1918.

[FULL BENCH.]

Present : Bertram C.J., Shaw and De Sampayo JJ.

BOX *v.* PULLENAYAGAM.

162—D. C. Kandy, 25,338.

Tundu—Issue of tundu by superintendent—Bolting of coolies after "paying off" en route—Irregular discharge tickets—Action for damages.

The defendant (superintendent of Mahatenne estate) issued a *tundu* undertaking to pay off Muttiah Kangany and fifty-eight coolies on payment of their debts (Rs. 5,676.17). The plaintiff (superintendent of Craighead estate) sent his clerk to Mahatenne with a letter to defendant asking him to permit the clerk to see the coolies, and saying that if he found them all there, and things were as represented to the plaintiff by Muttiah Kangany, the clerk would hand the defendant the plaintiff's cheque for Rs. 5,676.17. The clerk inspected and counted the coolies, and took the gang with him. On the way three of the coolies bolted. The discharge tickets were sent by defendant by post to the plaintiff; but with respect to four coolies, the tickets were either defective or missing.

The discharge ticket of one of the four coolies (Mariamma) did not show how she came to be employed at Mahatenne. It appeared that she had never previously been employed on an estate, but was residing in Colombo. She was engaged without a Magistrate's certificate by the defendant.

This cooly and another of the four died on the estate. The other two shortly afterwards passed on with the kangany to another estate and were there engaged, having obtained Magistrate's certificates. The

superintendent of this estate paid to the plaintiff the whole of the amount (subject to certain immaterial deductions) which the latter had paid on the original *tundu*, and the kangany gave a promissory note for this amount to the new employer.

The plaintiff sued the defendant for damages: (*a*) for refund of the amount paid in respect of these seven coolies on the *tundu* ; and (*b*) in respect of the loss of their labour.

Held, (1) That the defendant was not responsible for any loss incurred by the plaintiff through coolies bolting *en route*.

(2) As Mariamma was, whether rightly or wrongly, employed upon Mahatenne estate, and had been entered upon the register of the estate, she could have been passed on upon the discharge ticket.

The defect disclosed upon the face of the ticket might no doubt subject the superintendent of Mahatenne to a criminal penalty, unless it was proved that the woman was in fact born in Ceylon. But this did not prevent the plaintiff employing the cooly.

(3) There was a breach of contract with respect to the other three coolies. " By including them in his *tundu* the defendant impliedly guaranteed that they were in his employ, and that he would do everything necessary to terminate their employment with him and to enable them legally to be engaged by the plaintiff. The plaintiff is, *prima facie*, entitled to damages under both heads (*a*) and (*b*) mentioned above."

Held, further, however, (1) That, in respect of the claim for a refund of a portion of the amount of the *tundu*, the plaintiff having recovered the full amount of the *tundu* was not entitled to any damages, and could not recover any damages on behalf of the kangany, inasmuch as the kangany had suffered no actual damage by any act for which the defendant was responsible; and

(2) That, in respect of the claim for loss of labour, the plaintiff was only entitled to nominal damages, inasmuch as he could have secured the services of the three coolies, other than Mariamma, by procuring Magistrate's certificates.

THE facts are set out in the judgment.

Bawa, K.C. (with him *L. H. de Alwis*), for the defendant, appellant.—The entire contract is clear from the letters read in evidence. There is no room for maintaining an action on an implied warranty when the correspondence is so clear. There is no guarantee that the defendant is responsible for the coolies who do not go to the plaintiff's estate either in the *tundu* (see form of *tundu* in *2 Cur. L. R. 12*) or in the correspondence.

" Paying off " coolies means leaving the coolies free to take employment elsewhere. The *tundu* expired on August 30. On September 27 Mr. Box wrote to defendant asking whether he had any objection to his taking on the gang; he merely wanted to know whether he was at liberty to contract with the kangany and the coolies. The plaintiff's clerk went to defendant's estate to take over the coolies. The handing over the plaintiff's cheque by the clerk was after inspecting the coolies, and therefore, after the clerk

1918.

Box v. Pullenayagam

was satisfied that the statements in the *tundu* were correct. The defendant is not responsible for any coolies who may bolt *en route*.

Walker v. Cooke [1] did not hold that in circumstances such as are present here the defendant is liable for the bolting coolies. If it holds that it was wrongly decided. Counsel referred to *The Bambrakelle Estates Tea Co., Ltd., v. The Dimbula Valley Tea Co., Ltd.*[2]

As to the objection to employing Mariamma, plaintiff has not proved that defendant employed her after the Ordinance of 1909 came into force. Moreover, the plaintiff is protected by the discharge ticket given by the defendant.

