IN THE FEDERAL COURT OF MALAYSIA

CIVIL APPEAL NO: 01-11-2009(W)

BETWEEN

DATO' SERI IR. HJ MOHAMMAD NIZAR BIN JAMALUDDIN	**…**	**APPELLANT**
	and	
DATO' SERI DR. ZAMBRY BIN ABDUL KADIR	**…**	**RESPONDENT**
	and	
ATTORNEY GENERAL	**…**	**INTERVENER**

(IN THE COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: W-01-112-2009)

BETWEEN

DATO' SERI DR. ZAMBRY BIN ABDUL KADIR	**…**	**APPELLANT**
	and	
DATO' SERI IR. HJ MOHAMMAD NIZAR BIN JAMALUDDIN	**…**	**RESPONDENT**
	and	
ATTORNEY GENERAL	**…**	**INTERVENER**

CORAM: **ALAUDDIN MOHD SHERIFF, PCA**
ARIFIN ZAKARIA, CJM
ZULKEFLI AHMAD MAKINUDIN, FCJ
MOHD GHAZALI MOHD YUSOFF, FCJ
ABDULL HAMID EMBONG, FCJ

JUDGMENT OF THE COURT

Introduction

[1] Following the General Election held on 8.3.2008, the political alliance called Pakatan Rakyat (PKR) won 31 seats out of the 59 seats in the State Legislative Assembly of Perak (LA). The remaining seats went to Barisan Nasional (BN). On 17.3.2008, the appellant was appointed the Menteri Besar of Perak (the MB) by His Royal Highness the Sultan of Perak (HRH). On 5.2.2009 three members of the LA for Behrang, Changkat Jering and Jelapang declared and informed HRH that they no longer supported the PKR and instead threw their support behind BN. The appellant then had an audience with HRH on the same day where he was informed that his request for dissolution of the LA was rejected by HRH. He was then directed to tender the resignation of the Executive Council, as he no longer commands the confidence of the majority of the members of the LA. The direction was made pursuant to Art. XVI(6) of the Laws of the Constitution of Perak ('the State Constitution'). The appellant did not comply with the direction given by HRH. On 6.2.2009 HRH appointed the respondent as the new MB, replacing the appellant.

[2] Dissatisfied with the decision of HRH, the appellant filed an application for judicial review seeking the following reliefs:

"(a) A declaration that the appellant is still the MB of Perak;

(b) A declaration on the Interpretation of Article XVI(6) of the Undang-Undang Tubuh Kerajaan Negeri Perak that in the circumstances where –

(i) the MB wanted, and had given advice to dissolve the Perak Legislative Assembly ('LA');

(ii) the LA was not dissolved;

(iii) there was no motion of no confidence against the MB in the LA; and

(iv) there is no resignation from the post of MB,

whether the office of the MB Perak falls vacant or has been vacated.

(c) A writ of *'quo warranto'* be issued against the respondent to show cause and to give information how and under what authority can/is the respondent act as the MB of Perak;

(d) A declaration that the respondent has no legal right to be MB;

(e) An injunction to stop the respondent and/or agents from acting as the MB; and

(f) Damages (punitive, aggravated and exemplary).

Prayers (g), (h) and (i) were withdrawn at the end of the hearing before the High Court.

[3] The High Court granted the declaration that the appellant at all material times was and is the MB and the *writ of quo warranto* was issued against the respondent. On appeal to the Court of Appeal, the decision of the learned High Court Judge was reversed.

[4] On 9.7.2009, this Court allowed the appellant's application for leave to appeal to this Court against the decision of the Court of Appeal on the following questions:

> "(1) Whether, under Article XVI(6) of the Laws of the Constitution of Perak and in the circumstances that:
>
> (i) the Menteri Besar of Perak wishes, and has advised for the dissolution of the Perak state Legislative Assembly; and
>
> (ii) there was no dissolution of the Perak State Legislative Assembly; and
>
> (iii) there was no motion of no confidence taken in and adopted by the Perak State Legislative Assembly against the Menteri Besar of Perak; and
>
> (iv) there was no resignation by the Menteri Besar of Perak;
>
> the post of the Menteri Besar of Perak may be and/or has been vacated.

(2) Whether, under Article XVI(6) of the Laws of the Constitution of Perak, the determination of the issue of confidence in the Menteri Besar of Perak has to be made by members of the Perak State Legislative Assembly in an Assembly meeting on a vote of no confidence, or by means other than by a vote of no confidence in the Perak State Legislative Assembly as to whether the Menteri Besar commands the confidence of the majority of the members of the Perak State Legislative Assembly?

(3) If the Menteri Besar refuses to tender the resignation of the Executive Council whether under the Laws of the Constitution of Perak, a Menteri Besar may be dismissed from office or the Menteri Besar's post be deemed vacant or vacated?"

Events Leading To the Appointment Of The Respondent

[5] In considering the issues posed to us it is necessary to narrate in some detail the events leading to the appointment of the respondent as the MB, replacing the appellant. Chronogically they are as follows:

(i) On 30.1.2009, by separate letters addressed to the LA Speaker ('Speaker'), two members of the LA namely, Encik Jamaluddin bin Mohd Radzi (Member of the LA for Behrang) and Encik Mohd Osman bin Mohd Jailu (Member of the LA for Changkat Jering) purportedly resigned from their posts effective on the same day.

