of workmen. The Industrial Court was not in error in regarding it as a strike that was perfectly legal. A trade Union's primary object is to negotiate terms and conditions of service of its members and a dispute as to whether the management should recognise for this purpose is clearly connected with such terms. That can hardly be regarded as an unlawful purpose. Following that, was the Industrial Court right in arriving at the conclusion that the workmen, by going on strike, had not terminated their contracts of service? In my opinion, when workmen absented themselves from work because they had gone on strike with the specific object of enforcing the acceptance of their demands, they could not be deemed to have terminated their contracts of service. By going on strike they clearly indicated that they wanted to continue in their service but were only demanding collective bargaining. Such an attitude, far from evidencing termination of service, emphasises the fact that the service continued as far as they were concerned. There is a preponderance of authority in favour of this view. I need only quote a passage from the speech of Lord Evershed in Rookes v. Barnard (1964) 1 A.E.R. 367, 381:

> "It has long been recognised that strike action or threats of strike action in the case of a trade dispute do not involve any wrongful action on the part of workmen, whose service contracts are not regarded as being or intended to be thereby terminated."

Apart from the apparent "sin" of going on strike, I do not think that there is a prima facie case of breach of contracts of service. If there is, only then can the company resort to dismissal action. I say it for this reason. There is a manifest distinction between a collective agreement and a contract of service. A workman cannot, but an employer can, be a party to a collective agreement (see section 12 of the Industrial Relations Act, 1967). The

individual workman has no bargaining power in industrial relations. He can never enter into a collective agreement, nor can any number of workmen who do not form an association. It follows that a trade union of workmen, when bargaining collectively, acts always and exclusively as a principal and not as agent for its members, and this has consequences both as regards the effect of the agreement on the contracts of service, and in connection with the law governing trade disputes and trade sanctions. The obligations a union undertakes and the rights it acquires are collective by nature; they cannot be performed by an individual workman. The agreement itself imposed no obligations on union members, and an illegal strike is not a breach by the workmen, of the agreement; it may of course be a breach by the union. Nor can an individual member of the union derive any rights from the agreement as such, as distinguished from his contract of service the content of which has been determined by the collective agreement.

If the decision of the learned judge is correct, then it would have ominous repercussions for trade unions in regard to freedom to strike.

The second and last consideration is whether the Industrial Court's finding that the company, in refusing to reinstate the workmen, had declared a lock-out. It appears to me that if the management took this action with the knowledge or reasonable expectation that the workmen would be willing to return to work on February 16, 1974 and carry out their working obligations, then its act might in certain circumstances constitute a lock-out. It is necessary to look at the situation on that day, not with the benefit of hindsight, but in the light of the situation then prevailing. On February 12, 1974 the Minister had indicated his intention to refer the trade dispute to the Industrial Court. Both the management and the union were notified of the Minister's intervention. The union on receipt of that communication had instructed its members to call off the strike and return for work on February 16, 1974. They reported for work on that day but the management refused to take them back. It therefore seems to me clear that on

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this day the workmen had no longer wished to withdraw their labour and wanted to go back to work. They had, in my view, clearly ceased to be on strike and the management knew it was no longer under strike pressure. The inference is that it could reasonably expect that the workmen would be ready and willing to resume work. I therefore see no ground for setting aside the Industrial Court's finding that there was a lock-out; on the contrary, I would have been very much surprised if it had been the other way.

I say it again that workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike, they are not terminated, and the workmen are entitled to put back to the status quo on the same terms and conditions. Much had been canvassed in the court below and before us to the two warning notices given by the company indicating that if the workmen did not return to work by a certain date, they would be deemed to have abandoned their contracts of service. In my opinion, the management could not, by imposing a new term of service, unilaterally convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

I would allow the appeal with costs to the appellants both here and in the court below, setting aside the order of the High Court and restoring the award of the Industrial Court.

RAJA AZLAN SHAH
JUDGE,
FEDERAL COURT, MALAYSIA.

Kuala Lumpur
14th April, 1976

Gill, C.J. Malaya and H.S. Ong, F.J. concurred.

Counsel:

Mr. D.P. Xavier (with him Mr. G. Vadiveloo) of Messrs. Xavier & Vadiveloo, Kuala

Lumpur for appellants.

Mr. Ronald Khoo (with him Mr. V.T. Nathan) of Messrs. Shearn Delamore & Co., Kuala Lumpur, for respondents.