The two other coolies, though they had defective discharge tickets, remained on the estate, and were later transferred on a *tundu* to another estate by the plaintiff along with this gang.

The other cooly died on the estate. In any case the plaintiff is not entitled to any damages, because when he brought this action he had transferred all the coolies to Sogama estate on a *tundu*, which included the whole amount he had paid to the defendant (including the amount paid for these seven coolies). The plaintiff himself admits that he has not lost any part of the advances. He should not be allowed to sue to recover damages on behalf of Muttiah, who gave a promissory note for the full amount to Sogama estate. Moreover, the kangany gave the plaintiff a promissory note for the full amount as soon as he took service under him.

The contract created by the issue of a *tundu* is merely a contract of a novation of the debt, one creditor is substituted for another. By the issue of a *tundu* the defendant bound himself to pay off a certain number of coolies, and he was not responsible if the plaintiff could not employ them. The plaintiff could have got coolies from elsewhere, and therefore he was not entitled to damages. If at all, he is entitled to nominal damages.

Counsel referred to *14 N. L. R. 131* and *2 C. W. R. 306*.

A. St. V. Jayawardene (with him *J. W. de Silva*), for the plaintiff, respondent,—The obligations arising from the issue of a *tundu* are correctly stated in *Walker v. Cooke* [1] and *Periasamy v. The Anglo-American Direct Tea Trading Co., Ltd.*[3] Till the coolies arrive on the new estate and their names appear on the check roll, the paying-off estate is liable. It is only after such employment that the responsibility of the paying-off estate ceases. The new employer sends an agent to bring the coolies, but he does not decide the question whether the *tundu* had correctly stated the facts in every detail.

As to damages, can it be said that the paying-off estate is not liable because the kangany gives a promissory note ? The promissory note is only a security that the coolies would pay the amount mentioned in the note by working on tht estate. See *Whitham v.*

[1] *(1910) 14 N. L. R. 161.*

[2] *(1910) 2 Cur. L. R. 12.*

[3] *(1911) 14 N. L. R. 365.*

Pitche Muttu Kangany,[1] *Imray v. Palawasen*.[2] In considering the question of damages, a proportionate amount of the total amount of the *tundu* must be deducted for each cooly not supplied. Otherwise the paying-off estate, after issuing a *tundu*, may keep back all the coolies who are not indebted to the estate, and say that the plaintiff has not sustained any damages.

Our cause of action is that instead of fifty-nine coolies the defendant gave us fifty-two coolies. The transfer of the coolies to another estate on a *tundu* has nothing to do with the obligations of the defendant. He has broken the contract, and is liable in damages.

[Argument was adjourned for the next day.]

De Silva continued the further argument for the respondent.—The defendant has broken his contract to supply coolies, and he is liable in damages, even without proof of specific damages.

In the *Bambrakelle case* [3] damages were allowed calculated at a proportionate part of the total amount of the *tundu*. As proper discharge tickets were not given, the defendant is liable in damages.

Counsel referred to *Soysa v. Anglo-Ceylon and General Estates Co.*[4]

Bawa, K.C., in reply.

Cur. adv. vult.

November 27, 1918. BERTRAM C.J.—

This case arises out of a *tundu* given by Mr. Pullenayagam of the Mahatenne estate to Mr. Box of the Cholankande estate for fifty-nine coolies (including the kangany, Muttiah). Only fifty-six (including the kangany) appeared at Cholankande, three having bolted *en route*. In the case of four others, whose names were included in the *tundu*, the discharge tickets were said to be defective, or wanting altogether, and it is in respect of these seven coolies that the action is brought. Damages are claimed, and have been awarded, under two heads:—

(*a*) As a refund of the amount paid in respect of these seven coolies on the *tundu*.

(*b*) In respect of the loss of their labour during the period for which the gang was employed on Cholankande estate.

It may be mentioned that the cases of these seven coolies remain over after the adjustment between the parties of numerous other cases of coolies in the same gang, who were wrongly named, or wrongly described, or whose discharge tickets or registrations were otherwise defective.

