

(1912) 11 MAD CK 0032
In the Madras High Court

A.M. Chokalinga Mudaliar

APPELLANT

Vs

G. Mahomed Sheriff Saib and Others

RESPONDENT

Date of Decision : 07-11-1912

Acts Referred:

Contract Act, 1872 — Section 39

Citation : (1912) 23 MLJ 680

Hon'ble Judges : Sadasiva Aiyar, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—The plaintiff is the petitioner in revision. He brought this Small Cause Suit in the Nilgri Subordinate Judge's Court for

tb.2 salary due to him from 1st April 1908 to 20th March 1909 at Rs. 18/-a month or Rs. 216/-a year. His engagement was for one year from 1st

April 1908 to 31st March 1909. The Subordinate Judge has found that the plaintiff left the defendant's service without justification on 20th March

1909. He also found that though the salary-"was fixed at Rs. 18/-a month, the engagement was for one full year and his salary was agreed to be

payable in a lump sum of Rs. 216/-at the end of the year. On these findings he held that according to the rule of law established by English decisions

and followed in *Dhume Behara v. Sevenoaks* ILR (1886) C. 80, the plaintiff lost all right to wages for the 11 months and 20 days during which he

actually worked. The principle of the rule as stated in the English cases is that the contract must be deemed an entire indivisible contract and the

performance of the services for the whole time agreed upon was in the nature of a condition precedent to the right to recover even a portion of the

wages.

2. "It is a general rule applicable to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum, he can recover

nothing unless the work be done or, it can be shown that it was by the defendant's default that the work was incomplete, or that there is something

to justify the conclusion that the parties have entered into a fresh contract.

3. The leading English case on this question is *Cutter v. Powell* (1795) 2 SLC 1. That was the case of a sailor who agreed to serve as second mate

for a sum of 30 guineas during the voyage of a ship between Kingston and Liverpool. He did duty as mate between 31st July 1793 and 20th

Sep. 1793 but died during the voyage and before the ship's arrival at Liverpool. The suit was brought in *assumpsit* for work and labour done by

the deceased. The suit was dismissed on the ground that no contract can even be implied making the master liable to pay on a *quantum meruit*.

Lord Kenyon said that the contract was a "kind of insurance." The learned judges who decided the case also put it upon the custom of the

commercial world. In the notes to that case also there are learned disquisitions as to whether suits in particular cases lie in *indebitatus assumpsit* or

in *quantum meruit* or in the case and so on. But the learning connected with the nature of the action to be brought is not of much use in these days.

Two exceptions are mentioned to the general rule laid down the exception being (a) cases in which the special contract being unperformed a new

contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from partial performance

and (b) where the party to be made liable has absolutely refused to perform or has incapacitated himself from performing his side of the

contract, the other party may treat the contract as rescinded and sue for what he has already done under it upon a *quantum meruit*. So much for

English Law. I am, however, strongly of opinion that in cases between masters and servants, Courts should not be too strict in treating the

contracts of service for a certain period and for a certain wages as indivisible unless the nature of the services (like that of a sailor for a particular

voyage or a servant engaged for domestic service during particular pilgrimage) raises a strong presumption that the servant was intended not to be

entitled to claim wages for broken periods. Even in such cases if the servant was unable to perform his duty through illness or death, I would allow

a suit for the value of work actually performed for the broken period. Courts in India are not always bound by the technicalities of English Law or even by the precedents established by English cases. The Subordinate Judge in this case says that he "" was at first surprised when the contention was advanced on behalf of the 1st defendant that the plaintiff was not entitled in law to any wages at all by reason of his having quitted the service of his employers "" ten days before the stipulated period of one year had expired. He also says that the rule of English Law works great hardship in a case like the present one where the servant fell short of his year of service by only 11 days."" Though there are some cases decided by the Bombay and Calcutta High Courts following the rule of English Law (See *Bamji Manorr v. F.D. Little* ILR (1886) C. 80 and *Aryodaya S. & W. Co. v. Siva Virchand* (1910) 13 Bom. L.R. 19 no Madras case has been quoted to show which follows the strict rule of English Law. Even in *Calcutta I* came across an old case in *Rughoonath Das v. T. Halle* (1871) 16 W.R. 60 where Norman C.J. and Ainslie J. refused to follow the rule of English Law. That was a case of a dismissed servant who sued for wages for the broken period during which he served. The defendant on the authority of English cases contended that the plaintiff could not demand his pay for the broken period but ought to have brought an action for wrongful dismissal. But the High Court held that the plaintiff was already entitled to payment for the time during which he had served according to the rate of wages he was earning when dismissed. The presumption of a yearly hiring is capable of rebuttal and it is necessary to consider the circumstances of each case in order to find out whether the presumption has been rebutted in that case. See *Halsbury's Laws of England* Vol. 20 p. 92. In England it seems to have been held that the question whether a contract of service for a term was indivisible or divisible might also be decided on the nature of the service. I am of opinion that in India where payments of wages are usually made monthly, Courts should be more ready than in England to hold that servants are entitled to wages for the full months at least during which they did service though in some particular cases, the servant might have agreed to take his wages at the end of the year. Of course the master who, where the servant breaks his contract before the end of the period for which he agreed to serve, has sustained damages owing to such breach of contract is entitled to claim the damages

