1931 *Present:* **Macdonell C.J. and Garvin S.P.J.**

FORSYTH *v.* WALKER AND CLARK SPENCE.

406—D. C. Galle, 29,137.

Contract of service—Employment for definite period—No provision for termination on notice—Repudiation before termination—Wrongful dismissal—Cause of action.

Where a contract of employment, entered into for a definite period, contains no provision for termination on notice and is not subject to any custom as to notice, the repudiation of the contract by the employer before the expiration of the period, without lawful excuse, amounts to wrongful dismissal.

THE plaintiff sued the defendants to recover Rs. 6,000 as damages sustained by reason of the discontinuance of his services by the defendants without reasonable notice.

The plaintiff was employed as an engineer by the defendants on a three years' engagement in May, 1926, on a salary of Rs. 650 per mensem. On the expiration of the term, the plaintiff was re-engaged in May, 1929, for a period of four years on a salary of Rs. 800 per mensem for the first two years and a salary of Rs. 850 per mensem for the next two years. On August 2, 1930, the defendants wrote to plaintiff that they were unable to employ his services after September 30, 1930. The plaintiff

computed his damages by asking for six months' pay at Rs. 800 per mensem in lieu of notice. The learned District Judge awarded three months' pay and allowances as damages to the plaintiff.

N. E. Weerasooria, for plaintiff, appellant.—The main question is as to the terms of the second contract. The parties are agreed as to the period of service and the salary and even as to the *quantum* of house allowances. But no period of notice is stated. The dismissal was wrongful. The plaintiff was ready and willing to work but the defendant company was unable to give employment. The agreement was for four years' service. Six months' salary and house allowance is reasonable damages (*Gringer v. The Eastern Garage, Ltd*[1]; *10 Halsbury, p. 339, § 624*).

[GARVIN S.P.J.—Can a contract for a definite period without a provision for notice be terminated by notice ?]

No. The point has not been expressly considered in *Gringer v. The Eastern Garage, Ltd.* (*supra*). In *Perera v. Theosophical Society*[2] six months' salary was taken as the basis of damages.

[MACDONELL C.J.—*In re Arbitration Rubel Bronze and Metal Co. Ltd.*[3] supports the view that the contract is not terminable by notice.]

Yes. Unless a definite custom can be proved (*English and Empire Digest, Vol. 34, p. 66, § 420, and p. 103, § 767-769; 20 Halsbury, pp. 110-113, §§ 215-218; Bryant v. Flight*[4]; *Davis v. Marshall*[5]; *Smith v. Thompson*[6]).

H. V. Perera, for defendants, respondents.—The two contracts must be read together. The second was a continuation of the first with slight variations. At the commencement of his employment the plaintiff agreed to the usual conditions of service appearing in a printed form except in regard to notice. The agreement as to notice was three months. The same period must be read into the second contract (*Meek v. Port of London Authority*[7]). Even if the parties later sought to impose a different construction, that is immaterial. The question is merely one of legal interpretation of the documents. The trial Judge finds that the parties intended to incorporate the terms of the old contract. That would include the period of notice, viz., three months.

Weerasooria, in reply.—The evidence is clear that the second contract was distinct from the first. The defendant Company admits in the answer that no period of notice was agreed on. In the evidence they say one month's notice and not three months' was enough. *Meek v. Port of London Authority* (*supra*) refers in fact to a custom.

November 27, 1931. MACDONELL C.J.—

In this case the plaintiff-appellant sued the defendant-respondents for Rs. 6,000 as damages sustained by him owing to the discontinuance of his services by the defendants without reasonable notice. He arrives

[1] *(1929) 32 N. L. R. 281.*
[2] *(1930) S. C. 281, D. C. Colombo, 32,307, S. C. M. 18. 12. 30.*
[3] *(1918) 1 K. B. 316.*
[4] *(1839) M. & W. 114.*
[5] *(1861) 4 L. T. 216.*
[6] *(1849) 8 C. B. 44.*
[7] *(1918) 2 Ch. 96.*

at this figure by taking six months' pay at Rs. 800 per mensem, six months' house allowance at Rs. 70 per mensem, and six months' earnings on the car allowance made him by the defendants at Rs. 130 per mensem, and over and above the Rs. 6,000 he claimed a Bibby Line passage to England which is agreed to amount to Rs. 891. Judgment passed for him in the District Court but only for three months' pay and house allowance in lieu of notice. He was also granted the passage allowance claimed. From this decision he appeals.