The three bolters consisted of two Sinhalese and a man who was entered in the *tundu* as Weerappen, but in the estate register and in his discharge ticket as Ramasamy. There was a dispute as to this man, and Mr. Box declined to admit that the man referred to in the discharge ticket as Ramasamy was identical with the

[1] *(1902) 6 N. L. R. 289.*
[2] *(1900) 4 N. L. R. 113.*
[3] *(1910) 2 Cur. L. R., at p. 17.*
[4] *(1916) 19 N. L. R. 374.*

1918.

BERTRAM C.J.

Box v. Pullenayagam

bolting cooly Weerappen, but I am satisfied that the facts are as I have stated them. I will first consider whether Cholankande estate was entitled to any damages at all in respect of these bolters.

In my opinion an estate which pays off labourers to another estate on a *tundu* is not responsible for any loss incurred by the latter through coolies bolting *en route* from one estate to the other. There is no express guarantee to this effect in the ordinary *tundu*, and no such guarantee could be reasonably implied from the circumstances of the case. The paying-off superintendent has no control over the coolies when once he has discharged them. He cannot prosecute them for bolting, as they are no longer in his service. Why, then, should he be supposed to guarantee that they will present themselves?

The claim for a refund of the amount paid in respect of the debts of the three bolters in this case is based upon the decision of this Court in *Walker v. Cooke*.[1] In that case Hutchinson C.J. said: "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? (page 162). . . . . 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. . . . ."

Middleton J. said: "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 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. . . . ."

That case was, however, not a case of coolies bolting *en route*. It was a case in which, after a *tundu* had been accepted and the cheque paid, a sub-kangany and his gang declined to accompany the head kangany and the other coolies, on the ground of a dispute between the head kangany and the sub-kangany as to the amount of the

[1] *(1910) 14 N. L. R. 161.*

debt of the latter to the former. All that the case really decides is that a planter issuing a *tundu* impliedly guarantees that the coolies mentioned in the *tundu* are willing—or, to speak more strictly, have intimated their willingness—to transfer their services. If the coolies who have, expressly or impliedly, intimated this willingness after discharge bolt *en route*, that is an entirely different matter. The reference to " bolting " by Hutchinson C.J. in the extract above quoted appears to have been a reference to bolting before discharge, and was purely *obiter*. Middleton J. could not have meant to lay down that the paying-off superintendent was responsible for the debts of coolies bolting *en route*. This is plain from the case of *The Bambrakelle Estates Tea Co., Ltd., v. The Dimbula Valley Tea Co., Ltd.*, [1] where he says (on page 16): " It is perfectly clear that the person issuing the *tundu* cannot compel the coolies to go to the estate of the person who pays their debts or to remain there, and if they desert on the road or after reaching the estate, the person discharging them could not be made liable on that ground alone. . . . . "

The case of *Walker v. Cooke* (*supra*) is thus no authority for the proposition that the paying-off superintendent guarantees that the coolies paid off will present themselves for employment, and, in my opinion, in the absence of an express undertaking, no such obligation can be imputed to him. The kangany expresses the business view of the situation: " The loss resulting from such bolting must be borne by me, the kangany. That is the usual practice."

In the case, however, a special ground for damages in regard to the bolting of two of these coolies is contended for. They were Sinhalese coolies, and it is said that the *tundu* guaranteed that none of the coolies were Sinhalese. The schedule to the *tundu* had the following note appended: " If any Sinhalese are in the gang, the number and sex of these should be mentioned, " and there is an *obiter dictum* of Middleton J. in the *Bambrakelle case* that where, on a *tundu* in this form, no mention is made of Sinhalese, this is an implied warranty that " there are no Sinhalese in the gang." Even if this *dictum* is accepted, however, it does not assist the plaintiff. These coolies did not bolt because they were Sinhalese, nor is bolting a natural or probable consequence of a cooly's being a Sinhalese. Nor has any evidence been given to show that if the plaintiff had known that the gang comprised two Sinhalese, he would have rejected the *tundu*, or required their exclusion. I do not think, therefore, that any special case for damages has been made out as to these two coolies, on the ground that it was not disclosed that they were Sinhalese.

We now come to the cases of the four coolies whose discharge tickets are defective or missing. The first of these was a woman called Mariamma. Her discharge ticket described her as twenty

[1] *(1910) 2 Cur. L. R. 12.*

1918.

BERTRAM C.J.

