1962 *Present :* **Sansoni, J., and Silva, J.**

NARTHUPANA TEA AND RUBBER ESTATES, LTD.,
Appellant, *and* L. E. PERERA, Respondent

S. C. 178/60—D. C. Colombo, 46009/M

1. *Appeal—Finding of fact influenced by irrelevant considerations—Liability to be set aside—Judge—Duty to be guarded and restrained in his comments.*

A trial Judge's finding of fact is liable to be set aside in appeal if it was influenced by irrelevant considerations.

Parties to an action are entitled to a judgment written without exaggeration or passion. The very circumstance that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a Judge to be guarded and restrained in his comments, and to refrain from needless invective.

2. *Employer and employee—Termination of employee's services—Period of notice to which he is entitled—Overstaying servant—His position as trespasser.*

In the absence of agreement or custom to the contrary, a hiring of services for an indefinite period at a monthly salary is determinable by a month's notice. Accordingly, an Assistant Superintendent of a tea and rubber estate, drawing a monthly salary, is entitled only to one month's salary as damages for failure to be given due notice of termination of his services.

Where an employee occupies, as a servant and not as a tenant, a bungalow belonging to his employer, he has no right to remain in occupation after the termination of his services. He is on the premises thereafter as a trespasser and would not be entitled to claim damages if the lights and water service are cut off.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, for Defendant-Appellant.

C. D. S. Siriwardene, with *M. T. M. Sivardeen*, for Plaintiff-Respondent.

Cur. adv. vult.

July 11, 1962. SANSONI, J.—

The Plaintiff was employed by the Defendant as an Assistant Superintendent of its estate from 20th February 1956, on a salary of Rs. 400 a month plus a 10 % contribution to the Provident Fund. He was also entitled to a motor cycle allowance of Rs. 50 a month and one labourer. He was on probation for 6 months and was confirmed at the end of that period. He filed this action against the Defendant, alleging that on 1st November 1958 it discontinued his services wrongfully without any notice whatsoever. In his plaint he claimed :—

(1) the equivalent of 6 months' salary and allowances as damages amounting to Rs. 3,600 ;

(2) Rs. 5,000 as damages on the ground that the Defendant on 1st November 1958 cut off the lights and water services in his bungalow, and refused to issue rations to him and his family ;

(3) a sum of Rs. 18,886 as dearness allowance for the entire period of his service, which he says the Defendant agreed to pay him.

There was a further claim in respect of a sum of Rs. 2,000 which was withdrawn at the trial, and I need not refer to it.

In its answer the Defendant pleaded that the Plaintiff's services were terminated as from 31st October 1958 by a notice served on him on 30th September 1958. It denied that the Plaintiff was entitled to any dearness allowance. It pleaded that from and after 1st November 1958 the Plaintiff had been a trespasser in the bungalow on the estate.

The Plaintiff gave evidence in the course of which he said that 3 or 4 months after he was appointed on probation the former Managing Director, Mr. Wickramasinghe, agreed to pay him dearness allowance after the Company had liquidated its debts. He also said that when he spoke to the present Managing Director about such an allowance, the latter refused to pay it. On this point the learned District Judge has held that there was no unconditional promise to pay dearness allowance and that the Plaintiff was therefore not entitled to anything on that account.

It does seem strange, however, that if the Plaintiff had at any time thought that he was entitled to such an allowance, he should have been content to wait for over 2 years without ever mentioning this subject in a letter to the Defendant. Mr. Ranganathan submitted that the Plaintiff had deliberately made a false claim under this head, and that his veracity was therefore in doubt on the rest of the case.

The main question that remains for decision is whether the Plaintiff was served with a written notice on 30th September 1958 to the effect that his services would not be required after 31st October 1958. The Plaintiff denied that he was served with such a notice, while the Defendant led the evidence of the Head Clerk of the Estate to prove that a written notice was served on the Plaintiff at his estate at 4.30 p.m. on the 30th September 1958 by the Head Clerk who came from the Colombo office of the Defendant bringing that notice with him. A copy of the notice has been produced, and also a report of the service made to the Defendant by the Head Clerk of the estate. Apart from the evidence of this Head Clerk who said that he was present along with others (who were not called as witnesses) when the notice was handed over to the Plaintiff, the Managing Director of the Defendant spoke to having sent the Head Clerk from the Colombo office on that day for that specific purpose. The learned Judge has held that no notice was served on the Plaintiff and he has given his reasons for so holding.

