Judgment 15 of 1978

15/78

No. 5 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION

BETWEEN:

MAHAN SINGH S/O MANGAL SINGH — Appellant (Plaintiff)

- and -

THE GOVERNMENT OF MALAYSIA — Respondents (Defendants)

RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 5 of 1976

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FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

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- and -

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RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 5 of 1976

O N   A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

MAHAN SINGH S/O MANGAL SINGH — Appellant (Plaintiff)

- and -

THE GOVERNMENT OF MALAYSIA — Respondents (Defendants)

RECORD OF PROCEEDINGS

No. 1

Writ of Summons

In the High Court in Malaya

No. 1

Writ of Summons

29th December 1971

IN THE HIGH COURT OF MALAYA AT IPOH
CIVIL SUIT NO. 296 of 1971

Between

Mahan Singh son of Mangal Singh — Plaintiff

- And -

Government of Malaysia — Defendant

Tan Sri Ong Hock Thye, P.S.M., D.P.M.S., Chief
10 Justice of the High Court in Malaya, in the name
and on behalf of His Majesty the Yang di Pertuan
Agong.

To:
Government of Malaysia,
c/o Attorney-General of Malaysia,
Attorney-General's Chambers,
Kuala Lumpur.

We command you, that within twelve (12) days
after the service of this Writ on you, inclusive
of the day of such service, you do cause an
20 appearance to be entered for you in an action at

In the High Court in Malaya

No. 1

Writ of Summons

29th December 1971 (continued)

the suit of Mahan Singh son of Mangal Singh of 11-A, Jalan Manjoi, Pari Garden, Ipoh.

AND TAKE NOTICE that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

WITNESS Woon Thoong Shin, Assistant Registrar of the High Court at Ipoh the 29th day of December 1971.

Sd. Lim Cheng Ean & Co. Plaintiff's Solicitors.

Sd. Voon Thoong Shin Assistant Registrar

10

N.B. - This Writ is to be served within twelve months from the date thereof, or, if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Registry of the High Court at Ipoh.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $3.00 with an addressed envelope to the Registrar of the High Court at Ipoh.

20

If the Defendant enters an appearance he must also deliver a defence within fourteen days from the last day of the time limited for appearance unless such time is extended by the Court or a Judge, otherwise judgment may be entered against him without notice, unless he has in the meantime been served with a summons for judgment.

30

In the High Court in Malaya

No. 2

Amended Statement of Claim

21st September 1973

No. 2

AMENDED STATEMENT OF CLAIM

1. The plaintiff was at all material times in the service of the defendant and was on the permanent establishment.

2. By a letter dated 20 March 1970 (hereinafter referred to as the said letter of 20 March 1970) the Ketua Pengarah Perkhidmatan Awam Malaysia, a servant of the defendant, notified the plaintiff that his services were being terminated under section 10(d) of the Pensions Ordinance 1951 and that the plaintiff was required to retire in accordance with paragraph 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations 1969.

3. At 20 March 1970 the plaintiff was serving the defendant as clerk to the Special Commissioners of Income Tax.

4. The said letter of 20 March 1970 was received by the plaintiff on 31 March 1970 and on 2 April 1970 the plaintiff wrote to Ketua Pendaftar, Mahkamah Tinggi, Mahkamah Ke'adilan through the Chairman, Special Commissioners of Income Tax protesting, inter alia, that he had been condemned unheard but the plaintiff was neither given an opportunity to defend himself nor told of the reasons why his services were being terminated.

4A. The plaintiff contends that Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations 1969 is null and void and ultra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution.

And the plaintiff claims:

(1) A declaration that the said letter of 20 March 1970 from the Ketua Pengarah Perkhidmatan Awam Malaysia purporting to terminate the plaintiff's services is void and of no legal effect for failure to comply with section 10(d) of the Pensions Ordinance 1951 and Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations 1969.

In the High Court in Malaya

No. 2

Amended Statement of Claim

21st September 1973 (continued)

(2) A declaration that the said letter of 20 March 1970, if valid, is an attempt to circumvent Article 135(2) of the Constitution and is void for failure to comply with the said Article.

(3) A declaration that the termination of the services of the plaintiff is void and of no legal effect for failure to comply with rules of natural justice in that he was condemned unheard. 10

(4) Such further or other consequential relief as to the court shall seem fit.

(5) Costs.

Delivered this 28th day of December 1971

Amended pursuant to the order of The Honourable Mr. Justice N. Sharma made on 20th day of September 1973 and redelivered the 21st day of September 1973.

Sd. LIM KEAN CHYE
Solicitors for the plaintiff. 20

Filed on 21st September 1973

Sd.
Senior Assistant Registrar
High Court Malaya
Ipoh.

No. 3

Amended Amended Statement of Defence

22nd September 1973

No. 3

AMENDED AMENDED STATEMENT OF DEFENCE

1. The defendant denies paragraph 1 of the Statement of Claim and avers that the plaintiff was on the permanent service of the Government of Malaysia only from 1st October, 1949 until his retirement on 11th June, 1970. 30

2. Paragraphs 2 and 3 of the Statement of Claim are admitted.

3. The defendant denies paragraph 4 of the Statement of Claim and avers that the termination of the Plaintiff's employment is lawful and

proper and in accordance with the Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969 and he was lawfully retired under section 10(d) of the Pensions Ordinance 1951.

4. The defendant avers that the exercise of the Government of its right to terminate the Plaintiff's employment is not an act of dismissal or reduction in rank within the meaning of Article 135(1) and (2) of the Constitution and, it is not therefore, necessary first to give the Plaintiff a reasonable opportunity of being heard.

10

4A. The defendant denies paragraph 4A of the Statement of Claim and avers that Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969 is intra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution and further avers that the Services of the Plaintiff was properly terminated under the said Regulation 44.

20

5. Save as hereinbefore expressly admitted the defendant denies each and every allegation contained in the Statement of Claim as fully as if the same were herein set out seriatim and specifically traversed.

6. The defendant avers that the Action not having been commenced within twelve months from the alleged act is thus time-barred by virtue of section 2(a) of the Public Authorities Protection Ordinance 1948.

30

7. The defendant contends that the Statement of Claim discloses no cause of action and is bad in law and further contends that the Plaintiff is not entitled to the declaration, salary and emoluments prayed for and prays that the Plaintiff's claim be dismissed with costs.

Dated this 8th day of February, 1972.

Sd. Nik Mohamed bin Nik Yahya
Federal Counsel
for and on behalf of the defendant whose address for service is c/o Attorney-General's Chambers, Kuala Lumpur.

40

In the High Court in Malaya

No. 3

Amended Amended Statement of Defence

22nd September 1973 (continued)

Amended this 4th day of April, 1973 pursuant to the Order of Court dated the 30th day of March, 1973

Amended this 22nd day of September, 1973 pursuant to the Order of Court dated the 20th day of September, 1973.

Sd. LIM BENG CHOON
Federal Counsel
for and on behalf of the Defendant.

To: 10

Messrs. Lim Kean Chye & Co.,
P.O. Box 231,
12 Station Road,
Ipoh.

(Solicitors for the Plaintiff)

No. 4

Grounds of Judgment

3rd May 1974

No. 4

Grounds of Judgment

The Plaintiff joined government service on 15-2-1947 as a clerk and Punjabi interpreter. It is admitted by the Defendant that as from 1-10-1949 (20) he was on the permanent establishment of the Government of Malaysia. He served as Registrar of the Sessions from 1-4-1961 to 30.11.69. On 1.12.1969 he was transferred to the office of the Special Commissioners of Income Tax at Kuala Lumpur. He was appointed as a Registrar of the Sessions Court by the Public Service Commission (see P1) and could have been appointed as a clerk (Exhibit P1) to the Special Commissioners of Income Tax also by the Public Service Commission. On 31.3.1970 (30) he received a letter A7 (Exhibit A7) bearing date the 20th of March 1970 from the Promotion and Discipline Section of the Public Service Commission (see Translation A8) (Exhibit A8). This letter informed him that the writer of the letter (i.e. the Director of Public Services Malaysia) had been "directed" to notify him that the Government had decided to pension him off under the Pensions Ordinance 1951. The letter makes it clear that this decision to pension the Plaintiff off was of the Government. (40) The letter, however, did not say by whom the Director of Public Services was "directed". The letter further went on to say that the decision

was taken in the exercise of powers under section 10(d) of the Pensions Ordinance, 1951. It thus makes it clear that the exercise of power by the government was under section 10(d) of the Pensions Ordinance. He was also informed in this letter that his services "will be terminated" as soon as he had taken all the leave to which he was eligible. The Plaintiff was born on 27.6.1921 and was not yet 49 when he received A8. He appealed to the Director of Public Services (see A12). There was no change in the decision of the Government. The Plaintiff, however, was told that no disciplinary action was taken against him and that in taking the action that government did take against him use was made of section 10(d) of the Pensions Ordinance and Reg. 44 of Essential (General Orders, Chapter D), Regulations, 1969. Letter A20 informed him that pension had been approved in his case as if he had retired on grounds of health. The Plaintiff filed the writ of summons on the 29th December 1971 claiming a declaration that his services were improperly terminated, that the order of termination of services was null and void and of no effect and was merely a contrivance to circumvent the provisions of Article 135(2) of the Constitution and the rules of natural justice. The Plaintiff contended that Regulation 44 of Essential (General Orders, Chapter D) Regulations was ultra vires Ordinance No. 1 of 1969 and the provisions of Article 150 of the Constitution. The Defendant's contention was that the Plaintiff's services were validly terminated under Regulation 44 of the Essential (General Orders, Chapter D) Regulations, 1969, and that he was lawfully retired under section 10(d) of the Pensions Ordinance, 1951. It also averred that the Plaintiff was not dismissed or reduced in rank and therefore Article 135(2) of the Constitution had no application to the termination of Plaintiff's services, that it was not necessary to afford the Plaintiff a reasonable opportunity to be heard in opposition to the order which was proposed to be made against him and that Regulation 44 of P.U. (A) 273 of 1969 was intra vires Article 150 of the Constitution and Ordinance No. 1 of 1969.

Ex.A8

The Plaintiff gave evidence and maintained that he had not committed any breach of any of the Regulations which governed his conduct in service. There was hardly any cross-examination of the Plaintiff. The Defendant produced two witnesses but their testimony is not of much assistance in

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

the disposal of the questions involved in this case.

There was an admission of the following facts by the parties:-

(1) A report dated 3.1.1970 relating to the particulars of the conduct and work of the Plaintiff was obtained of the Director of Public Services Department from the Secretary to the Ministry of Justice for purposes of Regulation 44 of the Public Officers (Conduct & Discipline) (General Orders, Chapter D) Regulations, 1969. 10

(2) The said report is privileged under section 123 of the Evidence Act.

(3) The Secretary to the Ministry of Justice was the head of the Department in which the Plaintiff had served immediately prior to his transfer to the Department of Special Commissioners of Income Tax.

(4) As on 20.3.70 the Head of Department of the Plaintiff was the Chairman of the Special Commissioners of Income Tax. 20

(5) The above report dated 3.1.70 was referred to the Director of National Operations Council who agreed to the termination of the services of the Plaintiff under the said Regulation 44.

(6) The powers of Yang di-Pertuan Agung under section 10(d) of the Pensions Ordinance, 1951 have not, by any Gazette Notification, been delegated to any other officer of the Government up to now. 30

(7) A copy of the said report was not supplied to the Plaintiff and he did not know the contents thereof.

Article 150 of the Constitution deals with the proclamation of emergency and the powers of the Yang di-Pertuan Agung and the Parliament during the continuance of the emergency. If the proclamation is issued at a time when Parliament is not sitting it is the duty of the Yang di-Pertuan Agung to summon Parliament as soon as is 40

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

practicable and in the meantime he is empowered to promulgate such Ordinances which are warranted to meet the situation created by the emergency. He has, of course, to be satisfied that conditions in the country or any part thereof are such that immediate action is needed. The ordinances promulgated under Article 150(2) of the Constitution possess validity and binding force of law. Article 150(6) declares that should there be any
10 inconsistency between the provisions of the Constitution and the Ordinance thus promulgated the Courts shall have no power to declare any part of such Ordinance invalid or ultra vires because of such inconsistency. That there should be such a provision is understandable. Any civilised State which assures to its citizens essential rights should in times of emergency and national crisis have the right to curb those essential rights in the interests of national security and
20 the economic life of its people.

How far should this encroachment on the rights of the subject go and for how long it should last are questions not easy to answer. In the case of Rex vs. Halliday (1917) A.C. 260 (265,270) Lord Finlay, L.C. expressed the view of the majority in these words:

> " The power conferred on His Majesty is limited to the duration of the war and is to issue regulations for securing the public
> 30 safety and the defence of the realm ....
> ....
> Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State.".

Lord Finlay then went on to say:

> " The statute was passed at a time of supreme national danger, which still exists.
> 40 The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, etc., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken.".

Lord Shaw giving a dissenting but a vibrant judgment said (at pp.300-301):

" My Lords, I pass from the subject of repeal to the further proposition that what has been done on the implication supposed is alien to the practice of the Constitution. On many occasions in this island has the attention of the Legislature been called to the subject of exceptional legislation in view of foreign attack, political unrest, or civil war. And the mode of dealing has been frank, firm, and open - namely, a temporary suspension of the Habeas Corpus Act. When the authority of the King in Council was stretched out to interfere with liberty or life and to undermine the securities thereof in Magna Carta and the Habeas Corpus Acts, public unrest might grow, even a dynasty might accelerate its own ruin, but Parliament would reassert itself and sharply bring the peril to an end. But when Parliament itself devoted its energies to the task it took it up in no casual manner and left its action in no form so covert that the Bench had to expand inferentially its meaning.

Blackstone is quite clear upon the practice of the Constitution (Comm. i. 136). He searchingly treats the cases both of liberty and life as tests, both and equally, of one and the same principle, the very principle which is under scrutiny in the present case. "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet

sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger of the State is so great, as to render this measure expedient. For it is the Parliament only, or legislative power, that, whenever it sees proper, can authorise the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing.".

At page 285 Lord Shaw observed:

" When - so is the logic of the argument - Parliament took elaborate pains to make a legal course and legal remedy plain to the subject as to all the regulations which were stated in detail, there was one thing which Parliament did not disclose, but left Courts of law to imply - namely, that Parliament, all the time and intentionally, left another deadly weapon in the hands of the Government of the day under which the remainder of those very Acts, not to speak of the entire body of the laws of these islands protective of liberty, would be avoided. As occasion served the Government of the day, despotic force could be wielded, and that whole fabric of protection be gone ....
....
....
....
that the power in the Government to issue regulations is - within the general sphere and purpose of public safety and defence - to prescribe a line of duty and course of action for the citizens so as, in this time of emergency, to bring their private conduct into co-operation for that general end. This and this alone is what "regulation" means: it constitutes protanto a code of conduct; in following the code the citizen will be safe; in violating it the citizen will become an offender and may be charged and tried summarily, or by a court-martial or a jury, and as for a felony. This is perfectly simple: it squares with all the rest of the legislation and destroys none of it. It sacrifices no constitutional

principle: it introduces nothing of the nature of arbitrary condemnation or punishment; the Acts become a help and guide as well as a warning to the lieges.".

He then continued to say:

" Under this the Government becomes a Committee of Public Safety. But its powers as such are far more arbitrary than those of the most famous Committee of Public Safety known to history. It preserved a form of trial, of evidence, of interrogations. And the very homage which it paid to law discovered the odium of its procedure to the world. But the so-called principle - the principle of prevention, the comprehensive principle - avoids the odium of that brutality of the Terror. The analogy is with a practice, more silent, more sinister - with the lettres de cachet of Louis Quatorze. No trial: proscription. The victim may be "regulated" - not in his course of conduct or of action, not as to what he should do or avoid doing. He may be regulated to prison or the scaffold ....".

Lord Atkinson in the same judgment observed:

" .. However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement ....".

Reference may also be made to Liversidge vs. Anderson (1942) A.C.206 and Makhan Singh Tarsikka vs. State of Punjab A.I.R. 1964 S.C. 381 and 1220.

It was stressed by Encik Abdul Razak that our Constitution is in some respects uniquely liberal and great. He maintained that although most of its important provisions seem to be modelled on the Indian Constitution, there was a marked difference between our Constitution and the Constitution of India in so far as the operative force of certain constitutional guarantees during an emergency was concerned. Under Article 359 of the Indian Constitution the enforcement of certain rights under Part III of that Constitution (which

deals with Fundamental Rights) can by order of the President be suspended. There is happily no such restriction on the rights of the subjects in this country and they have normally a right, even during the existence of the emergency, (unless the Yang di-Pertuan by an ordinance restricts that right) to come to Court and ask the Judges to stand between them and any attempted encroachment on their rights or liberty by the executive. I shall have occasion to deal with that happy contention of the learned counsel for the Defendant at a subsequent stage of my judgment. I do, however, maintain that the pillar of freedom that a judiciary always is in any democracy, and, even in an emergency, does stand solid and strong to safeguard the law which must at all times reign supreme and to ensure that people do not suffer by an excess or misuse of power by the executive. A study of the provisions of Articles 352 and 359 of the Indian Constitution and Article 150 of our Constitution makes it clear that the proclamation of emergency by the head of the state is intended only as a legislation of a temporary nature and of a limited duration.

His Majesty the Yang di-Pertuan Agung issued a proclamation of emergency under Article 150 of the Constitution on 15.5.69 (P.U. (A) 145/69). On the same day His Majesty promulgated the Emergency (Essential Powers) Ordinance No. 1 of 1969 (P.U. (A) 146/69). Its preamble referred to the grave emergency threatening the security of Malaysia, and to the fact that election to Dewan Ra'ayat had not been completed. It also confirmed that His Majesty was satisfied that immediate action was required, inter alia, for the maintenance of services essential to the life of the community. Section 2(1) of the Ordinance authorised the Yang di-Pertuan Agung to make essential regulations for, inter alia, the maintenance of services essential to the life of the community. So far as is relevant Essential Regulations could be made under section 2(2)(f) of the Ordinance for directing and regulating the performance of services by any persons. Section 2(2)(h) contains a general provision to cover the making of any Essential Regulation which the Yang di-Pertuan Agung thought was desirable in the public interest to make. Section 2(4) was merely a paraphrase of Article 150(6). Section 9 of the Ordinance provided a penalty for breach of any of Essential

In the High Court in Malaya

No. 4

Grounds for Judgment

3rd May 1974 (continued)

Regulations. The important point to observe is that Article 150(2) provides that an Ordinance during an emergency can only be promulgated by the Yang di-Pertuan Agung. The Yang di-Pertuan Agung in complete confirmity with the Constitution promulgated the said Ordinance. His Majesty was thus the sole law-making authority. He provided by the said Ordinance that the Essential Regulations for the purposes of the said Ordinance were to be made by him. He was to be the sole judge of what was necessary or expedient. That in fact was the spirit of Article 150(2) of the Constitution. However on the very next day i.e. 16.5.69, another Ordinance was promulgated. It is Emergency (Essential Powers) Ordinance No. 2 of 1969 (P.U. (A) 149/69). I will shortly deal with its effect and implications. It is hereinafter referred to as the Ordinance. A Director of Operations was appointed and section 8 of the Ordinance empowered him to make Essential Regulations under section 2 of the Emergency (Essential Powers) Ordinance No.1 of 1969. The regulations could be made "for the purpose of this Ordinance" i.e. to ensure effective and immediate action for the security of the public, the defence of the country, maintenance of public order and of supplies and services essential to the life of the community. A number of Regulations were made by the Director of Operations but in this suit we are concerned only with Essential (General Orders, Chapter D) Regulations, 1969 (P.U. (A) 273/69). Prior to the publication of these Regulations the matter was dealt with by the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1968 (P.U. 290/68) (hereinafter referred to as the 1968 Regulations). The 1968 Regulations were to remain suspended during the period of the Emergency and the Public Officers (Conduct & Discipline) (General Orders, Chapter D) Regulations, 1969 (hereinafter referred to as the 1969 Regulations) contained in the Schedule to P.U. (A) 273/69 were to be operative instead. The 1968 Regulations repealed the Public Officers (Conduct & Discipline) Regulations 1956 (L.N. 432 of 1956). Except for some differences to which I will presently refer the scheme of the 1969 Regulations is the same as of the 1968 Regulations. Regulation 42 of the 1968 Regulations enumerates the various forms of disciplinary punishments and these include reduction in rank, termination of service and dismissal from service. According to regulation 42 termination of service

is more serious than reduction in rank but less serious than a dismissal. However Regulation 34 of the 1968 Regulations provides that no officer is to be dismissed or reduced in rank unless he is informed in writing of the grounds on which the action is proposed to be taken against him and unless he is given a reasonable opportunity of being heard. This might give an impression that in the case of termination of service no opportunity is to be afforded to the officer concerned as no grounds for the contemplated termination of his services are to be supplied to him. Regulation 47 dispels the doubt altogether. In fact Regulations 36 to 41 indicate that when any disciplinary proceedings are to be taken or are intended to be taken against an officer he should be told why it has become necessary to proceed against him. Part II of the 1969 Regulations deals with "Disciplinary Procedure". Regulation 27 of these Regulations is word by word the same as Regulation 34 of the 1968 Regulations and ensures that an officer is "dismissed" or "reduced in rank" only after he has been informed in writing of the grounds on which such an action is proposed to be taken against him and he is given an adequate opportunity to be heard in his defence. Regulation 30(1) specifies the grounds on which a dismissal or reduction in rank may be ordered. The grounds are unsatisfactory work or misconduct by the officer concerned. The grounds for other lesser forms of punishment are also the same (see Regulation 29 of the 1969 Regulations) but in such cases the Disciplinary Authority has to form an opinion that the unsatisfactory work or misconduct of the officer does not warrant punishment of dismissal or reduction in rank. Regulation 36 of the 1969 Regulations does not include "termination of service" as a form of punishment although it is referred to as a punishment in Regulation 42 of the 1968 Regulations. The Disciplinary Authority in the 1969 Regulations is the appropriate Service Commission. As far as termination of service is concerned, the authority which can exercise the powers of termination of service, now becomes the Government instead of the appropriate Service Commission. This is a marked departure from the 1968 Regulations. I have already stated that the 1968 Regulations recognised that termination of service was a form of punishment. Whether it still remains a form of punishment is not expressly stated in the 1969 Regulations, but it

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

is very difficult to imagine that it ceased to be a punishment merely because it is dealt with by Regulation 44 of the 1969 Regulations which makes no mention of it as a form of punishment. One has only to compare the words of Regulation 47 of the 1968 Regulations with the words of Regulation 44 of the 1969 Regulations to arrive at the aim and intention of the authority responsible for the making of the 1969 Regulations. Regulation 44 gave to the government a carte blanche such vast and unlimited powers which could perhaps be compared to an inexhaustible arsenal from which could flow such weapons as could make any of its servants a victim of that vast power which Regulation 44 conferred. It had potential for good as well as evil. It is, however, to be presumed that the power entrusted to the government is legitimately used for the legitimate objects for which it was conferred. A person who alleges that he has been discriminated against has to establish mala fides in the sense that action was intentionally taken against him by the government for the purpose of injuring him or in other words the act of the government was hostile. No mala fides on the part of the Defendant have been alleged or pleaded by the Plaintiff. Discretionary power is not necessarily a discriminatory power and the abuse of power by the government is not to be lightly assumed by the Court. No doubt very undue discretionary powers have been conferred on the government and such wide powers in the hands of the executives could in some cases be misused or abused and turned into an engine of oppressions, yet the bare possibility of that power being misused or abused cannot per se induce the Court to deny the existence of those powers. If the law is administered by the government "with an evil eye and an unequal hand" or for an oblique purpose the arms of the Court are long enough to reach it and to strike down such abuse with a heavy hand (see Ram Krishna Dalmia vs. Justice Tendolkar A.I.R. 1958 S.C. 538 (551) = 1958 S.C.J. 147. It is rightly said that official arbitrariness is more subversive of the doctrine of equality than Statutory discrimination. Regulation 44 lays down the principles on which the government can exercise the power. It has to be satisfied about certain matters. It can exercise the power only for the purposes mentioned in the Regulations. The power cannot be questioned

merely because it is capable of being construed as unfettered and uncontrolled or on the face of it looks so. If the government abuses this power, it is the abuse which will be struck down, not the existence of the power. There seems no vested right of remaining in government service up to a certain age. It is not in the nature of property. A government servant no doubt acquires a "status" on appointment, (See Government of Malaysia vs. Rosalind Oh Lee Pek Inn (1973) 1 M.L.J. 222), but it does not mean that the terms and conditions of his employment cannot be altered unilaterally. In that case Suffian F.J. (as he then was) observed: (p.224)

> " Though the plaintiff holds office at the pleasure of the Yang Dipertuan Agung (Article 132(2A) of the Federal Constitution) I hold contrary to the arguments on behalf of the government that the relation between her and the Crown are contractual. As was stated by Lord Diplock (page 460) in Kodeeswaran v. Attorney-General of Ceylon: (1970) 2 W.L.R. 456
>
> > "It is now well established in British constitutional theory ... that any appointment as a Crown servant, however subordinate, is terminable at will unless it is expressly provided by legislation; but as pointed out by Lord Atkin in Reilly v. The King (1934) A.C. 176, 180 'a power to determine a contract at will is not inconsistent with existence of a contract until so determined.'"
>
> I should add that the contract between a public servant such as the plaintiff and the government is of a very special kind, for as was stated by Ramaswami J. at page 1894 when delivering the judgment of the Indian Supreme Court in Roshan Lal v. Union of India A.I.A. (1967) S.C. 1889:
>
> > "It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both

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> parties, but by statute or statutory rules which may be framed and altered unilaterally by Government ... The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties.""