On 1.2.2009, there was an announcement over the media by the Speaker to that effect.

(ii) On the same day, the Speaker informed the Election Commission ('EC') of the purported resignation.

(iii) Following the media announcement, on 1.2.2009, Encik Jamaluddin bin Mohd Radzi and Encik Mohd Osman bin Mohd Jailu sent separate letters dated the same day to the HRH stating, *inter alia*, that:

[a] They did not issue the letter of resignation as alleged by the Speaker in his press statement; and

[b] They are still serving and carrying out their duties as the Assemblymen for Behrang and Changkat Jering respectively. On the same day, they issued a letter to the Speaker stating, *inter alia*, that:

(1) Any letter and/or notice purporting to contain their resignation as members of the LA whether dated before, on or after 1.2.2009 is invalid *ab initio* due to non-occurrence of an event;

(2) At all material time, they have not tendered their resignation letter to the Speaker as alleged;

(3) The purported resignation letter was not dated by them and the act of such person in inserting the date on the purported resignation letter was done without their prior approval and/or consent; and

(4) That they are issuing the letters dated 1.2.2009 voluntarily and on their own accord.

[6] The abovementioned letters dated 1.2.2009 were also copied to the State Secretary of Perak, the State Legal Adviser of Perak, the Secretary of the LA and the Director of Elections for the State of Perak.

[7] Both of them also issued a letter to the Director of Elections for the State of Perak stating, *inter alia*, as follows:

[a] Any letter and/or notice purporting to contain their resignation as members of the Perak LA whether dated before, on or after 1.2.2009 is invalid *ab initio* due to non-occurrence of an event; and

[b] They also enclosed a copy of their letters to the Speaker.

[8] On 2.2.2009, the Behrang Assemblyman lodged a police report at the Bentong Police Station (Report No. 000583/09) stating, *inter alia*, that:

[a] He did not tender the purported resignation letter to the Speaker;

[b] At all material time, he was on medical leave; and

[c] The purported resignation letter is invalid, fraudulent and issued in bad faith.

[9] On 2.2.2009, one Mohd Farizal bin Omar on behalf of the Changkat Jering Assemblyman lodged a separate police report at the Shah Alam Police Station (Report No. 000582/09) to the same effect.

[10] On the same day, the appellant, who was then the Menteri Besar of Perak, had an audience with HRH to inform HRH of the purported resignations of the Behrang and Changkat Jering Assemblymen.

[11] On 3.2.2009, both the Behrang and Changkat Jering Assemblymen wrote to HRH informing HRH that they:

[a] Have lost their confidence in the appellant;

[b] Will not support him as the MB; and

[c] The BN alliance now has a majority in the LA.

[12] Both the Behrang and Changkat Jering Assemblymen who at that time were still members of PKR wrote a letter dated 3.2.2009 respectively to the President of PKR and the Speaker stating that:

[a] They have lost their confidence in PKR;

[b] They are leaving PKR and denouncing their membership as members of PKR effective immediately;

[c] Their declaration leaving PKR does not operate as their resignation as members of the LA; and

[d] Any letter and/or notice purporting to contain their resignation as members of the LA whether dated before, on or after 1.2.2009 is invalid *ab initio*.

[13] By letter dated 3.2.2009 addressed to the Speaker, another member of the LA, namely, Madam Hee Yit Foong (Member of the LA for Jelapang) purportedly resigned as a member of the LA effective on the same day.

[14] The Jelapang Assemblywoman issued a letter on the same date to the Speaker stating, *inter alia*, that:

[a] Any letter or notice of resignation purporting to be her resignation as a member of the LA and which does not bear her official stamp is *void ab initio*;

[b] She has lost her confidence in the DAP;

[c] She is leaving the political party and denouncing her membership in the DAP; and

[d] Her declaration on leaving the DAP does not operate as her resignation as a member of the LA.

[15] The Jelapang Assemblywoman also issued a letter dated 3.2.2009 to the Secretary of the DAP reiterating the content of her letter to the Speaker;

[16] On 3.2.2009, the Jelapang Assemblywoman wrote to HRH to inform HRH that she:

[a] Has lost her confidence in the appellant;

[b] Will not support him as the MB; and

[c] The Barisan Nasional alliance now has the support of the majority of the members of the LA.

[17] On 4.2.2009, at about 3.00pm, HRH received three separate letters from:

[a] The Jelapang Assemblywoman;

[b] The Behrang Assemblyman; and

[c] The Changkat Jering Asemblyman.

The letters expressed their support for BN and that they had lost confidence in the appellant and that they were leaving their respective political parties but maintaining their position as members of the LA.

[18] At about 5.00 pm on 4.2.2009, the appellant had an audience with HRH. During the audience, it was alleged, that he had requested for dissolution of the LA. HRH, in the presence of the Perak State Legal Adviser, informed the appellant that HRH would have to consider his request. On 5.2.2009, the appellant wrote to HRH informing HRH of the latest development in the State and once again requested HRH to dissolve the LA. At about 10.00 am on the same day, the then Deputy Prime Minister Dato' Seri Mohd Najib bin Tun Abd Razak, in his capacity as the Chairman of the Perak BN, had an audience with HRH.

