

(1923) 08 CAL CK 0042
In the Calcutta High Court

L.W. Middleton

APPELLANT

Vs

Harry Playfair

RESPONDENT

Date of Decision : 28-08-1923

Acts Referred:

Citation : AIR 1925 Cal 87

Judgement

1. This is an appeal by the defendant in a suit for recovery of arrears of salary and commission and for damages for breach of contract. The facts material for the solution of the questions in controversy are really beyond dispute and may be briefly recited.

2. The defendant Middleton is the proprietor of what is known as the Sonapur Tea Estate in Kamrup. He managed the estate himself, but as in 1918, he obtained a commission in the army and had to leave for Persia, it became necessary for him to appoint a manager. He advertised for the post, with the result that the plaintiff Playfair saw him on the subject, and was appointed as his manager on a salary of Rs. 500. The initial arrangement was that besides his pay, the manager would get a furnished bungalow, all servants, the use of a motor car and a commission of ten per cent. on profits over a specified minimum. On this arrangement, Playfair took over charge on the 1st May, 1918, and on the next day Middleton left to join his regiment. The terms of the agreement between them were subsequently embodied in a document which was executed on the 11th July, 1918, and came into force from the 1st January, 1919.

An agreement made on the eleventh day of July, 1918, between Lionel William Middleton of Kamrup in the District of Assam the Proprietor of the Sonapur Tea Estate Kamrup aforesaid (hereinafter referred to as "the Proprietor") of the one part and Harry Playfair also of Kamrup in Assam at present acting as Manager of the said Sonapur Tea Estate (hereinafter referred to as "the Manager") of the other part whereby it is Agreed and declared as follows:

1. The Proprietor agrees to employ the Manager and the Manager agrees to serve the employer as Manager of the said Sonapur Tea Estate for the term of

five years with effect from the first day of January, 1919, with liberty nevertheless to either of the parties hereto upon the termination of the present war to terminate the agreement by giving to the other party six calendar months" notice in writing of his intention in that behalf.

2. The remuneration of the Manager for such service shall consist of (a) a fixed monthly salary of Rs. 500 plus the free use of the various personal servants in the employment of the Proprietor now working at the said Tea Estate with liberty to the Manager at the cost of the principal to engage new servants in the place of any of the present servants who may die or may leave the employment of the principal, but so always that the amount of the wages paid to such new servants shall not exceed the amount of the wages paid to the present servants, and (b) a sum equivalent to twenty-five per cent. on the net profits derived from the said Tea Estate in respect of every year ending on the thirty-first day of December after allowing interest on money borrowed and deducting all usual charges and out-goings and such sum or sums as the Proprietor shall consider it prudent and proper to deduct or set aside in respect of bad or doubtful debts provided that in the event of the determination of the agreement otherwise than on the thirty-first day of December in any year there shall be paid to the Manager a proportionate part only of the last-mentioned sum corresponding to the period that shall have elapsed since the date of the last account.

3. The manager shall also be provided with a furnished bungalow on the said Tea Estate for the use of himself and his family free of rent.

4. In order to ascertain the amount payable to the Manager under item (b) of paragraph two hereof the accounts of the said Tea Estate shall be made up yearly by or under the direction of the Proprietor on the thirty-first day of December in each year and when so made up shall be accepted as conclusive by the Manager.

5. During the continuance of his employment under the agreement the Manager shall devote his whole time to his duties as such Manager and shall do all in his power as such Manager to extend, develop and improve the said Tea Estate and shall at all times obey and follow the orders and directions of the Proprietor in relation to the business of the said Tea Estate.

6. The Manager shall not during his employment engage directly or indirectly in any other business except with the consent in writing of the proprietor.

7. The Manager shall at all times keep or cause to be kept proper books and shall whenever required by the Proprietor so to do deliver to the Proprietor full and correct accounts of receipts, payments, transactions and dealings of and in relation to the business of the said Tea Estate and shall not permit any of the said books of account to be removed from the office of the said Tea Estate. The said books of account shall be open to the inspection of the Proprietor or of his Auditor or Accountant at all times.

8. The Manager shall not in any way pledge the credit of the Proprietor or expose

the proprietor to pecuniary liability except so far as he may from time to time be authorised by the Proprietor whether generally or in any particular case.

9. Notwithstanding anything hereinbefore contained to the contrary the Proprietor shall be entitled to determine this agreement without any notice or payment in lieu of notice in case at any time the Manager shall be guilty of any disobedience or breach of any stipulation herein contained or misconduct likely in the opinion of the Proprietor to prejudice the interest of the said Tea Estate.