His rights and obligations are determined either under the statute or the Constitution. Rules of natural justice cannot be elevated to the position of fundamental rights. Their only aim is to secure justice or prevent miscarriage of justice. These rules, i.e rules of natural justice, can operate only in areas not covered by law validly enacted. They do not supplant the law but only supplement it. If a statutory provision can be read consistently with the principles of natural justice, the Courts should apply those principles, the presumption in such a case being that the legislature intended to act in accordance with the principles of natural justice. The statute may, however, either expressly or by implication exclude the application of the principles of natural justice in which event the duty of the Court is to abstain from applying those principles and to carry out the mandate of the Legislature. Whether the exercise of a power should be in accordance with the principles of natural justice depends on the language of the statute or law which confers that power, the nature of that power and the purpose for which it is conferred as well as the effect the exercise of that power may have.

Now Regulation 44 of the 1969 Regulations says that the government has the absolute right to terminate the services of a government servant if it is satisfied that it is in the public interest to do so. If the government bona fide forms that opinion, why and how it formed that opinion and whether that opinion is correct are matters which are not the concern of the Court. It is, however, open to the person affected to say that the opinion (as contemplated by the Regulations) was never formed or that the decision arrived at by the Government was arbitrary or that it was based on grounds which were totally extraneous and irrelevant to the exercise of the power. Compulsory retirement in most cases and in normal circumstances should not

entail any evil or adverse consequences. It, in those circumstances, does not entail any penal action against the government servant. Such circumstances generally arise when the post is abolished, or when such post becomes redundant or an officer has already reached the age of superannuation, or services are dispensed with in accordance with the terms of employment in the contract of service. Regulation 44 merely embodies one of the facets of the pleasure doctrine contained in Article 132 (2A) of the Constitution. There can be no denying the fact that in government service there is a good deal of dead wood. It is in the public interest to chop it off. Subject to the provisions of the Constitution and any law which may govern or regulate the conduct and employment of its servants, the government has the right to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in the interest of the public.

The discretion under Regulation 44 on the face of it appears absolute. It has, however, to be related to the purpose for which it is conferred. Markose in his work on "Judicial Control of Administrative Action in India" defines administrative discretion thus (at page 406):

> " An administrative discretion may be defined, (for practical purposes) as a statutory power conferred on a public authority to make a choice, out of available alternatives, on considerations which are either not feasible or not possible to be declared beforehand, the element governing a non-personal exercise of that choice being the statutory purpose. The element of subjective evaluation is prominent in an administrative discretion and for that reason it is practically impossible to demonstrate that any particular exercise of it is wrong. The considerations that guide a discretion are incapable of proof or disproof and words like 'adequate', 'advisable', 'fair', 'expedient', 'equitable', 'proper', etc., which are usually employed by statutes to qualify the administrative determination indicate this incapability. The outcome of an

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exercise of discretion is theoretically unpredictable. Ten bus owners may apply for a particular bus route and the regional transport authority may give it to one of them. This unforeseeability is a feature of discretion in contrast to action under a rule. At the same time it is not correct to say, as the usual definitions of the term suggest, that an exercise of discretion is solely according to the dictates of the judgment and conscience of the administrator. His judgment and conscience are not the final arbiters. He has, as recent decisions unmistakeably show, to be strictly guided by the object and purpose of the statute."

In Willcock v. Muckle (1951) 2 K.B. 844 at 851 Lord Goddard, C.J. observed that:

"Because the police may have powers, it does not follow that they ought to exercise them on all occasions or as a matter of routine ... This Act was passed for security purposes; it was never passed for the purpose for which it is now apparently being used. To use Acts of Parliament passed for particular purposes in wartime when the war is a thing of the past - except for the technicality that a state of war exists - tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs.".

There is a condition implied in all instruments which create powers that the powers shall be used bona fide and for the purposes for which they are conferred. When the power is exercised for a purpose or with an intention which is beyond the scope of the instrument which creates that power or where the exercise of power is not justified under that instrument, it becomes a case of fraud on power. In such a case if it could be shown that the authority exercising the power has taken into account, even with the best of intentions, matters which it could not properly take into account, the exercise of that power becomes bad and challengeable. Orders made under any Act or rules made thereunder are meant to be made in the actual exercise of power and not in colourable exercise of that power. No power is

conferred to be exercisable in bad faith or in abuse of the Act. When an enactment requires an official to have reasonable grounds for the decision, the law is not so defective that the aggrieved person cannot bring up the decision in Court, however seriously he may be affected, and however obvious it may be that the official acted in breach of his statutory obligations. The only authorised purposes for which Regulations could be made under Ordinance No. 1 of 1969 was public safety, defence of the country, maintenance of public order and maintenance of supplies and services essential to the life of the community. If one looks at the emergency legislation of other countries, England for example, one finds measures like the Emergency Powers Act 1920, Emergency Laws (Miscellaneious Provisions) Acts 1947 and 1953, The Supplies and Services (Defence Purposes) Act, 1951, Trading with the Enemy Act, 1939, Civil Defence Act, 1939 etc. There does not, however, seem to be, in England anything like the 1969 Regulations. The reason, perhaps, may be that in England and other countries the matter was, in the view of the governments in power, adequately covered by the provisions of ordinary law then existing and which governed the conduct of its civil servants. In this country also the 1968 Regulations made adequate provisions for maintaining discipline over government servants and for regulating and controlling their conduct. One, however, wonders if a clerk with the Special Commissioners could be classified as a member of that category of service which during the emergency could be regarded as essential to the life of the community. As far as I can find there was no notification declaring certain specified category of services as essential. All the services connected with the defence of the country and the security thereof, the maintenance of peace and public order and essential supplies would no doubt be essential and fall within the compass of Ordinance No. 2 of 1969. The Court is bound before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects and scheme of the piece of legislation as a whole and in the light of that examination to consider exactly what is the area over which powers are given by law under which the government purported to act. The conditions of the 1969 Emergency and of the public service here may have been such that the 1969 Regulations (P.U.(A) 273

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of 1969) were called for although I am inclined to the view that if a government servant was, in the time of emergency, guilty of any offence, he could be dealt with for violating the law and if convicted removed or dismissed from service. I have, however, reminded myself that no Court and hardly anyone outside the government can have the requisite knowledge to form a judgment as to what is required or necessary during an emergency or a state of war. The Legislature understands and correctly appreciates the needs of the country and its people. When it makes some statutory provisions, those provisions are directed to meet the problems, that manifest themselves at a particular times of the country's history. 10

In Australian Communist Party & Ors. v. The Commonwealth (1950-51) 83 C.L.R.1 = 24 A.L.J. 485 (497) Dixon, J. said:

> "A war of any magnitude now imposed upon the Government the necessity of organizing the resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implied. Those necessities made it imperative that the defence power should provide a source whence the Government might draw authority over an immense field and a most ample discretion.". 20 30

When a particular statute on provision of law comes before the Court for interpretation or is questioned the Court no doubt presumes the good faith and knowledge of existing conditions on the part of the legislature, yet it takes into account all the evidence and circumstances relating to the particular case in question and the grounds, if any, of the government in taking action under that statute. 40

Regulation 44 confers on the government a discretion as to whether the services of an officer ought to be terminated or not. The "satisfaction" referred to in the regulation is probably subjective. It is the exercise of this

subjective satisfaction which is discretionary. This discretion is only exercisable at the time of making the ultimate decision but before deciding that question subjectively, all the relevant considerations which are referred to in the Regulation are meant to be determined objectively on the evidence and facts by the government. (See R. v. Manchester Legal Aid Committee (1952) 2 Q.B. 413 (429). An officer on tribunal may act in his executive capacity at a particular stage of the proceedings while at a different stage in the same proceedings he may be required to act judicially or quasi-judicially. The discretionary element comes into play only at the stage of making the ultimate decision on the question of termination of service. "Public interest" is a vague and unsatisfactory term, calculated to lead to uncertainty and error when applied to the decision of legal rights. It may mean political expediency or that which is best for the common good of the community. It fittingly falls within the province of the government to determine what is in the public interest. The determination of the question of public interest depends entirely on the opinion formed and the policy which is intended to be pursued. The word "satisfied" in Regulation 44 can only be construed to mean "reasonably satisfied" (see Director of Public Prosecutions v. Head (1958) 1 A.E.R. 679 (691)) and in that sense the decision of the government has to be based on adequate material. It is only if the decision was so unreasonable that nobody could have ever come to it that the Court would interfere in cases when the exercise of discretion is left to the subject in satisfaction of the executive (see Associated Provincial Picture Houses, Limited v. Wednesbury Corporation (1948) 1 K.B. 223 (230)).

As stated by me earlier the powers conferred under Article 150 are in the nature of defence powers and have a purpose behind it. The contents of that power are to be ascertained by reference to the purpose which is designed to be achieved. If an emergency is proclaimed and legislation made under Article 150 the question that may arise is not so much the lack of power but the lawful and valid exercise of the power conferred on the executive. I was reminded by the learned Senior Federal Counsel that the emergency had not yet in law ended although the public might be

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3rd May 1974 (continued)

thinking otherwise. Maybe it still continues. The government knows best. The point is totally foreign to what has to be decided in this case. I will content myself by only saying this that restrictions or controls valid when imposed during a war may be held unreasonable and violations of constitution rights if the conditions of war have ceased to exist. Dixon J. put it very tersely in the case of Australian Textiles Pty Ltd. v. Commonwealth (1945-46) 19 A.L.J. 319 (322) where he said: 10

> "If a power applied to authorise measures only to meet facts, the measure could not outlast the facts as an operative law."

Also see Willcock v. Muckle (1951) 2 K.B. 844 at 851.

By the (English) Emergency Powers (Defence) Act 1939 the Secretary of State was empowered to make such Regulations "as appear to him to be necessary or expedient". In dealing with the provisions of the Regulations made under this Act the Court of Appeal held in the case of Rex vs. Comptroller-General of Patents, Ex parte Bayer Products, Ltd. (1941) 2 A.E.R. 677 that it was not open to the Courts to investigate the question whether the making of any particular regulation was in fact necessary or expedient for the purposes specified. Scott, L.J. observed at p.681: 20

> " The principle upon which delegated legislation must rest in our constitution is that the legislative discretion which is left in plain language by Parliament is one which is to be final, and not subject to control subsequently by the courts. In my view, that sub-section clearly conferred upon His Majesty in Council that ultimate discretion to which I have referred." 30

By the Emergency Powers (Defence) Act, 1939 Parliament had authorised the government to make Defence Regulations under the Act "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interest of public safety or the defence of the realm." Regulation 18(b) authorised the 40

Secretary of State to detain without trial any person whom the Secretary of State "has reasonable cause to believe to be of hostile origin ...."

The House of Lords in the case of Liversidge vs. Anderson (1942) A.C. 206 held that the Courts had no jurisdiction to examine in any case whether the grounds for belief of the Secretary of State were reasonable or not and that the only requirement laid down by the Act of Parliament and the Regulation was that the Secretary of State himself should be reasonably satisfied. Lord Atkin gave a dissenting judgment in Liversidge's case.

The force of authority of Liversidge's case (1942) A.C. 206 seems to have been somewhat qualified in the subsequent case of Ross-Clunis vs. Papadopoullos and Others (1958) 2 A.E.R. 23. The Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 empowered the Commissioner to impose a collective fine after making an inquiry. Regulation 5(2) provided:

> "In holding inquiries under these regulations the Commissioner shall satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry ......"

On the facts the Privy Council held that the evidence disclosed ample grounds on which the Commissioner could feel "satisfied" on the matter required by the Regulations but added that the applicants could challenge the Commissioner's order not only (i) by alleging and proving bad faith but also (ii) by showing that "there were no grounds on which the appellant could be so satisfied" from which a Court might infer either that it did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts.

In Nakkuda Ali vs. Jayaratne (1951) A.C. 66 (P.C.) the Controller of Textiles in Ceylon cancelled a certain textile licence on the ground that the licencees were not fit to hold the licence. No inquiry was made and no hearing was given to the affected licencees. Yet the Privy Council upheld the order on the score that principles of natural justice need not necessarily

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3rd May 1974 (continued)

be observed in a case where administrative discretion was involved.

Then came the case of Ridge vs. Baldwin (1964) A.C. 40. It was in this case that it was clearly laid down that no matter whether it was a quasi judicial discretion or an administrative discretion that the authority was required to observe the rules of natural justice. Their Lordships of the House of Lords also declared that the judgment in the Nakkuda Ali's (1951) A.C. 66 (P.C.) case was given under a serious misapprehension of the older authorities and that it could not be regarded as authoritative. This position makes it incumbent upon the administration to observe the principles of natural justice even where the discretion conferred by the statute is only an administrative or executive discretion as distinguished from a quasi judicial discretion.

In England there is legislative supremacy and a law enacted by Parliament can only be interpreted and enforced by the Courts. The competence of Parliament to pass that law on the constitutionality of the Act cannot be questioned by the Courts. In our country the Constitution alone is supreme. The technicalities of the English prerogative units ought not to worry as much here as the constitutionality and the vires of an executive act can be questioned even in the realm of discretion and expediency on the score that the enactment under which the act on discretion was based offends some provisions of the Constitution.

If one examines Regulation 44, one finds that it envisages two different treatments to the officers against whom the Regulations may be used. In one case the government may communicate to the officer the actual complaint and give him an opportunity to make a representation and clear himself, if he can. In the other case no such opportunity is afforded. In the latter case all that is required is a full report from the Head of the Department. The essential features of this report are required to be an appraisal of the work and conduct of the officer in question and the comments, if any, of the Head of the Department. The "full report" may contain other matters. The officer

is not supposed to know the contents of this "full report" unless he belongs to that category which is contemplated in Regulation 44(2) in which case again he may be supplied with the substance of the complaints. There is thus an obvious discrimination between two classes of officers against which the government wishes to proceed under the same regulations. It is, perhaps, violation of Article 8(1) of the Constitution. It is not necessary to go into that aspect of the case. Under Article 150(6) the validity of Regulation 44 cannot be questioned except on the ground that the entire legislation under which the 1969 Regulations were made is ultra vires the Constitution.

Article 132 (2A) of our Constitution provides that "Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a) to (h) of Clause(1) holds office during the pleasure of the Yang di-Pertuan Agung. The Plaintiff in the present case is covered by Clause (c) to Article 132(1). Article 135 (1) states "No member of any of the services mentioned in paragraphs (b) to (h) (which covers the Plaintiff) of Clause (1) of Article 132 shall be dismissed or reduced in rank by any authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank." Article 135(2) states "No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard." Article 135 of the Constitution is a rider to Article 132 (2A).

Article 132 (2A) and Article 135 of our Constitution are similar to Articles 310 and 311 of the Indian Constitution. There are two constitutional guarantees provided under Article 135 to the civil servants and those guarantees cut down the pleasure of the Yang di-Pertuan Agung.

Wan Suleiman, J. in the case of Thambipillai v. The Government of Malaysia (1969) 2 M.L.J. 206 (208) after referring to the case of P.L. Dhingra v. Union of India A.I.R. 1958 S.C. 36 said:

> " The three forms of punishment abovementioned are signified by the words "dismissed", "removed" and "reduced in rank"

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3rd May 1974 (continued)

in article 311(2), the former two words corresponding in meaning to the word "dismissed" in our article 135(2)." (The underlining is mine.)

It is worthy of note that the major punishments referred to in the Public Officers (Conduct & Discipline) (General Orders, Chapter D) Regulations, 1956 and the (Public Officers) (Conduct & Discipline) (General Orders Cap D) Regulations, 1968 do not make any reference to "removal" as a form of punishment. In fact no reference is made to it for very obvious reasons because it is in effect in substance no less than dismissal.

Removal is only a species of dismissal. They stand on the same footing except as to future employment. It, like dismissal, brings about a termination of service. As far as re-employment is concerned the effect of Regulations and of Chapter 'A' of the General Orders is the same on a person dismissed from serfice as on a person whose services are terminated.

As Article 135 of our Constitution is in *pari materia* with Article 311 of the Indian Constitution, it may perhaps be useful to refer to some of the Indian authorities on the point. The words "dismissed", "removed" and "reduced in rank" were well understood in India both at the commencement of the Government of India Act 1935 and the present Constitution of that country as words signifying or denoting three major punishments which could be inflicted on government servants.

In *P.L. Dhingra's* A.I.R.1958 S.C.36 case, Das, C.J. referring to the case of *Jayanti Prasad vs. The State of Uttar Pradesh* A.I.R. 1951 All 793 said:

" It has been said in Jayanti Prasad v. State of U.P.(D) (supra) that these are technical words used in cases in which a person's services are terminated by way of punishment. Those expressions, it is urged, have been taken from the service rules, where they were used to denote the three major punishments and it is submitted that those expressions should

be read and understood in the same sense and treated as words of art.

The form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be used merely as a camouflage to cover an order of dismissal because of some misconduct of the servant it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee.

If the dismissal, termination of service or compulsory retirement of a government servant (by whatever name it may be called) springs from an oblique motive it merely amounts to an "artifice" to eliminate the government servant involved from remaining in the employ or service of the government and would thus be clearly a misuse of power which the Emergency legislation may temporarily confer upon the Director of Operations.

There can be no doubt that dismissal (using the term synonymously with removal) generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds therefore involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer.

In India the Communist Party is not an illegal and banned organization and in the case of V.S. Menon vs. Union of India A.I.R. 1963 S.C. 1160 (1165) = (1964) I S.C.J. 369 it was held that a Government servant taking interest in activities of Communist Party does not mean he is engaged in subversive activities within meaning of R.3 of Civil Services (Safeguarding of National

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3rd May 1974 (continued)

Security) Rules 1949 - He cannot be compulsorily retired - Premature termination in such a case is tantamount to removal from service by way of penalty.

Reference may now be made to the case of Balakotaiah vs. Union of India (1958) S.C.J.451 = A.I.R. 1958 S.C. 232. The Governor General of India had promulgated the Railway Services (Safeguarding of National Security) Rules, 1949. Rule 3 dealt with compulsory retirement of a member of the Railway Services who was reasonably suspected to be engaged in subversive activities or was associated with others in subversive activities. Other rules laid down the procedure of how the compulsory retirement or termination of services was to be brought about.

The General Manager of the Bengal Nagpur Railway had reason to believe that the appellant was engaged in subversive activities and called upon him to show cause why his services should not be terminated. The services of the appellant were also suspended as from the date of the notice. An inquiry was duly held and the appellant heard. It was on the report of the Committee of Advisers that the General Manager terminated the services of the appellant by giving him one month's salary instead of notice. The appellant challenged the validity of the termination of his services.

Venkatarama Aiyar, J. in delivering the judgment of the Supreme Court said (at p.458):

> " But Art. 311 has application only when there is an order of dismissal or removal, and the question if whether an order terminating the services of the employees under R.3 can be said to be an order dismissing or removing them. Now, this Court has held in a series of decisions that it is not every termination of the services of an employee that falls within the operation of Article 311, and that it is only when the order is by way of punishment that it is one of dismissal or removal under that Article. Vide Satish Chandra Anand vs. Union of India (1953) S.C.J.323 = (1953) S.C.R. 655, Shyam Lal vs. The State of UttarPradesh

and the Union of India (1954) 1 M.L.J. 730 = (1954) S.C.J. 493 = (1955) 1 S.C.R. 26 State of Bombay vs. Saubhagehand M. Doshi (1958) S.C.J. 11, and Parshotam Lal Dhingra v. Union of India A.I.R.(1958) S.C. 36. The question as to what would amount to punishment for purposes of Article 311 was also fully considered in Parshotam Lal Dhingra's case (A.I.R.(1958) S.C. 36). It was therein held that if a person had a right to continue in office either under the service rules or under a special agreement, a premature termination of his services would be a punishment. And, likewise, if the order would result in loss of benefits already earned and accrued, that would also be punishment. In the present case, the terms of employment provide for the services being terminated on a proper notice, and so, no question of premature termination arises.

Where an authority has to form an opinion that an employee is likely to be engaged in subversive activities, it can only be as a matter of inference from the course of conduct of the employee, and his antecedents must furnish the best materials for the same. The rules are clearly prospective in that action thereunder is to be taken in respect of subversive activities which either now exist or are likely to be indulged in, in future, that is to say, which are in esse or in posse. That the materials for taking action in the latter case are drawn from the conduct of the employees prior to the enactment of the rules does not render their operation retrospective. Vide the observations of Lord Denman, C.J. in The Queen v. St. Mary, Whitechapel (1848) 12 Q.B. 120 = 116 E.R. 811 and The Queen v. Christchurch (1848) 12 Q.B. 149 = 116 E.R. 823, 825. This contention must also be rejected."

The following propositions emerge from existing case law in India if the dicta of the Court in Moti Ram v. N.E. Frontier Railway's case A.I.R.(1964)S.C. 600 are not taken into account.

(1) In ascertaining whether the order of compulsory retirement is one of punishment

it has to be ascertained whether in the order of compulsory retirement there was any element of charge or stigma or imputation or any implication of misbehaviour or incapacity against the officer concerned.

(2) The order for compulsory retirement will be indicative of punishment or penalty if the order will involve loss of benefits already earned.

(3) An order for compulsory retirement on the completion of 25 years of service or an order of compulsory retirement made in the public interest to dispense with further service will not amount to an order for dismissal or removal if there is no element of punishment.

(4) An order of compulsory retirement will not be held to be an order in the nature of punishment or penalty on the ground that there is possibility of loss of future prospects, namely, that the officer will not get his pay until he attains the age of superannuation, or will not get an enhanced pension for not being allowed to remain a few years in service and being compulsorily retired.

Unless it is established from the order of compulsory retirement itself that a charge or imputation against the officer is made the condition of the exercise of that power or that by the order the officer is losing benefits already earned, the order of retirement cannot be said to be one for dismissal or removal in the nature of penalty or punishment. (See State of U.P. vs. Shyam Lal Sharma (1971) 2 S.C.C. 514 = A.I.R. 1971 S.C. 2151. It may be noted that Moti Ram's A.I.R. 1964 S.C. 600 case was not cited in State of U.P. vs. Shyam Lal (1971) 2 S.C.C.514 = A.I.R. 1971 S.C. 2151. Moti Ram's case had no relevance because in Shyam Lal's case (1971) 2 S.C.C. 514 = A.I.R.1971 S.C.2151 the Head-Constable had already put in 26 years of service.

The scope of Articles 310 and 311 was elaborately considered by Das, C.J. in delivering the majority judgment, Bose, J. dissenting.

The appellant had been appointed to the Indian Railway Service as a Signaller (Telegraphist) in 1924 and was promoted to the post of Chief Controller in 1950, both posts being in Class III service. In 1951 he was appointed to officiate in the Class II service. As the result of certain remarks made by the General Manager on an adverse confidential report the appellant was reverted to his Class III post though the order of reversal did not mention the Manager's remarks. He filed a petition under Article 226 impugning the order of reversal as contravening Article 311(2). The trial Judge upheld his contention but it was reversed on appeal by a Division Bench which held that a Government servant officiating in a post had no right to hold that post, and therefore reverting him to his substantive post was not a reduction in rank within the meaning of Article 311(2). The Court found no warrant for the distinction made in some cases that a reversal for administrative reasons was not reduction in rank, but a reversal by way of punishment was. The appellant appealed to the Supreme Court.

Das, C.J. stated the Common Law doctrine that all services under the Crown was at pleasure and stressed its acceptance in India and the modifications introduced by section 96B Government of India Act, 1915 and section 240 Government of India Act, 1935. He observed that section 240(1) of the 1935 Act had been substantially reproduced in Article 310(1) and section 240(2) and (3) and became Article 311(1) and (2) with the word "removed" added after "dismissal" while section 276 of the 1935 Act which contained the existing rules in force was embodied in Article 313. On Article 311 two questions arose: first, who were entitled to the protection of Article 311? Secondly, what was the scope and ambit of Article 311? Das, C.J. went on to say that a scrutiny of the various rules in government service yielded the following results:

> " In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service

cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put to an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service." (Underlining is mine)

Posts may thus be permanent posts, temporary posts for a specified period, posts held on probation, posts when one is officiating or only acting and posts which are substantive though temporary.

In Dhringra's case A.I.R. 1958 S.C. 36 there was a conflict of opinion on the question whether the protection of Article 311 was available to each of these several categories. Some cases had held that Articles 310 and 311 made no distinction between temporary and permanent posts whereas others had held that those Articles did not apply to temporary posts. (See, for example, Jayanti Prasad v. State of U.P. A.I.R.1951 All 793; G.P. Oak vs. State of Bombay A.I.R. 1957 Bomb.175; Yusof Ali Khan vs. Province of Punjab A.I.R. 1950 Lah.59; Laxminarayan Chiranjilal Bhargava vs. The Union of India A.I.R. 1956 Nag.113; Engineer-in-Chief, Army Head Quarters vs. C.A. Gupta Ram A.I.R. 1957 Punj.42; Chironjilal vs. Union of India A.I.R. 1957 Raj.81. The preponderence of view was that Article 311(2) applied to dismissal, removal, or reduction in rank when these were inflicted as penalties but did not apply to a termination brought about otherwise than by way of punishment. Though the cases did not lay down

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Grounds of Judgment

3rd May 1974 (continued)

or clearly indicate any test for ascertaining when the termination can be said to be by way of punishment (see 1958 SCR 828, 845) Das, C.J. held that Article 311 was not limited to "permanent" members of the service, for so to hold would lead to the untenable position that persons who did not hold permanent posts did not hold service at "pleasure". Besides, there was no rational ground for depriving temporary servants or persons officiating in a permanent post of the protection of Article 311(1) and (2). Further, it could not be said that a temporary servant or a servant officiating in a permanent post does not "hold" the post.

The learned Senior Federal Counsel referred to the case of State of Madras vs. Sundaram A.I.R. 1965 S.C.1103. The facts of that case briefly were that Sundaram, the respondent was an Inspector of Police. He demanded a bribe. A trap was laid which was fruitful in its results. Subsequently there was an enquiry by a tribunal against him and he was found guilty on two charges. The tribunal recommended his dismissal. As a result of the enquiry by the tribunal the Government instead of ordering the dismissal of Sundaram directed the compulsory retirement of the respondent from service. The order directing the compulsory retirement was made after the said Sundaram had been served with a show cause notice and given an opportunity to make representations. Section 10 of the Madras District Police Act which is reproduced in paragraph 11 of the judgment reads:

> " Subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may, from time to time make under this Act, the Inspector-General, Deputy Inspector-General and District Superintendent of Police may at any time dismiss, suspend or reduce to a lower post, or time scale, or to a lower stage in time scale, any officer of the Subordinate Police whom they shall think remiss or negligent in the discharge of his duty or otherwise unfit for the same and may order the recovery from the pay of any such Police Officer of the whole or part of any pecuniary loss caused to Government by his negligence or breach of orders."