The facts were these. The plaintiff was engaged by the defendants as an engineer in May, 1926, on a three years' engagement at a salary of Rs. 650 per mensem. The defendants have a printed contract form which they usually get their employees to execute by which form the defendants can terminate the engagement entered into by one month's notice, and by which also they undertake on satisfactory completion of the particular agreement to give the employee engaged a second class passage to England if the latter claims the same within thirty days of the termination of the agreement, but the plaintiff never signed this printed form. A copy was sent to him by the defendants and in reply he asked that three months might be substituted as the period of notice in lieu of the one month in the printed form. To this the defendants assented in a letter of May 10, 1926, adding, "the other terms and conditions appearing in the agreement which has been sent you will hold". The plaintiff entered on his duties at Galle under this agreement and things went smoothly between him and defendants. During the course of this three years' engagement he asked of the defendants and obtained from them a house allowance of Rs. 70 per mensem. This was not a term in the engagement and was really an *ex gratia* concession by the defendants. The plaintiff also received a car mileage allowance, likewise a concession. In May, 1929, at the end, that is, of the three years' engagement, plaintiff engaged with defendants to serve them again as an engineer but for a period of four years and this time at a salary of Rs. 800 per mensem for the first two years and Rs. 850 per mensem for the second two years. He was then provided with a Bibby boat passage to England and six months' full pay. Later on in that year, 1929, he returned here to take up his duties under the four years' contract with defendants. This again was not a contract in writing but it is common cause that a return passage of Bibby boat at the conclusion of the engagement was a term of it, and likewise the plaintiff drew the house allowance and car allowance just as he had done under the three years' engagement, and there is evidence to show that these were actually terms of the new contract. Again things seem to have gone smoothly, and defendants expressly disclaim any default in diligence or skill on the part of the plaintiff in the carrying out of his duties under this contract.

On August 2, 1930, defendants wrote to the plaintiff that on account of business depression they had decided that they "were unable to employ his services after September 30, 1930", and they asked him to accept that notice, in effect, a notice of one month, since apparently he was paid on the 1st of each month. After some correspondence plaintiff commenced the present action.

In paragraph 5 of his plaint plaintiff sets out the facts of his re-engagement with the defendants in May, 1929, for a period of four years at Rs. 800 per mensem for the first two years and Rs. 850 for the second two years and adds " but no agreement was made as to the period of notice necessary to terminate the agreement ". This paragraph of the plaint is expressly admitted by the defendants in their answer. The only evidence bearing on the question of notice is this. Plaintiff in a letter of September 13, 1930, that is to say after he had been told that his services were dispensed with, wrote to defendants saying that they had dismissed him practically at a month's notice and drawing their attention to the letter of May 10, 1926, which had given him the right to three months' notice under the earlier three-year agreement. In their reply of September 23, 1930, defendants said, "As regards his (*i.e.*, plaintiff's) contention of three months' notice being required under the agreement, as this agreement is now terminated its conditions are no longer in force." This was a pretty clear statement on their part that in September, 1930, they did not consider that their contract made fifteen months before, in May, 1929, could be implied to contain a condition that it was terminable on three months' notice. At the trial the only witness called for defendants said he considered that they were entitled to terminate the contract on one month's notice. At the appeal it was argued for defendants that the question was, what was the contract itself, not what were the opinions given on it some fifteen months after it was made, and it was further argued that the contract sued on was a continuation of the first contract of May, 1926, and that consequently it impliedly took over from the first contract a condition of terminability on three months' notice. But this argument seems doubtful.

