

(1938) 01 MAD CK 0033
In the Madras High Court

Muna Sona Sundaram Chettiar

APPELLANT

Vs

Sona Theeanna Chockalingam Chettiar alias Nagappa
Chettiar

RESPONDENT

Date of Decision : 18-01-1938

Acts Referred:

Citation : AIR 1938 Mad 672 : (1938) 47 LW 803 : (1938) 1 MLJ 857

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The appellant was the defendant in the Court below. He had served the respondent as the chief agent of

the respondent's money-lending business at Madras. The contract of service commenced on the 19th November, 1925, the appellant having

executed what is known as a salary chit. Under the terms of the contract he was to serve the respondent in the capacity of chief agent of his

Madras business for a period of three years at a salary of Rs. 7,175. The respondent's business in Madras did not prove as successful as he

anticipated, and on the 5th January, 1928, he terminated the appellant's employment and appointed another agent at a lower salary. The suit out of

which this appeal arises was filed by the respondent for an account of the appellant's agency. He calculated that there would be due to him on the

taking of accounts a sum of Rs. 11,923-6-0. A preliminary decree for accounts was passed in due course, and on consideration of the

Commissioner's report a decree for Rs. 4,952-13-6 was passed in favour of the respondent. The appellant appeals against the final decree on

three grounds. In the first place he says that he has been disallowed his salary for 10 1/2 months whereas he is entitled in law to payment for this

period. In the second place he contends that he has been disallowed three months' salary, wrongly on the ground that he had absented himself from Madras on private affairs. In the third place he says that a sum of Rs. 982-9-6 was wrongly debited to him in respect of certain piece goods transactions.

2. With regard to the appellant's claim that the lower Court was wrong in disallowing his salary for 10 1/2 months the learned advocate for the respondent has taken the Objection that the suit was not a suit for wrongful dismissal and consequently no allowance can be given to the appellant in respect of this period. This point was not taken in the pleadings or in the course of the trial. It is manifest that all questions at issue between the parties in respect of the agency were gone into and decided in the course of the trial. The respondent's complaint was that the agent had overdrawn his salary when he should not have done so and evidence was given on this question. The trial Court on the case presented by the parties held that the appellant, had wrongly overdrawn his salary for 10 1/2 months, and he challenges this finding in this Court. We consider that he is entitled to do so. The nature of the objection is obviously one which the Court should not take notice of at this late stage.

3. The learned trial Judge disallowed the appellant's salary for 10 1/2 months on the ground that the respondent was entitled to dismiss the appellant when he found that his business was not proving profitable. This is an erroneous view of the law. The respondent had entered into a contract with the appellant under which the appellant was to serve him in Madras for a period of three years certain, and the appellant was always ready and willing to carry out his duties. The real reason why the respondent dispensed with the appellant's services after a little over two years was that he found he could get another agent at a lower salary. Where a person has agreed to employ another he is not entitled to put an end to the employment simply because he finds his business is not proving as profitable as he anticipated or because he finds "that he can get somebody to perform the duties at a smaller salary. If the contract provides for termination of employment by notice the employer can lawfully terminate the employment on giving the required notice. In a case like the present where the employment was for a definite period the employer is bound to pay

the stipulated salary, unless he shows that the discharged servant had an opportunity of other employment, but refused to avail himself of it. In other words, the principle that a person must do what he can to mitigate damages, applies to a contract of service just as it applies to an ordinary

commercial contract. The principle is concisely stated in Halsbury's Laws of England, Volume 10, paragraph 143, page 113 in the following terms:

It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which

he sues, and he cannot claim as damages any sum which is due to his own neglect; but he is under no obligation to injure himself, his character, his

business, or his property, to reduce the damages payable by the wrongdoer. The question what is reasonable for a plaintiff to do in mitigation of his

damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.

4. In this case the respondent is in the position of the defendant. The authority for the statement that the burden of proof is upon the defendant is to

be found in *Roper v. Johnson* (1873) L.R. 8 C.P. 167 and *James Finlay & Co. v. N.V. Kwik Hoo Tong Handel Maatschappij* (1928) 2 K.B.

