

Present: Mr. Justice Wood Renton.

June 22, 1910

PERERA v. PERERA *et al.*

C. R., Colombo, 16,088.

Public Servants' Liabilities Ordinance (No. 2 of 1899)—Person paid by the day—Is he a public servant?—May the plea of privilege be raised after judgment?

A person employed under Government, and who is liable to be fined for absence from duty without leave, was held to be a "public servant" within the meaning of section 3 of Ordinance No. 2 of 1899, though he was paid by the day.

A public servant who had not raised the plea of privilege in his answer was held to be not precluded from raising it when he was arrested for the debt.

A PPEAL from a judgment of the Commissioner of Requests, Colombo (M. S. Pinto, Esq.).

In this case the second defendant, respondent, who had been committed to jail for non-payment of the amount for which judgment had been entered against him, moved to be discharged from jail, on the ground that he was a public servant within the meaning of section 3 of Ordinance No. 2 of 1899.

The evidence of the second defendant was as follows:—

G. A. Fernando, sworn.—I am paid Re. 1.37 per day. If I am absent on any day I shall not be paid, but shall be fined. If I am absent for four days I shall not be paid for four days, and I shall be fined. I am employed under the Railway Locomotive Department. When judgment was entered I agreed to pay Rs. 15 per month. I paid Rs. 15 on the day the agreement was entered into, and I many times after that paid Rs. 15.

Cross-examined.—We are given gratuities if we leave service.

Re-examined.—We get gratuities if we work for twenty-five years.

The learned Commissioner of Requests made the following order:—

The question for decision is whether the defendant is a public servant. The definition of a public servant in the Public Servants' Liabilities Ordinance, under which the defendant seeks to be discharged, runs thus: "A public servant means a person employed in the service of the Government of the Colony." The defendant, in my opinion, is a public servant according to this definition. But *Palaniappa v. Fernando et al.*¹ was quoted to me. In this case it was held that a person employed as a tidewaiter at His Majesty's Customs, who did job work, and was paid a daily wage on several days as he chose to work and whose appointment was not pensionable, was not a public servant.

¹ (1905) 1 A. C. R 27.

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I may say that the definition of a public servant in the Ordinance seems to me to be wide enough to cover the case of even a person who is not a fixed employé under Government. But, even if it is otherwise, the case quoted is not on all fours with the present case. In this case the defendant is a fixed employé. He cannot absent himself as he chooses; if he absents himself on any day, he not only loses the pay for the day, but is also fined. He is eligible to a gratuity after twenty-five years' service, and there has been a case in which an employé has been offered a pension in lieu of a gratuity.

I am of the opinion that the defendant is a public servant, and discharge him.

The plaintiff appealed.

Tambyah (with him *A. L. R. Aserappa* and *Samarakoddy*), for the appellant.

B. F. de Silva, for the respondent.

June 22, 1910. WOOD RENTON J.—

In my opinion this judgment is right. I agree with Mr. Tambyah that it would have been well if the second defendant-respondent had taken his plea under section 3 of Ordinance No. 2 of 1899 in his answer to the appellant's plea. But the provisions of section 4 clearly entitle him to do so at a later stage, and impose upon any Court before which a plea of privilege under Ordinance No. 2 of 1899 is so brought the duty of investigating it. As regards Mr. Tambyah's second point, that the second defendant-respondent is not a "public servant" within the meaning of the Ordinance, it seems to me to fail on the evidence. The case is clearly distinguishable from *Palaniappa Chetty v. Fernando et al.*,¹ in which the alleged public servant held no fixed appointment under the Government, but was merely a person doing job work, who was paid only for what he actually did. In the present case the second defendant-respondent has stated, and there is nothing to contradict his allegation, that he was paid by the day, and that he was fined if he absented himself from duty without leave.

On these grounds, I dismiss the appeal with costs.

Appeal dismissed.

¹ (1905) 1 A. C. R. 27