[19] At this meeting, the Deputy Prime Minister presented HRH with a letter of support from the 28 members of the LA who are aligned to the BN and that of the Behrang and Changkat Jering Asemblymen and Jelapang Assemblywoman. The letter stated that the signatories will support whoever that will be named by YAB Dato' Seri Mohd Najib bin Tun Abdul Razak as the candidate for the new MB.

[20] On 5.2.2009 at about 11.15 am, the then Deputy Prime Minister brought in all 31 members of the LA including Encik Jamaluddin bin Mohd Radzi, Encik Mohd Osman bin Mohd Jailu and Madam Hee Yit Foong to Istana Kinta to meet with HRH. All 31 members of the Perak LA pledged their support to the BN.

[21] Thereafter, HRH spoke to the Jelapang Assemblywoman, the Behrang Assemblyman, the Changkat Jering Assemblyman and also Encik Nasaruddin, the Bota Assemblyman. All four members of the LA stated that they signed the letters wherein they have pledged their support to the BN voluntarily without any coercion from any other party. At about 1.00 pm on 5.2.2009, the appellant had an audience with HRH in the meeting room at Istana Kinta. At about 1.20 pm, the appellant left the meeting room.

[22] At about 2.16 pm, HRH's office issued a press statement to Bernama, the material part of which reads as follows:

“Yang Amat Berhormat Dato’ Seri Ir. Haji Mohammad Nizar bin Jamaluddin telah manghadap Duli Yang Maha Mulia Paduka Seri Sultan Perak Darul Ridzuan pada 04 Februari 2009 (semalam) memohon perkenan Baginda untuk membubarkan Dewan Negeri Perak.

Yang Amat Berhormat Dato’ Seri Mohd Najib, Timbalan Perdana Menteri Malaysia juga memohon menghadap Baginda atas kepasitinya sebagai Pengerusi Barisan Nasional Negeri Perak dan telah diberi perkenan menghadap Baginda pada esuk harinya, pagi 05 Februari 2009.

Yang Amat Berhormat Dato’ Seri Mohd Najib memaklumkan bahawa Barisan Nasional dan penyokong-penyokongnya kini yang terdiri daripada 31 orang ahli Dewan Negeri telah menguasai majoriti di kalangan ahli-ahli Dewan Negeri.

Atas titah Duli Yang Maha Mulia untuk meyakinkan Baginda bahawa maklumat yang dipersembahkan itu adalah tepat, kesemua 31 orang ahli Dewan Negeri tersebut telah dititah menghadap Paduka Seri Sultan.

Setelah menemui sendiri kesemua 31 ahli-ahli Dewan tersebut, DYMM Paduka Seri Sultan Perak telah yakin bahawa YAB Dato’ Seri Ir. Haji Mohammad Nizar bin Jamaluddin telah terhenti daripada mendapat kepercayaan sebahagian besar (ceases to command the confidence of the majority) dari kalangan ahli-ahli Dewan Negeri.

DYMM Paduka Seri Sultan Perak juga telah menimbangkan dengan sedalam-dalamnya permohonan YAB Dato’ Seri Ir. Haji Mohammad Nizar bin Jamaluddin pada 04 Februari 2009 memohon perkenan Baginda untuk membubarkan Dewan Negeri Perak. Baginda menggunakan budi bicara Baginda di bawah Perkara XVIII (2)(b) Undang-Undang Tubuh

Kerajaan Perak Darul Ridzuan dan tidak berkenan membubarkan Dewan Negeri Perak.

YAB Dato' Seri Ir. Haji Mohammad Nizar bin Jamaluddin telah dititah menghadap Baginda untuk dimaklumkan mengenai keputusan Baginda tidak membubarkan Dewan dan selaras dengan peruntukan XVI(6) Undang-Undang Tubuh Kerajaan Perak Darul Ridzuan, DYMM Paduka Seri Sultan Perak menitahkan YAB Dato' Seri Ir. Haji Mohammad Nizar bin Jamaluddin meletak jawatan sebagai Menteri Besar Perak bersama ahli-ahli Majlis Mesyuarat Kerajaan (MMK) berkuat kuasa serta merta.

Sekiranya YAB Dato' Seri Ir. Mohammad Nizar bin Jamaluddin tidak meletak jawatan sebagai Menteri Besar Perak bersama ahli-ahli MMK, maka jawatan Menteri Besar serta ahli-ahli MMK tersebut dianggap telah dikosongkan."

[23] By this statement, it was made known that HRH had turned down the request by the appellant to dissolve the LA under Art. XVI(6) and as a consequence the appellant was required to tender his resignation together with his Executive Council members. Since the appellant failed to do so, therefore, the offices of MB together with the Executive Council members were deemed to have been vacated.

Principles Applicable to the Interpretation of a Constitution

[24] The answers to the questions posed to us turn essentially on the construction to be accorded to the relevant provisions of the State Constitution. We have been reminded by learned

counsel for the parties as to the principles to be adopted in the interpretation of the Constitution. Basically, a Constitution being the supreme law of a State or Federation, it has to be interpreted differently from ordinary statute. The Privy Council in *Hinds v The Queen [1976] 1 All ER 353* said:

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would … be misleading."