Box v. Pullenayagam

years of age, and as of the village of Madamangalam, and gave her "estate where last employed" as "Colombo," and the date of her engagement at Mahatenne as February 14, 1913. That part of the discharge ticket which should have stated how she came to be employed at Mahatenne, as in the case of several other tickets issued in connection with this *tundu*, was not filled up. It appeared upon inquiry that she had never previously been employed on an estate; that she had been sent for by her parents, when a girl, from a Colombo boutique, where she was employed, and was engaged without a Magistrate's certificate. It was suggested that she was born on the estate, and so could be engaged without a certificate, but there was no evidence of this. As upon the face of the discharge ticket her engagement appeared to have been irregular, Mr. Box declined to accept her, and now claims damages in respect of her. She was allowed to remain upon his estate, where she shortly afterwards died.

Mr. Box, who dealt with the numerous points arising on this *tundu* with great patience and exactitude, and who acted on legal advice, was, no doubt, most anxious in all respects strictly to comply with his obligations under the Labour Ordinance, but in this case he was, in my opinion, unnecessarily conscientious. Rightly or wrongly, the woman had been employed upon Mahatenne estate, and had been entered on the register of the estate, and could, therefore, be passed on upon a discharge ticket. She comes within the express words of section 24, *i.e.*, she was a "labourer" quitting the service of an employer "by means of a document known as a *tundu*." The defect disclosed upon the face of the ticket might no doubt subject the superintendent of Mahatenne to a criminal penalty, unless it was proved that the woman was in fact born in Ceylon. There is, indeed, some authority for the view on which Mr. Box acted in an *obiter dictum* of Middleton J. in the *Bambrakelle case:* "I think the *tundu* also impliedly warrants that the granter has not knowingly infringed any of the penal provisions of the Labour Ordinance in regard to the engagement or employment of the coolies whom he seeks to discharge on payment of their debts by a new employer."

Middleton J. no doubt intended to confine this observation to such infringements as would legally preclude the new employer from engaging the transferred cooly. I do not know what particular infringements he had in mind as being of this nature, but, as at present advised, I do not think that the infringement relied on in this case was in infringement of this nature. I do not think, therefore, that damages can be claimed in respect of this cooly under either head.

The other three coolies were named Parvadi, Caderai, and Periacarpen. Parvadi, though a discharge ticket was issued in respect of her, and though (in my view of the facts) she was included

in the *tundu*, was described as "non-existing." This apparently means that she was never entered on the Mahatenne register, a fact which is admitted. Mr. Box could not, therefore, engage her on the *tundu*. She remained on the estate, and shortly afterwards died there. There was no discharge ticket for Caderai, but one was produced for a woman under a name Pootchie, which was said to be an *alias* for Caderai. There were several *aliases* in this gang, and in these cases the check roll name and the *tundu* name did not correspond. No adjustment was made in this case, and Mr. Box declined to accept for Caderai a ticket in the name of Pootchie. No discharge ticket was produced for Periacarpen at all, and no explanation was given for its absence. Caderai and Periacarpen were allowed to remain for the time being on the estate. Shortly afterwards the gang to which they belonged were transferred on a *tundu* to Sogama estate. Caderai and Periacarpen passed on with them, having obtained a Magistrate's certificate for engagement either at Sogama or at Cholankande, probably the former.

With regard to those three coolies, it seems to me that there was a definite breach of contract. By including them in his *tundu*, the superintendent of Mahatenne impliedly guaranteed that they were in his employ, and that he would do everything necessary to terminate their employment with him and to enable them legally to be engaged by the superintendent of Cholankande. The latter, therefore, is, *prima facie*, entitled to damages under both the heads mentioned above, *i.e.*:—

(*a*) In respect of the money paid out on the *tundu* on account of these coolies; and

(*b*) In respect of the loss of their labour, the securing of which was the object for which he paid out his money.

With regard to the first of these heads, the damages to which a superintendent in this situation is entitled must, it seems to me, depend on the circumstances of the case. It may be the actual debt of each cooly whose services are not made available, or it may be a proportionate part of the total debt of the gang. In *Imray v. Palawasen*[1] and *Whitham v. Pitche Muttu Kangany*[2] it was held on the facts in those cases that each individual cooly must be taken as directly indebted to the estate, and that the kangany was only the guarantor to the estate of the total debts of the gang. Those cases must, however, now be read in the light of the observations made upon them by Middleton J. in *Aiyappen Kangany v. Anglo-American Tea Trading Co., Ltd.*[3] In such a case, if similar facts were proved, the appropriate measure of damages under this head would appear to be the actual amount paid out in respect of the debt of the coolies whose services were not made available. This was the measure adopted in *Walker v. Cooke*.[4] In other cases, if

[1] *(1900) 4 N. L. R. 113.*
[2] *(1902) 6 N. L. R. 289.*
[3] *(1911) 15 N. L. R., on pp. 27, 28.*
[4] *(1910) 14 N. L. R. 161.*

1918.