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3rd May 1974 (continued)

The respondent's contention was that any action taken under section 10 of the Police Act amounted to dismissal and the order of compulsory retirement which in his view was tantamount to dismissal could only have been made by one of the officers specified in section 10 and not by the Government of the State of Madras. It is apparent from the judgment that the respondent was appointed in the year 1929 by an authority which was subordinate to the State Government. There were rules made by the State Government under section 10 of the Police Act and by other provisions including the provisions of the Constitution of India. Clause (g) of Rule 2 of the Police Rules mentions "compulsory retirement" as one of the penalties which could be imposed upon a police officer. (See paragraphs 12 and 13 of the judgment). The facts of State of Madras vs. G. Sundram (sic) A.I.R. 1965 S.C.1103 have no relevance whatsoever to the facts of the present case. Perhaps the only passage which the learned Senior Federal Counsel was relying upon was the first sentence in paragraph 12 of the judgment, namely, "Firstly, an order of compulsory retirement does not amount to an order of dismissal and, therefore, does not come within the language of this section."

In Sundaram's case, compulsory retirement was expressly provided as a form of punishment.

Reference was made to a passage from the judgment of Winslow, J. in the case of Amalgamated Union of Public Employees vs. Permanent Secretary (Health) & Anor. (1965) 2 M.L.J. 209 (211) where the learned Judge said:

" I should have thought that, even if the committee can be said to be exercising quasi-judicial functions, it is still open to grave doubts whether its decision can be said to affect any legal right which a civil servant may possess because, as Article 132 of the Federal Constitution provides, public officers ..... hold office during the pleasure of the Yang di-Pertuan Agung .... Furthermore they do not have any absolute right to pension .... A reference to the case of Terrell vs. Secretary of State for the Colonies (1953) 2 Q.B. 482 makes this quite clear."

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3rd May 1974 (continued)

I may add here that the case of Terrell vs. Secretary of State for the Colonies has no relevance as that was a case decided purely on principles governing the pleasure of the Crown in England.

The question that naturally arises is under what circumstances can the termination of services be regarded as a form of punishment.

Dhingra's case(A.I.R. 1958 S.C.36) was decided by a bench of five Judges of the Supreme Court. The question was more fully and exhaustively dealt with by the Supreme Court in the case of Moti Ram Deka vs. North East Frontier RailwayA.I.R.1964 S.C.600 by a bench of seven eminent Judges of the Supreme Court constituted to steer clear of the conflicting observations, if any, found in the judgments of the same Court and to arrive at a conclusion of its own unhampered by such observations. Subba Rao, J. in this case observed:

> "65. What is the scope of the relevant words "dismissed" and "removed" in Article 311 of the Constitution. The general rule of interpretation which is common to statutory provisions as well as to constitution provisions is to find out the expressed intention of the makers of the said provisions from the words of the provisions themselves. It is also equally well settled that, without doing violence to the language used, a constitution provision shall receive a fair, liberal and progressive construction, so that its true objects might be promoted. Article 311 uses two well-known expressions "dismissed" and "removed". The Article does not, expressly or by necessary implication, indicate that the dismissal or removal of a Government servant must be of a particular category. As the said Article gives protection and safeguard to a Government servant, who will otherwise be at the mercy of the Government, the said words shall ordinarily be given a liberal or at any rate their natural meaning, unless the said Article or other Articles of the Constitution, expressly or by necessary implication, restrict their meaning. I do not see any indication anywhere in the

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3rd May 1974 (continued)

Constitution which compels the Court to reduce the scope of the protection. The dictionary meaning of the word "dismiss" is "to let go; to relieve from duty." The word "remove" means "to discharge, to get rid of, to dismiss." In their ordinary parlance, therefore, the said words mean nothing more or less than the termination of a person's office. The effect of dismissal or removal of one from his office is to discharge him from that office. In that sense, the said words comprehend every termination of the services of a Government servant. Article 311(2) in effect lays down that before the services of a Government servant are so terminated, he must be given a reasonable opportunity of showing cause against such a termination. There is not justification for placing any limitation on the said expressions, such as that the dismissal or removal should have been the result of an enquiry in regard to the Government servant's misconduct. The attempt to imply the said limitation is neither warranted by the expressions used in the Article or by the reason given, namely, that otherwise there would be no point in giving him an opportunity to defend himself. If this argument be correct, it would lead to an extra-ordinary result, namely, that a Government servant who has been guilty of misconduct, would be entitled to a "reasonable opportunity" whereas an honest Government servant could be dismissed without any such protection. In one sense the conduct of a party may be relevant to punishment; ordinarily punishment is meted out for misconduct, and if there is no misconduct there could not be punishment. Punishment is, therefore, correlated to misconduct, both in its positive and negative aspects. That is to say, punishment could be sustained if there was misconduct and could not be meted out if there was no misconduct. Reasonable opportunity given to a Government servant enables him to establish that he does not deserve the punishment, because he has not been guilty of misconduct. That apart, a Government servant may be removed or

dismissed for many other reasons, such as retrenchment, abolition of post, compulsory retirement and others. If an opportunity is given to a Government servant to show cause against the proposed action, he may plead and establish that either there was no genuine retrenchment or abolition of posts or that others should go before him. (underlining is mine.)

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3rd May 1974 (continued)

10 Subba Rao, J. then traced the history of the provisions relating to tenure of office and the constitutional guarantee embodied in Article 311 of the Indian Constitution (see paragraphs 66 to 68 of the Judgment.)

He then went on to discuss, deal with, distinguish and analyse Dhingra's case, A.I.R. 1958 S.C.36, Shyamlal's case, A.I.R. 1954, 369, the cases of State of Bombay vs. Doshi, A.I.R. 1957 S.C. 892; Union of India vs. Jeewan Ram, A.I.R. 20 1958 S.C. 905; Dalip Singh vs. State of Punjab, A.I.R. 1960 S.C. 1305, and various other cases. I will consequently not repeat what Subba Rao, J. said about those cases. I will only adopt his reasons.

Subba Rao, J. continued to observe:-

"(75) The effect of the two rules is the same; the difference is only superficial, which lies more in clever drafting than in their content. Take for instance the 30 following two rules: (i) the Government may terminate the services of a permanent Government servant at any time or after a specified period but before the normal superannuation age, by way of compulsory retirement, and (ii) the Government may terminate the services of a permanent civil servant by giving him 15 days' notice. Arbitrariness is writ large on both the rules; Both the rules; both 40 the rules enable the Government to deprive a permanent civil servant of his office without enquiry Both violate Art. 311(2) of the Constitution. Both must be bad or none at all.

(76) The following principles emerge from the aforesaid discussion. A title

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to an office must be distinguished from the mode of its termination. If a person has title to an office, he will continue to have it till he is dismissed or removed therefrom. Terms of statutory rules may provide for conferment of a title to an office and also for the mode of terminating it. If under such rules a person acquires title to an office, whatever mode of termination is prescribed, whatever phraseology is used to describe it, the termination is neither more nor less than a dismissal or removal from service; and that situation inevitably attracts the provisions of Art. 311 of the Constitution. The argument that the mode of termination prescribed derogates from the title that otherwise would have been conferred on the employee mixes up two clear concepts of conferment of title and the mode of its deprivation. Article 311 is a constitutional protection given to Government servants who have title to office, against arbitrary and summary dismissal. It follows that Government cannot by rule evade the provisions of the said Article. The parties cannot also contract themselves out of the constitutional provision.

(77) Once that principle is accepted the cases dealing with compulsory retirement before the age of superannuation cannot also fall outside the scope of Art. 311 of the Constitution. Age of superannuation is common to all permanent civil servants; it depends upon an event that inevitably happens by passage of time, unless the employee dies earlier or resigns from the post. It does not depend on the discretion of the employer or the employee; it is for the benefit of the employee who earns a well-earned rest with or without pensionary benefits for the rest of his life; it has, by custom and by convention, become an inextricable incident of Government service; and it is an incident of a permanent post. Notwithstanding the rule fixing an age of superannuation, a person appointed to such a post acquires title to it. The same cannot be said of a

compulsory retirement before the age of superannuation. It is not an incident of the tenure; it does not work automatically; it is not conceived in the interest of the employee; it is a mode of terminating his employment at the discretion of the appointing authority. In effect, whatever may be the phraseology used in terminating the services of a Government employee, it is punishment imposed on him, for it not only destroys his title but also inevitably carries with it a stigma. Such a termination is only dismissal or removal within the meaning of Art. 311 of the Constitution." (underlining is mine.)

Gajendragadkar, J. (as he then was) delivering the judgment on behalf of himself, Wanchee, Hidayatullah and Rajagopala Ayyangar JJ. said:

"(28) At this stage, we ought to add that in a modern democratic State the efficiency and incorruptibility of public administration is of such importance that it is essential to afford civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should no doubt be proceeded against promptly under the relevant disciplinary rules, subject, of course, to the safeguard prescribed by Art. 311(2); but in regard to honest, straight-forward and efficient permanent civil servants, it is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent and truly efficient. In our opinion, the sword of Damocles hanging over the heads of permanent railway servants in the form of Rule 148(3) or R.149(3) would inevitably create a sense of insecurity in the minds of such servants and would invest appropriate authorities with very wide powers which may conceivably be abused.

(29) In this connection, no distinction can be made between pensionable and non-pensionable service. Even if a person is holding a post which does not carry any pension, he has a right to continue in service until he reaches the age of superannuation and the said right

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3rd May 1974 (continued)

is a very valuable right. That is why the invasion of this right must inevitably mean that the termination of his service is, in substance, and in law, removal from service. It appears that after R. 149 was brought into force in 1957, another provision has been made by R. 321 which seems to contemplate the award of some kind of pension to the employees whose services are terminated under R. 149(3). But it is significant that the application of R. 149(3) does not require, as normal rules of compulsory retirement do, that the power conferred by the said Rule can be exercised in respect of servants who have put in a prescribed minimum period of service. Therefore, the fact that some kind of proportionate pension is awardable to railway servants whose services are terminated under R.149(3) would not assimilate the cases dealt with under the said Rule to cases of compulsory retirement. As we will presently point out, cases of compulsory retirement which have been considered by this Court were all cases where the Rule as to compulsory retirement came into operation before the age of superannuation was reached and after a prescribed minimum period of service had been put in by the servant."

In the same judgment Shah, J. said:

" Power to exercise discretion is not necessarily to be assumed to be a power to discriminate unlawfully, and possibility of abuse of power will not invalidate the conferment of power. Conferment of power has necessarily to be coupled with the duty to exercise it bona fide, and for effectuating the purpose and policy underlying the rules which provide for the exercise of the power. If in the scheme of the rules, a clear policy relating to the circumstances in which the power is to be exercised is discernible, the conferment of power must be regarded as made in furtherance of the scheme, and is not open to attack as infringing the equality clause. " (underlining is mine.)

In the case of Bengal Immunity Co. Ltd. v.

State of Bihar, A.I.R. 1955 S.C.661, the Supreme Court had held that it had power to overrule its own decisions. The rule of stare decisis has no place in decisions on constitutional questions. In such cases there is no question of policy but only the question of power. An erroneous decision on a constitutional question should not necessarily be followed by the Court because constitutional questions are not settled until they are settled correctly. Precedents on such matters have to be treated as merely hypothetical conclusions and can be abandoned whenever proved false by test of experience.

Article 135 of the Constitution puts a check on the unabridged exercise of the doctrine of pleasure. The clearest example of such an exercise is when there is not a shadow of excuse for terminating the services of persons, e.g., in the case of a person with an unblemished record of service. To say, therefore, that the Article comes into play only when the termination is attached with the stigma, amounts to saying that it is the "stigma" which is actionable and not the "termination." Surely, Article 135 was not conferring a remedy for a clear case in tort. The inevitable logical conclusion in such cases where the servant involved has a clean and unblemished record of service, when in spite of such record his services are terminated and he is forced to submit to the decision of an executive which may be ill-disposed to him as if the only article of the Constitution applicable was Article 132(2A) is an inference which is totally unwarranted and which is against the spirit of the Constitution.

The 1969 Regulations were a piece of legislation necessitated by the emergency. The government needed powers to meet the situation. The Court in such a situation is generally inclined or prone to pronounce in favour of the validity not only of the existence but also of the exercise of those powers. I may, perhaps, have liked to follow such a trend had I not put to myself the question "Do the provisions of Article 150 and the 1969 Regulations require that I should be guided more by the letter and spirit of those Regulations than by the letter and spirit of the Constitution? What is my duty - to look at the Regulations or at Article 4 or both!" Article 4 of the Constitution declares that the Constitution shall be the supreme

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3rd May 1974 (continued)

law of the country. Article 150(6) makes safe the validity of our Ordinance promulgated by the Yang di- Pertuan Agung under Article 150. It says that "no provision of any ordinance promulgated under this Article .... shall be invalid on the ground of inconsistency with any provision of the Constitution." The concept of "validity" and the concept of "supremacy" are two distinct concepts. A law may be valid and yet inconsistent with another law. There are generally to be found provisions in enactments that in case of any conflict or inconsistency with some other law the provisions of that enactment are to prevail or that nothing shall override the provisions of that enactment. When the Constitution has been declared to be supreme nothing can override or abrogate its sovereign dictates, power and supremacy. Laws promulgated under Article 150 cannot be declared invalid. They remain operative and functional in their own field but they have in their effectiveness to yield to the supremacy of the Constitution. War does not nullify the Constitution nor suspend its operation.

If a law is to be valid in spite of its inconsistency with the Constitution it means that its effectiveness and force are to remain operational even though the whole of it or any part of it be inconsistent with any provision of the Constitution. In other words it cannot be declared void or ultra vires the Constitution. This in short is the effect of Article 150(6) of the Constitution. A law promulgated under Article 150(2) cannot be held invalid if it is inconsistent with any provision of the Constitution.

Once an emergency has been declared by the Yang di-Pertuan Agung, even the fundamental liberties guaranteed under Part II of the Constitution and their enforcement can be curtailed or abolished during the period that the emergency lasts. A law made under Article 150(2) is a law in its widest sense. Articles 4, 135 and 150(2) and (6) are parts of the same Constitution and stand on an equal footing. Their provisions have to be read harmoniously in order that the intention behind Article 150 is carried out and is not destroyed by Article 4. If it were otherwise Article 150(2) could in certain cases become nugatory. A law made under Article 150(2) derives its force and validity from

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3rd May 1974 (continued)

Article 150 itself and takes effect in accordance with its tenor and cannot be affected by Article 4 or tested under Article 135 or any other provision of the Constitution. The practical legal effect of Article 150 thus is that any law made under Article 150(2) overrides any provision of the Constitution with which it may be inconsistent. The Constitution no longer remains supreme but only the law so made becomes and remains supreme in the field that it covers. If Article 150(6) is to have any meaning at all and is not to be wiped out from the Constitution any law made under Article 150(2) cannot possibly be tested under any other provision of the Constitution with which it may be inconsistent. This is the only interpretation I can put on Article 150 and its contents. If there was room I would not have hesitated to interpret it in a way which preserved the rights of the subject guaranteed to him in peace time by the Constitution. I have taken into consideration the fact that Article 150(6) appears subsequent to Article 4 in the Constitution and according to one of the canons of construction if the two are irreconcilable Article 4 should prevail over Article 150(6).

In the case of Haji Ariffin vs. Government of Pahang (1969) 1 M.L.J.6, Raja Azlan Shah, J. (as he then was) referred to temporary and permanent posts and held that if the services of a particular government servant was regulated by contract and such a contract provided for termination of his services by serving on him an appropriate notice such a termination did not amount todismissal as it only flowed out of the terms of contract. He said at page 10:

> " An important test for ascertaining whether termination of service amounts to dismissal within the meaning of art.135(2) is to find out whether a Government servant had a right to the post in question (see P.L. Dhingra v. Union of India, A.I.R.1958 S.C.36. If he is appointed substantively to a permanent post or to a temporary post for a fixed period, then in the absence of contract or service rule he cannot be turned out of his post, unless the post as in the first case above-mentioned is abolished or unless he has been guilty of misconduct, negligence, inefficiency or

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Grounds of Judgment

3rd May 1974 (continued)

other disqualifications and appropriate proceedings are taken under the Public Officers (Conduct and Discipline) Regulations, 1956, i.e. Cap. D of General Orders, read with art. 135(2). Except in the two cases mentioned above, a Government servant has no right to his post, and termination of service of a Government servant does not amount to a dismissal. If the Government servant is appointed to a post, permanent or temporary, on the express condition or term that the employment will be terminable on one month's notice on either side, then the Government may at any time terminate his service by serving the requisite notice. It may well be that in certain cases misconduct, inefficiency, or other disqualification is the motive which influence Government to take action under the terms of the contract, but as long as the termination is founded on the right flowing from the contract then prima facie the termination is not a punishment within the meaning of art. 135(2). The motive which sets the Government machinery in motion is irrelevant (see Shrinivas Ganesh v. Union of India, A.I.R.1956 Bom.455."

Suffian F.J. (as he then was) drew a distinction between "dismissal" and "termination of services". Services could be terminated either on grounds of unsatisfactory work or conduct or grounds which may not be capable of bringing any discredit to the officer. Dismissal was always accompanied by penal consequences, but termination of services not necessarily so. Barakbah L.P. agreed with the views of Suffian F.J. (as he then was) but MacIntyre F.J. wrote a dissenting judgment. He said at page 18:

"By virtue of the provisions of article 4(1) of the Constitution, any law enacted after Merdeka Day, which is inconsistent with the Constitution, must be deemed void. By virtue of article 162(6) any law enacted before Merdeka Day should be applied by the court to conform to the Constitution. It, therefore, appears to me to be logical that what the State cannot achieve by legislation it cannot achieve by imposing a contract

term in the contract of service of a public servant, contrary to the provisions of the Constitution.

MacIntyre F.J. then referred to Article 135 of the Constitution and said:

"These guarantees constitute a clog on the right of the Yang di-Pertuan Agong or a Ruler or Governor, as the case may be, to dismiss a public servant at pleasure. The provisions of article 135 are substantially the same as article 311(2) of the Indian Constitution. The provisions of article 132(2A) are also substantially the same as article 310(1) of the Indian Constitution which declares that a public servant in India holds office at the pleasure of the President of the Union or a Governor or Raj Pramukh, as the case may be. Commenting on the scope and ambit of these provisions and the principle governing the common law doctrine of holding office at the pleasure of the Crown, Das C.J. in his judgment in Dhingra v. Union of India A.I.R. 1958 S.C.36 (p.40) which was considered persuasive by the Privy Council in Munusamy v. Public Services Commission (1964) M.L.J. 239 F.C. = (1967) 1 M.L.J. 199 P.C. .... that we are not concerned in this case with the meaning of 'dismiss' under the service rules but with the meaning of that word in article 135(2) of the Constitution. The Constitution is the supreme law of the land and a provision in the Constitution should not, in my opinion, be construed by reference to a subsidiary legislation or regulation made thereunder. In the second place, I do not think that a provision of the Constitution should be interpreted in a limited sense so as to deprive a public servant of a constitutional right conferred by the Constitution."

He then referred to regulation 36 of Cap. D of the General Orders and observed:

"Therefore, to hold that an action taken under regulation 36 for an alleged misconduct is not 'dismissal' within the meaning of article 135(2) could lead to a situation whereby the constitutional guarantee could be flouted in the case of

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Grounds of Judgment

3rd May 1974 (continued)

Division III and Division Iv officers who are not on the pensionable establishment by the simple means of taking disciplinary action under regulation 36. To construe the scope and ambit of article 135(2) in a manner which may result in the exclusion of a class of public servants from enjoying the constitutional protection would be contrary to the purpose and object of the Constitution. Such a construction should, in my opinion, be rejected in favour of one which would extend the protection to all classes of public servants enumerated in article 132(1). Since the premature termination of an appointment for an alleged misconduct involves the loss of a career, future earnings and prospect of pension , it is also by itself a punishment, and that is the penal consequence which must be implied in the kind of 'dismissal' envisaged by article 135(2)."

MacIntyre F.J. then referred to the distinction drawn in Dhingra's case A.I.R. 1958 S.C. 36 between a substantive appointment in a permanent or semi-permanent post and a temporary or probationary appointment. Applying that distinction to the class of services in this country he said: (p.22)

"Adverting to the judgment in Dhingra's case A.I.R.1958 S.C.36, it would appear that the right acquired by a Government servant to hold his post is not a right conferred by any provision in the service rules but by implication arising from the nature of the tenure of office. A person who holds a substantive appointment in a permanent post is said to acquire that right. In this country Government posts are not designated as permanent or semi-permanent. Government servants here hold office on a temporary basis or on probation subject to confirmation or, when confirmed, on timescale. A time-scale officer must be regarded as being in the permanent service. That is why the appellant's head of department, in the course of his evidence, said that he was a Division III officer holding a non-pensionable permanent appointment. The

post of a Kathi is a permanent post in the State Administrative Service. The appellant was the substantive holder of that post. He held his appointment on timescale under a scheme of service which envisages employment during the pleasure of the Ruler from date of appointment to date of retirement. Applying the principle in Dhingra's case A.I.R. 1958 S.C.36, the appellant must be deemed to be the holder of a substantive office in a permanent post and, as such, the premature removal from office for alleged misconduct must be regarded as a punishment by itself."

The scheme of our General Orders envisages a class of officers who hold permanent posts and another class that does not. I have taken the liberty to quote amply from the judgment of MacIntyre F.J. because that is the kind of reasoning and argument which seems to have inspired some of the decisions of the Supreme Court of India. In Moti Ram's case A.I.R.1964 S.C.600, for example, Subba Rao J. said:

"If this argument be correct, it would lead to an extra-ordinary result, namely, that a Government servant who has been guilty of misconduct would be entitled to a "reasonable opportunity" whereas an honest Government servant could be dismissed without any such protection. In one sense the conduct of a party may be relevant to punishment; ordinarily punishment is meted out for misconduct, and if there is no misconduct there could not be punishment."

This passage has already been quoted while dealing with the case of Moti Ram A.I.R.1964 S.C.600. I do not wish to repeat paragraphs 75 to 78 of the judgment in that case.

Chakraverti in his work "Wrongful Dismissals" (5th Edn.) says at page 664:

"It is a quibble to say toa man at the age of 50 or more, that as his services are being terminated without any stigma or taint, he may very well find out another suitable appointment. It is an absurd proposition for me to be able to say to my good servant, "Well I ask you to serve me no more,

because you have been all through so good, but then I am your master and can, therefore, do terminate your services in exercise of my right of pleasure and none can protect you from my sweet-will and pleasure." While the law courts compel me to say to my wicked servant, "Well you are to carry on serving until I find another opportunity to dismiss you, and God help me, this time I do not make any mistake in procedure." This is how a layman understands the effect of importation of punishment and penalty in Art.311. The feeling of a few legal intellectual acrobats may be satisfied, by this construction, but then it is also said that justice must not only be done but it should also be seen to have been done."

Reference may also be made to the case of State of U.P. vs. Madan Mohan A.I.R.1967 S.C. 1260 (1262) which like the present case was a case of compulsory retirement and where practically the same type of arguments were urged on behalf of the government as in the present case. Sikri J. (as he then was) delivered the judgment of the Supreme Court, expressed the view that the case was on all forces with the case of Jagdish Mitter vs. Union of India A.I.R.1964 S.C.449 and said:-

> "It is true that that was a case of a temporary servant, but that does not matter. The order in that case reads as follows:
>
> "Shri Jagdish Mitter, a temporary 2nd Division Clerk of this Office having been found undesirable to be retained in Governemnt service is hereby served with a month's notice of discharge with effect from November 1, 1949."
>
> Gajendragadkar, J., as he then was, speaking for the Court, said:
>
> "No doubt the order purports to be one of discharge and as such can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems

to us that whennthe order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense must be held to be an order of dismissal and not a mere order of discharge."

"It seems that anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable, and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal."

It seems to us that the same test must apply in the case of compulsory retirement, namely: does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily? In the present case there is no doubt that the order does cast a stigma on the respondent."

Balbir Singh vs. State of Punjab A.I.R.1970 P. & H. 459 was the case of a man on whom an order was served terminating his services and this order was based on confidential reports received by the government. In this case Sodhi J. said:

"It depends on the facts and circumstances of each case whether a certain order of discharge from service or compulsory retirement against a Government employee

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

casts aspersions against his character or integrity so as to be said to have been passed by way of punishment. A plain reading of this order ostensibly purporting to be one of retirement shows beyond doubt that the petitioner was being retired because of his work or conduct having been found to be unsatisfactory as it appeared to the appointing authority from an assessment of the annual confidential reports. It was open to the appointing authority to have retired the petitioner on his attaining the age of 55 years without assigning any reason whatsoever in terms of note to Rule 3.26 ibid, but once reasons have been assigned importing an element of punishment, shelter cannot be taken behind the power given under the aforesaid note forming a part of the statutory rules. It has been held by their Lordships of the Supreme Court in The State of Uttar Pradesh v. Madan Mohan Nagar A.I.R. 1967 S.C.1260 (1262), that in case of compulsory retirement the same tests are to apply as in the case of discharge from service, and it has to be determined in each case whether the order casts aspersion or attaches a stigma to the employee whom it is purported to discharge."

The matter was put in positive and unequivocal terms in the case of State of Bihar vs. S.B.Mishra A.I.R. 1971 S.C.1011 (1014) by Grover J. He said:

" We are unable to accede to the contention of the appellant that the ratio of the above decision is that so long as there are no express words of stigma attributed to the conduct of a Government Officer in the impugned order it cannot be held to have been made by way of punishment. The test as previously laid and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. In Dhaba's case A.I.R. 1969 N.S.C.21, it was not found that the order of reversion was based on misconduct or negligence of the officer. So far as we are aware no such rigid principle has ever been laid down by this Court that one has

> only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct (see S.R. Tewari v. District Board Agra 1964-3 S.C.R.55 = A.I.R.1964 S.C.1680. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.

