June 29, 1911

Present : Wood Renton J.

SCOTT *v.* SELLAN KANGANY.

395—*P. C. Hatton*, 1,654.

Employment of Indian cooly without a discharge ticket or Magistrate's certificate—Employer cannot prosecute a person harbouring cooly under s. 19 of Ordinance No. 11 of 1865—Proof of service of notice of appeal on respondent must be embodied in the record.

Appavoo, an Indian cooly, who was despatched from the depôt at Ragama, on a certificate applicable to Ladbrooke estate, found his way to Ottery estate. On the superintendent of Ottery estate (complainant) writing to the superintendent of Ladbrooke estate of the fact, he wrote to the complainant to keep the cooly and send a cheque for the cooly's bill. Subsequently the complainant charged the accused (Sellan Kangany) under section 19 of Ordinance No. 11 of 1865, with having wilfully and knowingly harboured the cooly.

Held, that the complainant cannot successfully maintain the prosecution against the accused.

It must be observed that, although he is admittedly an Indian labourer, he was taken into the complainant-appellant's service in direct violation of the provisions of sections 22 and 23 of "The Indian Coolies Ordinance, 1909." His name was not entered in the estate register, and he was received by the complainant-appellant without either a discharge ticket having been issued, or the certificate of a Magistrate. ..... The complainant is not in a position to prove that Appavoo was a servant bound to him by a contract of service.

Attention of Judges of first instance drawn to the necessity of embodying proof of service of notice of appeal on respondent.

THE facts are set out in the judgment of Wood Renton J.

Tambyah, for the appellant.—Though Appavoo was an "Indian labourer," he does not thereby cease to be a "servant" within the meaning of section 19 of Ordinance No. 11 of 1865. The new Ordinances (of 1889 and 1909) do not repeal section 19 of the old Ordinance. There is conflict of opinion as to the extent to which the new Ordinance has affected the old Ordinance. See *Welayden v. Perumal*,[1] *Henly v. Welayden*.[2] Ordinance No. 13 of 1889 says that the old Ordinance would stand, except where there is express provision to the contrary.

The letter of the superintendent of Ladbrooke estate amounted to a tundu. There is no prescribed form in which a tundu should be written.

Wills v. Higgins, relied upon by the Police Magistrate, does not apply. The complainant does not seek to enforce the alleged illegal contract. Counsel referred to *Smith v. Mawhood*,[3] *Herman v. Jeuchner*.[4]

No appearance for respondent.

June 29, 1911. WOOD RENTON J.—

This is an appeal, with the sanction of the Attorney-General, by the superintendent of Ottery estate, Dikoya, against the acquittal by the learned Police Magistrate of Hatton of one Sellan Kangany, of Kiribatgalla estate, Ratnapura, on a charge of having wilfully and knowingly harboured a cooly named Appavoo, a servant employed on Ottery estate. The material facts are shortly these. Appavoo was despatched from the depôt at Ragama, on a certificate applicable to Ladbrooke estate, on August 19, 1910. The certificate was issued in accordance with the terms of section 25 of "The Indian Coolies Ordinance, 1909". In company, as would appear, with other coolies Appavoo found his way to Ottery estate. The complainant-appellant's case was that he was a cooly intended for that estate, and came direct to it, although on a Ladbrooke certificate. On August 21 the complainant-appellant would seem to

