

Present : Hutchinson C.J. and Middleton J.

Aug. 25, 1910

WALKER v. COOKE.

127—D. C. Nuwara Eliya, 153.

“Tundu”—Issue of “tundu” warrants that the coolies were willing to enter the employment of person accepting “tundu.”

Plaintiff accepted a “tundu” issued by the defendant and paid him the amount stated in the “tundu.” A sub-kangany and fourteen coolies who were paid off by the defendant refused to accompany the head kangany to plaintiff’s estate.

Held, that defendant was bound to pay back the amount of the debt of the sub-kangany and his coolies to the plaintiff.

MIDDLETON J.—Defendant’s obligation on this “tundu” was to pay off the coolies mentioned in it from his estate, and to put them in such a position of freedom that the plaintiff might legally engage them if they chose to go. The issue of the “tundu” warranted further that the coolies were willing to enter the employment of any person who took over and paid their debt, and that the present employer was in a position to hand them over to a new one.

THE facts appear in the judgment.

Bawa, for appellants.

Schneider (with him *V. Grenier*), for respondents.

Cur. adv. vult.

August 25, 1910. HUTCHINSON C.J.—

The defendant, the Superintendent of Mayfield estate, issued the following “tundu” on a printed form :—

Tundu.

Mayfield Estate,
May 19, 1909.

The under-mentioned coolies will be paid off one month from date on receipt of their debts after June 1 till June 19, Rs. 4,780·14/100.

Names.—Nallu, head kangany, and one hundred and sixty coolies. Seven coolies at Coast.

W. H. COOKE,
Superintendent.

The plaintiff sent to the defendant on June 28 a cheque for the sum named (Rs. 4,780·14), and the defendant accepted it. The plaintiff alleges that the defendant, in breach of this agreement to pay off the men mentioned in the “tundu”, failed to pay off Ramasamy Kangany and his (14) coolies, who were included in the “tundu,” and who refused to accompany Nallu, the head kangany, to the plaintiff’s estate, and he brings this action to recover from the defendant Rs. 977·52, the amount of the debt due by Ramasamy and his coolies. The defendant denies that he failed to pay off Ramasamy and his coolies; and denies that their debt amounted to Rs. 977·52.

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The defendant received the plaintiff's cheque on or about June 28 On July 1 he wrote to the plaintiff saying that Nallu wanted two or three days before being paid off, and that Ramasamy and his (14) coolies wanted to stop, and would go to Court if Nallu persisted and pay their debt there. To this the plaintiff replied on the 3rd that he was ready for the men, and that Ramasamy should be paid off, and if he wished to leave the plaintiff's estate could have his "tundu." On the 3rd the defendant mustered all the men, including Ramasamy and his gang, and paid them off, and entered in his pay list that they were paid off, and wrote to the plaintiff the same day telling him that he had done so, and asking the plaintiff to send some one to take them over.

Ramasamy and his men refused to go to plaintiff. On the 7th the defendant wrote to the plaintiff informing him of this, and saying that he had not given Ramasamy work, and that Ramasamy was taking his debt to Hatton Court the next day ; and he offered to send to the plaintiff a cheque for Ramasamy's debt and keep him on. The plaintiff replied on the 10th saying that Nallu had consented, "so will you please send me the total debt of Rs. 977.52." Then it turned out that the amount of Ramasamy's indebtedness to Nallu was disputed ; negotiations followed ; the defendant offered to pay to the plaintiff the amount which Ramasamy admitted, viz., Rs. 619, but the plaintiff insisted on being paid Rs. 977.52, the amount at which Nallu put it. Hence this action, which is not founded on any subsequent agreement by the defendant to pay Rs. 977.52, but on the breach of the defendant's agreement contained in the "tundu".