(see also *Liyanage v Regina [1966] 1 All ER 650).*

[25] In *Minister of Home Affairs v Fisher (1979) 3 All ER 21,* the Privy Council was faced with interpreting the fundamental rights provisions of the Bermuda Constitution. It concluded by saying that these provisions "call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom." (See also *Teh Chong Poh v Public Prosecutor (1979) 1 MLJ 50.)* And this Court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor (1992) 1 MLJ pg 709* stated*:*

> "Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v Fisher at pg 329*, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its

character but not forgetting that respect must be paid to the language which has been used.

In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia* at pg. 17:

> The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning."

[26] NS Bindra's Interpretation of Statutes, Tenth Ed. at pg 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At pg 1296 it stated that the organic method is to be preferred. "The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties." From the authorities cited above our Courts are inclined to the organic theory in the interpretation of the Constitution.

[27] One other important guide in interpretation of Constitution is that, "The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the

others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous."

(See *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (2004) 2 MLJ 257*)

The First and Second Questions

[28] Guided by the abovestated principles on constitutional interpretation we will now endeavour to construe the relevant provisions of the State Constitution which are germane to the issues in the present case. The statement issued out of HRH's office dated 5.2.2009 sets out the premise on which HRH had decided to appoint the respondent as the MB replacing the appellant.

[29] The issue is whether HRH had acted within his authority in so doing. The answer to this question lies on the construction to be given to Art. XVI(6) of the State Constitution which states:

“The Executive Council

(6) If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.”

This Article contemplates a situation where the MB ceases to command the confidence of the majority of the members of the LA. In such a circumstance he may request for the dissolution of the LA so that a fresh election can be held. Such a request must be addressed to HRH, but in the event HRH rejected his request for the dissolution of the LA then he shall tender the resignation of the Executive Council. By definition ‘Executive Council’ consists of the MB appointed by HRH under Art. XVI(2)(a) and other members of the Executive Council appointed under Art. XVI(2)(b).

[30] It is not in dispute that the appellant did approach HRH for dissolution of the LA, but the issue is whether the request for dissolution was made under Art. XVI(6) or under Art. XXXVI(2). The appellant maintained that it was made under Art. XXXVI(2), while the respondent, through the evidence of the State Legal Adviser and documentary evidence tendered before the Court, maintained that it was made under Art. XVI(6).

[31] The learned High Court Judge, disbelieved the State Legal Adviser on this issue and found for the appellant. This issue arose because of the common stand taken by the parties that a request for dissolution under Art. XXXVI(2), unlike the request under Art. XVI(6), if rejected by HRH, would not trigger the consequence as provided in Art. XVI(6) i.e. the MB having to tender the resignation of the Executive Council.

[32] The Court of Appeal reversed the finding of the learned High Court Judge on the premise that his finding was perverse, being contrary to documentary and other evidence before the Court. (See *Dato' Seri Ir. Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener) (2009) 5 CLJ 265; (2009) 5 MLJ 464; and (2009) 4 AMR 569.* Raus JCA (as he then was) his judgment stated:

> "26. It is clear from the above uncontroverted documentary evidence that the request for the dissolution of the Legislative Assembly must have been made under Article XVI(6) of the Perak State Constitution. Moreover, state of events that led to the decision of His Royal Highness not to dissolve the Legislative Assembly, does not support Nizar's claim that he had requested the dissolution of the Legislative Assembly under Article XXXVI(2) of the Perak State Constitution.

27. It is an undisputed fact that the Pakatan rakyat Government at its formation had a 3 seat majority in the Legislative Assembly. Thus, when the two Assemblymen of Pakatan Rakyat from PKR on 1 February 2009 declared that they were leaving the party and crossing support to the Barisan Nasional, Nizar must be concerned of his position. Nizar quickly had an audience with His Royal Highness on 2 February 2009, to inform His Royal Highness that the two Assemblymen had in fact resigned. But by that time the two Assemblymen had openly disputed the fact they have resigned as members of the Legislative Assembly.

28. On 3 February 2009, another bombshell hit Nizar. This time an Assemblywoman from DAP announced her decision to leave DAP, a political party aligned to Pakatan Rakyat. She too had disputed the claim by the Speaker that she had resigned as a member of the Legislative Assembly. She openly declared that she no longer supported Nizar as the Menteri Besar, instead she was supporting Barisan Nasional.

29. The above was the state of affairs when Nizar had an audience with His Royal Highness at 5.30pm on 4 February 2009, where he made the request to dissolve the Legislative Assembly. At that time he could not credibly dispute the fact that he had lost the support of the majority of the members of the Legislative Assembly as the Barisan Nasional consisting 28 members with the support of 3

Independent members had a total of 31 members, while Pakatan Rakyat had 28 members. On these undisputed facts, how could he possibly claimed that his request to dissolve the Legislative Assembly was under Article XXXVI(2) of the Perak State Constitution.

30. Article XXXVI(2) is a general provision. A request for dissolution under this Article, have to be in relation to the conclusion of the five years term of the Legislative Assembly when a General election is contemplated. It is a well known fact that the General Election had been held barely one year ago. Hence, the learned Judge's finding that the request by Nizar for the dissolution of the Legislative Assembly was under Article XXXVI(2) cannot be supported. On the facts of this case, the request could only have been made in accordance to Article XVI(6) of the Perak State Constitution."