604 .

5. It has not been suggested before us that the appellant did anything which would justify his dismissal. All that has been urged is that the learned

Trial Judge was right in his view that the respondent could close his business at any time without regard to his obligations to the defendant. This is

clearly wrong, and as it has not been shown that the appellant could have obtained other employment he is entitled to payment for the full period of

three years. I should mention that at one time it was suggested that the respondent had offered him employment at Rangoon and that he refused to

go there after agreeing to do so. The record does not show that he ever did agree to go, but it was suggested in the early part of 1927, that is,

nearly nine months before the employment was terminated, that the appellant should go to Rangoon to look after the respondent's interests there.

Nothing, however, came out of this suggestion. The respondent himself had to admit in the course of his evidence that he did not remember

whether the appellant agreed to go or not. But even if the respondent had offered the appellant "employment in Rangoon in 1928, which he did

not, we do not consider that the appellant would have been bound to accept. His contract was to serve the respondent in Madras, and it has not been shown by the respondent that there was other employment for the appellant in Madras or in any part of the Presidency. The position, therefore, is that the respondent has failed to prove that the appellant could have obtained other employment, and having failed in this respect the appellant is entitled to his salary for the full period agreed upon. Accordingly we allow him his salary for the period from the 5th January, 1928, when his services were terminated, to the end of the agreed period of three years.

6. Coming now to the disallowance of salary, for three months on the ground that the appellant had absented himself from Madras, I would point

out that no suggestion has been made that the appellant ever neglected his employer's interests or in any way failed to perform his duties. It is true

that he was away from Madras for a total period of four months. He was compelled to leave Madras on account of ill-health for 1 1/2. months and

on another occasion he was away for 26 days owing to the death of his son-in-law, but during this period, he transacted business on behalf of his

principal. The other periods were periods of two or three days. It was the practice of the appellant to inform his employer that he was going away,

and except in one letter, Ex. CLII, there is no suggestion of objection. In the exhibit referred to, the criticism can hardly be described as an

objection. This particular letter related to a short period of absence without previous intimation. What is important is that in spite of the appellant

being away the respondent took no steps to terminate his employment on the ground of absence. When he did terminate his employment it was on

another ground. And what is more, the last period of absence was in March, 1927, nearly nine months before the appellant's services were

dispensed, with for the reason which I have indicated. Assuming that the respondent was entitled in law to dispense with the appellant's services

on the ground of his absence from Madras, he did not choose to do so, but continued his employment. Having continued the employment he is

liable under his contract to pay the agreed wages. In this connection I will quote the following passage from the judgment of Lush J., in *Hanley v.*

Pease and Partners, Limited (1915) 1 K.B. 698 :

Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract...Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant, but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages.

7. In the present case there was no suggestion that the appellant had broken his contract and it was not terminated because of absence from Madras. His employment therefore continued despite his absence. The learned Trial Judge allowed the appellant's salary for one month of absence, but he is entitled to salary for the total period. Therefore, he will be paid his salary for the three months which have been disallowed.

8. The only other question which remains to be decided is whether the appellant was wrongly debited in respect of Rs. 982-9-6 in connection with the piece goods business. The appellant says that this piece goods business was that of his principal and the respondent denies this. We consider that the appellant has failed to prove that it was his principal's business. All that we know is that the appellant sent to Rangoon two consignments of piece goods and he entered the expenses in his principal's books. A sum of Rs. 1,154-5-6 was subsequently remitted from Rangoon to Madras as being part of the sale proceeds. The sum of Rs. 982-9-6 represents the difference between this sum of Rs. 1,154-5-6 and the cost of the goods. The appellant, therefore, would have his principal held liable for the loss on the transaction. Before he can succeed in this contention he must show that the business was in fact his principal's. As I have said he has failed to do so, and therefore the trial Court was right in debiting this sum to the appellant and not to the respondent.

9. The result is that the appellant has succeeded on two out of his three objections to the decree of the lower Court, and the decree will be modified to this extent. The appellant will be entitled to costs calculated on the

amounts in respect of which he has succeeded and will pay costs on the amount in respect of which he has failed.