The defendant admits that he knew on July 1 that Ramasamy refused to go. And the plaintiff admits that Nallu had given him a promissory note, which includes the whole amount of the cheque which he gave to the defendant. The defendant's agreement is contained in the "tundu" ; it is, that on receipt of their debts the coolies will be paid off. The defendant says that he paid them off, and that that was all he undertook to do ; that he terminated their employment with him, and they were free to go to the plaintiff. The contention on the other side is that a man who gives such a "tundu" undertakes, not merely that he will discharge his indebtedness to them and theirs to him and leave them, so far as he is concerned, free to go, but also that they are willing to go. That is the real dispute. Does the man who gives the "tundu" undertake to hand over the coolies to the man who pays him, and that they will leave the estate with him ? Or, does he merely undertake that he has the specified number of coolies on his check-roll and working on his estate, and that he will pay them off and terminate their employment with him ? It is not denied that if Ramasamy and his men had once been taken over by the plaintiff or his agent and had gone away with him the defendant's

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responsibility would have ceased, but the plaintiff contends that the defendant was bound to hand them over to him, and undertook that they were willing to go.

There is no evidence in this case as to the meaning of "paying off" coolies on an estate. But there are many reported cases in which the effect of a "tundu" has been considered. When a householder or a merchant says that he "pays off" a servant, he means that he pays the man the wages due to him and discharges him. But that is not what a planter means. We must take note of the well-known custom of advances. A planter makes advances to his coolies, he makes them through the head kangany, who gives him a note to cover the amount; and when he "pays off" a gang of coolies, he means not merely that he pays them their wages, but also that he has given a discharge for the amount of their advances. When he receives that amount from another planter, B, both parties intend that B shall get some consideration for his payment; and the consideration is that the coolies will transfer their services to him, their indebtedness for their advances being transferred to him; and he takes a note from their kangany for the amount. The paying-off planter is bound to hand the coolies over to B or his representative; if he fails to do that, either because they have bolted, or because they refuse to go to B, or for any other reason, he has not fulfilled his part of the bargain. I think that this custom is sufficiently well established for the Court to take judicial notice of it. See *Bambarakelle Tea Estates Company v. Dimbula Valley Tea Estates Company*,¹ *Imray v. Palawasen*,² *Whitham v. Pitchche Muttu Kangany*.³ I think that the defendant is liable to pay to the plaintiff the amount of the indebtedness of the coolies who were amongst those referred to in the "tundu," and who refused to go to the plaintiff. If the parties cannot agree on the amount, the District Court must decide it. The decree of the District Court must be set aside, and the case must go back to the District Court, which will enter judgment for the plaintiff for the amount agreed or found to be due; and the defendant must pay the plaintiff's costs of the action and of the appeal.

MIDDLETON J.—

This was an action to recover the sum of Rs. 977·52, being the alleged damage due to the plaintiff upon a "tundu" transaction. The parties were superintendents of tea estates, and on May 19, 1909, the defendant issued a "tundu" on the following terms:—

The under-mentioned coolies will be paid off one month from date on receipt of their debts after June 1 till June 19, Rs. 4,780·14.

Names.—Nallu, head kangany, and one hundred and sixty coolies. Seven coolies at Coast.

W. H. COOKE,
Superintendent.

¹ (1909) 2 Cur. L. R. 12.² (1900) 4 N. L. R. 113.³ (1900) 6 N. L. R. 289.

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The difficulty arose from a kangany, Ramasamy, and his 14 coolies included in the 160 refusing to leave the defendant's estate and to take up service with the plaintiff owing to Ramasamy's objection to the head kangany, Nallu. The plaintiff accepted to pay the amount mentioned in the "tundu" and to take over the coolies mentioned in it, and on June 28, 1909, sent the defendant a cheque for Rs. 4,780·14, which the defendant admitted receiving.

The following issues were framed in the case :—

- (1) Did the defendant fail to pay off Sinne Ramasamy Kangany and his coolies ? Did they refuse to accompany Nallu to plaintiff's estate ?
- (2) What is the debt due by Sinne Ramasamy Kangany and his coolies ?
- (3) What, if any, damage has plaintiff suffered ?
- (4) If plaintiff has sustained any damage, is defendant liable therefor, and liable to pay the same to plaintiff ?

