HAMIDI MOOKAIYAH BIN ABDULLAH

v.

NATIONAL UNION OF THE TEACHING PROFESSION, PENINSULAR MALAYSIA

HIGH COURT [KUALA LUMPUR]
AZMEL MAAMOR J
SAMAN PEMULA NO: R2-24-5-1999
5 JUNE 2000

LABOUR AND EMPLOYMENT:

GROUNDS OF JUDGMENT

In this case there are two applications each filed by the opposing parties. Firstly, the Plaintiff made an application by way of an originating motion (Enclosure 2) for the following reliefs:-

(a) Satu Perintah mengarah cawangan Defendan di Selangor untuk menunda tarikh tutup pencalonan untuk semua jawatan untuk dipilih dalam Mesyuarat Agung tritahunan yang akan diadakan pada 13/6/1999 sehingga keputusan muktamad dibuat mengenai prayer (b), (c), (d), (e), (f) dan (g) disini atau sehingga arahan lanjut diberi oleh Mahkamah.

(b) Satu Deklarasi bahawa Majlis Eksekutif Defendan telah gagal meluluskan resolusi dibawah Kaedah 12 Perlembagaan

Defendan mengenai siasatan terhadap tuduhan pemalsuan Ekshibit "H-1" dan "H-2" dan seterusnya semua tindakan yang diambil oleh Defendan, pegawai-pegawai dan atau pekerja-pekerja atau ejen-ejennya terhadap Plaintif yang berakhir dengan pemecatan Plaintif pada 1/12/1998 sebagai ahli Defendan adalah ultra vires Kaedah 12 Perlembagaan Defendan dan oleh itu adalah batal dan tidak berkesan.

(c) Satu deklarasi bahawa Lembaga Penyiasat yang dilantik pada 30/9/1998 oleh Jawatankuasa Kerja Defendan yang ditubuhkan di bawah Kaedah 12(16) Perlembagaan Defendan, telah dilantik ultra vires Kaedah 12(13) Perlembagaan Defendan dan seterusnya semua keputusan yang dibuat oleh Lembaga Penyiasat Defendan pada 21/11/1998 adalah batal dan tidak berkesan.

(d) Secara alternatif, satu deklarasi bahawa penyiasatan dan keputusan Lembaga Penyiasat Defendan yang bersidang pada 21/11/1998 adalah dicemari dengan mala fide, berat sebelah dan telah diadakan dengan pencabulan terbuka Kaedah-kaedah Keadilan Asasi dan seterusnya keputusan Lembaga Penyiasat yang bertarikh 21/11/1998 adalah batal dan tidak berkesan.

(e) Secara alternatif, satu deklarasi bahawa keputusan Majlis Eksekutif Defendan yang diadakan pada 1/12/1998, untuk

memecat Plaintif adalah berat sebelah dan dibuat dengan pencabulan terbuka Kaedah-kaedah Keadilan Asasi dan oleh itu batal dan tidak berkesan.

(f) Satu deklarasi bahawa Plaintif berhak meneruskan keahliannya dengan Defendan bermula dari 1/12/1998, dan berhak untuk menyandang semula, dengan serta merta segala jawatan yang disandang olehnya dengan Defendan dan semua penggantian interim atau muktamad oleh mana-mana orang untuk mengganti jawatan-jawatan yang disandang oleh Plaintif pada atau sebelum 1/12/1998 hendaklah dengan serta-merta tamat berkuasa.

(g) Defendan diperintah untuk membayar gantirugi kepada Plaintif dan ianya hendaklah ditaksir oleh Penolong Kanan Pendaftar Mahkamah Tinggi.

(h) Secara alternatif, satu Perintah mengarah cawangan Defendan di Selangor untuk menunda tarikh tutup pencalonan untuk semua jawatan untuk dipilih dalam Mesyuarat Agung tritahunan yang akan diadakan pada 13/6/1999 sehingga keputusan muktamad dibuat dalam prosiding timbangtara di antara Plaintif dan Defendan dibawah Kaedah 27 Perlembagaan Defendan.