"As witness the hands of the parties hereto the day and year first above written."

3. Things went on smoothly, and Play-fair managed the garden satisfactorily. At the end of 1918, there was a profit of Rs. 29,000 approximately and Playfair got his commission according to the agreement. In May, 1919, Middleton paid a short visit to Sonapur and was apparently satisfied with what Playfair had done; he had no fault to find but all praises to bestow. The plaintiff alleges that Middlaton was relieved from military duties on or about September, 1919, and wrote him a letter on the 4th September, 1919, which conveyed a warning that he might find his engagement terminated, as Sonapur might in the long run have to be sold. Incidentally, the letter stated that the agreement would come to an end in December, 1919, though the document mentioned was for five years. This was followed by correspondence which need not be set out in details for our present purpose. On the 12th October, 1919, Middleton gave Playfair a notice in the following terms:

According to the terms of our agreement I send you this notice to terminate our agreement in six months from to-day, the 12th October, 1919.

4. This was followed by protracted correspondence which leaves no room for doubt that Middleton had lost all confidence in Playfair and was not prepared to entrust him with the performance of such duties as legitimately belong to a Manager and had been previously discharged by him. Playfair found his position in the garden intolerable and left on the 3rd February, 1920, On the 1st September, 1920 Playfair instituted the present suit for the recovery of;ha following sums with interest and costs.

Rs. a. p. (a) Pay and allowances for February, March and April, 1920. 1,950-0-0
(b) Commission on the net profits for 1919. 6,431-2-0

5. The defendant resisted the claim as entirely unfounded. The Subordinate Judge has decreed the claim for Rs. 7,840, namely, Rs. 1,950 for pay and allowances and Rs. 5,890 for commission. The defendant has appealed against this decree and has questioned the propriety of the decision of the Subordinate Judge in respect of salary as well as commission.

6. First, as regards salary. The defendant has urged that as the plaintiff left of his own accord on the 3rd February, 1920, he is not entitled to salary for any subsequent period.

7. The plaintiff, on the other hand, has maintained that the defendant by his conduct made it impossible for him to stay on.

8. The Subordinate Judge has on this part of the case, found in favour of the plaintiff. The correspondence which has been minutely commented on before us, furnishes abundant indication that the plaintiff could not stay longer in the garden with self-respect. It is sufficient to mention that on the 11th November, 1919, his power of attorney was cancelled and on the 3rd January, 1920 Middleton actually wrote to inform him "that at present there is no work that I can give you.

9. What happened in substance was that Playfair was practically deprived of all authority and Middleton took up the management himself. We have been pressed to hold on behalf of Middleton that he was constrained to act as he did, because the conduct of Playfair had seriously prejudiced the interest of the estate, and that he could have fully justified his action even if he had dispensed with his services under Clause 9 of the agreement. In our opinion, it would be fruitless to investigate whether Playfair had or had not misconducted himself so as to justify his dismissal by Middleton. If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. The view is supported by the observations of Bramwell J in *Horton v. Mc Murtry* (1860) 5 H. and N. 667 of Blackburn, J., in *Phillips v. Foxhall* (1872) 7 Q.B. 666 and of Lord Esher M.R. in *Beattie v. Parneter* (1889) 5 T.L.R. 396 see also *Boston Deep Sea Fishing Co. v. Ansell* 39 Ch. D. 339 *Federal Supply Co. v. Anghern* (1910) 80 L.J. P.C. 1 *Hartley v. Pease* (1915) 1 K.B. 698. We must consequently consider whether what happened between the 12th October, 1919, (when the notice was given) and the 3rd February, 1920, (when Playfair left), justified Playfair in leaving the garden.

10. It has not been disputed that a servant is justified in refusing to go on further with his work when he is subjected to severe ill-treatment. But it has been urged that the judicial decisions, which are usually cited as authorities for this proposition, such as *Limland v. Stephens* (1801) 3 Esp. 269 and *Edward v. Trevellick* (1854) 4 E 59 were cases of bodily chastisement or personal violence, and that the rule should be deemed restricted in its application accordingly.

11. We are not prepared to adopt this narrow view of the relation between a master and a servant.

12. A servant is not justified in abandoning his contract before the expiration of the term unless good and just causes exist therefor.

13. Generally speaking any breach of the express or implied provisions of the contract of employment by the master or any act or neglect on his part which is prejudicial to the safety, health, comfort, morals or reputation of the servant, will be deemed a sufficient ground for abandonment. The duties which an employer owes to his employee naturally depend upon the character of the employment.