BERTRAM C.J.

Box v. Pullenayagam

I rightly understand the *tundu* system, the coolies are not indebted to the estate but to the kangany, and the kangany is the only person who is directly indebted to the estate. The debt of the coolies to the kangany is not necessarily the same as the debt of the kangany to the estate. It may be less, but in some cases—sometimes spoken of as those of the "solvent kangany"—it may even be more. (*Cf. Kitnan Kangany v. Young*[1] and *Aiyappen Kangany v. Anglo-American Tea Trading Co., Ltd.*,[2] and see *Report of the Labour Commission, 1909, paragraph 6.*) In such a case the kangany is really contracting to supply so many coolies at so much a head, and the appropriate measure of damages might well be a proportionate part of the total. This was the measure of damages adopted in the *Bambrakelle case*. As it turns out, it is not necessary for us to inquire what is the appropriate measure in the case now before us, as it appears to me that, in view of the subsequent action taken by the plaintiff, he is not entitled to any damages under this head at all

As has already been mentioned, Muttiah Kangany's gang did not stay very long at Cholankande, but were transferred on another *tundu* to Sogama estate. On the occasion of this transfer, in making up the account for the purpose of the new *tundu*, Mr. Box (subject to certain deductions and additions not material to consider) included the whole amount he had paid to Mahatenne estate in respect of the original *tundu*, and including, therefore, all that he had paid in respect of these seven coolies. Mr. Ayscough, the superintendent of Sogama, actually paid him a cheque for this sum and took a promissory not for the corresponding amount from Muttiah Kangany. Thus, as Mr. Box himself puts it, "By those seven coolies not being sent to me, I suffered no pecuniary loss in the sense of losing any of the advances." I do not see, therefore, how he can recover any damages in respect of a supposed loss of these advances.

The explanation of the claim for damages is that Mr. Box conceives himself as suing for damages under this head, not on his own account, but for the benefit of Muttiah Kangany, who has shouldered the liability by giving a promissory note for the whole amount to Mr. Ayscough. Though he made no absolute promise to Muttiah Kangany, he explained this to him at the time. But I do not see on what principle he can do this. When a man has insured himself against any possible damage that may accrue to him through the act or default of another, and recovers the amount insured from in insurer, he suffers in fact no damage, except what he has paid for the premium. But he is entitled to sue the person primarily responsible for the benefit of the insurer, or, to put it in another way, the insurer is entitled to sue in his name. Mr. Box seems to have regarded Muttiah Kangany (whose promissory note he held)

[1] *(1911) 14 N. L. R. 435.* [2] *(1912) 15 N. L. R. 19.*

as being, by virtue of that promissory note, an insurer of Mr. Pullenayagam's liability to him. But, even if Muttiah Kangany can be regarded as paying (or procuring the payment of) the amount of this liability as an insurer—and, as at present advised, I am not convinced that he can be regarded as acting in that capacity—the only amount which Mr. Box could claim, when suing for Muttiah Kangany's benefit, would be the amount of damages which Muttiah Kangany has incurred through Mr. Pullenayagam's default. As far as Muttiah Kangany is concerned, he has lost nothing, or. at any rate, nothing that he can hold Mr. Pullenayagam responsible for. As far as the three bolters, he admits that the loss must fall on him. Of the other four coolies, two are dead (and Mr. Pullenayagam is not responsibe for their deaths), while the other two are still members of the gang at Sogama, and the kangany's hold over them for the purpose of receiving their debts is exactly what it was before. Even, therefore, if Mr. Box could sue for the benefit of Muttiah Kangany, neither he nor Muttiah Kangany has suffered any loss under this head for which Mr. Pullenayagam can be held responsible. No claim, therefore, lies for any damages under this head.