caused by the breach and to set off such damages against the wages claimed by the servant for the broken period. But to hold in India that the

servant loses his entire wages because he left the service without cause a few days before the expiry of one year or to hold as in *Cutter v. Powell*

(1795) 2 S.L.C p1, that the servant's legal representatives cannot recover even single pie because the servant died before the expiry of the year

would, in my opinion, be against justice, equity and good conscience. Even taking the question as a pure question of law Indian courts are bound

by the provisions of the Contract Act, in all these matters. Section 39 of the Contract Act is as follows:-" When a party to a contract has refused to

perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he has signified by

words or contract, his acquiescence in its continuance." Accepting the findings of the Subordinate Judge, the plaintiff no doubt broke his contract

when he absented himself from work on the 31st March 1909. The defendants were entitled to rescind the contract between them and plaintiff

such contract consisting of the plaintiff's promise to work for one year and the defendant's promise to pay Rs. 216 for one year's service. What

result follows after the contract was rescinded? Section 64 of the Contract Act says : " The party rescinding a voidable contract shall, if he have

received any benefit thereunder from another party to the contract, restore such benefit, so far as may be to the person from whom it was

received." Section 65 and its illustration (c) are as follows:-When an agreement is discovered to be void, or when a contract becomes void, any

person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from

whom he received it. A a singer contracts with B, the manager of a theatre to sing at his theatre, for two nights in every week during the next two

months and B engages to pay her a hundred rupees for each night's performance-On the 6th night, A willfully absents himself from the theatre and

B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung." This illustration (c) in my opinion is almost

conclusive in plaintiff's favor in this case. In the present case the plaintiff agreed to serve for one year just as A a singer in the illustration agreed to

sing during the nights of two months. Here the defendants agreed to pay Rs. 18 a month as salary just as B in the illustration agreed to pay Rs.

100/ for a each night's performance. The only difference in the two cases is that it is not expressly said in the illustration that the remuneration to the singer A for all the night's performances should be paid at the end of the two months. But the conclusion that B must pay A for the five nights on which she had sung implies that the remuneration was not to be paid at the end of each performance, for if that was the understanding B must have broken it by not having paid for the first night at the end of each night and she could not be said to have wilfully absented herself on the 6th night, That the strict rule of English Law would work injustice and would be inequitable if applied to all cases has been felt in many of the American States and has also been felt by some of the judges in England itself. In cases of death or illness of the servant and consequent rescission of the contract, American Courts always allow a quantum meruit on the ground that a contract may be implied between the master and servant that on such contingencies happening proportionate wages should be paid. In the American Cyclopaedia (Vol. XXVI p. 1*045) it is said that the more equitable rule which prevails in many states is that the employee is entitled to recover pro rata for the reasonable value of his services not to exceed the contract price, up to the time of the discharge, taking into consideration the damages resulting to the employer and in note 48 numerous cases decided in 10 different states are quoted to support" this proposition. In the said Cyclopaedia (Vol. XL Page 2833) it is stated "" There are, however, a number of cases in which it is held that where an entire contract"" for services has been only partially performed, the party in fault may nevertheless recover from the other part)" for the actual benefit resulting to him from such partial performance."" Then under note 43 several cases are quoted decided in several states. Of course if the services rendered have been of no benefit whatever for the employer, the master or principal cannot be made to pay anything to the servant or contractor. For instance in the case of building contracts if the incomplete building built by a contractor and the materials used by him are of absolutely no use and the building has to be wholly pulled down, the principal cannot be asked to pay the costs incurred by the contractor in the construction of the useless building. In Missouri it has been held that one who contracts to do work on a building but fails to complete his contract after partially performing it, is entitled to the reasonable value of the work done, not exceeding the

contract price less whatever damage the other contracting party has suffered through the new completion of the contract. In Kansas it has been

held that a recovery may be had in all cases where the other party has received benefit from the partial performance of the contract whether he has

so received the sum and retained it from choice or from the necessities of the case. This last clause and the illustration (c) to Section 65 meet fully,

in my opinion, the contention put forward in the able arguments of Mr. R. Kuppuswami Iyer who appeared for the respondents in this case viz.,

that as the defendants could not exercise any choice now in respect of the benefit which they had obtained from the plaintiff's services during the