(i) (Sekiranya prayer (h) disini diperintahkan oleh Mahkamah) satu arahan konsekuansial kepada Defendan untuk

menyediakan, dalam masa 7 hari dari tarikh Perintah ini, untuk membolehkan Plaintif untuk mencabut 3 nama dari panel penimbangtara Defendan yang hendaklah mendengar dan memutuskan pertikaian di antara Plaintif dan Defendan menurut Undang-undang dalam masa 30 hari dari tarikh nama penimbangtara-penimbangtara dicabut.

(j) Kos; dan

(k) Sebarang relif yang lain atau sampingan sebagaimana Mahkamah yang Mulia berpendapat suai manfaat untuk diberi.

Subsequently the Defendant filed another application by way of summons-in-chambers for the following orders:-

A) bahawa Saman Pemula Plaintif yang difailkan di sini terhadap Defendan hendaklah dibatalkan;

atau secara alternatif,

B) bahawa segala prosiding dalam tindakan ini digantungkan sehingaa Plaintif menghauskan segala remedi domestik yang terbuka kepadanya di bawah Kaedah 27 Perlembagaan Defendan.

C) bahawa kos permohonan ini dan kos bersampingan dengan permohonan ini serta kos tindakan ini hendaklah dibayar oleh Plaintif; dan

D) apa-apa relif yang selanjutnya dan/atau yang lain yang difikirkan patut dan adil oleh Mahkamah Mulia ini.

As the two applications are inter-related with each other and also with a view to save the Court's time I requested Counsels to give their written submissions in respect of both applications.

The brief facts of the case as follows. The Plaintiff, who is a teacher by profession, had been a member of the Defendant, a Trade Union established under the Trade Union Act, 1959. The Plaintiff had held post as the Defendant's Selangor Branch Secretary and had also been a member of the Defendant's Executive Council. In 1996 the Plaintiff was nominated as a candidate for the post of Secretary General of the Defendant. Almost at the same time, two nominations for the post of Assistant Treasurer General from the Selangor Branch were also submitted. They were Mr. D. Chelliah and Mr. K. Vijayasuriar. Nominations for all posts at the national level were closed on 27th April 1997. At a meeting of EXCO held a day earlier the Secretary General inquired whether any candidates had withdrawn their nominations. In respect of this matter the Plaintiff said that both Mr. D. Chelliah and Mr. K. Vijayasuriar had withdrawn their nominations and produced their withdrawal forms. The withdrawal forms were handed by the Plaintiff to the Secretary General at the said meeting with the consequence that the two nominations were withdrawn. The said withdrawal forms were exhibited as "H-1" and "H-2".

At the said EXCO meeting the Secretary General said that the Exhibits H-1 and H-2 were not signed by the respective candidates. The President of the EXCO then directed that disciplinary action be taken against the member responsible for falsifying the withdrawal forms. The Secretary General then requested the two candidates to verify whether it was their signatures appearing in the respective withdrawal forms.

At a subsequent EXCO meeting held on 16th August 1998 a member proposed that action be taken against the parties responsible for falsifying the withdrawal forms. On 17th August 1998 the Secretary General issued a letter to the Plaintiff alleging that the Plaintiff had falsified the signatures on Exhibit H-1 and H-2. The content of the letter states:-

> *"Saya diarah oleh Majlis Kebangsaan KPPK SM untuk merujuk masalah di atas.*
>
> *Berdasarkan dokumen yang dilampirkan, saudara telah memalsukan tandatangan calon untuk menandatangani Penarikan Diri Pencalonan.*
>
> *Walaupun calon berkenaan telah mengaku bahawa mereka telah memberi kuasa kepada saudara untuk menarik pencalonan tetapi mereka tidak memberi kuasa untuk memalsukan tandatangan mereka. Prosedur ini juga dianggap tidak teratur.*
>
> *Saudara diminta memberi penjelasan atas isu ini dalam tempoh 14 hari anda menerima surat ini."*

The Plaintiff denied the allegation. The Plaintiff further said that he had been given the mandate by the Selangor Branch to withdraw the 2 candidates' nominations.