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No. 20

ORDER

No. 20
Order
14th April 1976

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

FEDERAL COURT CIVIL APPEAL NO: 87 OF 1975

In the Matter of an application by South East Asia Fire Bricks Sdn. Bhd. for leave to apply for an order for Certiorari

A N D

In the Matter of Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No: 15 of 1974

BETWEEN

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah Binte Maon
represented by the Union — Appellants

AND

In the Federal Court — South East Asia Fire Bricks Sdn. Bhd. Respondents

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(In the Matter of Originating Motion No. 73 of 1974 in the High Court in Malaya at Kuala Lumpur)

BETWEEN

South East Asia Fire Bricks Sdn. Bhd. Applicant

AND

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar Bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah Binti Maon represented by the Union Respondents

CORAM: GILL, CHIEF JUSTICE, HIGH COURT, MALAYA.
ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 14TH DAY OF APRIL, 1976

O R D E R

THIS APPEAL coming on for hearing on the 1st day of March, 1976 in the presence of Mr. D.P. Xavier (with him Mr. G. VADIVELOO) of Counsel for the Appellants and Mr. Ronald Khoo (with him Mr. V.T. Nathan) of Counsel for the Respondents AND UPON READING the Record of Appeal herein AND

In the Federal Court

No. 20
Order
14th April 1976
continued

UPON HEARING Counsel as aforesaid IT WAS ORDERED that this appeal do stand adjourned for Judgment AND the same coming on 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 that the Order of the High Court made in Originating Motion No. 73 of 1974 be and is hereby set aside AND IT IS FURTHER ORDERED that the award of the Industrial Court in Industrial Court Case No. 15 of 1974 be and is hereby restored AND IT IS FURTHER ORDERED that the Respondents do pay to the Appellants the costs of this Appeal and also the costs in the Court below AND IT IS LASTLY ORDERED that the deposit of $500/- (Ringgit: Five Hundred only) paid into Court as security for costs be refunded to the Appellants.

GIVEN under my hand and the Seal of the Court this 14th day of April, 1976.

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

In the Federal Court

No. 21
Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong
15th November 1976

No. 21

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

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

FEDERAL COURT CIVIL APPEAL NO. 87 OF 1975

In the Matter of an application by South East Asia Fire Bricks Sdn. Bhd. for leave to apply for an Order for Certiorari

And

In the Matter of Award No. 39 of 1974 made on the 8th day of August, 1974 by the Industrial Court in Industrial Court Case No. 15 of 1974

Between:-

In the Federal Court

No. 21
Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong
15th November 1976
continued

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binte Maon represented by the Union — Appellants

And

South East Asia Fire Bricks Sdn. Bhd. — Respondents

(In the matter of Originating Motion No. 73 of 1974 in the High Court in Malaya at Kuala Lumpur)

Between

South East Asia Fire Bricks Sdn. Bhd. — Applicant

And

1. Non-Metallic Mineral Products Manufacturing Employees Union

2. (a) Tan Len Keow
(b) Yap Chuk Yook
(c) Loo Yok Ho
(d) Yap Ah Kiat
(e) Yap Choon Hoo
(f) Teh Yoke Toh
(g) Tan Yew
(h) Anuar bin Abdul
(i) Choon Ah Soo
(j) Lee Kim Yan
(k) Siti Zaibidah binte Maon represented by the Union — Respondents

In the Federal Court

No. 21
Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong
15th November 1976
continued

CORAM: ALI, AG. CHIEF JUSTICE, HIGH COURT IN MALAYA
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT, MALAYSIA;
WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 15TH DAY OF NOVEMBER, 1976

10

O R D E R

UPON MOTION preferred unto Court this day by Encik S. Woodhull of Counsel for the Respondents in the presence of Encik R.R. Sethu of Counsel for the Appellants AND UPON READING the Notice of Motion dated the 26th day of October, 1976 and the Affidavit of V.T. Nathan affirmed on the 18th day of October, 1976 filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be granted
20 to the Respondents to appeal to His Majesty the Yang di-Pertuan Agong against the decision of this Court given on the 14th day of April, 1976 AND IT IS ORDERED that the costs of and incidental to this Application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 15th day of November, 1976.

Sd: illegible
CHIEF REGISTRAR,
FEDERAL COURT,
30 MALAYSIA.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 7 of 19 ?

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :-

SOUTH EAST ASIA FIRE BRICKS SDN. BHD — Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION

2. (a) TAN LEN KBOW
   (b) YAP CHUK YOOK
   (c) LOO YOK HO
   (d) YAP AH KIAT
   (e) YAP CHOON HOO
   (f) TEH YOKE TOH
   (g) TAN YEW
   (h) ANUAR bin ABDUL
   (i) CHOON AH SOO
   (j) LEE KIM YAN
   (k) SITI ZAIBIDAH binte MAON

   represented by the Union

Respondent

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellants

HATCHETT JONES & KIDGELL,
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London, EC3N 2NA

Solicitors for the Respondents.