[33] Having considered the evidence before the Court, we find that the Court of Appeal was justified in reversing the finding of facts by the learned High Court Judge. We agree that this is a clear case where the trial Judge failed to judicially appreciate the evidence before him. Such a failure justifies an appellate intervention as was rightly done by the Court of Appeal in the present case. (See *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor (2003) 2 MLJ 97; Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors (2005) 2 MLJ 1*;

Watt v Thomas (1947) AC 484; Gulf Insurance Limited v The Central Bank of Trinidad and Tobago, 9th March 2005, Privy Council, Transcript).

[34] In this regard we would, however, add that the power to dissolve the LA is vested in HRH by Art. XXXVI(2) no matter in what circumstances it was made. This is clear from our reading of the said Article which provides:

> "(2) His Royal Highness may prorogue or dissolve the Legislative Assembly."

This is the only provision touching on the dissolution of the LA. Art. XVI(6), in our view, does not provide for the dissolution of the LA as such, but merely provides that the MB may in the circumstances stated in Art. XVI(6) request HRH for the dissolution of the LA. It does not confer the power on HRH to dissolve the LA. So in the event HRH accedes to the request for the dissolution of the LA it has to be done under XXXVI(2) not under Art. XVI(6). As we see it Art. XXXVI(2) is a general power to dissolve the LA, but the circumstances under which the LA may be dissolved are varied, and one such circumstance is when there is a request by the MB to do so under Art. XVI(6) and HRH agrees to such a request. Other instances that we can think of, is where the Government of the day may request for the dissolution of the LA prior to expiry of the five year term in order

to get a fresh mandate from the electorate. It is important to note that in all cases, the decision whether or not to dissolve the LA is in the absolute discretion of HRH. HRH does not act on advice of the Executive Council in the matter of dissolution of the LA. This is clearly stated in Art. XVIII(2)(6).

[35] What had happened here, as found by the Court of Appeal, was that the appellant had requested HRH for dissolution of the LA, on the ground that he no longer commands the confidence of the majority of the members of the LA. HRH rejected his request and acting under Art. XVI(6) HRH directed the appellant to tender his resignation together with that of the Executive Council. Had the appellant complied with the direction that would have been the end of the matter.

[36] The appellant, however, took the stand that the issue of confidence can only be determined by a vote taken in the LA. Without such a vote, he was not obliged to resign as directed by HRH. Hence, he contended that HRH had acted outside HRH's constitutional authority or power when he directed the appellant to tender the resignation of the Executive Council. In other words, before an Art. XVI(6) situation can be triggered there must first be a vote of no confidence put before the LA, and in the event the LA voted against him, then and only then, can a request for a dissolution of the LA under Art. VXI(6) be made to HRH. In the present case, there was no

such vote of no confidence against him. Therefore, the prerequisite of Art. XVI(6) had not been satisfied.

[37] Learned counsel for the appellant contended that what had happened in the present case was that, the appellant had an audience with HRH where he requested for a dissolution of the LA under Art. XXXVI(2) in order to avoid a possible deadlock in the house. The request for the dissolution of the LA was thus made under Art. XXXVI(2) not under Art. XVI(6). Therefore, even if HRH rejected his request he was not required to tender the resignation of the Executive Council. This is contrary to the finding made by the Court of Appeal which held that there was ample evidence (both oral and documentary) indicating that the appellant had in fact requested for a dissolution of the LA on the ground that he had lost the confidence of the majority of the members of the LA. They held that the request was made under Art. XVI(6). The learned Judges of the Court of Appeal in three separate judgments had considered this issue at some length before coming to their finding. After a careful examination of the evidence before us we are of the view that the Court of Appeal was justified in coming to the said finding.

[38] Having said that, therefore, the only issue before us is whether Art. XVI(6) by its terms requires that the test of confidence in the MB could only be done on the floor of the LA and not otherwise. It was contended for the appellant that,

since the MB, after being appointed by HRH, was only answerable to the LA, the only way to determine whether he commands the support of the majority of the members or otherwise was to have the motion tabled in the LA. In the event a vote of no confidence was passed by the LA then HRH will have to decide whether to dissolve the LA or not. The appellant drew support for this contention from the case of *Tun Datu Haji Mustapha bin Datu Harun v Datu Haji Mohamed Adnan Robert, Yang Di Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2)(1986) 2 MLJ 420,* which adopted the view expressed in *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli (1966) 2 MLJ 187*.

[39] The respondent and the learned Attorney General on the other hand submitted that *Ningkan's* case should not be followed, as the decision was based on the peculiar facts as found by the learned Judge in that case. Firstly, it was pointed out that the Assembly was in session when the Governor sacked Ningkan. Secondly the letter addressed to the Governor which was purportedly signed by 21 members of the Assembly was questionable. In one case there was merely a chop, with no signature, against the name of the member of the Assembly. Thirdly, two days before Ningkan was sacked, Bills were passed by the Assembly without opposition and no motion of no confidence was introduced in the Assembly. And fourthly, there was no request for dissolution of the Assembly ever being made by *Ningkan.*

[40] In the present case, they said, not only was there a request made by the appellant for the dissolution of the LA under Art. XVI(6), thus indicating a loss of confidence in the appellant by the majority of the members, this was further confirmed in the meeting between the 31 members of the LA and HRH. At that meeting the 31 members jointly expressed their support for BN. They contended that, on those facts, *Ningkan's* case can be distinguished from the present case as was done by the Court of Appeal.