There remains the claim for damages in respect of "loss of labour." There can be no doubt that if the proper number of labourers specified in a *tundu* are not furnished by reason of cause for which the original employer is responsible, the new employer can recover, not only the proper portion of the amount advanced, but also damages for loss of labour. Every labourer is worth something to an estate, and if the superintendent does not get the number he bargained for, he is entitled to be compensated. But the person claiming damages must put forward some basis on which the Court can calculate them. In this case the Court is afforded no material at all for the purpose. In the plaint a sum is claimed enough to bring up the total damages to a round figure, and the District Judge has awarded this amount, but, for anything that appears, he might equally well have awarded half or double that sum. If it were necessary to assess damages in this case, the case would have to go back to the District Judge for further inquiry for this purpose. I do not think, however, that this course is necessary, as, in the circumstances of the case, I am of opinion that the plaintiff is entitled only to nominal damages. It is the duty of any person who has a claim for damages against another for some act or default to do all that is reasonably possible to minimise the damages; in this case all the three coolies in question were present upon Cholankande estate, and were prepared to work on the estate; the only difficulty was that of the discharge tickets. One had an invalid discharge ticket, for the second a discharge ticket was tendered in a wrong name, and the third had no discharge ticket at all. It was open to Mr. Box, however, to secure the labour of these coolies, if he required it, by applying for a Magistrate's certificate. He was not

1918.

BERTRAM C.J.

Box v. Pullenayagam

bound to take this course, and, in view of the trouble he had had about this *tundu*, it is, perhaps, not surprising that he did not do so. Had he done so, his damages would have been reduced to a nominal sum. The only damages, therefore, which he can claim are, in my opinion, nominal damages. Mr. Box was no double put to a very great deal of personal trouble and some expense through the default of the paying-off employer; but, though he may be entitled to sympathy on that account, the Court cannot award "moral and intellectual damages" in respect of such incidents of business life.

In my opinion the plaintiff is entitled to judgment in respect of the three coolies mentioned, with nominal damages, and to his costs in the Court below; but the defendant having substantially succeeded on the appeal, is entitled to his costs of the appeal. The decree of the District Court should be amended accordingly.

SHAW J.—

The defendant, who is the superintendent of Mahatenne estate, issued a *tundu*, dated August 23, 1915, undertaking to pay off Muttiah Kangany and fifty-eight coolies on payment of their debts, Rs. 5,676.17, within one month. On September 27 the plaintiff, who is superintendent of Craighead estate, wrote to the defendant asking whether the coolies were all working coolies, and whether the defendant had any objection to his taking on the gang, although the time specified in the *tundu* had expired. On September 28 the defendant replied that he had no objection to the plaintiff taking on the gang, and that they were all good working coolies; and on September 30 the plaintiff sent his clerk to Mahatenne with a letter to the defendant asking him to permit the clerk to see the coolies, and saying that if he found them all there, and things were as represented to the plaintiff by Muttiah Kangany, the clerk would hand the defendant the plaintiff's cheque for Rs. 5,676.17 on payment of their debts, and he asked the defendant to then pay the coolies off and send their discharge tickets.

The plaintiff's clerk, and a kangany he brought with him, mustered, inspected, and counted the coolies, and then handed the plaintiff's cheque to the defendant. The defendant then paid off the gang and gave a general discharge note, stating that official discharge tickets would follow by post, and the gang then left Mahatenne with the plaintiff's clerk and kangany.

On the way to Craighead three of the coolies bolted, two being Sinhalese coolies named Kira and Maria and one a Tamil cooly named Weerappen.

The discharge tickets arrived some time later. There were, however, no discharge tickets to two of the coolies named Peria Carupen and Caderai, and the discharge ticket for another cooly, Mariamma, did not show that she had a Ragama or Magistrate's certificate, or that she was born in Ceylon.

There was also no discharge ticket in the name of Weerappen, one of the coolies who bolted in transit. There was, however, a discharge ticket for a cooly named Ramasamy, which name the evidence shows was an *alias* for Weerappen.

A cooly called Parwady arrived with the gang at Craighead, for whom no discharge ticket was sent. It does not appear from the evidence, however, that he was even one of the gang included in the *tundu*, and had he arrived with a discharge ticket, he would have made one more than the number of coolies included in the *tundu*.

After the coolies and discharge tickets arrived at Craighead, a dispute arose between plaintiff and defendant, the plaintiff alleging that the defendant had committed a breach of contract in respect of the seven coolies named. Muttiah Kangany and the gang, however, remained on at Craighead, and they were entered on the check roll of that estate, with the exception of Mariamma, Peria Carupen, Caderai, and Parwady, and Muttiah Kangany gave to the plaintiff a promissory note in respect of the full amount of the debts of the entire gang.

In November, 1916, before the present action was brought, the plaintiff paid off the gang to Sogama estate, and received from the superintendent of that estate the full amount of the debt of the gang.