14. It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged. Any reduction of the rank or a material change in the duties of an employee is, from this point of view, regarded as a violation of the contract of employment, and the servant may thereupon consider the contract as having been violated by the master.

15. Reference may in this connection be made to a passage from Wood on Master and Servant, Section 146, which is quoted with approval in Fraser on Master and Servant (Third Ed., by Campbell, 1882, p125), "the jury are to judge of the reasonableness of the excuse, in view of the circumstances, the language and conduct of the master, the frequency of the cause, the provocation if any for the language or conduct and its effect upon the servant; and in all cases, the age of the servant is a matter of material importance, as what might be regarded as a very good excuse in the case of a young person, might be regarded as no excuse at all on the part of a person of mature years. To attempt to enumerate all the instances which would justify servant in quitting the service before his term is ended would be impossible. In all cases, where the facts are not admitted the question of reasonableness is one of fact for the jury, and the servant takes the burden of establishing a reasonable excuse in all cases."

16. The relation of master and servant, while it thus implies obedience, submission and respect on the part of the latter, implies on the part of the former the duty of protection and of gentleness and moderation in his bearing towards his servant. Before we leave this part of the case, we may, as an analogy, usefully recall that in cases of restitution of conjugal rights, where cruelty is urged as a defence, it is not necessary to establish personal violence; what may be designated "legal cruelty" will be found explained in the judgment of this Court in Dular Koer v. Dwarkanath (1907) 34 Cal. 971

17. In support of the proposition that a reduction of the rank or a material change in the duties of an employee constitutes a violation of the contract of employment reference may be made to the decisions in Ross v. Pender (1871) 1 Ret 352 and Cooper v. Stronge & Warner Co. (1910) 111 Minn. 177 In the first case, it was ruled that a head game-keeper could not be required to act as under gamekeeper in the second case, it was held that a contract employing one as Manager of sales department is violated if he is required to work as the sales clerk. In the case before us, there is no room for reasonable doubt that, during the period of notice, Playfair was treated in such a way as to humiliate him in the eyes of all his subordinates, so that his continuance in the garden became impossible), and he could not by his presence promote the interests of his master.

18. We need not, from this point of view, discuss at length the effect of the intimation conveyed to him in the letter of the 3rd January, 1920, that no work could be found for him. But we may state that the argument on behalf of

Middleton that Playfair could not, so long as he received his salary, complain that he was left without work, is entirely untenable. It is well settled that an obligation on the part of a master to provide employment may be good consideration for his servant's promise of service: *Pilkington v. Scott* (1846) 15 M.W. 657 *Re Bailey* (1854) 3 E. B 607 *Fechter v. Montgomery* (1863) 33 Beav. 22 *Gravelly v. Bernard* (1874) 18 Eq. 518 *Bunning v. Lyric Theatre* (1894) 71 L.T. 396. Whether or not such an obligation exists, depends on the circumstances of the individual case before the Court; but it may be implied, for instance, where the opportunity of acting in the capacity indicated in the contract of service is of primary importance to the person employed.

19. We need not review the numerous authorities on this question which are difficult to reconcile, and, as observed by Lord Esher, M.R. in *Hamlyn & Co. v. Wood & Co.* (1891) 2 Q.B. 488 depend often upon the terms of the agreement in each case and we shall only refer to the decisions in *Turner v. Sawdon & Co.* (1901) 2 K.B. 653 *Re Rubel Bronze & Metal Co.* (1918) 1 K.B. 315 *Turpin v. Victoria Palace* (1918) 2 K.B. 539. But whatever divergence of judicial opinion may be discoverable from the decisions on the subject it is clear that where the refusal by the master to find work for the servant indicates reduction or of any material change of duties the employee is entitled to treat this as a violation of the contract of employment.

20. On the whole we feel, no doubt, that the Subordinate Judge correctly held that the plaintiff was justified in leaving the garden on the 3rd February, 1920. We further think that the pay and allowances have been correctly calculated at Rs. 650 a month.

21. The agreement, as we have seen, provides that the plaintiff should get Rs. 500 a month together with a furnished bungalow, free servants and the use of a motorcar; he therefore, estimates that the value of the post is Rs. 600 a month; this is *prima facie* reasonable. We may add that the question of the sufficiency of the notice has not been seriously pressed in this Court, and we have consequently not been called upon to consider either the precise effect of the expression "six calendar months" or the interesting question, whether the notice could be given on any day of a month, to terminate the contract on the corresponding day six months thereafter: *Gordon v. Pottar* (1858) 1 F. F 644 *Freeman v. Bead* (1863) 4 B. Sec 174 *Travers v. Mason* 45 W.R. 77 *Lindsay v. Queens Hotel Co.* (1919) 1 K.B. 212

22. As regards commission under this head the appellant has criticised the views of the Subordinate Judge upon numerous points. The objections may, however, be classified broadly under two heads, namely first, that gross income has been erroneously calculated, and secondly that the deductions have been incorrectly allowed.