(Also see paras 8 to 12 of the judgment of Gajendragadkar J. in Jagdish Mitter vs. Union of India A.I.R. 1964 S.C.449.

The case of Gnanasundram vs. Public Services Commission (1966) 1 M.L.J.157 was a case where the Applicant had under the express terms of the contract of employment accepted a temporary employment and this contract itself provided for the mode of termination of such services. Raja Azlan Shah J. (as he then was) said at page 159:

> "The applicant was never dismissed from service. Dismissal presupposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations, 1956. That is not the present position here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used."

In the High Court

No. 4

Grounds of Judgment

3rd May, 1974 (continued)

Apparently two tests have generally been applied to determine whether termination of services by compulsory retirement amounts to removal or dismissal. They are (1) whether the action is by way of punishment. It is said that in order to find whether the action taken is by way of punishment there should be a charge or imputation against the officer concerned. (2) Whether the officer is losing any benefit he has already earned because it is only in case of dismissal or removal that he loses those benefits and not in the case of compulsory retirement. While these two tests may generally lead to an answer, it is not always that a true answer may be found only by the application of those two tests. It is not the form of the order but its substance and the real motive for the making of the order terminating the services that has to be looked at and all the circumstances of the case gone into. (See State of Bihar vs. S.B. Mishra A.I.R.1971 S.C.1011 (1014).

In Mankad vs. State of Gujarat A.I.R.1970 S.C.143 (145-146) theSupreme Court of India had to deal with compulsory retirement of a public servant before he had reached the age of superannuation. Grover J. delivering the judgment of the Supreme Court referred to various earlier decisions of that Court on the point and in particular Moti Ram's case A.I.R.1964 S.C.600. The true legal position, according to him, was stated in these words:

> "..... We think that if any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311(2)."

He went on to say:

> "The basis on which this view has proceeded is that for efficient administration it is necessary that public servants should enjoy a sense of security of tenure and that the termination of service of a pulic servant

under a rule which does not lay down a reasonably long period of qualified service is in substance removal under Article 311(2). The principle is that the rule relating to compulsory retirement of a Government servant must not only contain the outside limit of superannuation but there must also be a provision for a reasonably long period of qualified service which must be indicated with sufficient clarity. To give an example, if 55 years have been specified as the age of superannuation and if it is sought to retire the servant even before that period it should be provided in the rule that he could be retired after he has attained the age of 50 years or he has put in service for a period of 25 years."

In the case of Munusamy vs. Public Services Commission (1967) 1 M.L.J.199 (201) P.C. the Appellant was an immigration officer. He made a false statement that he had passed the school certificate examination which was the minimum educational qualification for the post of an Assistant Passport Officer which was then vacant and for which he had applied. He secured that post and was to remain on probation for a period of one year. During this probationary period it came to the knowledge of the Public Services Commission that he did not in fact possess the minimum educational qualification for the post and they terminated his services without giving him any opportunity to be heard. He was not dismissed but reverted to his former post as an immigration officer. The Privy Council held that Article 135(2) had no application to the facts of the case as there was no element of punishment of the Appellant involved. Referring to the 1956 Regulations their Lordships observed:

"Regulations were made for the case of officers both on the non-pensionable and on the pensionable establishment in which the dismissal of an officer is contrasted with lesser punishment. It is sufficient to refer to one of these regulations, 37(h), which provides "In lieu of dismissal the Disciplinary authority may inflict such less penalty by way of fine, reduction in rank or otherwise as may seem to him fit".. Dismissal is treated as the penal consequence

In the High Court of Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

of charges meriting dismissal being established against an officer. Looking at the Constitution itself the disciplinary interpretation of dismissal is reinforced by the language of 135(3) which immediately follows the relevant Article and contains the significant phrase "dismissed or reduced in rank or suffer any other disciplinary measure." This confirms that the punishment element is involved in both cases and is not to be explained away as referring only to persons exercising judicial functions."

They then referred to Article 311 of the Indian Constitution and the cases decided in India under that Article and felt that those decisions were of persuasive authority. They also held that dismissal and removal were synonymous terms. They in particular referred to Dhingra vs. Union of India A.I.R.1958 S.C.36. They said: ((1967) 1 M.L.J. 202)

There is no question of dismissal from the service in this case which must if the appellant is to succeed be a case of a reduction in rank. In India it has been held in Dhingra's case, supra, that a reduction in rank must be a punishment if it carries penal consequences with it and the two tests to be applied are (1) whether the servant has a right to the post or the rank or (2) whether evil consequences such as forfeiture of pay or allowances, loss of seniority in his substantive rank, stoppage of postponement of future chances of promotion follow as a result of the order. Applying these tests to this case there has been no reduction of rank enabling the appellant to rely on the provisions of Article 135(2) of the Constitution and so obtain a hearing for the reason that the action of the respondent cannot be characterised as being by way of punishment."

The case is relevant only in so far as the principles enumerated by the Supreme Court in the case of Dhingra vs. The Union of India A.I.R. 1958 S.C.36 were approved by the Privy Council. Moti Ram's case, A.I.R.1964 S.C.600, does not appear to have been cited before their Lordships

of the Privy Council.

Government of Malaysia vs. Lionel (1974) 1 M.L.J. 3 (P.C.) is a recent case decided by the Privy Council. In that case the Respondent was appointed as a temporary clerk cum interpreter and under the terms of his appointment his services could be terminated by one month's notice or payment of one month's salary in lieu of notice. He was subject to the provisions of the General Orders. It was thought that he was guilty of acts of indiscipline. He was given an opportunity to esculpate himself but his explanation was not accepted by the authorities who decided to and did in fact terminate his services as a temporary clerk by giving him the requisite notice which was agreed upon under the contract of service. He contended that he was wrongfully dismissed. The Court, on the other hand, asserted that he was not dismissed at all, that it was entitled to terminate his services under the contract and that what it did was nothing more than an exercise of its contractual right after it has duly complied with the requirements of the General Orders. It was a case similar to Gnanasundram vs. Public Services Commission (1966) 1 M.L.J. 157 and Haji Ariffin vs. Government of Pahang (1969) 1 M.L.J. 6. An opportunity had, however, been afforded to the Respondent in this case to repel the suspicion or charges against him. Their Lordships of the Privy Council held that the employment of the Respondent was terminated in accordance with the terms of his engagement and that this did not constitute dismissal. The reason was that the Government could validly terminate the services of the Respondent under the terms of his engagement. Their Lordships did not under those circumstances consider it necessary to embark upon the question whether his hypothetical dismissal instead of termination of services could or could not in those circumstances be in accordance with the provisions of the Constitution or not. They held that the Respondent in order to succeed had first to establish that he was dismissed. The Respondent was not on the pensionable establishment of the government. Viscount Dilhorne referred toRegulation 36 of the 1956 Public Officers (Conduct and Discipline) Regulations which itself states that the Government can dispense with the services of any of its

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

employees on the non-pensionable establishment by giving him a notice in accordance with the terms of his appointment. A dismissal always entails punishment. There is a clear distinction between a dismissal and a termination of service which is in accordance with the terms of engagement. Members of the general public service in this country enjoy a degree of security of tenure under the Constitution. They are not guaranteed security of tenure by the Constitution. 10 This is what the Privy Council decided in Government of Malaysia vs. Lionel (1974) 1 M.L.J. 3(P.C.).

Facts in the present case are quite diffeent from the facts either in Munusamy's case (1967) 1 M.L.J.199 (201) P.C. or in Lionel's case (1974) 1 M.L.J.3 (P.C.). The Plaintiff was since 2.2.1954 on the pensionable establishment of the Government. He was then an interpreter of the Sessions Court Ipoh. The record of his service 20 shows the advance and progress he had made in his career as a government servant. The notice terminating his services A8 makes it clear that the decision was taken by the Government in the public interest.

Exhibit A8

There is also reference to Regulation 44 of the 1969 Regulations in A8. It states that the Plaintiff's services are to stand terminated as soon as he had taken all the leave. Section 10(d) of the Pensions Ordinance 1951 also finds 30 a place in A8. Anybody reading A8, Section 10(d) of the Pensions Ordinance, 1951 and Regulation 44 of the 1969 Regulations in the context of the emergency cannot fail to come to the inference that to allow the Plaintiff to continue in service at that time and during those conditions was thought by the government to be contrary to the public interest. In plain language the Plaintiff was, according to the government, not fit to remain in service. 40

Exhibit A8

In Munusamy vs. Public Services Commission (1967) 1 M.L.J.199 (201) P.C. the Privy Council approved of the principles enumerated in Parshotam Lal Dhingra vs. Union of India A.I.R. 1958 S.C.36. The question which arises is whether the Privy Council has in the case of Government of Malaysia vs. Lionel (1974) 1 M.L.J. 3 (P.C.) in any way departed from the principles

laid down in Dhingra's case A.I.R.1958 S.C.36 and if so how far is Lionel's case (1974) 1 M.L.J.3 (P.C.) a departure from Parshotam Lal Dhingra's case.(As far as this question is concerned it seems to me to be an unnecessary exercise in the present case.

The present case concerns powers of dismissal or termination under an emergency legislation. It is however necessary to determine whether the Plaintiff's services were only terminated or if he was dismissed.

In Satish Chandra Anand vs. Union of India A.I.R.1953 S.C.250, the Supreme Court simply said: "It is an ordinary case of a contract being terminated by notice under one of its clauses."

In K.S. Srinivasan vs. Union of India A.I.R. 1958 S.C.419 (423), the Supreme Court by a majority approved the following passage in P.L.Dhingra's case A.I.R.1958 S.C.36:

> " Shortly put, the principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary, either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

protection of Art.311. In other words and broadly speaking, Art.311(2) will apply to those cases where the government servant, had he been employed by a private employer, would be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it another way, if the government has, by contract, express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, prima facie and per se, not a punishment and does not attract the provisions of Art.311."

Bose, J., however, was unable to subscribe to the majority view. He said:

" The old technically rigid conceptions of contract and equity have given place in modern times to a juster appreciation of justice, and the fusion of law and equity in one jurisdiction has resulted in the emergence of a new equity in England more suited to modern ideas of human needs and human values. Lord Denning has cited instance after instance in his book "The Changing Law" to show how this has come about and how it is still in the process of formation, flexible and fluid with the drive behind to do real justice between man and man and man and the State, rather than to continue to apply a set of ancient hide-bound technicalities forged and fashioned in a wholly different world with a different conscience and very different evaluations of human dignity and human rights. At pp.54 and 55 Lord Denning sums up this new orientation in legal thinking thus:

"In coming to those decisions, the Courts expressly applied a doctrine of equity which says a Court of equity will not allow a person to enforce his strict legal rights when it would be inequitable to allow him to do so.

This doctrine warrants the proposition that the Courts will not allow a person to

go back on a promise which was intended to be binding, intended to be acted on, and has in fact been acted on."

"Why should we give greater sanctity and more binding force to rules and regulations than to our own Constitution? Why should we hesitate to do justice with firmness and vigour?"

10 "If we apply the same principles here, then the words "required to be made" in R.4(b) lose their sting and the way is free and open for us to do that justice for which the Courts exist." "

The Plaintiff was in the permanent service of the government. As such he had a "right to the post as contemplated by the majority decision in P.L.Dhingra's case A.I.R.1958 S.C.36. One of the two tests referred to in the passage from that judgment cited above is thus fulfilled and the 20 termination of Plaintiff's services should be held as a punishment and as such amounts to a dismissal for the purposes of Article 135. In my view, the real test is whether the order terminating the circumstances is without any black mark or comment on the ability of the employee, whether the order if shown to a future employer would prejudice him against the Plaintiff on the ground that he had been turned out of the former employment for some mistake or incompetency. It would be a simple 30 case of termination of service if firstlythe government servant had no right to continuity of service and secondly there is nothing in the order, either expressly or by implication, which tends to tar the name of the government servant as to his character, loyalty, capability and inefficiency or integrity. The test is what effect the order is likely to have in the mind of a future employer. (See Gopal Chandra Dutta vs. Union Territory, Tripura A.I.R.1960 Tripura 31, 40 and see A.I.R.1959 Tripura 2(b).

The Plaintiff received the letter A8 on 31.3.1970. It is marked confidential. On 2.3.1970, approval was given to an increase in his salary from $682/- to $700/- (see B1), such increase was to be effective from 1.4.1970. Letter B4 explains the letter A8. No disciplinary action was taken against the Plaintiff but he was required to

Exhibit A8

Exhibit B4

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No. 4

Grounds of Judgment

3rd May 1974 (continued)

Exhibit A8

retire under the provisions of section 10(d) of the Pensions Ordinance "and pursuant to Rule 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969." What the words within the inverted commas mean when read with Section 10(d) of the Pensions Ordinance I am not able to understand. As far as Section 10(d) is concerned it is only the Yang di-Pertuan Agung who could require the Plaintiff to retire from the public service if it was in the public interest and if his services were validly terminated. The letter A8 is from the Director of Public Services. It says that he had been "directed" to inform the Plaintiff that the "Government" had decided to take action under Section 10(d) of the Pensions Ordinance.

Under the Interpretation Act, 1967, "Government" is defined as the Government of Malaysia. This in itself is not a very helpful definition.

Articles 39 to 43A deal with the executive authority of the country and who is to exercise it and in what manner.

Under Article 80 the executive authority is made to extend to all matters with respect to which Parliament is able to make laws. The Yang di-Pertuan Agung being the Supreme Head of Malaysia all the executive authority vests in him but he is to exercise it subject to the provisions of the federal laws and the provisions contained in the Second Schedule to the Constitution. This executive authority can be exercised by the Cabinet or any Minister that is authorised to act by the Cabinet. Again Parliament has power to confer executive functions on any person it names. It is obvious that the expression "Government" for the purposes of the Constitution and the Laws of Parliament means the executive machinery set up by the Constitution and the laws made by Parliament. "Government" thus denotes an established authority entitled and able to administer the public affairs of a country.

Article 39, however, makes it clear that if by any Federal law the executive authority is vested in the Yang di-Pertuan Agung it can only be exercised by him unless Parliament had

conferred those executive functions on some one else. It is agreed that the functions and powers exercisable by the Yang di-Pertuan Agung under Section 10(d) of the Pensions Ordinance have not so far been delegated to any officer of the Government. Section 2 of Ordinance No.2 of 1969, however, conferred on the Director of Operations all the executive powers and authority of the Yang di-Pertuan Agung under the Constitution and all His Majesty's authority under any written law. Article 40 ceased to apply as by Section 2(1) of the said Ordinance there was no executive power left with the Yang di-Pertuan Agung. The word "Government" appearing in A8 has therefore to be construed as the Director of Operations. *Prima facie* the act of the Government in requiring the Plaintiff to retire from service seems quite valid. The power existed under Section 10 of the Pensions Ordinance. Section 8(2)(a) of the Ordinance fixes the age of superannuation at 55. Section 8(2)(f) provides for grant of pension to an officer whose services are terminated in the public interest. Section 9 also makes similar provision in the case of an officer whose services are terminated in the public interest and who is otherwise not eligible for pension and other benefits of service. Clause (d) of Section 10 of the Pensions Ordinance appears to me to be redundant. It empowers compulsory retirement "on the termination of a public officer's employment". If employment has already been terminated, the question of compulsory retirement does not arise. If the termination of service has already become an accomplished fact by an act or power independent of the Pensions Ordinance, the erstwhile public officer becomes totally bereft of his status and functions as such officer and the superimposition of compulsory retirement in those circumstances is meaningless. It is mere use of empty words without any sense or meaning. It is quite clear that if use was to be made of Section 10(d) of the Pensions Ordinance in respect of the Plaintiff, his services had first to be terminated and it was for that reason that Regulation 44 of the 1969 Regulations was expressly referred to in A8 which again brings us to the basic question of the validity of the termination of the Plaintiff's services and the validity of the Regulation itself.

Exhibit A8

Exhibit A8

I had earlier said that the crucial test to

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

determine whether an order ostensibly terminating the services of an employee is to be regarded as an order of dismissal or not is to see what effect that order could have on the mind of a future employer if it was shown to him and if the employee whose services had been terminated had approached such an employer for a new job. Now A8 expressly refers to Regulation 44 and it was under Regulation 44 that his services were terminated. The Plaintiff had never been convicted or found or suspected of misconduct or even of poor performance of the work assigned to him. No disciplinary proceedings were taken against him. Regulations 28, 29 and 30 of the 1969 Regulations could not be applied against him. The Plaintiff in his evidence stated that he had never committed any breach of any Regulations. He was not cross-examined at all on the assertion made by him. The first thing that any prospective employer of the Plaintiff could think of on reading A9 and the contents of Regulation 44 would be that although the Plaintiff may not be a criminal or a bad worker, he was not the type of man who could be thought suitable to be kept in the employment of the government. He would certainly infer that the report called for by the Government must be adverse to the Plaintiff, in fact so adverse that the government thought it a waste of time to communicate with him or to ask him for an explanation or afford him an opportunity to show that the comments against him in the report were baseless or were motivated by some bias or ill will. He would think that the Plaintiff was not the man who could serve public interest, that he had to deal with a section of the public and how could the Plaintiff be useful to him in the promotion of his business. As an employer he would go back to Regulation 3 and the very first thing that will strike him is that in the circumstances the Plaintiff was not loyal to the Yang di-Pertuan Agung. If he could not be loyal to the Yang di-Pertuan Agung, how could he be loyal to him. If he went through various clauses of Regulation 3 and asked himself what sort of man the Plaintiff was, he would only find him unworthy of any trust and refuse to employ him. I find that the Order A8 is a black mark against the Plaintiff in seeking future employment. It indirectly tarnishes his character, doubts his capability of loyalty to the King, and his integrity as a servant. It casts definite stigma on him.

Ex.A8

Exhibit A9

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Regulation 44 casts a very wide net. In this net could fall persons of virtue and honesty, persons who are totally blameless, as well as persons utterly useless and detestably corrupt, incompetent, persons hostile to national stability and tranquility. No one could escape from the tentacles of this Regulation had not the protection of the law and the Courts existed.

Ex.A8

I have already held that the order Exhibit A8 did in fact cast a stigma on the Plaintiff and constituted a punishment, that amounts to a dismissal although it was clothed in seemingly innocuous and harmless words intended to convey the impression that the order constituted only a mere termination of service. There is no escape from the fact that it was intended and meant to be a punishment. Section 9 of Ordinance No. 1 of 1969 provides the penalty for breach of any of the Regulations where no specific penalty is prescribed. The notion of punishment is inherent in any emergency legislation. Such legislation is aimed at enforcing discipline and conduct which is conducive to the national interest and those who choose to ignore the provisions of such legislation do so at their own risk as to consequences. No doubt Article 135(2) had no application to the present case, the procedure prescribed for dismissal under Part II of the 1969 Regulations should have been followed. The so-called termination of Plaintiff's services was in fact a summary dismissal.

The next important question demanding serious attention is the question of delegation of powers and authority and the extent of such delegation. The question is tied up with the vires of the 1969 Regulations. Where the legislation provides and lays down a principle underlying the provisions of a particular statute and also affords guidance for the implementation or enforcement of the said principles, it is open to the legislature to leave the actual implementation or enforcement to its chosen delegate. In England the validity or invalidity of a delegation of legislative power by Parliament can never become a constitutional issue. A clause in a statute delegating powers to the executive to amend the statute itself was called "Henry III clause" in memory of that King who was regarded as the very emblem and monument of executive autocracy. In 1929 Lord Hewart, the

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No. 4

Grounds of Judgment

3rd May 1974 (continued)

then Lord Chancellor published his book "The New Despotism" exposing the dangers of legislation by the executive. I should perhaps go straight to decided cases on the subject of delegated legislation.

In Victoria Stevedoring and General Contracting Co. vs. Dignan (1931) 46 C.L.R.73 (H.C.) Evatt, J. stated the position of the Australian Parliament in these words:

> " On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."

In the Queen vs. Burah 5 I.A.178(195) = (1878) 3 A.C.889 the Privy Council distinguished conditional legislation from delegated legislation. (For facts see pp.107-111 of Subba Rao.)

> "The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances,

it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

10 In Re. The Initiative & Referendum Act (1919) A.C.935 (944,945) was a case from Canada. (For facts - see pp.105-109 of Subba Rao.)

" Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that 20 position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It provides that when a proposal for repeal of some law has been approved by the majority of the 30 electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the ultra vires character of the 40 Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable.

Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in Hodge vs. The Queen 9 app.Cas.117, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."

Next the case of King-Emperor vs. Benoari Lal Sarma 72 I.A.57 (66,67) = 1945 P.C. 481 may be considered. (Facts:- p.108 of Subba Rao.)

"It is undoubtedly true that the Governor-General, acting under s.72 of sched IX., must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under s.102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a special court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity."

The time when the Special Criminal Courts

Ordinance was to come into force in a State was left to the government of that State. The legislature can no doubt delegate the power to implement a statute but not its law-making power. A discretion as to the implementation of the law can be left to the subordinate authorities but not the power of law-making.

In Russell vs. The Queen (1882) 7 A.C.829, the Canadian Temperance Act was challenged. (Subba Rao Vol.1 p.106)

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" In this case the Canadian Temperance Act, 1878, was challenged on the ground that it was "ultra vires" the Parliament of Canada. The Act was to be brought into force in any county or city if on a vote of the majority of the electors of that county or city favouring such a course, the Governor-General-in-Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. The passage in which this is made clear, runs as follows:

20

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency .... If authority on this point were necessary, it will be found in the case of Queen v. Burah 5 I.A.178 (195) = (1878) 3 A.C.889, lately before this Board."

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40

The question was examined at length in In Re Art.143, Constitution of India and Delhi Laws Act (1912) 1951 S.C.J.527 = 1951 S.C. 332: (Facts see

Subba Rao p.110)

" The question was re-examined at great length by the Supreme Court in In Re Article 143, Constitution of India and Delhi Laws Act, (1912) 1951 S.C.J.527 = 1951 S.C.332. The question as to the delegability of Legislative power was comprehensively placed before the Supreme Court by a reference made by the President of India under Article 143 of the Constitution asking the Court's opinion on the validity of three Acts (i) The Delhi Laws Act, 1912; (ii) The Ajmer-Merwara (Extension of Laws) Act, 1947, (iii) Part C State (Laws) Act, 1950. The three Acts related to three different epochs of constitutional development (a) before the Government of India Act, 1935, (b) under the Government of India Act, 1935 and (c) under the present Constitution. Thus the Supreme Court had to review the position of delegability of legislative power in the various stages of our constitutional development.

It was held by a majority of the judges of the Supreme Court that the power conferred on the executive to extend the existing Acts with such modifications as the executive thought fit was intra vires the legislatures concerned.

Fazl Ali, J., adhered to the minority view in Jatindranath's case (1949) 2 F.C.R. 595 = (1949) F.C.175 that the power to extend an act is only a ministerial power and not a legislative power and that the power to modify is only incidental to the power to adapt since the modifications should be only "within the framework of the Act and cannot be such as to affect its identity or structure or the essential purpose to be served by it.

Bose, J., was of the view that "the Indian Parliament can legislate along the lines of The Queen v. Burah 5 I.A.178(195) = (1878) 3 A.C.889 that is to say, it can leave to another person or body the introduction or application of laws which are or may be in existence at that time in any part of India which is subject to the

legislative control of Parliament ......
The power upheld by The Queen v. Burah 5 I.A. 178(195) = (1878) 3 A.C. 889 does not extend as far as the latter portion of S.2 of the Part C States (Laws) Act of 1950 endeavours to carry it." Mahajan, J., and Kania, C.J., were of the view, reiterating the view maintained by them in Jatindranath's case (1949) 2 F.C.R.595 = (1949) F.C.175 that the sections of the three Acts under consideration were in their entirety invalid and not merely the latter part of S.2 of the Part C States (Laws) Act." (underlining is mine - pp.110 & 111 of Subba Rao.)

In case of a proclamation of emergency under Article 150 when Parliament is not in session and it is thought not practicable to summon it, the Yang di-Pertuan Agung becomes the sole legislative authority. It is the Constitution as the supreme law of the country which in times of emergency confers on the Yang di-Pertuan Agung the powers of the Legislature, and, subject to the powers of Parliament under Article 150(2) and (3), makes those powers exclusive to himself alone. That supreme law which is the source of those powers does not expressly or by implication authorise any delegation of powers to any person or authority. Under Article 44 i.e. in normal times the Legislature consisting of the Yang di-Pertuan Agung and the two Houses of Parliament invested with the power to legislate. If times no longer remain normal and an emergency is declared, the entire power of the Legislature falls on Yang di-Pertuan Agung. It is to meet the exigencies of the situation arising out of the emergency that the supreme law of the country makes provision for legislation by Yang di-Pertuan Agung who in fact is under a duty to summon Parliament as soon as he deems fit. There is no abandonment of authority by Parliament. The question which arises is:-

Can the Yang di-Pertuan Agung in legislating under Article 150(2) (and thus acting under the supreme law) delegate all his executive functions to any particular person under the Constitution or any other law?

The definition of "written law" to be found in the Interpretation Act, 1967 includes the

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

Constitution. Constituent powers cannot be delegated. In fact section 2 of the Delegation of Powers Ordinance expressly declares that for purposes of sections 3 to 12 of that Ordinance the expression "written law" does not include the Constitution. So no duty or power laid or conferred on any person or authority by the Constitution is capable of being delegated. It is urged that what the Yang di-Pertuan Agung delegated was his executive powers and not his legislative powers. Whatever it be Article 39 created a bar to any delegation of powers, legislative or executive, if any federal law prohibited such delegation. Section 2 of the Delegation of Powers Ordinance is no more than a statutory recognition of the well established principle that powers specifically conferred on a specific authority under the Constitution cannot be delegated unless the Constitution itself authorises such delegation.

