

**(1912) 11 MAD CK 0044**  
**In the Madras High Court**

A.M. Chokalingam Mudaliar

APPELLANT

Vs

G. Mahomed Sheriff Saheb and Others

RESPONDENT

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**Date of Decision :** 07-11-1912

**Acts Referred:**

Contract Act, 1872 — Section 64

**Citation :** 17 Ind. Cas. 894

**Hon'ble Judges :** Sadasiva Aiyar, J

**Bench :** Single Bench

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**Judgement**

Sadasiva Aiyar, J.—The plaintiff is the petitioner in revision. He brought this Small Cause Suit in the Nilgiri Subordinate Judge's Court for the 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 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* 13 C.k 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. "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 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." The leading English case on this question is *Cutter v. Powell* 6 Term. Rept. 320 : 3 R.R. 185 : *Smith's Leading Cases* Vol. II p. 1. That was the case of a sailor who agreed to serve as second mate for a sum

of 39 guineas during the voyage of a ship between Kingston and Liverpool. He did duty as mate between 31st July 1793 and 20th September 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, there are learned disquisitions as to whether suits in particular cases lie in indebitatus assumpsit or in quantum meruit or on 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 exceptions being (a) cases in which the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay 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 master and servant, Courts should not be too strict in treating the contracts of service for a certain period and for a certain wage as indivisible unless the nature of the service (like that of a sailor for a particular voyage or a servant engaged for domestic service during a 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 the English cases. The Subordinate Judge in this case says that he was at first surprised when the contention was advanced on behalf of the first 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 elapsed. 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 *Ramji Manor v. F.D. Little* 10 B.H.C.R. 57; *Dhume Behara v. Sevenoaks* 13 C.k 80 and *Aryodaya S. & W. Co. v. Siva Virchand* 13 Bom. L.R. 19 no Madras cases has been quoted to me which follows the strict rule of English law. Even in Calcutta, I came across an old case in *Rughoonath Doss v. Mr. T. Halle* 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 clearly 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 re-butted in that case. See *Laws of England by Halsbury, Volume 20, page 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* 6 Term. Rept. 320 : 3 R.R. 185 : *Smith's Leading Cases, Vol. II, p. 1*, that the servant's legal representative cannot recover even a 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 provision 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 conduct, 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 21st 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 such 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 persons from whom he received it. As a singer, contracts with B., the manager of a theatre, to sing at his theatre for two nights in every week during next two months, and B. engages to pay her a hundred rupees for each night's performance. On the 6th night, A. wilfully absents herself 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 favour in this case. In the present

case, the plaintiff agreed to serve for one year just as A., the 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 each night's performance. The only difference between the two cases is that it is not expressly said in the illustration that the remuneration to the singer A. for all the nights' 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 five nights at the end of each night and A. could not be said to have wilfully absented herself on the 6th night.

2. 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 Judges in England itself, in cases of death or illness of the servant and the consequent rescission of the contract, American Courts always allow quantum meruit on the ground that a contract may be implied between the master and the servant that on such contingencies happening, proportionate wages should be paid. In the American Cyclopedia (Vol. XXVI, page 1045), 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.

3. In the said Cyclopedia (Vol. XI, page 2833), it 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 party 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 the contractor and the material 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 cost 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 damages the other contracting party has suffered through the non-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 Aiyar, 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 Encyclopedia, Volume XI, 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 whereas in the present case, the salary is calculated as 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 34th Century Digest, pages 514 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 one 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, meruit, 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 propositions are decidedly less numerous than the cases which establish the contrary propositions. 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 two 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 of 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 from 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. Ahmedbhai* 23 B.L. 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 service actually rendered by him. See *Massey v. Taylor, Wood and Co.* 5 Cold. 447. It is

Said by Lord Coleridge in *George v. Davies* (1911) 2 K.B. 445 : 27 T.L.R. 415 that Lawrence, J., in one of his judgments, distinguishing *Cutter v. Powel* 3 R.R. 185 : *Smith's Leading Cases* Vol. II p. 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.