

**IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)**

**CIVIL APPEAL NO. 01-5-2007(S)**

**BETWEEN**

**MINISTER OF FINANCE,  
GOVERNMENT OF SABAH** ... **APPELLANT**

**AND**

**PETROJASA SDN. BHD. (275950-P)** ... **RESPONDENT**

(In the Matter of Civil Appeal No. S-01-56 of 2006 in  
The Court of Appeal of Malaysia at Kota Kinabalu)

**BETWEEN**

**PETROJASA SDN. BHD.** ... **APPELLANT**

**AND**

**MINISTER OF FINANCE,  
GOVERNMENT OF SABAH** ... **RESPONDENT**

**QUORUM:**        **ABDUL HAMID MOHAMAD, CJ  
ARIFIN BIN ZAKARIA, FCJ  
HASHIM BIN HAJI YUSOFF, FCJ**

**JUDGMENT OF ABDUL HAMID MOHAMAD, CJ**

I have had the privilege of reading the judgment of Arifin Zakaria FCJ and I agree with his conclusion. However, I would like to make a few points. As he has narrated the facts and reproduced the relevant provisions of the law under consideration, I shall not repeat nor reproduce the same, except where it is absolutely necessary.

The Respondent had obtained a monetary judgment at the High Court at Sandakan against the State Government of Sabah. The Respondent then applied for and obtained a Certificate of Judgment Sum and Order for Costs pursuant to section 33(1) of the Government Proceedings Act 1956 ("GPA"). The party named in the Certificate is the State Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the Respondent filed an ex-parte Application for Leave for Judicial Review for an order of mandamus against the Appellant, the Minister of Finance, Government of Sabah, to pay the judgment sum in accordance with said certificate. Leave was granted. The Respondent then filed the substantive Application for Judicial Review for the said order. The High Court dismissed the application. On appeal to the Court of Appeal, the court allowed the appeal of the Respondent. The Appellant, then obtained leave to appeal to this court, on only one issue i.e.:

“Given that Section 33(3), Government Proceedings Act 1956 imposes a statutory obligation on the Government of Sabah to pay according to a Certificate issued under Section 33(1), Government Proceedings Act 1956, the issue is whether Judicial Review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a Certificate issued under Section 33(1), Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the State Government of Sabah.

Provided that in the event the Federal Court decides that the Minister of Finance, Government of Sabah is not the proper party in these proceedings the Applicant consents that the proper person be joined in these proceedings.”

Now, let us look at the overall scheme of the law on the issue.

Section 33(1) GPA provides that, in brief and in relation to the facts of this case, where in any civil proceeding against the Government, any order is made by any court in favour of any person

against the Government, the court shall issue to the person a certificate.

Sub-section (3) provides that where the order (i.e. the certificate) provides for the payment of money, the government shall pay to the person entitled the amount stated in the certificate.

Sub-section (4) then provides that “Save as aforesaid no execution or attachment or process in the nature of attachment, shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid”.

In other words, the only method provided by GPA to recover a judgment sum is by the issue of the certificate. Ordinary execution proceedings are not available.

This is further strengthened by the provisions of Order 73 of the Rules of the High Court 1980 (“RHC 1980”). Rule 12(1) provides:

“(1) Nothing in Orders 45 to 52 shall apply in respect of any order against the Government.”

Sub-rule (2), though not an issue here, makes specific reference of section 33(1) GPA.

It must be noted that Order 45 to 52 are orders pertaining to Enforcement of Judgments and Orders (Order 45), Writs of Execution: General (Order 46), Writs of Seizure and Sale (Order 47), Examination of Judgment Debtor, etc (Order 48), Garnishee Proceedings (Order 49), Changing Orders, Stop Orders, etc (Order 50), Receivers: Equitable Execution (Order 51), Rateable Distribution (Order 51A) and Committal (Order 52).

In other words, as against a Government one cannot resort to any of the procedures provided by Orders 45 to 52. The only procedure allowed is as provided by section 33 GPA.

We now come to the question: does mandamus lie in this situation?