When Emergency (Essential Powers) Ordinance No.2 of 1969 was promulgated on 16.5.1969 vast and astonishing changes in the status of the Yang di-Pertuan Agung as the executive head of the Federation were made. The position and powers of the Cabinet were altered. The effect of this Ordinance was that in the executive sphere the Director of Operations stood supreme and towering over everyone else, even over the King. If I read section 2(2) of this Ordinance correctly he was to be responsible to no one but himself although until 5.11.1970 he was to act in accordance with the advice of the Prime Minister. It is perhaps best to reproduce section 2(1) and (2) of this Ordinance:

> "2. (1) The executive authority of Malaysia referred to in Article 39 of the Constitution and all powers and authorities conferred on the Yang di-Pertuan Agung by any written law are hereby delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agung.
>
> (2) The Director of Operations as designated under sub-section (1) shall act in accordance with the advice of the Prime Minister and shall exercise and be responsible for the exercise of the executive authority of Malaysia and of

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

the powers and authorities referred to in sub-section (1); and Article 40 of the Constitution shall not apply to the exercise of the executive authority and the exercise of the powers and authorities referred to in sub-section (1)."

I have already stated that the power to make such laws as may effectively meet the threat to the nation or its economy remains within the exclusive province of the Yang di-Pertuan Agung. Article 150(2) requires him to act and legislate if he feels satisfied that action is necessary. The action which is contemplated is the making of laws or ordinances. Section 2(1) of Ordinance No.2 of 1969 does not make any law. It is merely a recital of a fact, namely, the relinquishment of all executive power and authority conferred on him under the Constitution and all powers under any other written law. This, in my view, is not what Article 150(2) authorised or required him to do.

Delegation cannot imply giving up of authority but rather the conferment of authority upon someone else. It does not contemplate entire abandonment of power. A careful reading of Section 2(1) and (2) of the Ordinance shows that as far as exercise of any executive power, initiative and control is concerned there was a total effacement or abdication of the powers and functions which the Constitution required the King alone to exercise and perform.

As the sole Legislature in times of emergency the Yang di-Pertuan could make laws. He could, as the sole legislature, lean to the executive or any authority the implementation of the policy and principles of the law promulgated by him. He was the supreme executive. It was his duty not to part with all his executive powers. If he chose to reassert his executive powers he could not do so under Ordinance No.2 of 1969 but only by promulgating another Ordinance. Further Ordinance No.2 was promulgated under special powers conferred on Yang di-Pertuan Agung by Article 150(2) and before he could delegate his powers under the Constitution he should have modified section 2 of the Delegation of Powers Ordinance or by a separate Ordinance giving himself power to delegate all his functions even under the Constitution. I

In the High Court of Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

say nothing of the constitutionality of such an action. Article 150(6) deals only with an inconsistency between an Ordinance and a provision of the Constitution. It does not deal with lack of power to delegate functions especially reserved to the Yang di-Pertuan Agung under the Constitution, powers which are not outside the vast ambit of Article 39. When the Head of the State delegates all the executive authority of the State that vests in him he delegates all the residue of the functions of the State that remain after legislative and judicial functions are taken away. Articles 41 and 42 are merely an examplification of the total executive authority vested in the Yang di-Pertuan Agung. Those powers are not outside the vast ambit of Article 39. Executive authority required to meet the emergency cannot be as comprehensive and all-embracing on the totality of all the executive authority vested in the Yang di-Pertuan Agung.

Section 3(1) and (2) of the Defence of India Act, 1962 provides: (Dutt & Boetra pp.8 & 9)

> "3. Power to make rules. - (1) The Central Government may, by notification in the official Gazette, make such rules as appear to it necessary or expedient for securing the Defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.
>
> (2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters, namely, -
>
> (1) ensuring the safety and welfare of the Armed Forces of the Union, ships and aircrafts, and preventing the prosecution of any work likely to prejudice the operations of the Armed Forces of the Union;

(2) prohibiting anything likely to prejudice the training, discipline or health of the Armed Forces of the Union;

(3) preventing any attempt to tamper with the loyalty of persons in, or to dissuade (otherwise than with advice given in good faith to the person dissuaded for his benefit or that of any member of his family or any of his dependants) persons from entering the service of the Government;

(4) preventing or prohibiting anything likely to assist the enemy or to prejudice the successful conduct of military operations or civil defence including -

(a) communications with the enemy or agents of the enemy;

(b) acquisition, possession without lawful authority or excuse and publication of information likely to assist the enemy;

(c) contribution to, participation or assistance in, the floating of loans raised by or on behalf of the enemy;

(d) advance of money to, or contracts or commercial dealings with the enemy, enemy subjects or persons residing carrying on business, or being, in enemy territory, or occupied territory; and

(e) acts, publications or communications prejudicial to civil defence or military operations;"

Sub-section (2) of section 3 is followed by an enumeration of 57 matters on which rules could be made by the Central Government of India to achieve the objects referred to in section 3(1). This Act was repealed by the Defence of India Act, 1971. At the beginning of the last war the Defence of India Act, 1939 was passed. Section 3(1) of the 1962 Act is the same as section 3(1) of the 1971 Act and section 2(1) of the 1939 Act. It has been held by the Indian Courts that the provisions of section 3 are not ultra vires (See Haveliram Shetty vs. Maharaja of Morvi A.I.R.1944

In the High Court in Malaya
No. 4
Grounds of Judgment
3rd May 1974 (continued)

Bom.487 and A.I.R.1945 Bom.88 (F.B.), State vs. Basdeo A.I.R.1951 All.44, Khetsidas vs. Pratapmull A.I.R.1946 Cal.197, Keshav Talpade vs. Emperor A.I.R.1943 F.C.1, Cruz. vs. State of Merala A.I.R. 1963 Kerala 341.

Section 3(1) and (2) of the Indian Act is the same as section 2(1) and (2) of Ordinance No.1 of 1969 except for the clauses which follow section 2(2) of our Ordinance. A regulation if it is to be valid and operative it has to be for the purposes of the statute under which it is made and must fall within the strict limits and the principles laid down in the statute which authorises the making of that regulation. Rules were made in India both under the Defence of India Act, 1939 and the Defence of India Act,1962. They have also been made under the 1971 Act. Rules were also made under the Defence of the Realm Act in England but there is nothing in the relevant rules of those countries which is the near equivalent of Essential (General Orders, Chapter D) Regulations, 1969 (P.U.(A) 273/69). The relevant Acts and the Rules in England and India both are of a privitive character. In fact it is hard to imagine how they can be designated otherwise. An emergency threatens the security of the country by war, external aggression or internal disturbance. It connotes a state of things which calls for drastic and immediate action. It may very well be that the civil service of this country contained quite a sizeable or at least some officers who were suspected of causing or exciting disaffection to the government or bringing it into hatred or contempt, they wee promoting feelings of enmity and hatred between different races in this country. The government alone knew it best and that might have justified the making of Essential (General Orders, Chapter D) Regulations, 1969. This was a matter entirely for the Yang di-Pertuan Agung to decide. Emergency legislation, however, is not intended to be used when the public safety and the defence of the country are not imperilled.

It is the Yang di-Pertuan Agung alone who, in the absence of Parliament, can promulgate Ordinances during the existence of an emergency. Ordinances promulgated under Article 150(2) have the same force and effectiveness as laws enacted by Parliament. Regulations are not to be

regarded so. They are no doubt laws, but they rest on a different foundation and are to be looked at as the rules made by a subordinate authority in the exercise of power which it has received by delegation from a supreme legislative authority. It is not within my province to criticize the wisdom or propriety of the Regulations made under section 2 of Emergency (Essential Powers) Ordinance No.1 of 1969. My only duty is to determine their validity and, if I find them valid, to administer them according to law.

On the strength of the authorities already referred to by me, I am of the view that the Essential (General Orders, Chapter D) Regulations, 1969 are valid and not ultra vires either the Constitution or Ordinance No.1 of 1969. I have followed the decisions under the Defence of India Acts and the Rules made thereunder. The principles involved are the same. The only qualification I will make is (as I have already held it earlier) that the termination of service referred to in Regulation 44 is in fact a dismissal. The law treats it as such. The government cannot by a play of words and by granting a pension out of its rich coffers turn a dismissal into a simple termination of service.

Having reached the conclusion that I have, consideration of other questions involved or raised in this suit, including the question of "satisfaction" of the government referred to in Regulation 44(3) of the Essential (General Orders, Chapter D) Regulations will only be otiose.

There will be a declaration that the termination of the Plaintiff's services referred to in the letter dated the 20th March, 1970 constituted a dismissal and that such dismissal was null, void, inoperative and of no effect. There will be a further declaration that the Plaintiff still continues in government service and is entitled to all the arrears of unpaid salary after deduction of amounts paid to him by way of pension. The Plaintiff will also have the costs of the suit.

I should perhaps conclude this judgment by quoting the following words of Lord Macmillan:

" We have had good reason to realise the

In the High Court in Malaya

No. 4

Grounds of Judgment

3rd May 1974 (continued)

truth of Cicero's adage that amidst the clash of arms the laws are silent. The still small voice of the law is quelled when men kill and destroy in defiance of its dictates. What we have to do is to restore the reign of law, to reseat justice on her throne, to cause right once more to prevail over wrong.". (Judicial Control Vol.IV V.G. Ramachndran)

Delivered this 3rd day of May, 1974. 10

N. Sharma
(N. SHARMA)
Judge,
HIGH COURT,
IPOH.

M. Sivalingam, Esq., of Messrs. Lim Cheng Ean & Co. for the Plaintiff.

Encik Abdul Razak bin Datuk Abu Samah, Senior Federal Counsel (Mr. Lim Beng Choon with him) for the Defendant. 20

TRUE COPY

Secretary to Judge
High Court, Malaya, Ipoh.

No. 5

Judgment

3rd May 1974

No. 5

Judgment

BEFORE THE HONOURABLE MR. JUSTICE NARAIN SHARMA

IN OPEN COURT

THIS 3RD DAY OF MAY 1974

J U D G M E N T

THIS ACTION coming on for hearing on the 18th, 19th, 20th and 27th days of September 1973 and on the 22nd and 23rd days of April 1974 in the presence of Mr. M. Sivalingam of counsel for the plaintiff and Encik Abdul Razak bin Dato Abu Samah Senior Federal Counsel with Mr. Lim Beng Choon Senior Federal Counsel appearing for and on behalf of the defendant AND UPON READING the 30

pleadings filed herein AND UPON HEARING the evidence adduced by the parties AND UPON HEARING the said counsel as aforesaid for the parties:

IT WAS ORDERED that this action do stand adjourned for judgment:

AND THIS ACTION STANDING IN THE PAPER for judgment this day in the presence of Mr. M. Sivalingam of counsel for the plaintiff and Encik Abdul Kadir bin Sulaiman Federal Counsel appearing for and on behalf of the defendant:

THIS COURT DOTH DECLARE that the termination of the service of the plaintiff was null and void, inoperative and of no effect and that the plaintiff still continues to be in the service of the defendant:

AND THIS COURT DOTH FURTHER DECLARE that the plaintiff is entitled to all arrears of salary as from the date of his purported termination after deduction of the pension so far received by him:

AND LASTLY THIS COURT DOTH ORDER that the defendant do pay the plaintiff the costs of this action.

GIVEN under my hand and the seal of the court this 3rd day of May 1974.

Sd. Yusof Khan bin Ghows Khan

Senior Assistant Registrar,
High Court,
Ipoh.

(SEAL)

No. 6

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 6

Notice of Appeal

9th May 1974

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

Federal Court Civil Appeal No. of 1974

Between

The Government of Malaysia APPELLANT

- and -

Mahan Singh s/o Manggal Singh RESPONDENT

(In the Matter of Civil Suit No.296 of 1971
In the High Court in Malaya at Ipoh

Between 10

Mahan Singh s/o Manggal Singh PLAINTIFF

- and -

The Government of Malaysia DEFENDANT)

NOTICE OF APPEAL

TAKE NOTICE that the Government of Malaysia, the Appellant abovenamed being dissatisfied with the decision of the Honourable Mr. Justice N. Sharma delivered at Ipoh on 3rd May, 1974, appeals to the Federal Court, Malaysia, against the whole of the said decision. 20

Dated this 9th day of May, 1974.

Senior Federal Counsel
for and on behalf of the Appellant

To:

(1) The Chief Registrar,
Federal Court of Malaysia,
Kuala Lumpur.

(2) The Senior Assistant Registrar,
High Court,
Ipoh. 30

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 6

Notice of Appeal

9th May 1974 (continued)

(3) Messrs. Lim Kean Chye & Co.,
12 Jalan Station,
Ipoh, Perak.

(Solicitors for the Respondent)

Appellant's address for service is c/o Attorney-General's Chambers, Kuala Lumpur.

No. 7

Memorandum of Appeal

2nd July 1974

No. 7

MEMORANDUM OF APPEAL

The Government of Malaysia, the appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Mr. Justice N. Sharma given at Ipoh High Court on 3rd May 1974 on the following grounds:-

1. The learned trial judge was wrong in law in holding that the order of termination of service in this case was a dismissal notwithstanding that the said order was made under Regulation 44 of the Essential (General Orders, Cap.D) Regulations 1969.

2. The learned trial judge erred in law in holding that the procedure specified in Part II of the Essential (General Orders Cap.D) Regulations 1969 should be adopted in the termination of the Plaintiff's service.

3. The learned trial judge misdirected himself in limiting the circumstances under which compulsory retirement could not attract any penal consequent.

4. In holding that the termination of service in this case stood in the same footing as dismissal the learned trial judge misdirected himself as to the meaning of the term "dismissal" in law.

5. In holding that the termination of service in this case amounted to a dismissal, the learned trial judge misinterpreted the scope of the said Regulation 44 under which the order of termination was made.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 7

Memorandum of Appeal

2nd July 1974 (continued)

6. The learned trial judge misdirected himself when he wrongly inferred that there was an imputation against the character of the Plaintiff in the order of termination.

7. The learned trial judge had no basis to hold that there had been an abuse and colourable exercise of the discretionary power conferred under the said Regulation 44.

8. After having held that the Essential (General Orders Cap.D) Regulations 1969 were valid and not ultra vires the Constitution or Emergency (Essential Powers) Ordinance No. 1 of 1969, the learned trial judge erred in law in holding that the termination of service made under the said Regulation 44 was null and void.

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9. The learned trial judge erred in law in taking into account the following matters which he could not properly have taken into an account:

(a) that a mere clerk in the public service could not possibly be deemed to hold a service which is essential to the life of the community;

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(b) that the powers granted under an emergency legislation could not be validly exercised when the condition of war had in the opinion of the Court ceased to exist.

10. The conclusion of the learned trial judge in holding that the provisions of Regulation 44 were in violation of Article 8(1) of the Constitution was misconceived.

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11. The learned trial judge erred in law in holding that Article 39 of the Constitution created a bar to any delegation of power by the Yang di-Pertuan Agong.

12. The learned trial judge erred in law in holding that there had been a delegation of the legislative power of the Yang di-Pertuan Agong pursuant to section 8 of Essential Powers Ordinance, No. 2.

Dated this 2nd day of July, 1974.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 7

Memorandum of Appeal

2nd July 1974 (continued)

Sd. Lim Beng Choon,
Senior Federal Counsel for
and on behalf of the Appellant

To:

(1) The Chief Registrar,
Federal Court of Malaysia
Kuala Lumpur.

(2) The Senior Assistant Registrar,
High Court,
Ipoh.

10 (3) Messrs. Lim Kean Chye & Co.,
12 Jalan Station,
Ipoh, Perak.

(Solicitors for the respondent)

Appellant's address for service is c/o Attorney-General's Chambers, Kuala Lumpur.

No. 8

Judgment of Suffian, Lord President

3rd May 1975

No. 8

Judgment of Suffian, Lord President

Coram: Suffian, L.P., Malaysia;
20 Lee Hun Hoe, C.J. Borneo;
Ong Hock Sim, F.J.

(read by Ong, F.J.)

The plaintiff joined Government service on 15th February, 1947, as a Clerk and Punjabi Interpreter. On 1st October, 1949, he was put on the permanent establishment. He served as Registrar of the Sessions Court from 1st April, 1961, to 30th November, 1969. On 1st December, 1969, he was transferred to the office of the
30 Special Commissioners of Income Tax at Kuala Lumpur.

While he was working with the Special Commissioners of Income Tax, a report dated 3rd January, 1970, on his conduct and work was received by the Director of Public Services Department from the Secretary to the Ministry of Justice under regulation 44 of the Public

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Judgment of Suffian, Lord President

3rd May 1975 (continued)

Officers (Conduct and Discipline) (General Orders, Cap D) Regulations, 1969 published on 29th July, 1969, as P.U.(A) 273, hereinafter referred to as Cap.D. That report is privileged under section 123 of the Evidence Act and no copy was ever supplied to the plaintiff. The Secretary to the Ministry of Justice was the head of the department in which the plaintiff had served immediately prior to his transfer to the Special Commissioners of Income Tax. 10

The report was referred to the Director of Operations, who agreed to the termination of the plaintiff's service under regulation 44 of Cap.D.

Exhibit A7

On 20th March, 1970, when the head of the plaintiff's department was the Chairman of the Special Commissioners of Income Tax, a letter (Exhibit A7 at page 157 of the Appeal Record) was written by the Director of the Public Services Department to the plaintiff informing him that his service would be terminated under 20 regulation 44 of Cap D as soon as he had taken all the leave for which he was eligible and that his pension will be worked out according to the Pensions Ordinance, 1951. An English translation of that letter reads:

Exhibit A8

"JPA.SULIT N P/7046/SJ.13/13

Public Services Commission,
Malaysia,
Rumah Persekutuan,
Jalan Sultan Hishamuddin, 30
Kuala Lumpur.

20th March, 1970.

(Promotion and Discipline Section)

Sir,

I have been directed to inform you that in the exercise of the power conferred under section 10(d) of the Pensions Ordinance, 1951, the Government has decided to Pension you off in the Public Interest. According to Regulation 44 of 40 the Public Officers Regulations (Conduct and Discipline) (General Orders, Cap "D") 1969 your service will be terminated as

soon as you have taken all the leave for which you are eligible.

Your eligibility for pension will be worked out according to the Pensions Ordinance, 1951.

Yours obediently,

(Sgd.) (Tan Sri Syed Zahiruddin b. Syed Hassan)

Director of Public Services Malaysia.

10

Enche Mahan Singh,
Office of the Special Commissioner,
Income Tax,
Kuala Lumpur."

It should be noted that the plaintiff was born on 27th May, 1921, and was not yet 49 when he received A7. Normally under the Pensions Ordinance he could have worked until age 55 when he would have retired with a bigger pension. He wanted to work until age 55. So he appealed to the Director of Public Services, Malaysia. A translation of his appeal is as follows:-

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"(Confidential)

Exhibit A12

Mahan Singh,
Setiausaha,
Pejabat Pesurohjaya Khas
Chukai Pendapatan,
Bangunan Sharikat Polis.

3rd April, 1970.

30

The Chief Registrar,
High Court Registry,
The Law Courts,
Kuala Lumpur.

Through:

Chairman,
Special Commissioners Income Tax,
Kuala Lumpur.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Judgment of Suffian, Lord President

3rd May 1975 (continued)

Sir,

I have the honour to forward herewith a copy of the letter JPA.Sulit NP/7046/SJ. 13/13 dated 20th March, 1970 from the Director of Public Services, Malaysia which was received on 31st March, 1970 for your views. I shall be grateful if you will forward my grounds of appeal to the Director of Public Services, Malaysia:

(a) I was taken by surprise in receiving this letter. I do not know at all that something was going on behind my back. I was not given any opportunity to explain and to clear myself from any allegation against me. 10

(b) I have been in the Government Service for 23 years honestly and diligently, even up to this very moment my annual confidential reports from various Presidents of the Sessions Court can be referred to. 20

(c) I have 9 children (4 by my 1st wife who had passes away) and 5 by my present wife. In February last year my eldest son left for United Kingdom to study law and I am the sole supporter of all my children, who are still schooling in various schools in Ipoh.

(d) I wish to state also that I am unlucky as my present wife is sickly and had been attending the mental clinic since 1962. 30

(e) As far as I can remember I have not committed any offence and offended anybody during my service. During my term of office as Registrar, Sessions Court, I performed my duty straight forward and impartial. I believe that a certain person held a grudge against me and started making false report. 40

(f) I will be attaining the age of 49 in June 1970. I intend to bring up my family properly. I have just reached

the maximum salary of my appointment.

(g) I was thinking that when I am old my financial problem will be lessened. I came to my position as it is now by working hard and diligently. On receiving this letter asking me to retire make all my plans shattered away.

On the ground stated above I appeal to you to reconsider and to allow me to carry on working until such time when my eldest son returns from United Kingdom after being qualified in his law study. He is depending solely on me and after that I will voluntarily retire. At present it is difficult for me to get loan from my relative or friends.

Thank you.

I have the honour to be,
Sir,
Yours obediently,

Sgd. Mahan Singh."

There was no change in the decision of Government.

A few months later the Secretary, Minister of Justice, received a letter A20 29th July, 1970, from the Director of Public Services, informing him that the Yang Dipertuan Agung had approved the grant of pension benefits to the plaintiff but subjects to a deduction of 10% as if he had retired on the ground of his health. A translation of that letter reads as follows:-

Exhibit A20

"JPA Sulit.7046/SJ/13/20.
29th July, 1970.

The Secretary,
Ministry of Justice,
Kuala Lumpur.

Sir,

Pensioned off in the Public Interest
Enche Mahan Singh, Senior Registrar,
Sessions Court

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Judgment of Suffian, Lord President

3rd May 1975 (continued)

I am directed to refer to your letter KK/Sulit/O.169/20 dated 3rd January, 1970 about the above subject and to inform you that Duli Yang Maha Mulia Seri Paduka Baginda Yang Dipertuan Agong has graciously approved the pension benefits be granted to Enche Mahan Singh, Senior Registrar, Sessions Court of which he is eligible to receive as if he is to be pensioned off on the grounds of his health with deduction of 10% of the pension benefit. 10

According to the decision of para. 1 above you may now take action and arrange for the payment of the pension benefit to the above- mentioned officer.

Yours obediently,

Sgd. (Mohd. Affendy bin Hanafiah) for Director of Public Services, Malaysia."

On 29th December, 1971, the plaintiff brought a suit in the High Court at Ipoh against the Government. In his Statementof Claim he complains that he was condemned unheard, that he was not given an opportunity to defend himself nor told why his service had been terminated. He contends that regulation 44 is null and void and ultra vires the provisions of Ordinance No. 1 of 1969 and article 150 of the Constitution. 20

He asks for a declaration that -

Exhibit A7

(1) the letter of 20th March, 1970 (exhibit A7) was void as it failed to comply with section 10(d) of the Pensions Ordinance and with regulation 44 of Cap D; 30

(2) if that letter is valid, it was an attempt to circumvent article 135(2) of the Constitution and is void because of non-compliance with the article; and

(3) the termination of his service was void because of non-compliance with the rules of natural justice. 40

He claims ancillary relief.

The defendant maintains that the plaintiff was not dismissed within the meaning of article 135(2) of the Constitution, that his service was merely terminated in accordance with regulation 44, that he was lawfully retired under section 10(d) of the Pensions Ordinance 1951 and that it was therefore not necessary to give the plaintiff a reasonable opportunity of being heard before his service was terminated.

10 The defendant denies that regulation 44 was ultra vires the provisions of Ordinance No. 1 of 1969 and article 150 of the Constitution .

Finally the defendant contends that the plaintiff's action, not having been commenced within 12 months from the termination of his service, is time-barred by section 2(a) of the Public Authorities Protection Ordinance, 1948. This defence was abandoned at the commencement of the trial.

20 Hearing of the plaintiff's claim began on 18th September, 1973. It went on for 6 days. The evidence itself was short and most of the time of the court was taken up by arguments on the law.

On 3rd May, 1974, the learned trial judge gave judgment in favour of the plaintiff.

The Government appeals to us.

The main issue in this appeal is whether the purported termination of the plaintiff's 30 service by the Government in these circumstances was lawful.

As regards the first declaration sought by the plaintiff, namely that the letter A7 was void as it failed to comply with section 10(d) of the Pensions Ordinance and with regulation 44 of Cap D, section 10 of the Ordinance reads:

Exhibit A7

"10. It shall be lawful for the Yang di-Pertuan Agong in the case of a Federal 40 officer [which the plaintiff was]........ to require any officer to retire from the public service in the Federation -

(a) who, in the case of a male officer in the public service in the Federation at the commencement of this Ordinance, has attained the age of fifty-five years, and in any other case has attained the age of fifty years if a man or forty-five years if a woman; or

(b) who, being a police officer below the rank of Assistant Superintendent, prison officer below the rank of Superintendent, or a male nurse at a Government mental hospital, has attained the age of forty-five years; or

(c) who appears to the Yang di-Pertuan Agong or the Ruler, as the case may be, to be incapable, by reason of some infirmity of mind or body likely to be permanent, of discharging the duties of his office; or

(d) on the termination of his employment in the public interest; or

(e) who, being a woman, is married or marries; or

(f) on the abolition of his office; or

(g) for the purpose of facilitating improvement in the organisation of the department to which he belongs by which greater efficiency or economy may be effected; or

(h) on the ground of national interest."

The Yang Dipertuan Agung may by law delegate any of his functions under that section, but it is admitted that he has not delegated his power under paragraph (d).

Regulation 44 of Cap D reads:

"44. (1) Notwithstanding these General Orders, where it is represented to or is found by the Government that it is desirable that any officer should be required to retire from the public service in the public

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8th May 1975 (continued)

interest or on grounds which cannot suitably be dealt with by the procedure laid down in these General Orders, the Government may call for a full report from the Head of Department in which the officer is serving. The said report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

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

(3) If after considering the report or (in the case of the Government having communicated to the officer as in paragraph (2)) after giving the officer an opportunity of submitting a reply to the complaints the
20 Government is satisfied that having regard to the conditions of the services, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.