On 30th September 1998 a Board of Inquiry consisting of 3 members to inquire into the allegation against the Plaintiff was set up. On 21st November 1998 an Inquiry was held by the Board of Inquiry. At the conclusion of the Inquiry the Plaintiff was found guilty of a breach of Rule 12(11) of the Defendant's constitution. The Defendants EXCO at its meeting of 1st December 1998, decided to expel the Plaintiff as a member of the Defendant for the disciplinary wrong he had committed.

Being dissatisfied with the decision of the Defendant's EXCO, the Plaintiff then on 19th December 1998 applied to have his matter referred to an arbitration pursuant to Rule 27 of the Defendant's constitution. On 4th January 1999, the Defendant had made preparations for the arbitration and had invited the Plaintiff to select 3 arbitrators pursuant to Rule 27(2) and (3) of the Constitution. The date for selection of the arbitrators was fixed on 23rd January 1999. Before that fixing date the Plaintiff applied for an adjournment to which the Defendants had agreed. However on 19th January 1999 the Plaintiff informed the Defendant that he did not wish to proceed with the arbitration. On 28th January 1999 the Plaintiff filed this originating summons in Court.

In the light of the preliminary objection applied by the Defendants'

in Enclosure 7 I thought it would be more appropriate to deal with it before considering the Plaintiff's application in Enclosure 2.

The grounds given by the Defendant in making the application in Enclosure 7 are as follows:-

1. *That it was an abuse of the Court process; and*

2. *That the dispute between the Plaintiff and the Defendant falls within the scope of s. 44 of Trade Unions Act 1959 and the Plaintiff should exhaust all domestic remedies under Rule 27 of the Defendant's constitution before taking any action in Court.*

Section 44 of the Trade Unions Act 1959 reads:-

"44. Decision of disputes.

(1) Every dispute between - (a) ...; (b) any person aggrieved who has ceased to be a member of a registered trade union or any branch thereof, or any person claiming through such person aggrieved, and the union or any branch thereof, or any officer thereof; (c) ...; (d) ... shall be decided in the manner directed by the rules of the trade union, and the decision so given shall be binding and conclusive on all parties; and application for the enforcement thereof may be made to a Sessions Court.

And the relevant rule of the Defendant's constitution reads:-

1. Every dispute between - (a) ...; or (b) any person aggrieved who has ceased to be a member of the Union or any person claiming through such person aggrieved on the one part, and the Union or other Branch thereof or an officer thereof on the other part; or (c) ...; or (d) ...; shall be decided by reference to arbitration: ... 2. ... 3. The complaining party to a dispute or a person appointed by him shall draw three names from the Panel of Arbitrators by lot in the usual manner and the three Arbitrators whose names are first drawn shall decide the dispute. 4. ... 5. There shall be a right of appeal to a Delegates Conference against any decision made by the Arbitrators. The decision of the Delegates Conference shall be binding and conclusive."

It was contended by the Counsel for the Defendant that it would be improper for this Court to grant declaratory reliefs applied by the Plaintiff when the remedy open to him was one prescribed by s. 44(1) of the Trade Unions Act 1959, read together with Rule 27 of the Defendant's Constitution. The grievances claimed by the Plaintiff should be referred to the three Arbitrators as would be appointed under Rule 27(3) of the Defendant's Constitution. In the event that the Plaintiff was not satisfied with the decision of the three Arbitrators an appeal can be lodged to the Delegates Conference. Therefore in the light of the existence of such provision it would be unlawful for the Plaintiff to bring this action to this Court. The Plaintiff may only.