I have considered all these reasons carefully. I have also taken into account the Plaintiff's evidence that it was only after he wrote a letter on 3rd November 1958 to the Defendant that he was sent a notice This evidence was given when he was questioned by the Court. It is pertinent to ask when such a notice was received by him, where it is, and how he received it. No such notice has been produced by the Plaintiff. It seems to me that the Plaintiff tried to show that the Defendant gave him notice of his termination of his service some day after the 3rd November ; but the rest of the evidence has fully satisfied me that such a thing could not have happened. On 30th October, 1958, the Defendant wrote to the Plaintiff the letter P2 in which it refers to a notice that had already been served on him, to leave its service as from 1st November. On 1st November the lights and the water service in the bungalow occupied by the Plaintiff were discontinued, according to a statement in paragraph 6 of the Plaint. It seems far more probable that the Plaintiff did receive a month's notice on 30th September and not after 3rd November.

I appreciate that this is a question of fact that the learned Judge had to decide, and, if there had been a careful and well-considered decision arrived at in an atmosphere of calm, I would have been reluctant

to interfere with his findings. Unfortunately, the learned Judge has failed in writing his judgment to exercise that moderation and restraint which one expects of a Judge. It has been made a matter of complaint that the language used by him in referring to the management of the Defendant is intemperate and unjustified. He has said " the Management of the defendant company stands in no better position than that of a thug or bully and/or a fraud or cheat. " He has referred to the Management's " inhuman behaviour ", " fraudulent conduct ", and added that the " defendant company is capable of stooping low ". He has suggested that the " Plaintiff's bungalow was burgled with the benediction of the defendant company or of its servants and agents at the spot, and that the responsibility for the burglary can well be brought home to the Defendant Company. " Finally be has said : " These brown Moghuls who have succeeded to the planting interests of the white Imperialists have yet to learn the sense of justice and the due respect for law and order their predecessors had. "

I regret that it should be necessary to remind the learned Judge that the parties were entitled to a judgment written without exaggeration or passion. Chief Justice Stone of the Supreme Court of America once said : " Precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government. " The ampler the power, the greater the care with which it should be exercised. And the very circumstance that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a judge to be guarded and restrained in his comments, and to refrain from needless invective. The learned Judge has used hard words in referring to the management of the Defendant Company. I do not think they were justified, and in these circumstances I feel that it would not be wrong for us to interfere with his finding of fact regarding the service of notice on the Plaintiff.

The learned Judge's attack on the management, and his opinion of its conduct and behaviour, appear to have been provoked by two matters, both of which were hardly relevant to the questions at issue. One was that, whilst under a contract to supply all its produce to a certain firm which had given it advances, the Defendant Company has not scrupled to sell a part of its produce elsewhere. It is true that the Plaintiff has given evidence to this effect, but the alleged contract could only have been proved satisfactorily by the production of the written agreement. The charge that the Company had acted in breach of that agreement should have been specifically put to the Managing Director when he was in the witness box. The other matter was the learned Judge's view

that the Defendant Company took some part in the burglary of the bungalow which was occupied by the Plaintiff. There is no evidence whatever to justify this view. The learned Judge has said that it was imperative that he should look for corroboration of the Defendant's case. He would probably have taken a different view if he had not been influenced by the irrelevant considerations to which I have just referred.

After considering what damages the Plaintiff should be awarded for the Defendant's failure to give him notice, the learned Judge has awarded him damages amounting to three months' salary. In my view he erred in so doing, because the Plaintiff was a monthly paid servant whose service was from month to month. He was therefore only entitled to a clear month's notice.

In view of the arguments addressed to us, I shall deal briefly with the questions of law that arise on this part of the case. Mr. Siriwardena seemed to argue at one stage that the Plaintiff was not on a monthly engagement, and he cited Lee & Honore on The South African Law of Obligations, p. 107, where it is said " The mere fact that a servant is paid weekly or monthly does not constitute his engagement a contract of service for a week or a month. " The case cited in support of this statement is *Central South African Railways v. Cooke*[1]. But that was a case where no sum was agreed between the parties as monthly wages, and the wages were paid at the end of each month for convenience. The employee was in fact engaged at a daily rate. It was therefore held that it was not a monthly hiring. What is more pertinent is the passage at p. 96 of the same text book which reads " In the absence of agreement or custom to the contrary, a hiring for an indefinite period at a monthly rent or wage, whether of things or of services, is determinable by a month's notice expiring at the end of a calendar month. " There is no doubt that in this case the Plaintiff was engaged from month to month.