The contract sued on was for four years at a higher rate of pay as against one for three years at a lower rate. So far then the contract sued on does not look to be a continuation of the old one. It is urged that the condition of the Rs. 70 per mensem house allowance was common to both. But the evidence shows that this allowance was not a term in the earlier contract but an *ex gratia* concession, and in their pleadings defendants say that it was not a term in their second contract either but again a concession withdrawable at will. Even if it was a term in this second contract sued on, it certainly was not on the evidence a term in the earlier contract, and therefore is not an argument in favour of the contract sued on being a continuation of the former contract and this is so *a fortiori* if it was not a term in either contract. It is equally difficult to use the promise of a passage as an argument in favour of continuity of one contract with the other. According to the printed form which was expressed to govern the earlier contract, the passage promised was a second class one, but in actual fact a Bibby passage was given, again something *dehors* that, the earlier contract, and if the present contract, the one sued on, contains, as seems conceded, the promise of a Bibby passage, then this is something not to be found in the earlier, three-year, contract. It is difficult then to hold that the contract sued on is a continuation of the earlier contract and, if so, the condition of terminability on three months' notice cannot be read into it as an implied term. Then we are thrown back on the evidence of

the defendants themselves, their letter of September 23, 1930, to the effect that there can be no argument from the one contract to the other as to three months' notice, and the statement of their witness that they could terminate it on one month's notice—not a very reasonable assertion as to a four-year agreement.

Of the issues framed the first three are the important ones:—

" 1. Were defendants entitled to terminate the second contract before the expiration of four years ? ".

The answer to this was " Yes."

" 2. If so, should defendants have given reasonable notice ?

" 3. What is reasonable notice ?".

The answer to these two issues was " Three months' notice is sufficient on the contract or as reasonable notice ".

Now on the pleadings it is admitted that no agreement was made as to the period of notice necessary to terminate the agreement. The rules as to termination of contracts of employment seem to be these. Where the contract itself states the period of notice on which it may be determined, that statement governs the question. Where though the contract is silent on the period of notice on which it may be determined, still a custom is proved that a contract of such a character can be determined on such and such a period of notice, then that custom governs the question. Where the contract is silent on the period of notice on which it may be determined and where no custom as to such period can be proved but still it is shown to be a contract terminable on notice of some sort, then the period of notice on which the contract is terminable must be a reasonable one. But there remains a further category. If a contract of employment is expressed to be for a definite period and nothing as to terminability on notice can be discovered in it or read into it, then its termination by the employer without lawful cause before that definite period has elapsed is a case of wrongful dismissal, and an instance of the general legal rule that action will lie for unjustifiable repudiation of a contract whether of employment or of any other character. The remedy for such unjustifiable repudiation is damages.

I think the present contract is one of this last character. It is expressed to be for a definite period whose duration is emphasized by the rise in salary to take place when two years of the period have elapsed, and the employer contemplates the employee coming from a distance to perform his duties under the contract and so to forego changes of employment elsewhere. If that is so, then all that is necessary is to estimate the damages which plaintiff is entitled to claim for breach of contract.

He claims six months' pay and as he had every reason to expect a four years' employment and as he has been kept here by the refusal of the defendants to pay that amount, I think he is fairly entitled to the sum, viz., Rs. 4,800. It is in evidence that he has done all that he can to obtain other employment and that this is a time when it is very difficult for men of his profession, engineers, to get employment at all. According to the evidence, then, it is no fault of his if he has failed to reduce defendants' liabilities by getting employment elsewhere. With the six months' pay will go the claim for a house allowance, Rs. 70 per mensem,

again since he has been detained here through the defendants' refusal to pay. His claim on his car mileage allowance must be disallowed. Such an allowance is given an employee that he may do his duties as such without being out of pocket, not that he may make money out of it. His claim to a Bibby boat passage to England, which is agreed at Rs. 891, seems to be conceded and he is therefore entitled to this also. Total damages, Rs. 4,800 plus Rs. 420 plus Rs. 891, equals Rs. 6,111.

I would add this. In his plaint plaintiff claims damages but then goes on to speak of them as due to " discontinuance of his services without reasonable notice ". This is really to confuse two things, damages for illegal repudiation of a contract, and compensation for termination of a contract terminable on reasonable notice without having been given that reasonable notice. If I am wrong in holding, as I do, that this was a contract illegally repudiated with liability to damages as the consequence, and if it really is a case of a contract terminable on reasonable notice, still I would say that six months' notice and no less period would be a reasonable notice on such a contract as this in all the attendant circumstances.

The appeal then must be allowed with costs, and the judgment below must be set aside and altered into a judgment for plaintiff for damages Rs. 6,111 and costs.

GARVIN S.P.J.—I agree.

Appeal allowed.