The above *Syarikat Kenderaan Melayu Kelantan* case dealt with the application of s. 33B(1) of the Industrial Relations Act 1967 which reads:-

> *"Subject to this Act and the provision of section 33A an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A(1) shall be final and conclusive, shall not be challenged, appealed against, reviewed, quashed or called in question in any Court."*

It was submitted by the Counsel for the Plaintiff that in the light of the Court of Appeal decision in the *Syarikat Kenderaan Melayu Kelantan* case which allowed the High Court to entertain an application for judicial review of a decision of on an inferior tribunal even though s. 33B of the Industrial Relations Act 1967 states that the decision of the Industrial Court is final, similar ruling should also be applied to the present case. Hence there should not be any reason to disallow this Court from hearing the Plaintiff's application.

I must straightaway point out there is a serious flaw in the argument of the Counsel for the Plaintiff. What the Counsel for the Defendant contended was that the law requires the Plaintiff to exhaust all the domestic remedies available to him under the statute. The Defendant's Counsel did not say that the Plaintiff could not at any stage resort to the Court for his grievances. What he had stressed was that at

this stage the application by the Plaintiff was premature. After he had exhausted all his remedies he may then seek further reliefs to the Court if he could produce valid grounds for doing so. No where in the decision of the *Syarikat Kenderaan Melayu Kelantan* case it was said that application to the Court can be made even before the Plaintiff has exhausted all his domestic remedies. In such a situation the facts of this case are different from those of the *Syarikat Kenderaan Melayu Kelantan* case in that there was no evidence at all and in fact no issue had been raised as to whether the aggrieved party had exhausted all its domestic remedies. In fact by making reference to s. 33B of the Industrial Relations Act, 1967 it would appear that the aggrieved party had already exhausted all its domestic remedies. Therefore this case is distinguished from the *Syarikat Kenderaan Melayu Kelantan* case. In the circumstances I fully agreed with the contention of the Counsel for the Defendant in saying that it is trite law that a declaratory judgment cannot be given by the Court in the exercise of its original jurisdiction where the only remedy open to the Plaintiff is one prescribed by statute.

In addition to what has been stated above, the peculiar facts of this case are that the Plaintiff had commenced action to seek redress through arbitration. And the Defendant had consented to the method or procedure taken by the Plaintiff as evidenced by the fact that a date had been fixed by the Defendant to select the 3 Arbitrators to decide the dispute between the Plaintiff and the Defendant. However before the selection of the 3 Arbitrators took place the Plaintiff changed his mind and

abandoned his intention to refer the matter to arbitration. In my view the Plaintiff could not be allowed to change the method of settling the dispute which he himself had initiated and had been consented to by the Defendant. To abandon it and then to seek reliefs to this Court would tantamount to an act of abusing the Court process. The doctrine of *estoppel* is therefore applied in that the Plaintiff be *estopped* from abandoning the procedure he himself had initiated. In the light of the facts and circumstances of this case I arrived at the view that the Plaintiff must proceed with the method of settling the dispute by way of arbitration which method the Defendant had given its consent. And after exhausting those domestic remedies and it the Plaintiff was still not satisfied then only he could seek further reliefs to the Court.

For the reasons as stated above I found the Defendant's application had merits and therefore I allowed Prayer B of Enclosure 7. On hind sight I am now of the view that I should have granted Defendant's Prayer A itself, since having regard to the whole circumstances of this case the Plaintiff should not have taken this application to Court. In other words the proper decision which I should have given was to strike off the Plaintiff's application rather than to stay all the proceedings.

It was for that reason I had struck off the Plaintiff's application under Enclosure 2. I also ordered costs be paid to the Defendant by the Plaintiff in respect both application.

Counsel:

D Kalaimany; M/s Kalai & Partners

Francis Pereira with Shunmugan; M/s Francis Pereira & Shan