Privy Council Appeal No. 7 of 1977

South East Asia Fire Bricks Sdn. Bhd. – – – *Appellants*

v.

Non-Metallic Mineral Products Manufacturing Employees Union and others – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JUNE 1980

Present at the Hearing:

LORD EDMUND-DAVIES

LORD FRASER OF TULLYBELTON

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

[*Delivered by* LORD FRASER OF TULLYBELTON]

This appeal from the Federal Court of Malaysia (Gill C.J. Malaya, Ong Hock Sim F. J., Raja Azlan Shah F.J.) first came before their Lordships' Board in October 1979. The Federal Court had allowed an appeal from the High Court of Malaya (Abdul Hamid J.), who had issued a Writ of Certiorari to quash a decision of the Industrial Court set up by the (Malaysian) Industrial Relations Act 1967 on the ground that it contained an error of law. After counsel for the appellants had opened the appeal on the merits, counsel for the respondents began his reply by submitting that the High Court had no jurisdiction to quash the award on the ground of error of law. As the appellants had had no notice of the point, which had not been raised in the lower courts, their Lordships on 31st October 1979 adjourned the hearing in order to allow time for the parties to lodge Supplemental Cases and for the Attorney General of Malaysia to be informed of the matter. These steps have been taken, and their Lordships have heard argument on the question of jurisdiction, and are now in a position to give their advice upon it.

The proceedings in the Industrial Court had their origin in a dispute between the appellants and the first-named respondents, who are a trade union to which the majority, but not all, of the appellants' employees belonged when the dispute began. The second-named respondents are 11 employees who did not then belong to the union. but no separate issue arises with regard to their position which need not be further considered. The first-named respondents called out their members in the appellants' factory on strike on 4th February 1974. On 5th February the appellants

issued notices to all their employees who were on strike informing them that unless they returned to work within 48 hours their services would be deemed to be terminated. On 12th February 1974 the Minister for Labour and Manpower referred the dispute to the Industrial Court pursuant to the provisions of section 23(2) of the Industrial Relations Act, 1967. On 16th February the employees who had gone on strike sought to return to work on the advice of the union, but the appellants refused to allow them to return, maintaining that their employment had already been terminated and their places filled. The respondents maintained that the men were still employees of the appellants, that they had been locked out by the appellants, and that the lock-out was illegal because the dispute had been referred to the Industrial Court. On 8th August 1974 the Industrial Court made an award in favour of the respondents on the ground that, in the opinion of that Court, the employees by going on strike had not terminated their contracts of employment, and it ordered the appellants to take them back as from 16th February 1974, the date of the lock-out, on the same terms and conditions as before. The appellants considered that that decision was erroneous in law and they applied to the High Court in Malaya for certiorari on the ground of an error of law on the face of the record. The High Court granted the application and quashed the award. The Federal Court held that there had been no error of law, and they reversed the decision of the High Court and restored the award of the Industrial Court. Having regard to the opinion their Lordships have reached on the question of jurisdiction, they express no opinion on the question that was considered by the Courts in Malaysia.

Under the provisions of the Courts of Judicature Act, 1964, section 25(2) and the Schedule, the Malaysian High Courts have jurisdiction to issue, *inter alia*, writs of the nature of certiorari for any purpose. But the appellants conceded that the Malaysian Parliament had power, by legislating in appropriate terms, to oust that jurisdiction *quoad* the issue of writs of certiorari to the Industrial Court. The respondents contend that it has done so by paragraph (*a*) of section 29(3) of the Industrial Relations Act 1967, which is in the following terms: —

> "(*a*) Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any Court of law;"

the words "subject to this Act" do not import any qualification that is relevant for present purposes. They appear to refer to section 30 of the Act (under which the Industrial Court has power to vary its own awards for the purpose of removing ambiguity or uncertainty) and to sections 53 (as amended in 1971) and 53A, to the latter of which further reference will be made below.

In considering the effect of section 29(3)(*a*) two questions arise, and it is important to keep them separate. The first question is whether the paragraph has any application to certiorari, so as to oust it, or whether it merely prohibits appeals. If it does apply to certiorari, the second question is whether, notwithstanding the ouster, certiorari is still available to correct an error on the face of the record.

Taking the first question first, the provision that an award shall be "final" might exclude appeals but it would not be enough to exclude certiorari: see *Rex v. Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574, *Mohamed v. Commissioner of Lands and Mines* [1968] 1 M.L.J. 227. It is unnecessary to consider whether the addition of the word "conclusive" and of the provision that no award shall be "challenged, appealed against [or] reviewed" would have that effect, because the final words "quashed or called in question in any Court of law" seem to

their Lordships to be clearly directed to certiorari. " Quashed " is the word ordinarily used to describe the result of an order of certiorari, and it is not commonly used in connection with other forms of procedure (except in the quite different sense of quashing a sentence after conviction on a criminal charge). If " quashed " were for some reason not enough, the expression " called in question in any Court of law " is in their Lordships' opinion amply wide enough to include certiorari procedure. Accordingly they are of opinion that paragraph (*a*) does oust certiorari at least to some extent.