23. As regards the first head, namely, the assessment of the income: we are of opinion that the appellant has no ground for complaint. The commission is to be

calculated under the terms of the agreement, "on the net profits derived from the said Tea Estate in respect of every year ending on the 31st day of December."

24. The Subordinate Judge, it is said, has taken the income from January, 1919 to February, 1920, and it is urged that he should not have taken into account sums realized after December, 1919. This argument, in our opinion, is not supported by a fair construction of the contract. It is plain that the net profits derived in respect of a year must be determined by reference to the sale proceeds of the tea grown during that year, even though the whole of the sale proceeds may not be actually realised during the year. For the calculation of the net profits, it is immaterial that a part of the sale proceeds of the tea grown in 1919 is not actually received till the early months of 1920; the Subordinate Judge has properly taken into account the entire sale proceeds of the tea grown in 1919 though the money was received in part in January and February, 1920.

25. As regards the second head, namely, the income the chief grievance of the appellant is that the expenses in connection with the deductions to be allowed from what is called the zemindari have not been set off against the income from the garden. It appears that a small zemindari is attached to the garden and the defendant has allocated the Government revenue (leviable on the entire property) in the proportion of two-thirds to the garden and one-third to the zemindari. This seems to be an arbitrary distribution and does in, our opinion, affect the rights of the plaintiff. It may be conceded that the plaintiff was expected and called upon to supervise in a general way the work of the zemindari which was really looked after by Lalit Chandra Das. But the outstanding fact remains that the income from the zemindari was not treated as an integral part of the income of the tea garden and we cannot appreciate why, for purposes of calculation of expenditure only, the two should be treated as amalgamated.

26. In addition to this our attention has been invited to eleven selected items from the judgment of the Subordinate Judge, where it is asserted, he has erroneously-disallowed the expenditure. Seven of these instances are governed by the same principle; in each the question is, whether the cost of stores which were not really required for use in 1919, but would be utilized in 1920, could be debited against" the profits for 1919.

27. We are of opinion that the Subordinate Judge has rightly answered the question in favour of the plaintiff. If the plaintiff had continued in service, it would have been immaterial whether the cost was debited against the profits of 1919 or 1920. It seems to us plain that the defendant has made a strenuous endeavour to debit the cost of stores really required for 1920 against the income of 1919, because the service of the plaintiff had been terminated by the six months" notice contained in the letter of the 12th October, 1919.

28. The Subordinate Judge has rightly refused to accept the contention of the defendant in respect of these items. He has also properly disallowed the claim

made by Middleton to charge the accounts with salary at Rs. 500 a month in his own favour; it is sufficient to point out. that this was clearly not allowable under the agreement.

29. The Subordinate Judge is also correct in his view that the railway freight paid on samples of tea sent to Srinagar and Mombassa for purposes of advertisement should not be debited against the garden-accounts which were not credited with the sale proceeds.

30. There is however, one item which the Subordinate Judge has not correctly appreciated. The bill of Heatley and Gresham was admittedly payable, by the garden. The expenditure was actually incurred in 1918, but as the bill was submitted in that year, it was not paid till the 29th November, 1919. There is no escape from the conclusion that it must find a place in the accounts of either 1918 or 1919. The accounts of 1918 have been closed and cannot be re opened. The amount must consequently be shown in the accounts of 1919, though the plaintiff is rightly entitled to contend that he should not be thereby placed at a disadvantage, as the commissions were not calculated on the same basis in 1918 and 1919. In this connection it has been shown to us that a sum of Rs. 2,000 must be set off on account of a boiler against the bill of Rs. 4,221. If this deduction is allowed, it follows that the commission has been calculated by the Subordinate Judge on a sum which exceeds the correct amount by Rs. 2,221. The amount decreed in favour of the plaintiff must accordingly be reduced by ten per cent. of the sum mentioned.

31. The result is that this appeal must be allowed to the small extent just indicated. The sum decreed by the Subordinate Judge in favour of the plaintiff is reduced by Rs. 222 so that Rs. 7,618 will be substituted for Rs. 7,840. Subject to this variation, the decree will stand confirmed.

32. As the appeal has substantially failed the appellant will pay the respondent his costs in this Court.