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

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

40 It is argued on behalf of the plaintiff first that under section 10(d) of the Pensions Ordinance only the Yang Dipertuan Agung has power to terminate the plaintiff's service in the public interest, whereas the letter A7 stated that it was the Government that had decided to so retire him; and secondly that

Exhibit A7

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under regulation 44, Cap D, the Government must be satisfied that it was desirable to terminate the plaintiff's service in the public interest when so terminating it, whereas the letter merely stated that his service would be so terminated without saying that Government had been satisfied that it was desirable to so terminate his service.

With all due respect I do not think that there is anything in this point. First, it is quite clear that at the material time there were two concurrent authorities with power to terminate a public officer's service in the public interest: 10

(a) the Yang Dipertuan Agung under section 10(d) of the Pensions Ordinance; and

(b) the Government under regulation 44, Cap D.

Exhibit A7

The letter A7 shows quite clearly that in this case the decision to terminate the plaintiff's service in the public interest was taken by Government which also had power to do so. The reference in it to the Yang Dipertuan Agung is merely to indicate that the plaintiff, despite the termination of his service, would get a pension under the Ordinance. 20

Secondly, I agree that that letter might have been more happily worded, but nevertheless I am of the opinion that it should be read as a whole, and I hold that when read as a whole it plainly did two things: 30

(a) it notified the plaintiff that Government had decided to terminate his service; and

(b) that his pension would be worked out in accordance with the Pensions Ordinance.

As regards (a), I do not think that the notification invalidated the decision because the letter plainly implied that Government must have been satisfied that it was desirable to so terminate the plaintiff's service in the public interest: otherwise Government would not have so decided. As regards (b), though A7 nowhere mentioned the Yang Dipertuan Agung, letter A20 certainly did, and when the two letters are read 40

Exhibit A7

Exhibit A7

together as they should be, then it is clear that it was a decision of the Yang Dipertuan Agung also that his service be terminated in the public interest: otherwise, he would not have got any pension at all. The use of the word "retire" in section 10 is to enable officers required to retire under that section to be paid a pension. The scheme of the pension laws is such that the word "retire" is used in contrast to the words "resign", "dismiss" and so on, for it is only officers who retire who are paid a pension, not officers who resign, are dismissed, and so on.

As regards the second and third declarations sought by the plaintiff, namely that if letter A7 did comply with section 10(d) of the Pensions Ordinance and regulation 44 of Cap D, nevertheless it was void as it contravened article 135(2) of the Constitution and the plaintiff had been dismissed without having been given a reasonable opportunity of being heard, clause (2) of article 135 reads:

> "(2) No member of such a service as aforesaid [which the plaintiff was] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

Briefly the argument on behalf of the plaintiff on this point may be summarised as follows. The Malaysian cases decided so far on the meaning of the word "dismissed", such as Haji Ariffin (1969) 1 M.L.J.6, Gnanasundram (1966) 1 M.L.J.157 and Lionel (1974) 1 M.L.J. 1, involved temporary or contract officers who were not on the pensionable establishment; the plaintiff on the contrary was on the pensionable establishment and, being a permanent officer, he had a right to his post; when his service was terminated he was deprived of a right, and this deprivation amounted to a punishment; as a punishment was involved, he should have been given a reasonable opportunity of being heard as required by article 135(2); and as he was never given that opportunity, his dismissal was therefore void.

It is true that our courts have not so far decided the question whether the termination of the service of a pensionable officer is or is not dismissal within the scope of article 135(2), but

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with all due respect I do not think that in Malaysia a pensionable officer has a right to his post, unlike the position in India where there are many Supreme Court decisions to the contrary, saying that a pensionable officer has a right, a lien, even title to his post equivalent to property. Passages from some of these decisions to that effect have been reproduced in the learned trial judge's judgment, and there is no need for me to reproduce them. 10

With all due respect I think that the law here is as stated by me at page 16 in Haji Ariffin's case (supra):

> " In India 'semi-permanent service' and 'permanent service' are defined by the Indian General Orders - as it would appear from the Indian law reports - and a semi-permanent or permanent officer has a 'right' to his post. I think that is what is meant by the expression 'it has 20 ripened to a semi-permanent post' which occurs in Dhingra's case A.I.R.1958 S.C. 36 in paragraphs 12 and 26. I do not know what is meant by a right but if it exists it must flow from the Indian service rules which I regret I have not seen, because the Indian Constitution does not say that the ordinary public officer has a right to any post in the Indian public service.
>
> Here in Malaysia there is no such thing 30 as permanent service, though the expression is much used by Government servants - there is no such thing as permanent service because every member of the public service (other than Judges and the Auditor-General) holds office during the pleasure of the State. This was so before independence (see Terrell's case 1953 2 Q.B.482 and section 5 of the Pensions Ordinance which explicitly says that Government has the right to dismiss 40 a public officer without paying compensation). Terrell was told before he became a judge in the then Straits Settlements that the compulsory retiring age for a judge was 62. He was compulsorily retired before that age and sued the Secretary of State. Lord Goddard C.J. said at page 500 that Terrell could not argue (as he did) that he had a

contractual right to remain in the service till that age, because such an argument would in effect override all the cases which decided that a servant of the Crown held office at pleasure. This selfsame argument had been put forward in Shenton v. Smith 1895 A.C.229 and rejected by the Privy Council."

Before independence the legal position of public servants vis-a-vis the Ruler of Kedah was considered by the Kedah Court of Appeal as early as in 1927 in S.K.Pillai v. State of Kedah 6 FMSLR 160, 170. There the plaintiff, a minor P.W.D. official, had been placed on the "fixed" establishment on 23rd December, 1922. The State Engineer was not quite happy with the plaintiff's work, and also the plaintiff got embroiled in squabbles relating to the administration of a new Hindu temple at Sungei Patani; and there was correspondence between the plaintiff and the P.W.D. Then on 7th December, 1925, the plaintiff was dismissed by the State Government. He sued the State Government for damages for wrongful dismissal. He lost before Dinsmore J. and again in the Kedah Court of Appeal, which held that a public servant in Kedah like a public servant in the F.M.S. and the Straits Settlement held office at pleasure only and by the terms of his engagement had no legal right as against the Crown to continuity of employment, promotion or pension. In the Court of Appeal Sproule J., proceeding on the basis that the plaintiff was on the pensionable establishment, said at pp.165-6:

> " It seems to me, however, both upon reasoning and authority, that the power to dismiss a public servant of the Colony at will does not depend upon the prerogative at all, but upon rules of contract and of public policy. The Privy Council explicitly so held in the case of Shenton v. Smith (1895) A.C.229 at p.234, where it is stated that Their Lordships
>
> > consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service.

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3rd May 1975 (continued)

It comes to this, then, that a contract of service with the Crown is to be construed as containing an implied term, well known to all public servants, that they hold [? office] at pleasure only. That rule of construction is so well settled that no authority acting under or representing the Crown itself, has any power to exclude or depart from it. See Dunn v. The Queen (1896) 1 Q.B. at p.118, per Lord Esther, M.R.; Gould v. Stewart (1896) A.C. at p.577; and Grant v. Secy. of State for India L.R.2 C.P.D., 445.

This rule is based not upon the prerogative, but rather on public policy. Such employment being for the good of the public, must not continue when it is no longer for the public good. It is essential for the public good that the Crown should not be hampered in dismissing a servant whose continuance in office it deems to be detrimental to the best interests of the State and its good government, by any fear of suits in reprisal (Dunn v. The Queen at p.120; Shenton v. Smith at p.235). Such continuance in office may, indeed, be a danger to the Commonwealth (per Kay, L.J. in Dunn v. The Queen.)

I think it is clearly our duty, in the absence of any statute or custom, to apply in Kedah this fundamental rule of public policy and good government. We must hold that into all contracts of service under the State must be read an implied term, well known to all public servants, that they hold office only during pleasure and are dismissible at will, without any right or recourse to suit for salary or pension or for damages for wrongful dismissal."

In the next paragraph the learned judge added:

"....... just as no authority under the Crown has power to restrict or dispense with the rule, so no regulations or general orders lacking the force of statute can avail to create any such dispensation."

Stevens J. was quite emphatic that the plaintiff had no legal right as against the Crown to continuity of employment, promotion or pension. He said at page 169-171:

" The trial Judge has based his judgment on the view that the well-known principle that servants in the employment of the British Crown hold their appointments at the pleasure of the Crown should be imported (if I may use the term) into this State, and made applicable to the relations of the Sultan of Kedah with the servants of his Government. He supports this view by reference to a number of cases in which Judges of the Federated Malay States have thought fit to apply principles of English law to the matters before them, and by the consideration that the adoption of the principle referred to will be in the public interests of the State. I am disposed rather to hold that the question for determination must be - what is in fact the existing relation between the Sultan and his servants - and that this question cannot be determined by assuming that a condition applicable to service under the British Crown is applicable to service under the Sultan of Kedah, prima facie the constitutional law of Great Britain, which is peculiar to Great Britain, is wholly unadaptable to the widely different institutions of a Malay State.

It is necessary to consider what is the nature of the contract (if it can be so called) entered into between a public servant and the British Crown. Now a public servant on accepting an appointment under the British Crown is in general appointed for no defined period. The Crown does not bind itself either to retain his services or to grant him increased pay or promotion. But it is the custom to bring to his notice that he may expect, if he remains in the service, promotion to higher grades accompanied by increased emoluments, and ultimately on retirement (at an age that is not infrequently specified) a pension to be enjoyed for the remainder of his life. Such an arrangement is not a binding contract of service such as is usually made between a

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private employer and his servant. It confers no rights on the servant, but rather offers him an expectation of reward if his services are found to be satisfactory; and the inducement to the servant to embrace such a career lies not in any contractual rights acquired, but in the circumstances that it is in the public interest that public servants should look forward with confidence to the fulfilment of the expectations held out, and that for the most part those expectations are in fact fulfilled. In practice it is well-known that the service of the Crown is accompanied by a greater degree of security of tenure than almost any other employment.

10

Now the appellant in this case is a member of one of the subordinate branches of the State service, and the conditions of his employment appear to me to be closely parallel to those applying to similar appointments in the Federated Malay States and the Colony of the Straits Settlement. In this State, as in the Colony and the Federated Malay States, it is the custom to publish by order of the executive, what are called 'schemes setting out the appointments open to servants of the department concerned, the salary payable to the holders of those appointments, and the conditions governing promotion to higher appointments. Officers whom the Government select as fit for permanent employment are invited to take their places on what is called the permanent establishment, which embraces appointments generally made pensionable, by which is meant that the holders of such appointments become entitled on retiring from the service to expect a pension on a definite scale laid down by statute.

20

30

40

But it is to be noted that no right to a pension is conferred. The Pensions Enactments definitely so provide, and the prospect of a pension is on precisely the same footing as the prospect of continued employment or that of promotion. Apart therefore from all considerations of law, it is apparent that such an arrangement as I have outlined does not confer on public servants a legal

right as against the Crown to continuity of employment, promotion or pension. This proposition is so securely established that it is needless to cite any authority for it.

Now the employment of the appellant being apparently on the terms above described, it appears to me that, quite apart from constitutional principles, he has in fact acquired no contractual right to remain longer in the service of the State than the State chooses. His position would appear to be precisely similar to that of public officers in the service of the other Governments above referred to."

Such being the legal position of public servants as against the Crown before independence, to say that after independence they have on being placed on the pensionable establishment a right, a lien or a title to their job is to say that since independence there has been a radical change in the law. I would have expected our constitution-makers to use the clearest of language if they had intended to make such a radical change, but what do we find? We find that clause (1) of article 176 provides that premerdeka officers such as the plaintiff shall after Merdeka Day serve on the same terms and conditions as were applicable to them immediately before merdeka. It reads:

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

Then to remove any doubt, in 1960 clause (2A) was added to article 132 reading as follows:

> " (2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (e), (f) and (h) of Clause (1) [such as the plaintiff] holds office during the

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pleasure of the Yang di-Pertuan Agong and, except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Governor."

In my judgment it is plain from all this that the pre-Merdeka law as expounded by Pillai's case 6 FMSLR 160, 170 still applies after Merdeka Day, so that a public servant today has no legal right as against the Crown to continuity of employment, promotion or pension. 10

As regards pension, subsection (1) of section 5 of the Pensions Ordinance No. 1 of 1951 which is still in force expressly provides:

> "5. (1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance, nor shall anything in this Ordinance contained limit the right of the Federal Government or, as the case may be, of the Government of any State or Settlement to dismiss any officer without compensation." 20

I find support for my view in a Singapore case, the Amalgamated Union of Public Employees v. Permanent Secretary (Health) (1965) 2 M.L.J. 210 where Winslow J. said at page 212:

> " It is no doubt true that article 135 of the Federal constitution confers certain rights on civil servants but these relate to matters such as the manner in which or by whom they may be dismissed. They do not confer any right to office or to pension or any right not to be dismissed." 30

In view of the above, I would with all due respect to learned counsel for the plaintiff hold on to the view which I expressed in Ariffin (1969) 1 M.L.J.6 which was decided without reference to Pillai's 6FMSLR 160, 170 and the Singapore case (1965) 2 M.L.J.210. 40

With respect, the legal position here is the same as it would have been in India if the minority view at page 638 of Shah J. in Moti Ram

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3rd May 1975 (continued)

v. N.E. Frontier Railway A.I.R. 1964 S.C.600 had been accepted by the Indian Supreme Court. This is what he said:

> "(131). The argument that on being appointed to a public service, the employee acquires right to continue in employment, proceeds upon a misconception of the nature of the appointment to a public post. Appointment to a public post is always subject to the pleasure being restricted in the manner provided by the Constitution. A person appointed substantively to a post does not acquire a right to hold the post till he dies, he acquires thereby merely a right to hold the post subject to the rules, i.e., so long as under the rules the employment is not terminated. If the employment is validly terminated, the right to hold the post is determined even apart from the exercise of the pleasure of the President or the Governor. There is in truth no permanent appointment of a public servant under the Union or the State. Nor is the appointment to a public post during good behaviour, i.e., a public servant cannot claim to continue in office so long as he is of good behaviour. Such a concept of the tenure of a public servant's office is inconsistent with Arts. 309 and 310 of the Constitution."

I am of the opinion that the cardinal principle obtaining here during British rule lasting about 125 years that a public servant holds office at the pleasure of the Crown, is an important principle that should not be whittled away in the absence of express statutory words whittling it, for as stated by Sproule J. in Pillai's case 6FMSLR 160,170 government employment being for the good of the public, it must not continue when it is no longer for the public good; it is essential for the public good that the Crown should not be hampered in dismissing a servant whose continuance in office it deems detrimental to the best interests of the State and its good government, by any fear of suits in reprisal; indeed such continuance in office may be a danger to the community. The only amendment I would make to the above observation is that in the light of our Constitution, these days dismissal must comply with article 135.

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In the light of Munusamy's case (1967) 1 M.L.J. 199 a decision of the Privy Council, it is common ground that if the purported termination of the plaintiff's service involved punishing or penalising the plaintiff, then it would amount to dismissal within the scope of article 135(2).

Lionel's case (1974) 1 M.L.J.3, a recent Privy Council decision, lays down quite clearly that in Malaysia too, as in England, there is a clear distinction between dismissal and mere termination of service. There the plaintiff could have been dismissed only by the Public Services Commission, but his service was terminated not by the P.S.C., but simply by the Johore C.P.O. purporting to act under regulation 36 of the Cap D then in force (gazetted as L.N. 432 of 1956). The plaintiff argued that in fact he had been dismissed and as he had been dismissed by the wrong authority his dismissal was void. The Government on the other hand argued that he he had not been dismissed but only had his service terminated, which could validly be done by the C.P.O. The Privy Council agreed with the Government. After examining regulation 6 of Cap A and regulations 33, 36 and 48 of Cap D, Viscount Dilhorne giving the advice of Their Lordships said at page 5:

> " Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of services [also] appears to exist ..... "

Accordingly Their Lordships advised that the purported termination of Lionel's service was simple termination, not dismissal, and that therefore the C.P.O.'s decision was lawful.

The Cap D with which we are concerned also maintains a distinction between dismissal and termination of service. For instance, regulations 27, 29, 30, 32, 33, 34, 35, and 36 refer to dismissal. Regulation 44 under which Government purported to terminate the plaintiff's service, on the other hand, refers four times solely and simply to termination of service.

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3rd May 1975 (continued)

It seems to me that this distinction as regards public servants is somewhat blurred in India because the Indian constitutional provision corresponding to our article 135(2) uses the word "dismissal" and another word "removal" which does not appear in ours.

The plaintiff contends that anybody reading (a) the letter A7 which, as its heading showed, emanated from the Promotion and Discipline Section of the Public Service Commission and referred to the Government having decided to retire the plaintiff in the national interest, and (b) the letter A20 which stated that the plaintiff's pension benefit had been reduced by 10%, would think that somehow the plaintiff had left the service under a cloud, that this cast a stigma on him, that the Government meant to punish him, that the purported termination was in law dismissal and that on the authority of Munusamy v. P.S.C. (1967) 1 M.L.J.199 he should have been given a reasonable opportunity of being heard under article 135(2). With all due respect, considering that pensions are only an eligibility and not a right and indeed may be withheld altogether, and considering that the letter expressly stated that the plaintiff could take all leave due to him and would also get a pension, I do not think that any one reading the two letters (which give no reason why the plaintiff's service was terminated) would necessarily conclude that the plaintiff had been punished. With respect I would agree that the law is as stated by Ray J. (as he then was) when he said at page 2156 in State of U.P. v. Shyam Lal A.I.R.1971 S.C.2151:

Ex.A7

Ex.A20

> " Where the authorities can make an order of compulsory retirement for any reason and no reason is mentioned in the order it cannot be predicated that the order of compulsory retirement has an inherent stigma in the order."

As already stated, the letter A7 refers to the plaintiff having been retired in the public interest under section 10(d) of the Pensions Ordinance, 1951. If one looks at that section, one will find that public servants who retire at age 55 with a pension (as most of them do) are required to retire under para.(a) of that section.

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Similarly the Yang Dipertuan Agung may require the following to retire under that section:

(1) certain police and prison officers and certain male nurses on reaching age 45 (under para.(b));

(2) officers suffering from infirmity of mind or body (under para.(c))

(3) a woman officer who marries (under para.(e));

(4) an officer whose office has been abolished (under para.(f)); 10

(5) any officer as a result of reorganisation (under para.(g)); and

(6) any officer in the national interest (under para.(h)).

Nobody in his right mind would say that such officers, if and when called upon to retire, have left the service under a cloud, and that they have been dismissed, though it is true that they have been removed from office; but removal from office is not necessarily dismissal. The 20 plaintiff had his service terminated under para.(d) of the same section 10 and I do not think that it can be said that there was any stigma attached to his departure from government service. Therefore I would rule, respectfully disagreeing with the learned trial judge, that the plaintiff, though removed from office, had not been dismissed.

I now turn to other arguments advanced before us on the plaintiff's behalf. 30

It is argued that clause (6) of article 150 saves only laws, but not acts meaning decision, inconsistent with the Constitution; that even if regulation 44 applied, the Government's act here was unlawful because the plaintiff had a right to appeal to the Board established by the Public Services Disciplinary Board Regulations, 1967, published as P.U.292 on 1st July, 1967, which had not been superseded by the Cap D in question; that the plaintiff wrote the letter 40 dated 3rd April, 1970, and Government did not reply to that letter thereby implying that it

had denied the plaintiff his right of appeal. If this had been a genuine complaint, the plaintiff should have pleaded it, so as to give Government a chance to produce evidence to rebut the allegation; he did not do it and I think that it is too late for him to raise it before us.

It is argued that there should be read into regulation 44 a requirement that before an officer's service is terminated he should be given a reasonable opportunity of being heard. It is said that this is required by the very language of that regulation. I agree, but only where Government acts under sub-regulation (2) of that regulation, which was not the case here. Where Government does not act under that sub-regulation, there is no need to give an officer a hearing.

It is argued that regulation 44 being made by the Director of Operations is invalid if inconsistent with the Constitution, because clause (6) of article 150 which reads:

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

allows only the Yang Dipertuan Agung and Parliament to make laws inconsistent with the Constitution, but not the Director of Operations. With all due respect, I do not think there is any merit in this argument, for the simple reason that in my judgment regulation 44 is not inconsistent with the Constitution where the cardinal principle stated is that a public servant holds office at pleasure.

It is argued that the Yang Dipertuan Agung may delegate only part of his power (see Eng Keock Cheng(1966) 1 M.L.J. 18,20; that by subsection (1) of section 2 of the Emergency (Essential Powers) Ordinance No. 2 of 1969 published as P.U.(A)149 on 17th May, 1969, His Majesty purported to delegate all his power to the Director of Operations;

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Judgment of Suffian, Lord President

3rd May 1975 (continued)

that this purported delegation amounts to an abdication of His Majesty's power and is invalid, and accordingly regulation 44 made by the Director of Operations in purported exercise of power delegated to him, is void. With all due respect, I do not think there is any merit in this argument. If His Majesty may delegate part of his power he may delegate all of it, and there is no question of abdication in the instant case: after promulgating Ordinance No. 2 of 1969 His Majesty remained Yang Dipertuan Agung, still retained such power as he might have wished to exercise; and indeed has since then by P.U.(A) 62/71, section 3, in exercise of his royal power repealed that Ordinance.

It is argued that as the report on the plaintiff's conduct and work was dated 3rd January, 1970, when he had been with the Special Commissioners of Income Tax only one month and three days, it could not have been written by his then head of department; that it must have been written by his former head of department, the Secretary to the Ministry of Justice, that therefore the Government could not have terminated his service on the basis of that report, because regulation 44, sub-regulation (1), required that such a report should have been called by Government from the head of department "in which the officer is serving"; and as Government did terminate the plaintiff's service on the basis of that report, the said termination was unlawful. With all due respect, I do not think that there is any merit in this argument. In my judgment the word "is" should be read to mean "is or has been," as otherwise Government would be powerless to terminate the service of an officer such as the plaintiff who has recently been transferred to another department. The cardinal principle being that a public servant holds office at the pleasure of the Crown, the courts should not fetter the undoubted discretion of the Crown to terminate the service of the public servant.

To sum up, I am of the opinion that a pensionable public officer has no right, no lien, no title to his post; that regulation 44 is perfectly valid, that Government had power to terminate the plaintiff's service in the public interest under that regulation, that

Government's decision to do so did not involve punishing or penalising him, that accordingly he had not been dismissed and that therefore he was not entitled to a reasonable opportunity of being heard under article 135(2). The plaintiff's claim should have been dismissed. I would therefore allow this appeal. The plaintiff to pay costs here and below. The defendant's deposit to be returned to Government.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Judgment of Suffian, Lord President

3rd May 1975 (continued)

10 Delivered in Kuala Lumpur on 3rd May 1975.

Sd. M. Suffian

(Tan Sri Mohamed Suffian)
LORD PRESIDENT, MALAYSIA.

Notes

1. Separate judgments to the same effect by Hon'ble Lee Hun Hoe, C.J. Borneo, and Hon'ble H.S.Ong, F.J.

2. Arguments in Kuala Lumpur on 12th, 13th, 14th March, 1975.

20 3. Counsel:
   For appellants - Encik Abu Talib bin Othman and Encik Lim Beng Choon;

   For respondent - Encik M. Sivalingam of M/s Lim Kean Chye & Co., Ipoh.

4. Authorities cited:

(1) Ningkan (1968) 1 MLJ 119, 122D.
(2) Ariffin (1969) 1 MLJ 6, 10F, 16.
(3) Dhingra A.I.R. 1958 S.C. 36.
(4) Moti Ram (1964) A.I.R. S.C.600.
30 (5) Munusamy (1964) MLJ 239, F.C.
(6) Munusamy (1967) 1 MLJ 199, P.C.201.
(7) Pillai (1927) 6 FMSLR 160.
(8) Terrell (1953) 2 QB 482.
(9) Lionel (1974) 1 MLJ 3, 4.
(10) Gnanasundram (1966) 1 MLJ 157, 159A.
(11) Ahad (1965) All.142, 147 (para.8).
(12) Mohan A.I.R. 1967 S.C. 1260.
(13) Sharma A.I.R. 1971 S.C. 2153 para.14.
(14) Wong (1968) 2 MLJ 158.
40 (15) Najar Singh (1974) 1 MLJ 138, 141.
(16) Mahmud (1967) 1 A.C. 13.

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Judgment of Suffian, Lord President

3rd May 1975 (continued)

(17) R. v. Kent Police (1971) 2 QB 662,669 E-F.
(18) In re Pergamon Press Ltd. (1971) 1 Ch.388, 399B-400A.
(19) Maxwell (1974) 2 WLR 338.
(20) Furnell (1973) A.C. 660, 680.
(21) Liew (1970) 2 MLJ 174.
(22) Mahadevan (1974) 1 MLJ 2.
(23) Ridge 1964 A.C. 40.
(24) Merricks v. Nett-Bower 1965 1 Q.B. 57, 66G to 67C. 10
(25) Doraisamy v. P.S.C. (1971) 2 MLJ 127.
(26) Kraypak v. U. of India 1970 A.I.R. S.C. 150, headnote (c).
(27) Yajuverdi A.I.R. 1970 Delhi 211, 214.
(28) Oliver (1967) 1 A.C. 115, 136D, P.C.
(29) Liyanage v. Queen (1967) 1 A.C. 259, 291D.
(30) King v. Chapman (1931) 2 K.B. 606.
(31) Guide to Disciplinary Control in the Public Service issued by P.S.C. p.15. 20
(32) Lim Hock Siew (1968) 2 MLJ 219, 220.
(33) Banerji A.I.R. 1945 P.C. 156.
(34) Chhatar Singh A.I.R. 1967 Raj. 194.
(35) Liversidge 1942 A.C. 206.
(36) Rosalind Oh (1973) 1 MLJ 222, 224F to G, 2nd col.
(37) Thambipillai (1969) 2 MLJ 206.
(38) Jayakumar (1969) 2 MLJ lvi, Part IV.
(39) Eng Keock Cheng (1966) 1 MLJ 18.
(40) P.P. v. Ooi (1971) 2 MLJ 108, 113G, 1st col. 30
(41) Huth v. Clarke 25 QBD 391.