[41] The Privy Council case of *Adegbenro v Akintola [1963] 3 All ER 544* was relied by the respondent and the learned Attorney General in support of the proposition that the evidence that the MB ceases to command the confidence of members of the LA for the purposes of Art. XVI(6) may be gathered from other sources and are not confined to the votes taken in the LA provided that, that extraneous sources are properly established. *Akintola* was not followed by Harley Ag. CJ (Borneo) in *Ningkan*. He held that on the provisions of the Sarawak Constitution a lack of confidence could only be demonstrated by a vote in the Council Negeri. He pointed to the distinguishing feature in the Nigerian Constitution in that the Governor had the express power to assess the situation "as it appeared to him." Furthermore, in Nigeria it was not disputed that the Governor had the express power to remove the premier if he no longer commands the support of the majority of the members of the House.

[42] The respondent and the learned Attorney General also drew support from the case of *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors (1995) 1 CLJ 184.* In *Amir Kahar*, the plaintiff was a Cabinet Minister in the Cabinet led by Datuk Pairin Kitingan, as the Chief Minister. Following the exodus of PBS assemblymen to BN, Pairin Kitingan tendered his resignation as Chief Minister. A new Chief Minister was appointed together with a new cabinet. The plaintiff challenged the legality of the new government and sought for a declaration that the resignation of Pairin Kitingan, being personal in nature, had not affected his Cabinet and the plaintiff's position as State Minister. The primary issue that arose was whether the resignation of Pairin Kitingan was constitutionally proper and effective, and if so, whether that resignation in law amounted to the resignation of his whole Cabinet. It was held, *inter alia,* that even if the Chief Minister, under those circumstances, refused or did not tender the resignation of the members of the Cabinet, or if he tendered the resignation of himself alone, the fact remained that the Cabinet was dissolved on account of his losing the confidence of a majority of the members of the Assembly. Following *Akintola* the Court held further that the evidence that a Chief Minister ceased to command the confidence of the majority members of the Assembly for the purpose of Art. 7(1) of the Constitution was not only available from the votes taken in the Assembly. The learned Judge noted that there was nothing in the

Constitution which could be construed as requiring that the test of confidence must be by a vote taken in the Assembly itself. That fact could also be evidenced by other extraneous sources. In that case the extraneous source was to be found in the clear expression contained in the petition by the 30 assemblymen to the 1st defendant and the admission of that fact by Datuk Pairin himself. This clear expression, the learned Judge held, sufficed for the 1st defendant to exercise his discretion under Art. 6(3) to appoint the 2nd defendant as the new Chief Minister.

[43] Abdul Kadir Sulaiman J (as he then was) at pg 196 stated:

> "In the circumstances I would adopt the dicta of Viscount Radcliffe who delivered the judgment of the Privy Council in *Adegbenro v Akintola's case (supra)* at page 70 when his Lordship says:
>
> 'What, then, is the meaning of the words 'the Premier no longer commands the support of a majority of the members? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed, that, so long as the elected House of the Representatives is in being, a majority of the members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other

principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

It is said, too, that the 'support' that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a part or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities in the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordship somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned.'

Based on what was said by Viscount Radcliffe in the case, the evidence that a Chief Minister ceases to command the confidence

of the majority of members of the Assembly for the purpose of Article 7(1) of the Sabah Constitution, may be found from other extraneous sources than to be confined to the votes taken in the Legislative Assembly provided that, that extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the 1st defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the 1st defendant to exercise his discretion under Article 6(3) to appoint the 2nd defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. The expression of lost of confidence is not, therefore, confined to a vote taken in the Assembly but depending on the circumstances, which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the Assembly itself."

[44] In *Amir Kahar*, even though the learned Judge distinguished that case on its facts from *Ningkan,* he explicitly stated that the question whether the Chief Minister ceases to have the support of the majority of the members of the Assembly could be gathered from sources outside the Assembly. In this regard we would also refer to the Indian case of *Mahabir Chandra Prasad Sharma, Petitioner v Prafulla Chandra Ghose and others, Respondents AIR 1969 Cal. 198.* There, the High Court held that the Governor may remove the Chief Minister from his office and dissolve the Council of Ministers headed by him after being satisfied that the Chief Minister no

longer had the support of the majority of the Legislative Assembly. This was done without there being a vote of no confidence passed by the Legislative Assembly. In his judgment, B.C. Mitra J stated that the provision in Clause (2) of Article 164 of India Constitution that the Ministers shall be collectively responsible to the Legislative Assembly of a State, does not in any manner fetter or restrict the Governor's power 'to withdraw the pleasure' during which the Ministers hold office. It is true that there, the Council of Ministers hold office at the pleasure of the Governor but the point we are making is that the Governor may remove the Chief Minister and the Council of Ministers without a vote of no confidence being passed in the Legislative Assembly.