The second question then arises. The decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or " if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity " (per Lord Reid at p.171). But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In *Pearlman v. Harrow School* [1979] 1 Q.B.56, 70, Lord Denning M.R. suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be " discarded ". Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane, L.J., as he then was, when he said (at p.74):

> " . . . . . the only circumstances in which this court can correct what is to my mind the error of the [county court] judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of ' structural alteration . . . . or addition '."

Counsel for the appellants submitted that there was a line of authority in Malaysia holding that it was settled law that the power of the High Courts to grant certiorari to quash awards of Industrial Courts for errors of law on the face of the record had not been excluded. It is therefore necessary to consider the cases on which the submission was based. The first is *Selangor Omnibus Co. Ltd. v. Transport Workers' Union, Malaya* [1967] 1 M.L.J. 280 where Gill J. had to consider the effect of Regulation 9 of the Essential (Trade Disputes in the Essential Services) Regulations, 1965, which was in terms practically identical with section 29(3)(*a*) of the 1967 Act, and at page 281 he said this:

> " I ruled against the preliminary objection because it seemed clear to me from a line of authorities that *the wording of regulation 9* did not suffice to prohibit applications for certiorari, whether *on the ground of error of law on the face of the record* or excess or lack of jurisdiction (see *Rex v. Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B.574 " (Emphasis added).

The learned judge did not advert to the fact that the wording of Regulation 9 was quite different from, and much wider than, the wording which was considered in *Gilmore* where the provision was that any decision was to be " final "—see National Insurance (Industrial Injuries) Act, 1946, section 36(3). *Gilmore* is therefore not an authority on the construction of Regulation 9. The only other authority cited was *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 Q.B.711, from which the learned judge quoted a passage from the opinion of Lord Goddard C.J. (at p.716) to the effect that the fact

that certiorari was taken away never debarred the court from granting certiorari "If a question of jurisdiction arose." The decision in *Selangor Omnibus Co. Ltd.* was that the Industrial Arbitration Tribunal had jurisdiction to hear the dispute, and certiorari was refused. The reference to error on the face of the record was therefore *obiter*. In the opinion of their Lordships it was erroneous.

In *Kannan and another v. Menteri Buruh Dan Tenaga Rakyat and others* [1974] 1 M.L.J.90 Syed Othman J. dismissed an application for certiorari to quash a decision of the Minister of Labour in an industrial dispute. After considering a number of authorities including *Anisminic*, the learned judge at page 92 (1—left-hand column) said this:

> "From all these authorities, I am inclined to think that the better view of the law is that a plea that the court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all. In the present case, I would say that the decision of the Minister can be questioned if it can be shown that it was reached as a result of no proper enquiry, or of failure to comply with the prescribed procedure for an enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction *or for failure to comply with the law.*"
>
> (Emphasis added)

That statement is capable of being read, and was read in the argument before their Lordships, as meaning that any decision which was "not according to law", in the sense of containing an error of law, could be quashed by certiorari. If that is what the statement was intended to mean their Lordships would be unable to agree with it. But having regard to an earlier passage in the judgment it seems that, when the learned judge referred to a decision that was "not according to law," he had in mind a case in which a Commissioner in arriving at his decision had "deliberately ignored the law". In that more limited sense the statement is unexceptionable but it does not support the argument for the appellants.

In *Lian Yit Engineering Works Sdn. Bhd. v. Loh Ah Fon and others* [1974]2 M.L.J.41, 42 Abdul Hamid J. said this:

> "It is, I think, well established law that this court has power to issue an order of certiorari to quash an Industrial Court's decision which, on the face of it, is wrong in law."

The learned judge briefly mentioned an argument in support of that proposition which had been addressed to him, and which had apparently relied on the *Selangor Omnibus* case (*supra*), and the case of *Ex parte Shaw*, (*supra*). He did not mention any argument to the contrary and it may be that none was presented to him. Nor did he refer to the ouster clause that he was then considering but it would seem probable that it was section 29(3)(*a*) of the 1967 Act. In the opinion of their Lordships the statement quoted is erroneous and the decision, which was in accordance with it, should be overruled, although it is possible that the decision might be supported on the ground (mentioned but not considered) that the Industrial Court had acted in excess of its jurisdiction—see page 44C.