Certified true copy

Sd. Wong Yik Ming
Setia-usaha kepada Ketua Hakim Negara
Mahkamah Persekutan
Malaysia
Kuala Lumpur.
19 May 1975.

No. 9

Judgment of Lee Hun Hoe Chief Justice Borneo

3rd May 1975

No. 9 40

Judgment of Lee Hun Hoe, Chief Justice, Borneo

Coram: Suffian, L.P. Malaysia
Lee Hun Hoe, C.J. Borneo
H.S. Ong, F.J.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 9

Judgment of Lee Hun Hoe, Chief Justice Borneo

3rd May 1975 (continued)

I have the advantage of reading the judgment of the Honourable the Lord President with which I concur. I wish, however, to add a few words.

The main question in this appeal is whether the learned judge was right to say that the termination of respondent's services amounted to a dismissal. He relied completely on Indian authorities and held, with respect, wrongly that respondent had a right to his post and that the letter of termination (A8) cast a stigma on respondent. Suffice to say that the Lord President has explained lucidly that in Malaysia a public servant does not have a right to a post and that (A.8) in no way cast any stigma on respondent. If termination involves punishment, then it would amount to dismissal. This is not only the position in India but also in Malaysia. If a public servant has a right to a post, then the mere termination of his services would be regarded as a punishment. Where, however, there is no such right, as in this case, then the termination does not deprive him of any right and cannot, by any stretch of the imagination, be regarded as a punishment. Consequently, the termination cannot be said to amount to a dismissal within the meaning of Article 135(2) of our Constitution and the question of reasonable opportunity to be heard does not arise.

Ex.A8

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That the position in Malaysia is different from that of India has been stated quite clearly in a number of local cases. See Munusamy v. Public Services Commission (1964) 30 MLJ 239 and 243; Haji Ariffin v. Government of Malaysia (1969) 1 M.L.J.6; and Government of Malaysia v. Lionel (1974) 1 M.L.J.3. Thomson, then Lord President, expressed in no uncertain terms in Munusamy's Case (1964) 30 M.L.J.239 and 243 that he could not agree that "the views of the Supreme Court of India regarding the effect of Article 311(2) of the Indian Constitution are very much in point in arriving at a correct interpretation of Article 135(2) of our Constitution." In Ariffin's Case (1969) 1 M.L.J. 6 Suffian, F.J., as he then was, discussed about the pleasure rule. He has now gone ever deeper into this question to show that the pleasure rule has not changed since Merdeka. Munusamy's Case (1964) 30 M.L.J. 239 and 243 went to the Privy Council (1967) 1 M.L.J.199, 202 (P.C.) where

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3rd May 1975 (continued)

their Lordships held that "dismissed" in Article 135(2) reflected an element of punishment. The words "dismissed or reduced in rank or suffered any other disciplinary measure" in Article 135(3) seem to strengthen their Lordships' view that the right to be heard only arises in the case of "dismissal" involving disciplinary offences. After referring to Article 311 of the Indian Constitution and Indian cases, particularly Dhingra's Case (1958) S.C.R.828; A.I.R. 1958 S.C.36, Lord Hodson concluded with these words:- 10

> " The Indian Constitution contains no provision corresponding to Article 135(3) of the Malaysian Constitution which, as has been already stated, strengthens the view that "dismiss" relates to disciplinary action."

Exhibit B.2
Exhibit B.4

In reply to the letter (B.2) from respondent's solicitors the Attorney-General stated (B.4) that disciplinary action was not taken against respondent but he had been pensioned off in the public interest under section 10(d) of the Pensions Ordinance, 1951 and pursuant to Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969. Further, the Attorney-General made clear that the report was privileged and could not, therefore, be supplied to respondent. That the report was privileged was, in fact, conceded by respondent. 20

In Malaysia a public servant is not guaranteed a security of tenure. In other words he has no right to a post. In the case of Government of Malaysia v. Lionel (1974) 1 M.L.J. 3 Viscount Dilhorne, delivering the judgment of the Board, after discussing Articles 135 and 144 of our Constitution stated:- 30

> " So under the provisions of the Constitution, members of the general public service obtained a degree of security of tenure of their appointments. In their Lordships' view it is not correct to say, as Ong, C.J. said in the course of his judgment, that they were guaranteed security of tenure under Part X of the Constitution." 40

He went on to say later:-

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" Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of service appears to exist ....".

I do not have to repeat the provisions of Regulation 44 as these have been set out *in extenso* by the Lord President in his judgment. It was contended that "full report" indicated completeness and it could not be so unless respondent was given a reasonable opportunity to say something otherwise it would infringe the rule of natural justice. In particular, if the report was adverse to respondent he should be told of it. This is so only if the Government requires further clarification. See Regulation 44(2). But, where it is clear and unambiguous and, having regard to various factors the Government is satisfied that it is desirable in the public interest the Government may terminate respondent's services without much ado. So long as the Government acted in good faith in considering the report it must be presumed that the Government was satisfied that it was indeed in the public interest to terminate respondent's services. The Court cannot go behind the report. The procedure, being administrative, rather than judicial the approach has to be on broad lines and cannot be compared with judicial methods and procedure. See *Local Government Board v. Arlidge* (1915) A.C.120: *Ridge v. Baldwin & Ors.* (1964) A.C.40; and *Maxwell v. Department of Trade and Industry* (1974) Q.B.523; The Times, Jan. 26, 1974. Where there is an allegation of breach of natural justice the Court must be concerned with the substance and reality of the situation.

" I always find the expression 'natural justice' very difficult", said Lord Parker, C.J. in *R. v. Registrar of Building Societies* (1960) 1 W.L.R. @ 676. "There is no one code of natural justice which is automatically imported into any procedure of a judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important of

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all, the exact words of the statute, because Parliament may be suitable words, provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. Each case must depend upon the nature of the function and the exact words of the statute."

There is nothing in the pleading to suggest that the Government has acted mala fide. So, respondent cannot now be heard to say that Government has acted mala fide. Since the Government has acted in good faith that would be the end of the matter. On this aspect the learned Judge stated the position correctly at page 68 of the Appeal Record:-

> " Now Regulation 44 of the 1969 Regulations says that Government has the absolute right to terminate the service of a Government servant if it is satisfied that it is in the public interest to do so. If the Government, bona fide, forms that opinion, why and how it formed that opinion and whether that opinion is correct are matters which are not the concern of the Court."

There is one matter I would particularly like to touch on, that is, the contention of respondent that the Yang di-Pertuan Agong cannot delegate his powers under the Constitution. Normally, the power to legislate rests with the Yang di-Pertuan Agong (His Majesty) and the two Houses of Parliament, namely, the Dewan Negara (The Senate) and the Dewan Ra'ayat (The House of Representatives). See Article 44 of the Constitution. But, where as a result of a national crisis an emergency is declared and Parliament is not sitting then the entire power falls on His Majesty. Article 150 makes provisions for such a situation. His Majesty is dutybound to summon Parliament as soon as practicable. As a result of what is now commonly known as the "May 13" incident, His Majesty, in the exercise of the power under the said Article issued a Proclamation of Emergency on 15th May, 1969 in order to safeguard the security and economic life of the nation. Because of the plural society in Malaysia the framers of the

Constitution, in their wisdom and with foresight, had inserted the said Article giving His Majesty absolute power to deal with such a situation. Article 150 reads:-

"150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting the Yang di-Pertuan Agong shallsummon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State, or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution or in the Constitution of the State of Sarawak, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79

shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent. 10

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak. 20

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language. 30

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period." 40

In such a national crises the individuals must suffer some restrictions in the interest of the nation as a whole. The Ordinances promulgated under Article 150(2) would be as valid and binding as those made by Parliament. To prevent any doubt,

Article 150(6) makes clear that any inconsistency between the Ordinances so promulgated and the Constitution the former shall not be declared to be invalid.

On the same day that the said Proclamation was issued, His Majesty, pursuant to Article 150(2), promulgated the Emergency (Essential Powers) Ordinance, No. 1 of 1969 (P.U.(A) 146/69) which empowered him to make essential regulations and which also continued in force the Essential Regulations made under Emergency (Essential Powers) Act, 1964. With commendable wisdom His Majesty acted in accordance with the spirit of the Constitution at a time of extreme national danger. On the following day His Majesty promulgated another Ordinance, that is Emergency (Essential Powers) Ordinance No. 2 of 1969 (P.U.(A) 149/69) under which a Director of Operations was appointed. By section 8 of Ordinance No. 2 of 1969 the said Director was empowered to make Essential Regulations under section 2 of Ordinance No. 1 of 1969. Ordinance No. 2 of 1969 provides for the delegation of executive authority of Malaysia and all the powers and authorities conferred on His Majesty by any written law to the Director. This enabled the Director to make regulations to ensure the effective control of security, defence, maintenance of public order and supplies and services essential to the life of the community. Consequently, until Parliament could be summoned the Director could exercise all executive and legislative powers in Malaysia and in exercising such powers he was not subject to control by Parliament. The only control was that he must act in accordance with the advice of the Prime Minister. Some regulations were thus made by the Director. One of these was the Essential (General Orders, Chapter D) Regulations, 1969 (P.U.(A) 273/69) and in its Schedule the Public Officers (Conduct and Discipline) (General Orders, Chapter) Regulations 1969 were listed and to be applied during the Emergency. Sections 2 and 3 of the Essential (General Orders, Chapter D) Regulations 1969 make the position clear and read:-

" 2. For so long as the state of emergency continues to be in force the provisions of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1968 shall be suspended and the provisions

of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1969 as set out in the Schedule hereto shall have effect in place thereof.

3. For so long as the state of Emergency continues to be in force the disciplinary procedures provided in the General Orders set out in the Schedule hereto shall apply to any breach of contravension of any provision of the Public Officers (Conduct and Discipline) Regulations, 1956 or the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1968 as they apply to any breach or contravension of any provision of the General Orders as set out in the Schedule hereto."

This was not the first occasion when recourse was had to the provision of Article 150. A Proclamation of Emergency existed in the Federation of Malaya for some twelve years when the Government had to deal with communist insurgency. During this period two national elections had taken place. The second occasion arose in 1964 after the formation of Malaysia when a Proclamation of Emergency was issued as a result of Indonesian Confrontation. During both these occasions the State legislatures and Governments continued to function and Parliament sat whenever summoned. Parliament promulgated the Emergency (Essential Powers) Act, 1964. Under this Act His Majesty was conferred with wide powers to make such regulations as he considered necessary to secure public safety, the defence of the nation and the maintenance of public order and of supplies and services essential to the life of the community. The Emergency (Criminal Trials) Regulations, 1964 was enacted. The validity of the said regulations was challenged in the case of Eng Keock Cheng v. Public Prosecutor (1966) 1 M.L.J. 18, 21. One of the contentions was that the 1964 Act amounted to abrogation by Parliament of its powers to legislate. This contention was rejected by the Federal Court.

The third occasion a Proclamation of Emergency was issued by His Majesty was in 1966 as a result of a grave political crisis in Sarawak threatening the security of the State. The validity of the Proclamation was challenged in the case of Stephen Kalong Ningkan v. The

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The Government of Malaysia (1968) 2 M.L.J.238. The Privy Council held the Proclamation to be ultra vires and valid and considered that the continuing existence of earlier Emergency Proclamations or Acts (whether under Article 149 or Article 150 of the Federal Constitution) could not in the circumstances justify a different conclusion. The emergency, the subject of the appeal, was distinct in fact and kind from those that preceded it and the powers conferred by Article 150 were in being and not spent when it arose.

The emergency in 1969 is different from the previous emergencies in that when the Proclamation was made, Parliament had already been dissolved and elections to Dewan Ra'ayat had yet to be completed. As it was not possible to summon Parliament, the Proclamation could not be laid before Parliament. In such a situation, legislation could only be promultated by His Majesty. Some Ordinances were promulgated. Two of them have been mentioned. The third one is Emergency (Essential Powers) No. 3 Ordinance, 1969 (P.U.(A) 170/69) which provides for modifications to the Eighth Schedule in relation to State Constitutions. It also removes provisions of section 2 of Ordinance No. 1 of 1969 relating to citizenship: provisions which because of Article 150(6A) would appear to be ultra vires the powers of the Yang di-Pertuan Agong. Further, it specifies that, notwithstanding, Article 55, the Yang di-Pertuan Agong may summon Parliament to meet on a date to be determined by him. Ordinance No. 3 of 1969 was replaced by P.U.(A) 64/71.

> " The true effect of article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution."

Under Ordinance No. 2 of 1969 His Majesty may delegate all his powers and authorities to the Director of Operations. Respondent contended

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3rd May 1975 (continued)

that His Majesty could only delegate part of his power but not all. Delegating all his powers would amount to abdication and would be invalid. Therefore, Regulation 44 made by the Director of Operations by virtue of such delegation would be void. The learned Judge dealt with the question of validity of Ordinance No. 2 of 1969 at some length and with great care. He considered various authorities cited to him and came, with respect, to the right conclusion when he said at page 148 of the Appeal Record:- 10

> " I am of the view that the Essential (General Orders, Chapter D) Regulations, 1969 are valid and not ultra vires either the Constitution or Ordinance No. 1 of 1969."

I agree with the Lord President that if His Majesty could delegate part of his power he could delegate all and this could not amount to abdication because he still retained certain constitutional power which he alone could exercise. In any event, Ordinance No. 2 of 1969 was enacted pursuant to Article 150 and clause (6) of that Article expressly provides for legislation that may override the provisions of the Constitution. The result is that any legislation enacted under a power which gave it validity notwithstanding inconsistency with the Constitution it would be otiose to consider whether such legislation would be inconsistent with any provision of the Constitution. 20 30

In an emergency the situation not being normal extraordinary measures may have to be adopted. In such a situation the nation comes first and there is nothing to prevent His Majesty from delegating all his powers both executive and legislative to some other authority. He chose to give such powers to the Director of Operations, who incidentally, happened to be our Deputy Prime Minister. It was a manifest necessity of the time. It would be futile to argue that the delegation of powers by His Majesty or, for that matter, Parliament, would be against the Constitution. The short answer to such an argument is provided by Article 150(6). The wide power given to the Director of Operations lasted as long as the emergency existed. It was 40

temporary in nature. It ceased to exist once Parliament annulled the Proclamation. In my opinion, it is not beyond the power of His Majesty or Parliament to enact Ordinances No. 1 of 1969 and No.2 of 1969 and other such Ordinances.

It is the emergency legislation that we are dealing with. The seriousness of the situation which threatened to destroy the unity of the nation should not be overlooked. Even though elections to the Dewan Ra'ayat had not been completed it would seem possible to summon Dewan Ra'ayat and Dewan Negara for under Article 62(2) each House might act notwithstanding any vacancy in its membership. The amendment made by Emergency (Essential Powers) Ordinance No. 3 of 1969 (P.U. (A) 170/69) empowers His Majesty to summon Parliament on a date to be determined by him. But, Summoning of Parliament was not the answer to meet such an extraordinary situation which demanded extraordinary measures. In the present emergency, His Majesty alone could decide what was best for the nation. The situation called for prompt and speedy action to restore law and order. Events had proved that the Director of Operations had acted fairly, honestly and with moderation to bring the situation back to normal. Article 150 gives His Majesty wide powers, so wide that he could in the interest of the nation during an emergency act as he thought fit. This is a most important aspect of the matter. The interest of the nation comes first. This is the law of civil or state necessity which forms part of the common law and which every written constitution of all civilised states takes for granted. The reason underlying the law of necessity was aptly put by Cromwell that "if nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make law." In Ronnfeldt v. Phillips & Ors. (1918) 35 T.L.R.47, Scrutton, L.J. observed:-

> " In time of war there must be some modifications in the interests of the State. It had been said that a war could not be conducted on the principles of the Sermon of the Mount. It might also be said that a war could not be carried on according to the principles of Magna Charta."

It is part of the democratic process, even

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3rd May 1975 (continued)

during national emergency for the Court to be vigilant that emergency expedients do not exceed the real necessities of the situation. In an emergency the Crown could use a subject's property in defence of the realm without compensation. Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C.508. In time of war and out of military necessity the King could take a subject's property. This is part of the common law. See Saltpetre's Case (1606)12 Co.Rep.12, Shipmoney's Case, R. v. Hampden 3 St.Tr.825. 10

In the Prerogatives of the Crown, 1820 Edition, page 68 Chitty said that:-

> " The King is the first person in the nation - being superior to both Houses in dignity and the only branch of the Legislature that has a separate existence, and is capable of performing any act at a time when Parliament is not in being."

In re An Arbitration between Shipton, Anderson & Co. and Harrison & Co. (1915) 3 K.B. 676, certain quantity of wheat was requisitioned by the Government under an Act. It was held that as the delivery of wheat by the seller to the buyer was rendered impossible the seller was excused from the performance of the contract. Darling, J. remarked in that case:- 20

> " It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. Salus populi supreme lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it." 30

All acts done by His Majesty and by the Director of Operations in an emergency were dictated by necessity and so long as they were done in good faith the courts could not question them for simple reason that in an emergency state necessity and interest was of paramount importance than individual rights. 40

I would allow the appeal with costs here and

in the court below.

Sd. Lee Hun Hoe

CHIEF JUSTICE,
BORNEO.

Kuala Lumpur,
Date: 3rd May, 1975.

Counsel: Encik Abu Talib bin Othman, Senior Federal Counsel, with Mr.Lim Beng Choon, Federal Counsel for the appellant.

10 Encik Sivalingam of M/s Lim Kean Chye & Co. for respondent.

Certified True Copy:

Sd. Valerie Kueh
Secretary to Chief Justice,
Borneo.

No. 10

Judgment of Ong Hock Sim, Federal Judge

Coram: Suffian, L.P., Malaysia
Lee Hun Hoe, C.J., Borneo
20 Ong Hock Sim, F.J.

I have had the advantage of reading the judgments in draft of my Lord President and the learned Chief Justice, Borneo and agree with them that this appeal be allowed. An exhaustive examination of the law respecting dismissal and termination of service has been made by the Lord President and I would only express my full concurrence with his conclusions thereon. I would like to add, as briefly as I can, my own views why I am of the opinion that the 30 learned trial Judge erred, despite certain conclusions reached by him, in deciding in favour of the Respondent, particularly, as the subject matter of this appeal has far-reaching effects and involves construction of the Constitution.

The Notes of Evidence, so far as oral testimony is concerned, took up no more than four pages of the Record, with the rest devoted to legal

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Judgment of Ong Hock Sim Federal Judge

3rd May 1975 (continued)

arguments (pages 19 - 49). The facts are set out in the judgment of the Lord President. On pain of being repetitious, I would refer to the Amended Statement of Claim dated September 20, 1973, relevant portions of which, summarised, I now set out:-

Ex.A8

"2. By a letter dated 20 March 1970 ...... the Ketua Pengarah Perkhidmatan Awam Malaysia ..... notified the plaintiff that his services were being terminated under Section 10(d) of the Pensions Ordinance 1951 and that the plaintiff was required to retire in accordance with paragraph 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter 'D') Regulations 1969.

Exhibit A12

4..... on 2 April 1970 the plaintiff wrote ...... protesting, inter alia, that he had been condemned unheard but the plaintiff was neither given an opportunity to defend himself nor told ...... why his services were being terminated.

4A. The plaintiff contends that Regulation 44 .... is null and void and ultra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution." (underlining is mine).

The Amended Amended Statement of Defence is equally brief and I quote the relevant portions:-

"3. The defendant ... avers that the termination of the Plaintiff's employment is lawful and proper and in accordance with the Regulation 44 ... and he was lawfully retired under section 10(d) of the Pensions Ordinance, 1951.

4. The defendant avers that the exercise of ... its rights to terminate ... is not an act of dismissal or reduction in rank within the meaning of Article 135(1) and (2) ... and ...... not therefore necessary .... to give the Plaintiff a reasonable opportunity of being heard.

4A. The defendant ... avers that Regulation 44 ... is intra vires the provisions of Ordinance

No. 1 of 1969 and Article 150 ...... and further avers that the services ...... was (sic) properly terminated under the said Regulation 44." (Underling is mine)

In the light of the pleadings and having regard to the Notes of Evidence recorded, it would have been thought that the issues were straightforward and simple. In a somewhat lengthy judgment, the learned Judge decided in favour of the Plaintiff. With respect, I am of opinion that the learned Judge had permitted himself to fall into the error of leaning too heavily upon certain Indian authorities, which might be quite correct for an interpretation of Article 311 of the Indian Constitution. Our Article 135 of the Constitution has not the word "removed". The learned trial Judge went on to observe:-

> "Article 135 of our Constitution is in pari materia with Article 311 of the Indian Constitution ...... The words 'dismissed', 'removed' and 'reduced in rank' were well understood in India ..... as words signifying or denoting three major punishments which could be inflicted on government servants."

As the Lord President said, on the distinction between "dismissal" and "termination of services":-

> "It seems to me that this distinction as regards public servants is somewhat blurred in India because the Indian constitutional provision corresponding to our Article 135(2) uses the word 'dismissal' and another word 'removal' which does not appear in ours."

It seems reasonably clear that the words used bore a different meaning and I would respectfully disagree with the trial Judge in Thambipillai v. The Government of Malaysia (1969) 2 M.L.J.206(208) where he said:

> " The former two words corresponding in meaning to the word 'dismissal' in our Article 135(2)."

That seems tantamount to saying that the use of the two words in Article 311 merely resulted in a distinction without a difference. As the trial judge said "Removal is only a species of dismissal.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Judgment of Ong Hock Sim Federal Judge

3rd May 1975 (continued)

It, like dismissal, brings about a termination of service. As far as re-employment is concerned the effect of Regulations and of Chapter 'A' of the General Orders is the same on a person dismissed from service as on a person whose services are terminated."

In Government of Malaysia v. Lionel (1974) 1 M.L.J. 3 at 4-5 Viscount Dilhorne said in regard to Article 135:-

" So under the provisions of the Constitution, members of the general public service obtained a degree of security of tenure of their appointments. In their Lordships' view it is not correct to say, as Ong, C.J. said in the course of his judgment, that they were guaranteed security of tenure under Part X of the Constitution. Although they hold their offices at the pleasure of the Yang di-Pertuan Agong, only the Public Services Commission, or an officer or officers to whom the Commission had validly delegated its functions, could exercise disciplinary control and they cannot be dismissed or reduced in rank save by a person who could appoint a member of the service of equal rank and without an opportunity of being heard.

Regulation 6 of the General Orders Chapter A reads as follows:-

'An officer who has been dismissed from the service or whose services have been terminated on the grounds of unsatisfactory work or conduct may only be re-emmployed in special and exceptional circumstances.'

A distinction is thus drawn between dismissal and termination of services. This Regulation is in that part of the General Orders dealing with appointments and in their Lordships' view was not intended to be and is not a penalty imposed by a Disciplinary Authority on dismissal or by the person who terminates an appointment."

With respect therefore to the trial Judge, I do not agree that the termination constitutes a dismissal. The termination of services under

Regulation 44 is not in that part of the General Orders of Chapter D governing Disciplinary proceedings and is not one of the forms of punishment set out in Regulation 36. As the judge himself said "It is worthy of note that the major punishment referred to in the Public Officers (Conduct & Discipline) (General Orders, Chapter 'D') Regulations, 1969 ..... do not make any reference to 'removal' as a form of punishment."

10 As I have said, the simple issue raised by paragraph 4A of the Amended Statement of Claim is whether Regulation 44 of the 1969 Regulations is null and void and ultra vires the provisions of Ordinance No.1 of 1969 and Article 150 of the Constitution. The trial Judge observed:-

> " ..... Prima facie, the act of the Government in requiring the Plaintiff to retire from service seems quite valid ..... It is quite clear that if use was to be made of Section 10(d) of the Pensions Ordinance in respect of the Plaintiff, his services had first to be terminated and it was for that reason that Regulation 44 of 1969 Regulations was expressly referred to in A8, which again brings us to the basic question of the validity of termination of the Plaintiff's services and the validity of the Regulation itself."

20

As he further said:-

30

> " The 1969 Regulations were a piece of legislation necessitated by the emergency .... There does not, however, seem to be, in England anything like the 1969 Regulations. .... Article 4 of the Constitution declares that the Constitution shall be the supreme law of the country. Article 150(6) makes safe the validity of our Ordinance promulgated by the Yang di-Pertuan Agong under Article 150. It says 'no provision of any ordinance promulgated under this Article ... shall be invalid on the ground of inconsistency with any provision of the Constitution.' .... When the Constitution has been declared to be supreme nothing can override or abrogate its sovereign dictates, power and supremacy. Laws promulgated under Article

40

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Judgment of Ong Hock Sim Federal Judge

3rd May 1975 (continued)

150 cannot be declared invalid ... A law made under Article 150(2) derives its force and validity from Article 150 itself and takes effect in accordance with its tenor and cannot be ... tested under Article 135 or any other provision of the Constitution. .... On the strength of the authorities already referred to by me, I am of the view that the Essential (General Orders, Chapter 'D') Regulations, 1969 are valid and not ultra vires either the Constitution or Ordinance No. 1 of 1969." 10

On this finding, clearly the claim should have been dismissed. With regard to paragraph 4, the right to be heard or to have an opportunity to defend himself can only arise if Plaintiff had been dismissed or reduced in rank in the words of Article 135. I do not agree with the Judge that the termination in this case pursuant to Regulation 44 is in fact a dismissal, notwithstanding, 20 as he cynically observed, the "granting a pension out of its rich ooffers", a privilege which is not accorded to a person dismissed. It is not disputed that no disciplinary proceedings were taken against him and therefore Regulations 28, 29 and 30 of the 1969 Regulations could not be applied against him. It is a little difficult to reconcile the statement of the learned Judge where he said in one breath that "No doubt Article 135(2) had no application to the 30 present case" and immediately after "the procedure prescribed for dismissal under Part II of the 1969 Regulations should have been followed. The so-called termination was in fact a dismissal." Regulation 27 is specific when it said:-

" In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on 40 which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard." (Underlining is mind).