[45] The question is, which of these two contrasting stands is applicable to the present case. The answer to this depends wholly on the construction to be given to the relevant provisions of the State Constitution. In this regard it is important to bear in mind what was said by Raja Azlan Shah J (as His Royal Highness then was in *Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 at pg 188*:

> "Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording 'can never be overridden by the extraneous

> principles of other Constitutions' – see *Adegbenro v Akintola & Anor*. Each country frames its Constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well-being is ensured by their fundamental law."

[46] Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan (2008) 1 MLJ 1* similarly said, "So, in determining the constitutionality or otherwise of a statute under our Constitution by the Court of Law, it is the provision of our Constitution that matters, not a political theory by some thinkers." And as stated in the authorities referred to earlier, the interpretation of a Constitution calls for more generosity than other statutes and as *sui juris,* calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which had been employed. A Constitution is not to be construed in any narrow or pedantic sense. (See *Public Prosecutor v Datuk Harun Idris & Ors (1981) 2 MLJ 72.*

[47] Raus Sharif JCA (as he then was) agreed with the view expressed by Kadir Sulaiman J in *Amir Kahar* and stated that:

> "Similarly, in the present case there is nothing in the Perak State Constitution which can be construed as requiring that the test of confidence or lack of it must be by way of vote taken in the Legislative Assembly. Of course, actual voting

> in the Legislative Assembly is ideal but interpreting Article XVI(6) to require the loss of confidence to be established only by voting in the Legislative Assembly would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it. Thus, as rightly stated by Kadir Sulaiman J in *Amir Kahar* that there must be other circumstances, which are capable of contributing sufficient evidence to such lack of confidence in Chief Minister or the Menteri Besar."

[48] We agree with the view stated above as there is nothing in Art XVI(6) or in any other provisions of the State Constitution stipulating that the loss of confidence in the MB may only be established through a vote in the LA. As such, evidence of loss of confidence in the MB may be gathered from other extraneous sources provided, as stated in *Akintola*, they are properly established. Such sources, we think, should include the admission by the MB himself and/or representations made by members of the LA that the MB no longer enjoys the support of the majority of the members of the LA. In the present case, the Court of Appeal held that there was evidence of such admission by the appellant himself and what is beyond dispute is the demonstration of support by the 31 members of the LA for BN. Hence, giving BN a clear majority in the LA. All these clearly point to the loss of confidence of the majority of the members of the LA in the leadership of the appellant as the MB.

[49] For the above reasons our answer to the first question is in the affirmative and for the second question, is that there is no requirement in the State Constitution which requires a vote of no confidence to be tabled in the LA under Art. XVI(6).

The Third Question

[50] The third and final question posed to us is whether a MB who has been asked to resign by HRH under Art. XVI(6) may be dismissed from office or his office is deemed vacated if he refuses to resign. To recap Art. XVI(6) provides:

> "(6) If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council."

[51] From our reading of this Article, it is plain that where a MB ceases to command the confidence of the majority of the members of the LA he may request HRH to dissolve the LA. This gives him the opportunity to obtain a fresh mandate from the electorate. The issue arises, when his request for dissolution under Art. XVI(6) is refused by HRH, is he in the circumstances required to resign from his office? The learned High Court Judge agreed with the appellant that on the wording of Art. XVI(6) he was not so required. He rejected the argument put forth by the learned counsel for the

respondent and the Attorney General that because of the word 'shall' in the said Article it is, therefore mandatory for him to tender the resignation of the Executive Council. In his judgment the learned High Judge said:

> "But in my view no matter how mandatory is the word 'shall' in Article XVI(6), it cannot be read to mean that the office of Menteri Besar becomes or deemed to be vacant if the Menteri refuses to resign under the circumstance of Article XVI(6) of Perak's State Constitution. It cannot be done because the language of Article XVI(6) is so plain and obvious. What is so plain and obvious on Article XVI(6) is that the Menteri Besar shall tender his resignation if he faces the circumstances specified in the said Article which is that he has ceased to command the confidence of the majority in the State Legislative Assembly."

[52] The finding of the High Court on this issue was reversed by the Court of Appeal. Raus Sharif JCA (as he then was) in his judgment at para 50 stated:

> "50. The question of Perak having two Menteri Besars does not arise. Article XVI(6) of the Perak State Constitution and established convention, demand that once the Menteri Besar is made to know that he has lost the confidence of the majority of the members of the Legislative Assembly, he should take the honourable way out by tendering his resignation and the resignation of the Executive Council. If the

> Menteri Besar refuses or does not tender his resignation and the resignation of the Executive Council, as had happened in this case, the fact remains that the Executive Council is dissolved (which include the Menteri Besar) on account of the Menteri Besar losing the confidence of the majority of the members of Legislative Assembly. Therefore, it is not necessary for the DYMM Sultan of Perak to remove Nizar and the other members of the Executive Council. The DYMM Sultan of Perak in exercise of His Royal Prerogative under Article XVI(2)(a) of the Perak State Constitution is at liberty to appoint another Menteri Besar to replace Nizar. But His Royal Highness must appoint someone who has the command and the confidence of the majority of the members of the Legislative Assembly. In the present case, there is no doubt that Zambry has the majority support of the members of the Legislative Assembly. He has the support of 31 members from 59 members of the Legislative Assembly."