Section 44 of the Specific Relief Act 1950 (SRA) provides, in brief and in relation to the facts of this case, that a Judge may make an order requiring any specific act to be done “by any person holding a public office”. However, subsection (2) provides that the section does not authorize a Judge:

“(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon the Government; or

- (c) to make any order which is otherwise expressly excluded by any law for the time being in force.”

The question is whether this provision prohibits the issue of mandamus. This section speaks of an order that may be made against “any person holding a public office”. After that it qualifies that an order cannot be made in respect of, inter alia, (b) and (c).

The answer to the question depends on, first, who is a “person holding a public office”? In Loh Wai Kong v Government of Malaysia & Ors (1978) 2 MLJ 175 , Gunn Chit Tuan J (as he then was) held:

“However, according to sub-section (1) of s. 44 of the Specific Relief Act 1956, an order can only be made against any person holding a public office ..... . According to s. 3 of the Interpretation Act, 1967, “public officer” means office in any of the public services, and “public services” means the public services mentioned in art. 132(1) of the Federal Constitution. Therefore, 1 and 2 respondent in this case, namely the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri,

Malaysia who are not persons holding a public office within the meaning of s. 44 of the Specific Relief Act have, in my view, been wrongly cited as respondents.”

In other words, since the Government of Malaysia and the Minister of Home Affairs are not “persons holding a public office”, an order pursuant to section 44 of the SRA cannot be issued against them. Regarding the other two respondents, i.e. the Ketua Pejabat Imigresen, Pulau Pinang and the Pegawai Paspot, Pulau Pinang even though they were held to be persons holding a public office, nevertheless the order prayed for was refused by the learned judge because the applicant had failed to fulfill the five conditions set out in the proviso to sub-section (1) of section 44 SRA.

For purpose of record, in spite of the judgment of the High Court was in favour of the respondents, the respondents (i.e. the Government of Malaysia and others) appealed to the Federal Court and, as stated by Suffian L.P. who delivered the judgment of the 5-member Court, because the learned Judge “in the course of his judgment made certain observations on the law which the Government took objection.” While the Federal Court “allowed” the appeal and dismissed the cross appeal, the net effect of the judgment of the Federal Court is the same as that of the High Court: the application was dismissed. However, it should be noted that the

Federal Court made no reference whatsoever to the interpretation of the words “any person holding a public office.”

The learned Judge of the High Court in the instant case (Linton Albert J) followed the view of Gunn Chit Tuan J and, on that ground dismissed the Respondent’s application. The Court of Appeal disagreed with the learned Judge on this point. The Court of Appeal in a Judgment written by James Foong JCA said:

“This, in our view, is a narrow perception of s.44(1) Specific Relief Act. If adopted it would jeopardize the powers of the Court to order any Minister of the Government to do or forbear from doing the many administrative acts required of such a person in the Government. This would tantamount to practically saying that s. 44(1) of the Specific Relief Act does not apply to a Minister in the Government. Perhaps, the learned trial Judge had overlooked the great number of authorities where the Courts had directed a Minister of the Government to perform or forbear from performing certain specific act. A case in point is that of this Court in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & another* appeal (1996) 1 MLJ 481, where the order of the Court was directed at the Minister of Labour & Manpower involved in an

industrial relation dispute. In this respect, we are of the opinion that the learned trial Judge has erred in his ruling on this point. To us, a Minister of a Government in Malaysia is a person holding a public office under the provision of s.44(1) of the Specific Relief Act.”

With respect, I do not agree with the approach and the interpretation given by the Court of Appeal. If words used in statutes are defined, it is that meaning that the court should give to them. It is not right for the court, purporting to give a “wider interpretation”, to give a meaning different from what is defined by statute.

SPA does not define the words “public office”. However, “public office” is defined by the Interpretation Act 1948 and 1967 (Act 388) (“IA”) as follows:

“ “public office” means an office in any of the public services;”

“ “public officer” is defined as follows:

“ “public officer” means a person lawfully holding, acting in or exercising the functions of a public office.”

What is “public services”? Article 132(1) of the Constitution provides:

“132(1) For the purposes of this Constitution, the public services are –

- (a) the armed forces
- (b) the judicial and legal service
- (c) the general public service of the Federation
- (d) the police force
- (e) (Repealed)
- (f) the joint public services mentioned in Article 133
- (g) the public service of each State; and
- (h) the education service.”