Was he then only entitled to a month's notice ? It has been held over and over again by this Court that where a servant is engaged from month to month, he is entitled only to one month's notice. The first case I might refer to, although there are earlier cases which took the same view, is *Sirisena v. Kurugama Tea Co.*[2] A Bench of two Judges held that a dispenser engaged on a monthly salary of Rs. 140 was entitled only to one month's notice. Ennis J. there said " The question would depend not on the professional character of the service, but on the tenor

[1] *(1904) T. S. 531.*

[2] *(1924) 26 N. L. R. p. 208.*

of the engagement." He also cited the passage which has often been quoted in subsequent cases. It appears in 3 Maasdorp (1924 Edition) p. 265. The principle there laid down is that an "employee is entitled to a reasonable notice of the termination of the contract, and what is reasonable notice will depend on the circumstances of each particular case. *When the service is from month to month, the salary being payable monthly, he will be entitled to a clear month's notice.*" The italics are mine.

The same rule was followed in *LaBrooy v. The Wharf Lighterage Company*[1] and *Samarasekera v. Urban District Council, Negombo*[2]. Both those cases concerned persons engaged from month to month, and one month's notice was held to be sufficient. Wille in Principles of South African Law (4th Edition) p. 414 says in dealing with notice of termination where the contract of service is periodic: "Under the common law the contract is terminable by reasonable notice given by either party. *Reasonable notice in the case of a monthly contract is a month's notice given so as to expire at the end of a month*, and such notice given on the first day of a month is sufficient to terminate the contract at the end of that month." The italics are mine. The only exception to this rule that I can find is where there is custom or agreement to the contrary—See *Tiopaizi v. Bulawayo Municipality*[3]. No such custom or agreement has been relied on in this case.

There are two cases which do not seem to have followed this principle, but the judges do not appear to have intended to lay down any principle. In *Thuraisamy v. Thailpayar*[4], a teacher employed at Rs. 20 per month was awarded 2 months' salary in lieu of notice, but Wijeyewardene, J. expressly said that he was treating the Plaintiff generously in holding that he should have been given two months' notice. This case can hardly be treated as a binding authority in these circumstances. In *H. A. de Zoysa v. R. T. de Silva*[5], a school teacher employed on a monthly salary of Rs. 63 plus a cost of living allowance, was dismissed without notice. The dismissal was sought to be justified by charges which were not substantiated. Gratiaen J. awarded the plaintiff the equivalent of six months' salary and allowances as damages. He said this, however: "I must not, in reaching this conclusion, be understood to express any view of general application with regard to the period of notice which a professional school teacher is entitled to claim from his employer." Again I would say that no principle can be deduced from this authority.

[1] *(1932) 34 N. L. R. 85.*
[2] *(1935) 37 N. L. R. 169.*
[3] *(1924) A. D. 317.*
[4] *(1943) 44 N. L. R. 28*
[5] *(1948) 19 Times of Ceylon Law Reports 144.*

The learned trial Judge has relied on the cases of *Forsyth v. Walker and Clark Spence* [1] and *Perera v. The Theosophical Society* [2], when dealing with this part of the claim. In my view they have no application. The former case was one where the employee was engaged for a definite period of 4 years. The agreement was broken by the employer and it was held that 6 months was reasonable notice. The latter case was one where, upon consideration of the agreement, the Court held that the contract was more than a monthly engagement and 6 months was held to be reasonable notice again. The same principle was applied in *Gringer v. The Eastern Garage Ltd.* [3], where there was a breach of a three year agreement and the Court held that 7 months' salary less any earnings made during those 7 months should be awarded. A distinction must always be drawn between cases such as the present one, where there is a month to month engagement, and the last three cases I have referred to, where there is an engagement for a fixed period. Following the opinion expressed in the vast majority of the judgments of this Court, I would hold that a month's notice is sufficient. Since such notice was given in this case, the plaintiff was not entitled to any damages for the termination of his services.

There only remains the award of a sum of Rs. 750 as damages on the ground that the Defendant cut off the lights and water service of the Plaintiff's bungalow, and refused to give rations to the Plaintiff and his family, from 1st November, 1958. I am satisfied that the Plaintiff, who was provided with a furnished bungalow for his occupation, occupied it as a servant and not as a tenant. Upon the termination of his services the Defendant was entitled to retake possession—see Diamond's Law of Master and Servant (2nd Edition) p. 29. The Plaintiff therefore had no right to remain in occupation. He cannot complain in these circumstances if the lights and water service were cut off and rations refused, because he was on the premises thereafter as a trespasser. His claim on this account must therefore fail. In the result the Plaintiff's action fails entirely. I set aside the judgment and decree under appeal and dismiss the Plaintiff's action with costs in both Courts.

SILVA, J.—I agree.

Appeal allowed.

[1] *(1931) 33 N. L. R. 211.* [2] *(1930) 14 Ceylon Law Recorder 190.*
[3] *(1929) 32 N. L. R. 281.*