[53] It is not in dispute that it is within the discretion of HRH to withhold consent to a request for dissolution of the LA. [See Art. XVIII(2)(b)] Given that HRH may reject the request to dissolve the LA then, if that happens, the question arises, is the appellant required by law to tender his resignation? The answer to this issue turns very much on the effect to be given to the word 'shall' in Art. XVI(6). According to Words, Phrases & Maxim Legally & Judicially Defined, the word 'shall' is interpreted to mean:

> "In common parlance, a term which, it is said, has always a compulsory meaning, and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the sense of 'must' of which it is a synonym. As used in statutes, the word is generally mandatory; although it is not always imperative but may be consistent with an exercise of discretion. Thus it may be construed to mean 'may' when a right or benefit to any one depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction; or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with mental branches of government; and it also means 'may' when used by a legislature in a grant of authority to a Court. (*Ame Cyc*) The word 'shall' in its ordinary signification is mandatory though there may be considerations which would influence the Court in holding that the intention of the legislature was to give a discretion."

(See also *Perwira Affin Bank Bhd v Tan Ah Tong (2003) 5 MLJ 193*; *Public Prosecutor v Chang Han Yuan (1999) 4 MLJ 49; SOP Plantations (Suai) Sdn Bhd v Ading AK Layang & Ors (2004) 4 MLJ 180; Pow Hing & Anor v Registrar of Titles, Malacca (1981) 1 MLJ 155; London & Clydeside v Aberdeen (1980) 1 WLR 182; and Courts v Commonwealth of Australia (1985) ALR 699.*

[54] In *Amir Kahar's* case the word 'shall' was construed to have the mandatory effect. The Court said: "Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of the majority of the members of the Assembly and it is not necessary, therefore, for the Yang di-Pertua Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet." (See page 194)

[55] Similarly here, on the literal interpretation of Art. XVI(6), we are of the view that the word 'shall' should be given a mandatory effect. Therefore, it is incumbent upon the appellant in the circumstances of this case to tender the resignation of the Executive Council. The term Executive Council by definition includes the MB. [See Art. XVI(2)] We, therefore, agree with the respondent that the refusal on the part of the appellant to resign after having been directed to do so by HRH clearly went against the express provisions of Art. XVI(6). It cannot be the intention of the framers of the State Constitution that in the circumstances, it is open to the appellant whether to resign or to stay on as MB. The word 'shall', in our opinion, ought to be given a mandatory effect, otherwise, it would lead to political uncertainty in the State. The appellant cannot continue to govern after having lost the

support of the majority. To allow him to do so would be going against the basic principle of democracy. However, we would add that this by no means is the end of the matter, as it is always open to the appellant to bring a vote of no confidence against the respondent in the LA or make a representation to HRH at any time if he thinks that the respondent does not enjoy the support of the majority of the members of the LA.

Conclusion

[56] In the upshot we would answer the questions posed to us as follows:

(i) The answer to the first question will be in the affirmative;

(ii) As for the second question, our answer is that under Art. XVI(6) the question of confidence in the MB may be determined by means other than a vote of no confidence in the LA; and

(iii) As for the third question our answer is that if the MB refuses to tender the resignation of the Executive Council under Art. XVI(6) the MB and the Executive Council members are deemed to have vacated their respective offices.

[57] The appeal is accordingly dismissed. No order as to cost. Deposit to be refunded to the appellant.

T.T

(TAN SRI ARIFIN BIN ZAKARIA)
Chief Judge of Malaya

Dated: 9.2.2010

Date of Hearing	:	5.11.2009
Date of Decision	:	9.2.2010
Counsel for Appellants	:	Tuan Hj. Sulaiman Abdullah Dato' Ambiga Sreenevasan Mr. Nga Hock Cheh Mr. Philip Koh Tong Ngee Mr. Chan Kok Keong Mr. Ranjit singh Mr. Razlan Hadri bin Zulkifli Mr. Mohamed Hanipa bin Maidin Mr. Leong Cheok Keng Mr. Edmund Bon Tai Soon Mr. Amer Hamzah bin Arshad Mr. Zulqarnain bin Lukman Ms. Joanne Leong Pooi Yaen

Solicitors for Appellants	:	Messrs. Leong & Tan Advocates & Solicitors 102 Jalan Raja Ekram, 30450 Ipoh, Perak Darul Ridzuan.
Counsel for Respondent	:	Dato' Cecil Abraham Ms. Sunil Abraham Ms. Farah Shuhadah Razali
Solicitors for Respondent	:	Messrs. Zul Rafique & Partners Advocates & Solicitors 17th Floor, Menara PanGlobal 8, Lorong P. Ramlee 50250 Kuala Lumpur
Counsel for Intervener	:	Tan Sri Abdul Gani Patail, Peguam Negara Malaysia Dato' Tun Abd. Majid Tun Hamzah Dato' Kamaludin bin Md. Said Datin Hjh Azizah Hj Nawawi Mr. Amarjeet Singh Puan Suzana bt Atan Mr. Andi Razali Jaya bin A. Dadi
Intervener Address	:	Attorney General's Chambers Civil Division Level 3, Block C3, Complex C Federal Government Administrative Centre 62512 Putrajaya.
Watching brief for Malaysian Bar	:	Mr. Cheng Poh Heng
Watching brief for Barisan Nasional	:	Mr. M. Reza Hassan