In *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No.1)* [1975] 2 M.L.J. 168 Abdoolcader J. held that certiorari was available to quash an order by the Minister of Home Affairs depriving an applicant

of citizenship of Malaysia, notwithstanding an ouster clause (section 2 of Part III of the Second Schedule to the Constitution of Malaysia) in the following terms:

> "2. A decision of the Federal Government under Part III of the Constitution shall not be subject to appeal or review in any court."

That was evidently a narrower clause than section 29(3), but their Lordships must refer to some observations by the learned judge at page 170 (E—right hand column) as follows:—

> "And I had occasion recently to observe in *Sungei Wangi Estate v. Uni s/o Narayan Nambiar* [1975] 1 M.L.J. 136 that it is now settled law that this court has power to issue an order of certiorari to quash a decision of the Industrial Court which on the face of it discloses an error of law notwithstanding the much wider and far-reaching provisions of the privative clause enacted in section 29(3)(*a*) of the Industrial Relations Act.
>
> "I do not think that there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue certiorari to quash for jurisdictional defect, *error of law on the face of the record* or manifest fraud."

The learned judge then referred to two cases, *The Colonial Bank of Australasia and another v. Willan* (1874) L.R.5P.C.417, 442 and *Secretary of State v. Mask & Co.* (1940) L.R.67IA 222, 236, neither of which appears to their Lordships to support the view that when certiorari has been taken away it is still available to quash for error on the face of the record, in contrast to excess of jurisdiction. The decision itself is not directly in point, but the passage cited is in their Lordships' opinion erroneous. But in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175 the same learned judge distinguished, correctly as their Lordships think, between those errors of law that give rise to an excess of jurisdiction and those that do not, and held that there had been no excess or lack of jurisdiction which would justify the Court in issuing an order of certiorari.

In *Chan Siew Kim v. Woi Fung Sheng Tim Medical Store and another* [1978] 1 M.L.J. 144, (at p.146) Abdoolcader J. held that a provision in the Control of Rent Act 1966 which he construed as an ouster clause was effective to exclude certiorari except for "manifest defect of jurisdiction in the authority that made the decision or manifest fraud in the party procuring it," and he referred to his own decision in *Mak Sing Kwong* (No. 2) (*supra*).

Their Lordships do not consider that these decisions in the Malaysian Courts amount to a line of authority which could establish that certiorari is available to quash an award of the Industrial Court for a mere error of law on the face of the record. Some of them contain *obiter dicta* to that effect, but the decisions do not all speak with one voice. There appears to be no decision of the Federal Court or of this Board that is in point.

A further reason for thinking that certiorari is effectively ousted in such a case is, in the opinion of their Lordships, to be found in section 53A of the Act (added by section 18(*b*) of the Industrial Relations (Amendment) Act 1971) which indicates that Parliament intended to exclude certiorari. Section 53A provides that the Industrial Court may, and shall if so directed by the Attorney General, refer any question of law to the Attorney General for his opinion and that it may make an award "not inconsistent with the opinion". The section is unusual

in thus making the opinion of the Attorney General on a question of law effectively binding on the Industrial Court. It seems to be intended to keep questions which have been remitted to the Industrial Court away from the ordinary courts; otherwise it would have followed the more usual pattern of directing the Court to state a case for the opinion of the High Court. It would be inconsistent with that intention that an award of the Industrial Court, giving effect to the Attorney General's opinion, should be liable to be quashed by the High Court for an error of law on its face. The reason for keeping questions remitted to the Industrial Court away from the ordinary courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by section 27(4) of the Act of 1967, in making its award in respect of a trade dispute, to have regard to *inter alia* "the financial implications and the effect of such award on the economy of the country, and on the industry concerned" and by sub-section (5) to "act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form". Whatever the policy underlying section 53A, it provides strong reinforcement for the view that awards of the Industrial Court are not subject to review by certiorari merely on the ground of error of law.

The facts of the present case have already been summarised above, and in the opinion of their Lordships there is no doubt that the dispute between the appellants and the respondents was a trade dispute within the definition in the Industrial Relations Act 1967, section 2. It was therefore a dispute which the Minister had power to remit to the Industrial Court (under section 23(2)). The Industrial Court applied its mind to the proper question for the purpose of making their award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that section 29(3)(*a*) effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings. Accordingly their Lordships agree with the decision (though not with the reasoning) of the Federal Court and they will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed.

With regard to costs, having regard to the late stage at which the question of jurisdiction was raised their Lordships consider that there should be no order for costs of this appeal. The order of the Federal Court so far as relating to costs should of course stand. Their Lordships will so advise His Majesty the Yan di-Pertuan Agong.

912537—2 Dd 0074336 95 7/80

In the Privy Council

SOUTH EAST ASIA FIRE BRICKS SDN. BHD.

v.

NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION and OTHERS

DELIVERED BY
LORD FRASER OF TULLYBELTON

Printed by HER MAJESTY'S STATIONERY OFFICE
1980