Mariamma and Parwady died on the plaintiff's estate prior to the transfer to Sogama, and Peria Carupen and Caderai obtained Magistrate's certificates, and are still in Muttiah Kangany's gang on Sogama estate.

The District Judge has found that there was a breach of contract in respect of the seven coolies referred to, and has given judgment for the plaintiff for Rs. 1,000 damages, being Rs. 778 the proportion of the debt of the entire gang attributable to seven coolies, the balance being general damages.

I find myself unable to read into the contract the various representations and warranties suggested on behalf of the plaintiff. All that can be gathered from the *tundu* itself and the correspondence is that the defendant undertook, on receipt of the amount of the debt of the gang, to pay off the coolies named, and place the plaintiff in a position to legally employ them. No evidence of any custom has been given that justifies our reading into the contract any warranty that the coolies will not bolt during the transfer to Craighead, or that there are no Sinhalese amongst the gang. Nor do I think that any such custom has been sufficiently established by judicial authority. The whole contention seems to be based on certain *dicta* of Middleton J. in *The Bambarakelle Estates Tea Co., Ltd. v. The Dimbula Valley Tea Co., Ltd.*,[1] and *Walker v. Cooke*.[2] In the former case, however, at page 16, the learned Judge makes it clear that in his opinion, the paying-off estate would not be liable if the coolies bolted in transit to the new estate. As a matter of fact, it

[1] *(1910) 2 Cur. L. R. 12.*

[2] *(1910) 14 N. L. R. 161.*

1918.

SHAW J.

Box v. Pullenayagam

appears from the plaintiff's evidence that the real objection to the two coolies Kira and Maria was, not that they were Sinhalese, but that they had bolted on the way to Craighead, for which the defendant is, in my opinion, clearly not unswerable. The plaintiff has, as he himself admitted, sustained no damages in the sense of having lost any of the money paid to the defendant in respect of the coolies' debts, because he received a promissory note for the full amount from the kangany, which was paid off on the transfer of the gang to Sogama. He cannot, therefore, recover anything in respect of this from the defendant. The damages in respect of which the plaintiff can recover from the defendant appear to me to be the loss he incurred in not having been given by the defendant proper discharge tickets, so that he could at once legally employ Mariamma, Peria Carupen, and Caderai. The first of these, even if not born in Ceylon, had never previously been employed on an estate, and a Magistrate's certificate could easily have been obtained for her if she had not died. With regard to the other two, reasons for the absence of discharge tickets do not very clearly appear, but they are now employed with the gang at Sogama on Magistrate's certificates. The plaintiff has not proved any specified loss to have been sustained by his estate under this head of damage.

I therefore agree that it must be assessed at a nominal amount only, and agree with the order proposed by the Chief Justice.

DE SAMPAYO J.—

This case has been referred to a bench of three Judges, in order that certain legal questions as to the nature of the obligation undertaken by the superintendent of an estate when he issues a *tundu* for his coolies may be considered. The *tundu*, which forms the basis of this action, is not forthcoming, but it appears to have been in the usual form, and referred to Muttiah Kangany and fifty-eight coolies, whose debts were stated to be Rs. 5,676.17. The plaintiff alleges in the plaint that " by the terms of the said *tundu*, expressed and implied, the defendant warranted, *inter alia*, (1) that all the said labourers were in his legal employment, and available to be paid off by him; (2) that there were no Sinhalese in the gang; (3) that he had not infringed any of the penal provisions of the Labour Ordinance in regard to the engagement or employment of the labourers referred to in the said *tundu*, or any of them; and (4) that upon payment to him of the said sum of Rs. 5,676.17, he would pay off the said labourers from his service, and would enable a new employer to employ them under the provisions of the Labour Ordinance. " An issue was stated at the trial as to whether the defendant made the representations set out in the plaint.