On the issues the District Judge found that the defendant did pay off Sinne Ramasamy and his coolies ; that they refused to accompany Nallu, head kangany, to plaintiff's estate ; that by the failure of Ramasamy and his coolies to go to the plaintiff's estate, plaintiff has suffered damages to the extent of the actual amount of their debt, which has not been yet ascertained. On the latter part of the last issue the District Judge found that the plaintiff's remedy lay against Nallu, and dismissed the action. The plaintiff appealed, and it was admitted by counsel for him that if Sinne Ramasamy personally declined to go when duly paid off, the contract under the "tundu" may have been strictly complied with. I take it, however, that counsel meant if he had declined to go after he had been put at the plaintiff's disposal.

In accordance with my opinion in the *Bambarakelle* case, I think the defendant's obligation on this "tundu" was to pay off the coolies mentioned in it from his estate, and to put them in such a position of freedom that the plaintiff might legally engage them if they chose to go.

The issue of the "tundu" warranted further that the coolies were willing to enter the employment of any person who took over and paid their debt, and that the present employer was in a position to hand them over to a new one. I think it is clear on the evidence that the defendant duly paid off Sinne Ramasamy in time to enable him to accompany Nallu to the plaintiff's estate. Sinne Ramasamy, however, refused to go, and was allowed to remain on the defendant's estate, though not given work to do. The cheque was apparently received by the defendant on the 28th, and the coolies were paid off by him on July 3, and it is clear from the defendant's letter, P 5 of July 7, that the defendant felt that the equity of the case involved his paying back to the plaintiff a cheque for Sinne Ramasamy's

debt. The question is whether he is liable in law. In my opinion he is. The defendant says that he knew on July 1 that Ramasamy refused to go. I think it is clear then that he had not previously made the necessary inquiries as to the willingness of the sub-kanganies and their coolies to accompany Nallu. He does not say that he knew this for the first time on July 1, or that he had made any inquiries. There has been no evidence given in the case of custom in regard to these "tundus," but I have no doubt that Mr. Ryan was absolutely right when he said in the *Bambarakelle* case that the right thing to do in these cases was to send some responsible person with a pocket check-roll, or to go oneself and enter into the new contract with the coolies before paying off their debts.

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If the plaintiff's cheque had been stopped at the bank by him on July 1 when he got defendant's letter P 2, and an action brought on it by the defendant, it seems to me the plaintiff might have successfully raised the defence of want of consideration as regards Sinne Ramasamy's debt. If so, is there not a breach of contract here which will enable the plaintiff to recover back his money, the breach being the defendant's inability to fulfil his agreement by handing over the coolies? The case is by no means free from difficulty, being one of a contract in connection with the disposal of the services of free human beings, but I think its construction must involve the obligation of the grantor of the "tundu" to be in a position to deliver over the men when the new employer comes to take over. Here the defendant could not have delivered the coolies to the plaintiff, and I think that both in law and equity the plaintiff is entitled to recover back from him the amount due by Sinne Ramasamy to Nallu, whatever that may be. It seems that great efforts have been made to arrive at the sum in question out of Court, but without result. Unless the parties can agree to a reasonable sum, which seems to me quite possible after all the inquiries which have been made, the District Judge must further inquire and ascertain what sum is in fact due. The judgment of the District Judge will be set aside and judgment entered for the plaintiff, and the appeal allowed with costs in both Courts.

The case will be sent back for the inquiry I have indicated, if necessary. The costs of that inquiry will be dealt with by the District Judge, but if the inquiry is unnecessary, judgment will be entered for the sum agreed on. There is some evidence of a novation, but neither the plaint nor the evidence support it.

As regards the promissory note given by Nallu to the plaintiff, this I think was only given for further security, and will not affect the plaintiff's rights against the defendant on the "tundu".

Set aside.