The action pursuant to Regulation 44 is not within the ambit of Regulation 27.

I am in agreement with my brethren that

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Judgment of Ong Hock Sim Federal Judge

3rd May 1975 (continued)

Article 132(2A) preserves the doctrine of pleasure. "There seems no vested right in remaining in government service up to a certain age," as the Judge himself remarked but which is what the Plaintiff claimed he was entitled to. Unlike Judges who "hold office until he attains the age of sixty-five years" and who "shall not be removed from office" except in accordance with the provisions of Article 125, a member of the public service under the pleasure doctrine occupies a different position. Long ago, in S.K. Pillai v. State of Kedah 6 F.M.S.L.R.160 at 170 :-

> " Now a public servant on accepting an appointment under the British Crown is in general appointed for no defined period. The Crown does not bind itself either to retain his services or to grant him increased pay or promotion. But it is the custom to bring to his notice that he may expect, if he remains in service .... ultimately on retirement (at an age that is not infrequently specified) a pension, ... such an arrangement ... confers no rights on the servant."

and in Terrel v. The Secretary of State for the Colonies and Another (1953) 2 Q.B.D.482 at 495, 500, Lord Goddard, L.C.J. said:-

> " In my opinion it is clear that judges in the Straits Settlements, or Malaya ... hold and always have held their office at the pleasure of the Crown ...
>
> In strictness the claimant was appointed by Letters Patent ... and I regard the correspondence merely as telling him of the age of compulsory retirement and of the pension at whatever age he retired that he might expect. I say 'expect' because under the Pensions Ordinance there is no absolute right to a pension.
>
> Were I to accede to the argument that these letters amount to a contract, I should be holding, in effect, that every person entering the service of the Crown who is told before he enters that his retiring age will be so and so could say that he had a contractual right to remain in the service till that age, and this would in effect

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Judgment of Ong Hock Sim Federal Judge

3rd May 1975 (continued)

override all the cases which have decided that a servant of the Crown holds office at pleasure."

I agree that this appeal be allowed with costs here and in the Court below.

Sd. H.S. Ong

(ONG HOCK SIM)
JUDGE,
FEDERAL COURT,
MALAYSIA. 10

Kuala Lumpur,
3rd May, 1975.

Counsel

Encik Aby Talib b. Othman, Senior Federal Counsel, with Mr. Lim Beng Choon, Federal Counsel for the Appellant.

Mr. M. Sivalingam of Messrs. Lim Kean Chye & Co. for the respondent.

Certified True Copy

Sd.Lee Yoke Weng 20
Secretary to Tan Sri Dato Justice H.S.Ong
Federal Court,
Kuala Lumpur.
19/5/75

No.11

Order of The Federal Court

3rd May 1975

No.11

Order of The Federal Court

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO; ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA 30

IN OPEN COURT
THIS 3RD DAY OF MAY, 1975

THIS APPEAL coming on for hearing on the 12th and 13th days of March, 1975 in the presence of Encik Abu Talib bin Othman, Senior Federal Counsel

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.11

Order of The Federal Court

3rd May 1975 (continued)

(Encik Lim Beng Choon, Senior Federal Counsel with him) appearing for and on behalf of the Appellant abovenamed and Encik M. Sivalingam of Counsel for the Respondent abovenamed AND UPON READING the Record of Appeal filed herein AND 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 the Senior Federal Counsel and Counsel for the Respondent as aforesaid IT IS ORDERED that this Appeal be and is hereby allowed AND IT IS FURTHER ORDERED that the Respondent do pay the costs of this Appeal and the costs in the Court below to the Appellant to be taxed by the proper officer of the Court.

GIVEN under my hand and the Seal of the Court this 3rd day of May, 1975.

Sd. E.E. Sim
Chief Registrar.

No.12

Notice of Motion for conditional leave to appeal

5th June 1975

No. 12

Notice of Motion for conditional leave to appeal

TAKE NOTICE that this Honourable Court will be moved on Monday the 23rd day of June 1975 at 9.30 o'clock in the forenoon or as soon thereafter as counsel can be heard by counsel on behalf of the respondent abovenamed for an order that conditional leave to appeal to His Majesty the Yang Dipertuan Agung be granted to the respondent abovenamed against the order of the Federal Court made on the 3rd day of May 1975 and that the costs of this application be costs in the appeal.

Sd. Lim Kean Chye & Co.
Solicitors for the respondent.

Dated at Kuala Lumpur this 5th day of June 1975.

Sd. E. E. Sim
Chief Registrar,
Federal Court,
Kuala Lumpur.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.12

Notice of Motion for conditional leave to appeal

5th June 1975 (continued)

This Motion is filed by Messrs. Lim Kean Chye & Company Solicitors for the respondent/plaintiff herein whose address for service is at Malayan Banking Chambers, 12 Station Road, First Floor, Ipoh.

This application is supported by the affidavit of Mahan Singh s/o Mangal Singh affirmed the 10th day of May 1975 and filed herein.

To: The Chief Registrar,
Federal Court, Malaysia
Kuala Lumpur.

10

The appellant abovenamed
c/o Attorney-General Malaysia,
Attorney-General's Chambers,
Kuala Lumpur.

No.13

Appellant's Affidavit

10th May 1975

No. 13

Appellant's Affidavit

I, Mahan Singh s/o Mangal Singh of 11-A, Jalan Manjoi, Pari Garden, Ipoh hereby solemnly affirm and state as follows:-

20

1. I am the respondent abovenamed.

2. On the 3rd day of May 1975 the Federal Court delivered final judgment allowing the appeal of the appellant.

3. I am desirous of appealing to His Majesty the Yang Dipertuan Agung against the said judgment of the Federal Court.

4. The matter in dispute is from its nature a fit one for appeal and involves a sum in excess of $25,000/- as there is a claim for arrears of salary.

30

5. I am able and willing to enter into good and sufficient security to the satisfaction of the court for the prosecution of the appeal and to conform to such other conditions as this Honourable Court may think reasonable to impose.

Affirmed by the abovenamed Mahan Singh s/o Mangal Singh this 10th day of May 1975) Sd. Mahan Singh

Before me,

Sd. R.G. Suppiah
COMMISSIONER FOR OATHS.

This affidavit is filed by Messrs. Lim Kean Chye & Company of Malayan Banking Chambers, 12 Station Road, Ipoh solicitors for the respondent abovenamed.

No.14

Order of the Federal Court granting conditional leave to appeal

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA: WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA: CHANG MIN TAT, JUDGE, HIGH COURT, MALAYA.

IN OPEN COURT
THIS 23RD DAY OF JUNE 1975

UPON MOTION made unto this court this day by Mr. C.V. Das on behalf of Messrs. Lim Kean Chye & Company Solicitors for the respondent abovenamed in the presence of Cik Zaleha binti Zahari, Federal Counsel on behalf of the appellant abovenamed AND UPON READING the Notice of Motion dated the 5th day of June 1975 and the affidavit of Mahan Singh s/o Mangal Singh affirmed the 10th day of May 1975 AND UPON HEARING Counsel and the Federal Counsel as aforesaid IT IS ORDERED that leave be and is hereby granted to the respondent abovenamed to appeal to His Majesty the Yang Di-Pertuan Agong against the order of the Federal Court made on the 3rd day of May 1975 upon the following conditions:

(a) that the respondent abovenamed do within three months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia in the sum of $5,000/= (Ringgit five thousand only) for the due prosecution of the appeal, and the payment

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.14

Order of the Federal Court

23rd June 1975 (continued)

of all such costs as may become payable to the appellant abovenamed in the event of the respondent abovenamed not obtaining an order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or of His Majesty the Yang Di-Pertuan Agong ordering the respondent abovenamed to pay the appellant's costs of the appeal as the case may be;

(b) that the respondent abovenamed do within the said period of three months take the necessary steps for the purpose of procuring the preparation of the Record and for the despatch thereof to England. 10

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 23rd day of June 1975.

Sd. E. E. Sim
Chief Registrar. 20

No.15

Order granting final leave to appeal to His Majesty the Yang Di-Pertuan Agong

22nd September 1975

No. 15

Order granting final leave to appeal to His Majesty the Yang Di-Pertuan Agong

CORAM: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO;
ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA;
WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT 30
THIS 22ND DAY OF SEPTEMBER 1975

UPON MOTION made unto court this day by Mr.P. Cumaraswamy on behalf of Messrs. Lim Kean Chye & Company Solicitors for the Respondent abovenamed in the presence of Mr. Lim Beng Choon, Senior Federal Counsel on behalf of the Appellant abovenamed AND UPON READING the Notice of Motion dated the 4th day of September 1975 and the Affidavit of Mahan Singh s/o Mangal Singh affirmed the 3rd day of September 1975 and filed herein AND UPON 40

HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Respondent to appeal to His Majesty the Yang Di-Pertuan Agong against the order of the Federal Court made on the 3rd day of May 1975 AND IT IS LASTLY ORDERED that the costs of this application be costs in the cause.

GIVEN under my hand and the seal of the court this 22nd day of September 1975.

10 Sd. Haji Abdullah bin Ghazali
CHIEF REGISTRAR.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.15

Order Granting final leave to appeal to His Majesty the Yang Di-Pertuan Agong

22nd September 1975 (continued)

EXHIBITS

Exhibits

P.1

Letter of Appointment from Suruhanjaya Perkhidmatan Awam

24th January, 1961

P.1 - Letter of Appointment from Suruhanjaya Perkhidmatan Awam

Public Service Commission,
Young Road,
Kuala Lumpur.

24hb. January, 1961.

10 Tuan,

I am directed to inform you that on behalf of the Government of the Federation of Malaya, the Public Services Commission is pleased to offer you appointment as Registrar, Sessions Court, Judicial Department, Federation of Malaya on the following terms and conditions:-

(a) The salary scale of the appointment is $538x18-700;

(b) Your appointment as Registrar, Sessions Court, will be effective from the date on which you assume the duties of the post following the acceptance of this offer;

(c) Your salary on appointment will be determined in accordance with General Orders, Cap.A. Section 45;

Exhibits

P.1

Letter of Appointment from Suruhanjaya Perkhidmatan Awam

24th January, 1961 (continued)

(d) You will serve on probation for a period of one year with effect from the date of your appointment to the post;

(e) You will be liable for service in any part of the Federation of Malaya.

2. If the above terms and conditions of appointment are acceptable to you, I am to request you to inform this office accordingly through the proper channel.

Saya yang menurut perintah, 10

Sd. Clement Y.M. Hon,
b.p. Setiausaha,
Suruhanjaya Perkhidmatan Awam.

Mr. Mahan Singh,
c/o Magistrate's Court,
Kampar.

Through: The Registrar,
Supreme Court,
Federation of Malaya,
Kuala Lumpur. 20

B.1

Letter of approval for increase of salary of Mahan Singh

2nd March 1970

B.1 - Letter of approval for increase of salary of Mahan Singh

2hb. Mac, 1970

Setiausaha Tetap Perbendaharaan,
Malaysia,
Kuala Lumpur.

Tuan,

Encik Mahan Singh, Setiausaha Pesuruhjaya Khas Cukai Pendapatan

Saya maklumkan bahawa saya tiada apa-apa halangan di atas kenaikan gaji tahunan Encik Mahan Singh dari $682.00 kepada $700.00 sebulan malai daripada 1hb. April, 1970. 30

Saya yang menurut perintah,

Sgd.
(WAN HAMZAH BIN WAN MOHD. SALLEH)
Pengerusi,
Pesuruhjaya Khas Cukai Pendapatan.

Exhibits

A.8

Translation of Exhibit A7 - Letter of Termination of Services of Mahan Singh from Director of Public Services, Malaysia

20th March 1970

A.8 - Translation of Exhibit A.7 - Letter of termination of services of Mahan Singh from Director of Public Services, Malaysia

Public Service Commission,
Malaysia,
Rumah Oersejytaabm
Jalan Sultan Hishamuddin,
Kuala Lumpur.

10 20th March, 1970.

(Promotion and Discipline Section)

Sir,

I have been directed to inform you that in the exercise of the power conferred under Section 10(d) of the Pension Ordinance, 1951, the Government has decided to Pension you off in the Public Interest. According to Regulation 44 of the Public Officers Regulation (Conduct and Discipline) (General Order Chapter "D") 1969, your services 20 will be terminated as soon as you have taken all the leave which you are eligible.

Your eligibility for the pension will be worked out according to the Pension Ordinance, 1951.

Yours obediently,

Sgd.
(Tan Sri Syed Zahiruddin b. Syed Hassan)
Director of Public Services
Malaysia.

30 Enche Mahan Singh,
Office of the Special Commissioner,
Income Tax,
Kuala Lumpur.

Forwarded to you
Sd. Secretary,
Ministry of Justice.
26.3.1970.

Through and copy

This is the certified
Translation of the
40 original document for

Exhibits

A.8

Translation of Exhibit A7 - Letter of Termination of Services of Mahan Singh from Director of Public Services, Malaysia

20th March 1970 (continued)

Secretary of Justice,
Kuala Lumpur

Translation in Ipoh High Court Translation Serial No. 45A of 1972.

Sd. (illegible)
Interpreter,
High Court,
Ipoh.

Date: 30/5/72.

Translation of letter from the Secretary of the Ministry of Justice to the Chief Registrar of the High Court

31st March 1970

Translation of letter from the Secretary of the Ministry of Justice to the Chief Registrar of the High Court 10

Ministry of Justice,
Malaysia,
Jalan Clarke,
Kuala Lumpur.

31st March, 1970.

The Chief Registrar,
High Court Registry,
The Law Courts,
Kuala Lumpur. 20

Sir,

To be pensioned off in the Public interest. Enche Mahan Singh - Registrar, Office of Special Commissioners of Income Tax Dept.

I have been directed to inform you that in the exercise of the power conferred under the Pension Ordinance, 1951, the Government have decided that Enche Mahan Singh of the Office of the Special Commissioner of Income Tax Dept. to 30 be pensioned off in the Public Interest under Sec.10(d) of the said Ordinance. I wish to

inform you that under Regulation 44 of the Public Officers Regulation (Conduct and Discipline) General Order Chapter "D" 1969 the services of Enche Mahan Singh will be terminated as soon as he has taken all his eligible leave.

2. Please inform me the date this officer commencing his retirement, so as to consider for his retirement benefit under the Pension Ordinance, 1951.

Exhibits

Translation of letter from the Secretary of the Ministry of Justice to the Chief Registrar of the High Court

31st March 1970 (continued)

10

Yours obediently,

Sg. (Abdul Aziz b.Haji Mohd. Ali)
Secretary
Ministry of Justice

Copy to:

Director of Public Services,
Malaysia,
Service Branch (Pension Section),
Public Service Commission,
Kuala Lumpur.

20

This is the certified translation of the original document produced for translation in Ipoh High Court Translation Serial No. 45C of 1972.

Sg: (illegible)
Interpreter,
High Court, Ipoh.

Date: 30/5/72.

A.12 - Translation of Exhibit A.9 - Letter of appeal of Mahan Singh to the Chief Registrar

A.12

Translation of Exhibit A.9 - Letter of Appeal of Mahan Singh to the Chief Registrar

3rd April 1970

30

Mahan Singh,
Setia Usaha,
Pejabat Pesurohjaya Khas
Chukai Pendapatan,
Bangunan Sharikat Polis,

3rd April, 1970

Exhibits

A.12

Translation of Exhibit A.9 - Letter of Appeal of Mahan Singh to the Chief Registrar

3rd April 1970 (continued)

The Chief Registrar,
High Court Registry,
The Law Courts,
Kuala Lumpur.

Through:

Chairman,
Special Commissioners Income Tax,
Kuala Lumpur.

Sir,

I have the honour to forward herewith a copy of the letter JPA.Sulit NP/7046/SJ.13/13 dated 20th March, 1970 from the Director of Public Services, Malaysia which was received on 31st March, 1970 for your views. I shall be grateful if you will forward my grounds of appeal to the Director of Public Services, Malaysia: 10

(a) I was taken by surprise in receiving this letter, I do not know at all that something was going on behind my back. I was not given any opportunity to explain and to clear myself from any allegation against me. 20

(b) I have been in the Government Service for 23 years honestly and diligently, even up to this very moment my annual confidential report from various Presidents of the Sessions Court can be referred to.

(c) I have 9 children (4 by my 1st wife who had passed away) and 5 by my present wife. In February last year my eldest son left for United Kingdom to study law and am the sole supporter al all my children, who are still schooling in various schools in Ipoh. 30

(d) I wish to state also that I am unlucky as my present wife is sickly and had been attending the mental clinic since 1962.

(e) As far as I can remember I have not committed any offence and offended any body during my service. During my term of office as Registrar, Sessions Court I performed my duty straight forward and impartial, I believe that certain a person hold a grudge against me and started making false report. 40

Exhibits

A.12

Translation of Exhibit A.9 - Letter of Appeal of Mahan Singh to the Chief Registrar

3rd April 1970 (continued)

(f) I will be attaining the age of 49 in June 1970. I intend to bring up my family properly. I have just reached the maximum salary of my appointment.

(g) I was thinking that when am old my financial problem will be lesson. I came to my position as it is now by working hard and deligently. On receiving this letter asking me to retire make all my plans shattered away.

10

On the ground stated above I appeal to you to reconsider and to allow me to carry on working until such time, when my eldest son returns from United Kingdom after being qualified in his law study. He is depending solely on me and after that I will voluntarily retire. At present it is difficult for me to get loan from my relatives or friends.

Thank you.

20

I have the honour to be Sir
Yours obediently,

Sg. Mahan Singh.

This is the certified Translation of the original document produced for Translation in Ipoh High Court Translation Serial No. 45B of 1972.

Sd. (illegible)
Interpreter
High Court, Ipoh.

A.15

Translation of A.14 - Letter from Mahkamah Persekutuan to Persurohjaya Khas Cukai Pendaptan, Kuala Lumpur

22nd April 1970

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A.15 - Translation of A.14 - Letter from Mahkamah Persekutuan to Pesurohjaya Khas Cukai Pendaptan, Kuala Lumpur

Pejabat Pendaftaran,
Mahkamah Persekutuan,
Mahkamah Ke'adilan,
Kuala Lumpur.
22nd April, 1970.

The Special Commissioner,
Office of the Special Commissioner
of Income Tax,
Bangunan Sharikat Polis,
Kuala Lumpur.

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Exhibits

A.15

Translation of A.14 - Letter from Mahkamah Persekutuan to Persurohjaya Khas Cukai Pendaptan, Kuala Lumpur

22nd April 1970 (continued)

Sir,

Pension Off in Public Interest
Enche Mahan Singh - Registrar,
Office of Special Commissioners,
Income Tax Dept.

I forward herewith a letter from the Secretary, Ministry of Justice KK/Sulit/0.169/A/34 dated 31st March, 1970 which is self explanatory. Please instruct Enche Mahan Singh to take all his available leave and let me know that date the commencement of his retirement. 10

2. An appeal letter from Enche Mahan Singh dated 3rd. April, 1970 have been forwarded to the Secretary, Ministry of Justice for the consideration of the Director of Public Services Malaysia.

Yours obediently

Sd. Haji Mohd. Azmi b. Dato
Haji Kamaruddin

This is the certified Translation of the original document produced for Translation in Ipoh High Court Translation Serial No. 45D of 1972. 20

Sd: (illegible)
Interpreter,
High Court, Ipoh.

Date: 30/5/72.

Translation of letter from Mahan Singh to Pesuruhjaya Khas Cukai Pendapatan, Kuala Lumpur

23rd April 1970

Translation of letter from Mahan Singh to Pesuruhjaya Khas Cukai Pendapatan, Kuala Lumpur

Mahan Singh, 30
c/o Pejabat Pesurohjaya Khas,
Chukai Pendapatan,
Kuala Lumpur.

23hb.April, 1970.

Tuan Pengerusi,
Pesurohjaya Khas Chukai Pendapatan,
Kuala Lumpur.

Exhibits

Translation of letter from Mahan Singh to Pesuruhjaya Khas Cukai Pendapatan, Kuala Lumpur

23rd April 1970 (continued)

Tuan,

Persaraan atas kepentingan Awam
Enche Mahan Singh - Pendaftar
Pejabat Pesurohjaya Khas Chukai
Pendapatan

As directed by Ketua Pendaftar, Pejabat Pendaftaran, Mahkamah Persekutuan, Mahkamah Ke'adilan vide Bil:(96)dlm.RSC.SULIT No.2/53-Pt.3 dated 22hb. April, 1970, I beg to inform you that I have 49 days' vacation leave due to me and which I am applying for, as directed, from 24.4.70 to 12.6.70 (both dates inclusive). Thus my date of retirement will be w.e.f. 13.6.70. I shall be grateful if this is kindly notified to Ketua Pendaftar, Mahkamah Persekutuan, Mahkamah Ke'adilan, Kuala Lumpur as stated in para 1 of the aforesaid letter.

I have to thank you and the Special Commissioners of Income Tax and other members of the staff in this office, who have been very kind and co-operative with me during my stay here.

My house address will be as follows:-

Mr. Mahan Singh,
No.11-A, Jalan Manjoi, Pari
Garden,
Ipoh, Perak.

Thanking you Sir,

I beg to remain,
Sir,
Your obedient servant
Sd. Mahan Singh.

Translation of A.20 - Letter from the Director of Public Services of Malaysia to the Secretary of the Ministry of Justice

Translation of A.20 - Letter from Director of Public Services of Malaysia to the Secretary of the Ministry of Justice

29th July 1970

29th July, 1970.

The Secretary,
Ministry of Justice,
Kuala Lumpur.

Sir,

Pensioned off in the Public Interest
Enche Mahan Singh, Senior Registrar,
Sessions Court

Exhibits

Translation of A.20 - Letter from Director of Public Services of Malaysia to the Secretary of the Ministry of Justice

29th July 1970 (continued)

I am directed to refer to your letter KK/Sulit/0.169/20 dated 3rd January, 1970 about the above subject and to inform you that Duli Yang Maha Mulia Seri Paduka Baginda Yang Di-Pertuan Agong has graciously approved the pension benefits be granted to Enche Mahan Singh, Senior Registrar, Sessions Court of which he is eligible to receive as if, he is to be pensioned off on the ground of his health with deduction of 10% of the pension benefit. 10

According to the decision of para 1 above you may now take action and arrange for the payment of the Pension benefit to the above mention officer.

Your obediently,

Sg.(MOHD.AFFENDY BIN HANAFIAH)
for Director of Public Services,
Malaysia.

Copy:
Permanent Secretary, 20
Treasury,
Malaysia,
Kuala Lumpur.

True Copy,
Sg.Nik Mohamed b.Nik Yahya
Peguam Negara
Attorney-General,
Malaysia.
4.4.72. 30

This is the certified Translation of the original document produced for Translation in Ipoh High Court Translation Serial No.45E of 1972.

Sg. (illegible)
Interpreter,
High Court, Ipoh.

Date: 30/5/72.

Exhibits

B.2

Letter from Lim Cheng Ean & Co. to Peguan Negara (Attorney-General)

21st April 1972

B.2 - Letter from Lim Cheng Ean & Co. to Peguan Negara (Attorney-General)

LIM CHENG EAN & COMPANY
ADVOCATES & SOLICITORS.

Malayan Banking Chambers
12 Station Road,
(First Floor),
Ipoh.

Our Ref: M45(SM)

Your Ref: PN/SIVIL) 674

IPOH, 21st April,1972

Peguam Negara,
10 Jabatan Peguam Negara,
Malaysia,
KUALA LUMPUR.

For the attention of
Mr.S. Augustine Paul

Dear Sir,

Ipoh High Court Civil Suit
No.296 of 1971

Reference the above matter we shall be grateful if you will let us have the following:-

1. A copy of letter of appointment of Mahan Singh as Registrar of Sessions Court.

20 2. A copy of the letter dated 3.1.70 which is referred to in the letter of 29.7.70 from Ketua Pengarah Perkhidmatan Awam, Malaysia to Setiausaha, Kementerian Keadilan.

We shall also be grateful if you will let us know whether the question of our client's retirement was submitted to the Disciplinary Authority as required under paragraph 44 of the 1969 Regulations. If it was not submitted we shall be glad to know if there was any report by the
30 Head of the Department. If there is a report we shall be glad to have a copy.

We undertake to pay your charges for making copies.

Yours faithfully,

Sdg:

(LIM CHONG EAN & CO.)

Exhibits

B.4

Translation of Exhibit B.3 - Letter from Attorney-General's Chambers to Lim Cheng Ean & Co.

26th May 1972

B.4 - Translation of Exhibit B.3 - Letter from Attorney-General's Chambers to Lim Cheng Ean & Co.

Attorney-General's Chambers,
Malaysia.

Kuala Lumpur. 26th May 1972.

M/s. Lim Cheng Ean & Co.,
P.O. Box 231,
Ipoh,
Perak.

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Sirs,

Ipoh High Court Civil Suit No.296 of 1971

I refer to your letter dated 21st April, 1972 and send herewith a copy of the Letter of Appointment of Mr. Mahan Singh.

Disciplinary action was not taken against Mr. Mahan Singh but he has been pensioned upon public interest under section 10(d) of the Pensions Ordinance 1951 and pursuant to Rule 44 of the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969. It is regretted that the report cannot be supplied to you because it is "privileged".

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Your obedient servant,

Sd. Nik Mohamed bin Nik Yahya,
for Attorney-General.

This is the certified translation of the original document produced for translation in Ipoh High Court Translation Serial No. 80 of 1973.

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Sd. (Illegible)
Interpreter,
High Court, Ipoh.

Dated 17.9.73

No. 5 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N   A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION

B E T W E E N :

MAHAN SINGH S/O MANGAL SINGH — Appellant (Plaintiff)

- and -

THE GOVERNMENT OF MALAYSIA — Respondents (Defendants)

RECORD OF PROCEEDINGS

PARKER GARRETT & COMPANY,
St. Michael's Rectory,
Cornhill,
London EC3V 9DU.

Solicitors for the Appellant

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

Solicitors for the Respondents