It may be stated at once that the last of the above allegations is correct. There is no question that a superintendent whose *tundu* is accepted is obliged, not only to discharge the coolies, but to fulfil certain other conditions, such as the issue of discharge tickets, as

required by the Labour Ordinance, so as to enable the new employer validly to take the coolies into his service. The obligation to pay off also implies that the coolies are willing to leave and take employment in the taking-on estate. *Walker v. Cooke.*[1] I do not think that this obligation extends further. It is supposed that the decision just mentioned is an authority for the proposition that the paying-off planter is bound to deliver over the coolies to the new employer, with the result that the former would be liable for breach of contract if the coolies bolted on the way before they reached the estate of the latter. The language of the learned Judges does not bear that construction. Hutchinson C.J. said: "The paying-off planter is bound to hand the coolies over to the taking-on planter or his representative; if he fails to do that, either because they have bolted, or because they refuses to do ....., or for any other reason, he has not fulfilled his part of the bargain." Middleton J. said that the contract "must involve the obligation of the grantor of the tundu to be in a position to deliver the men when the new employer comes to take over." The custom is for the planter who accepts the *tundu* to send his head kangany or other responsible person to the paying-off estate to be present at the discharging of the coolies and bring them to the new estate. The grantor of the *tundu* cannot discharge the coolies at any time and without reference to the presence of the acceptor of the *tundu* or his representative, and in that sense he may be said "to deliver over the coolies." I think that this is all that was meant by the learned Judges, and I think there is no further obligation in this respect.

The other terms alleged to be implied in a *tundu* require some consideration. To what extent does the paying-off planter warrant that the coolies are in his legal employment? In my opinion such warranty can exist only so far as is necessary to ensure the valid engagement of the coolies by the new employer. For example, the coolies must not be "bolters," who are still bound by a contract of service to some other estate, and whose employment under the paying-off planter is therefore precarious. But the plaintiff in this case wishes to go further, and require that the paying-off planter shall not have infringed any of the penal provisions of the Labour Ordinance. Thus, he claims damages in respect of the cooly woman Mariamma, for whom the defendant himself held no discharge ticket or Ragama certificate or a Magistrate's certificate. In these circumstances, the defendant may have incurred the penalty provided in section 23 of the Ordinance No. 13 of 1889, as amended by the Ordinance No. 9 of 1909, but Mariamma was in his *bona fide* employment, and had not been employed elsewhere before, and there was no reason why he could not pass her on to plaintiff, who having received a discharge ticket for her from the defendant, was quite able validly to take her into his service. In my opinion there

[1] *(1910) 14 N. L. R. 161.*

1918.

DE SAMPAYO J.

Box v. Pullenayagam

is no warrantly implied in a tundu as regards the legality of the employment of a cooly under the paying-off planter, beyond the limited one I have above indicated.

With regard to the inclusion of two Sinhalese coolies in the *tundu*, the point is not very clear. The very large majority of labourers employed on estates in Ceylon are, of course, Indian coolies, and a *tundu* may generally, especially in the up-country districts, relate to that class of labourers. But there is nothing to prevent *tundus* being given for Sinhalese coolies if any are employed on an estate, and, indeed, I believe that such *tundus* are common in the low-country. There is no witness called to prove that a *tundu* is understood as warranting that none of the coolies are Sinhalese, and we are without any material to form an opinion as to what is the recognized custom among planters in this matter. It, however, one is to judge by the form of *tundus* adopted by the Labour Federation of Ceylon, and said to be similar to those issued by the defendant and accepted by the plaintiff, no such implication appears possible, for there is a direction, as regards the particulars required to be stated, that " if any Sinhalese are in the gang, the number and sex of these should be mentioned. " This shows that *tundus* may include Sinhalese coolies.

The only other point I need touch upon is with regard to the measure of damages. If the taking-on planter does not repudiate the entire contract, but only claims damages in respect of any shortag of coolies, what are his damages ? Of course, he may claim damages in respect of the loss of services of the coolies for such time as may be necessary to procure elsewhere an equivalent number of coolies. But as regards the money paid on the *tundu*, how much can he reclaim ? Is it a proportionate share of the total amount, or the actual debts of the coolies included in that amount ? The *tundu* system does not involve a detailed account of the individual debts making up the amount of the tundu. The reason, perhaps, is that generally estates do not keep the separate accounts of the individual coolies, and the matter is also complicated by the fact that the debts due by the coolies to the kangany are not the same as the estate advances which the kangany guarantees. But the taking-on planter is only concerned with the whole amount he pays, and the size of the gang for which he pays it. In this point of view, he appears to me to be entitled to reclaim so much per head in respect of the missing number of coolies, and in *The Bambrakelle Estates Tea Co., Ltd., v. The Dimbula Valley Tea Co., Ltd.*,[1] this was considered not unreasonable. In view of the result of this action, however, it is unnecessary to discuss this question further.

I agree with the opinion expressed by the Chief Justice as regards the facts, and I concur in the order proposed.

Varied.

[1] *(1910) 2. Cur L. R. 12.*