354 days during which he has served them they are under no obligation to remunerate him for the 354 days' service. As regards the reasonable

remuneration for the broken period, the broken contract is admissible to prove the value of the services for the broken period. See American

Cyclopedia vol. XL. page 2849. As I said in the beginning the presumption that the work agreed to be done is indivisible and the wages to be

given for such work is also indivisible is not in most cases in conformity with equity. Numerous exceptions have been grafted upon the rule and I

think that where as in the present case the salary is calculated at so much per month in the agreement between the parties though it is payable at the

end of the year, equity requires that the contract should be deemed divisible at least so far as to allow of division into entire monthly periods. As I

have also said already Indian courts are not absolutely bound by English Precedents. In 34 Century Digest pages 544 to 555 the cases pro and

con on this question are digested and several cases are quoted where the following two propositions have been laid down (a) "A servant who,

without excuse, abandons his employment before the expiration of the term may, after its expiration, recover the value of the services performed,

less the master's damages for the breach of the contract" and (b) where a party hires himself to another for a given period of time and leaves the

service before the expiration of the term without any fault on the part of the employer, the former may recover the value of the services performed

as upon a quantum meriti, without showing that he performed his entire contract, or that he left the service of his employer for good cause." No

doubt the cases which establish these two provisions are decidedly less numerous than the cases which establish the contrary proposition. But I

might be permitted to repeat again that the Contract Act and the principles enacted by its provisions are more binding on the Indian courts than the majority of English and American Precedents. Reading sections 39, 64, 65 73 and 74 of the Contract Act together I am clearly of opinion that the 2 rules enunciated in the minority of the American cases already referred to are much more in conformity with the Contract Act than the majority of such cases decided in England and America. Mr. Shephard in his commentary to Section 65 on the Contract Act admits that "" that section is a departure from the English Law."" He says "" A right to compensation under the section exists although, according to English Law, apportionment would be said to be impossible. Thus when the plaintiff paid a lump sum by way of rent for a godown let to him for 12 months and during that period the godown was destroyed by fire it was held that as the lease had become void the plaintiff was entitled to recover a proportionate part of the sum paid. *Dhuramsey v. Ahinedbhai* ILR (1898) B. 15. In *Tennessee* the law has gone so far as to say that even where the employee has been guilty of a gross violation of duty and has even been discharged for embezzlement he can still recover compensation for the services actually rendered by him. See *Massey Taylor Wood and Co.* 98 Ame. Dec. p. 429. It is said by Lord Coleridge in *George v. Davies* (1911) 2 K.B. 445 that Lawrence, J. in one of his judgments, distinguish *Cutter v. Powell* (1795) 2 S.L.C. 1 which related to a sailor's contract for wages from the ordinary contract relating to the hiring of an ordinary servant, used the following words "" with regard to the common case of a hired servant to which this has been compared, such a servant though hired in a general way is considered to be hired with reference to the general understanding upon the subject that the servant shall be entitled to his wages for the time he serves, though he did not continue in the service during the whole year."" Thus there has at least been one English Judge who has taken the view which in my opinion is both the common law in India and the statute law enacted by the Contract Act. (This case in 2 King's Bench Division contains some other instructive remarks on this question). I believe that I have dwelt at sufficient length on the question of law involved in this case and differing from the learned Subordinate Judge I hold that the plaintiff is entitled to recover wages for the 11 entire months during which he did service there being no allegation in the written statements that by reason of

his not working during the last 10 days of the stipulated period of one year the defendants have sustained any damages which they are entitled to set off. Defendants Nos. 2 and 3 as the 1st defendant's partners who authorised the 1st defendant to employ the plaintiff as a servant of the partnership are also liable for the plaintiff's claim. In the result judgment is given for the plaintiff for Rs-198 and proportionate costs of suit with interest at 6 per cent, per annum on Rs. 198 from date of suit till date of payment against the defendants. The defendants will also pay the plaintiff's proportionate costs of this revision petition.