Present: Wood Renton A.C.J.

1913.

JAYAWEERA *v.* SIMON.

786—P. C. Balapitiya, 37,554.

Labour Ordinance, No. 11 of 1865—Toddy drawer—Is he a servant ?

There is nothing in the nature of the occupation of a toddy drawer to prevent him from being a servant within the meaning of the Ordinance No. 11 of 1865. Whether he is such a servant or not depends on the facts of each particular case.

A person who was engaged as a toddy drawer on a written contract, by which it was agreed that he should receive a certain share of the profits by way of wages and be paid in addition Rs. 6 per mensem as subsistence money, was held to be a "servant."

THE facts appear from the judgment.

A. St. V. Jayewardene, for the accused, appellant.—The accused was engaged on a written contract as a toddy drawer. He was not paid any fixed salary. He was to receive a share of the profits, and to get Rs. 6 per mensem as subsistence allowance. That was practically money advanced out of the profits to which he was entitled. A person under a contract of this character cannot be

[1] *(1908) 11 N. L. R. 348*

[2] *1 Bal. 146.*

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said to be a servant. Counsel cited *Wickremesinghe v. Fernando;*[1] *Rodrigo v. Mel;*[2] P. C. Matara, 72,220;[3] P. C. Mullaittivu, 7,851;[4] 357—P. C. Kalutara;[5] P. C. Balapitiya, 16,283.[6]

J. S. Jayewardene, for the respondent.—It has been held by the Supreme Court in some of the cases cited that a toddy drawer is a servant. The mere fact that the toddy drawer is paid other than a fixed sum for his services does not affect the question whether he is a servant or not. Counsel cited *Caduruvel v. Miskin,*[7] *Bliss v. Perera,*[8] *Jonklaas v. Muttusamy.*[9]

Cur. adv. vult.

November 11, 1913. WOOD RENTON A.C.J.—

The accused-appellant was charged in the Police Court of Balapitiya, under section 11 of Ordinance No. 11 of 1865, with neglect of work, without leave or reasonable cause, from April 26 last onwards. The learned Police Magistrate convicted him, and sentenced him to six weeks' rigorous imprisonment. The accused was engaged by the complainant as a toddy drawer under a written agreement. He received an advance from the complainant, and then, while his original contract was still running, entered into another and similar contract elsewhere. He says that he brought back to the complainant the amount of his advance to induce him to rescind the contract. But this the complainant denies. The accused, after obtaining the advance, continuously absented himself from work. He excused his absence on the day in question by producing a medical certificate to the effect that he had been ill at the end of April and beginning of May, and that during that period he could not have done work as a toddy drawer. The learned Police Magistrate did not regard the medical evidence on this point as satisfactory, and it does not show that the accused was unable to go to the estate, at any rate at a later period, while his original contract of service was still in force. On the evidence, I see no reason to interfere with the decision under appeal. It is contended, however, that a toddy drawer under a contract of service of this character is not a " servant " within the meaning of Ordinance No. 11 of 1865. It was held by the Supreme Court in P. C. Matara, 72,220,[3] that a toddy drawer might be a " servant " within the meaning of Ordinance No. 11 of 1865. In *Wickremesinghe v. Fernando* [1] Lawrie J. held that a toddy drawer, if engaged as a monthly servant, is liable under the section under which the present charge is laid. In P. C. Mullaittivu, 7,851,[4] the Full Court held that where, under an agreement, the defendant was to be compensated for his labour by

[1] *(1898) 1 Tamb. 55.*
[2] *(1895) 1 N. L. R. 91.*
[3] *(1873) 2 Gren. 94.*
[4] *(1872) 1 Gren. 15.*
[5] *S. C. Min., Sept. 7, 1896.*
[6] *S. C. Min., Nov. 30, 1897.*
[7] *(1897) 7 Tamb. 10.*
[8] *(1912) 1 C. A. C. 80.*
[9] *(1913) 16 N. L. R. 214.*

a share of the profits of a certain fishery, and it was expressly stipulated that for any negligence on his part " the proprietor might bring an action in the Court, " no criminal prosecution could be maintained against the defendant under the penal provisions of Ordinance No. 11 of 1865. The *ratio decidendi* in that case, however, clearly was that the contract had provided the only remedy open to the employer. The only rule to be deduced from the decisions, in my opinion, is this, that there is nothing in the nature of the occupation of a toddy drawer to prevent him from being a " servant " within the meaning of Ordinance No. 11 of 1865. Whether he is such a " servant " or not depends on the facts of each particular case. The accused here was engaged under a written contract. He was to receive a certain share in the profits. But, on the other hand, that share is spoken of as his " wages, " and, in addition to that, he was to be paid a sum of Rs. 6 a month as subsistence money. He was in no sense in the position of an independent contractor, and the contract gave the complainant no remedy against him for any breach of its provisions. In these circumstances, I see no reason why he should not have been held to be a " servant " within the meaning of the Ordinance here in question.

The appeal is dismissed.

Appeal dismissed.