Clause (3) provides:

“(3) The public services shall not be taken to comprise-

- (a) the office of any member of the administration in the Federation or a State; or”

“Member of the administration” is defined in Article 160 as follows:

“ “Member of the administration” means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as a member (other than an official member) of the Executive Council.”

It is clear that the Minister of Finance, Government of Sabah is “a member of the administration” but not a “person holding public office.” What it means, in relation to section 44 SRA is that section 44 SRA is not applicable to the Appellant, meaning that an order under section 44 SRA cannot be issued against the Appellant. To that extent the High Court Judge Gunn Chit Tuan J, was right in Loh Wai Kong (supra) regarding the effect of section 44 SRA on the Government of Malaysia and the Minister of Home Affairs. In my view the learned High Court Judge in the instant appeal was right in following Loh Wai Kong (supra) and the Court of Appeal was wrong in its interpretation of section 44 SRA.

Since section 44 SRA does not apply to the Appellant, proviso (b) and (c) become irrelevant.

That being the case, was the High Court Judge right when he held that the “judgment obtained by the [Respondent] cannot ,,, be enforced by mandamus against the Minister of Finance of the Government of the State of Sabah”? He did so held because, in his view “..... Section 33 GPA and section 44 SRA clearly restrict the wide powers conferred by para. 1 of the Schedule to the CJA which must be read together with section 25.”

I have said earlier that the effect of section 33 GPA and Order 73 rule 12(1) of the RHC 1980 is that, the only method of enforcing a monetary judgment against a Government is by way of obtaining a certificate. I have also come to the conclusion that section 44 SPA does not empower the court to make an order provided therein against the Appellant. But, what about paragraph 1 of the Schedule to the CJA?”

We now come to the provisions of CJA. First, section 25(2) provides:

“(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the issue”.

Then paragraph 1 of the Schedule provides:

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

These powers are additional powers, i.e. additional to any other power given by other written laws. Being additional powers they can only be more than, not limited to, what has already been provided by other laws. The proviso to section 25(2) uses the words “in accordance with any written law or rules of court relating to the issue.” I am of the view that the use of the word “in accordance” and not “subject to” merely refers to the procedural aspects. It cannot mean limited to what are provided in other written laws. To read that proviso in such a way is to nullify the effect of “additional powers”. There would be nothing additional. So, what is the point of having the provision? Bear in mind that the CJA was enacted after the Federal Constitution was promulgated and paragraph 1 of the

Schedule makes specific reference to the Constitution i.e. “for the enforcement of the right conferred by Part II of the Constitution.....” GPA and SRA were both enacted much earlier even though they have been revised. So, in my view, it is not correct to read section 25(2) as subject to or limited to what are provided by GPA or SRA.

We shall now look at the provision of paragraph 1 of the Schedule in detail. Mandamus is mentioned as one of the additional powers. It may be issued to “any person or authority” which, in my view, includes a Minister of a Government.

My brother Arifin Zakaria FCJ has dealt at length, citing authorities to the effect that judicial review lies against a Minister. I shall not repeat. Indeed, the writ of habeas corpus, one of the writs mentioned in paragraph 1 of the Schedule are mostly issued against a Minister. That being the case, I am of the opinion that mandamus may be issued against Appellant.

Para. 1 of the Schedule of the CJA itself provides that mandamus may be issued “for the enforcement of rights conferred by Part II of the Constitution, or any of them.....”

Article 13 which is the last article in Part II of the Constitution provides:

“(1) No person shall be deprived of property save in accordance with law”.

In other words, mandamus may issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law. Here, the Respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying, clearly the State Government of Sabah has deprived the Respondent of its property contrary to law.

Furthermore, paragraph 1 of the Schedule of the CJA goes on to provide “or for any purpose”. This is even wider.

It is, therefore, clear to me that mandamus lies against the Appellant.

I would dismissed the appeal with costs.

My brother Hashim Yusoff FCJ has read this judgment and agrees with it.

**TUN DATO' SERI ABDUL HAMID BIN HAJI MOHAMAD  
KETUA HAKIM NEGARA, MALAYSIA**

Date of Decision : 2 July 2008

Date of Hearing : 26 February 2008

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