[1] *(1896) 2 N. L. R. 209.*
[2] *(1891) 1 S. C. R. 136.*
[3] *(1845) 14 M. & W. 452.*
[4] *(1885) 15 Q. B. D. 614.*

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have written to the superintendent of Ladbrooke estate in regard to four coolies who had come to Ottery on Ladbrooke tickets. On August 22 the superintendent of Ladbrooke estate replied to that letter, which, so far as I can see, has not been put in evidence, and made use of the following language :—" Will you kindly send me a cheque for the amount of their bill " (that is to say, of the coolies' bill) " and keep the coolies." On August 25 Appavoo's name appears in the check roll of Ottery estate. It must be observed that, although he is admittedly an Indian labourer, he was taken into the complainant-appellant's service in direct violation of the provisions of sections 22 and 23 of " The Indian Coolies Ordinance, 1909." His name was not entered in the estate register, and he was received by the complainant-appellant without either a discharge ticket having been issued, or the certificate of a Magistrate, in compliance with the requirements of section 23, sub-section (1) (*a*) and (*c*), of the Ordinance of 1909, respectively. Clause (*b*) of that sub-section is not applicable to the present case, for the Ragama ticket had been issued to the superintendent of Ladbrooke estate. Under these circumstances, the question that had to be decided is, whether or not the complainant-appellant can successfully maintain in law—for I am not here concerned with the facts—a prosecution against Sellan Kangany for having harboured Appavoo. The offence of harbouring is defined by section 19 of Ordinance No. 11 of 1865, and under the provisions of that section it is necessary that the servant alleged to have been harboured should have been bound by a contract to serve the employer who complains of the harbouring. The provisions of Ordinance No. 11 of 1865 do not, however, stand alone. They are amended as to Indian coolies by those of Ordinance No. 13 of 1889, which are in turn amended by " The Indian Coolies Ordinance, 1909 ".

It is not necessary in the present case to consider the question how far the provisions of the principal Ordinance of 1865 have been superseded, as regards Indian labourers, by those of the Ordinances of 1889 and 1909. All those three Ordinances have to be construed together in such cases as the present. If we apply that test, what do we find ? Under section 19 of Ordinance No. 11 of 1865 it is necessary, as I have already pointed out, that the servant alleged to have been harboured should have been bound by contract to serve the employer, who is the prosecutor in the case. Here the complainant-appellant took the cooly Appavoo into his service under circumstances which the Ordinance of 1909 has expressly declared shall not constitute a contract of service for the purposes of that Ordinance, and, as it appears to me, of the Ordinances of 1865 and 1889 also. Section 23 of Ordinance No. 9 of 1909 provides that no employer shall take into his employment, or allow to be employed on any contract on his estate, any " labourer," other than a boy or girl who has been born in Ceylon and has not

previously been employed on an estate, unless he has received—I will quote only the words applicable to the present case—in respect of such labourer either a discharge ticket, or the Police Magistrate's certificate, for which the section provides. It is quite true that sub-section (2) of section 23 attaches a penalty to a breach of that duty. But it seems to me—and the decision in *Wills v. Higgins*[1] corroborates my view on the point—that sub-section (1) declares that any contract entered into, except under the conditions that it prescribes shall be illegal. The complainant-appellant is not here suing on the illegal contract, as was the case in *Wills v. Higgins*[1], but he is bound to rely on that contract for the proof of the relation of employer and "labourer," or, for that matter, if we are to confine ourselves to the words of section 19 of Ordinance No. 11 of 1865, of employer and "servant", as between himself and Appavoo, In view of the provisions of section 23 of Ordinance No. 9 of 1909, no such relationship—for the purpose of proceedings under section 19 of Ordinance No. 11 of 1865—existed. The complainant-appellant, therefore, on his own showing, is not in a position to prove that Appavoo was a servant bound to him by a contract of service. In addition to that fact, the evidence here shows that Appavoo was an Indian cooly, and that being so, I think we are bound to look at the definition of the term "labourer" contained in section 2 of the Ordinance of 1909. According to that definition, the term "labourer" means any labourer or kangany (commonly known as Indian coolies) whose name is borne on the estate register, for the keeping of which section 22 provides. Appavoo, therefore was not a "labourer." But altogether apart from section 22, I am clearly of opinion that, in view of the joint provisions of section 19 of Ordinance No. 11 of 1865 and section 23, sub-section (1), of Ordinance No. 9 of 1909, he was not even a "servant bound by contract" to serve the complainant-appellant in any sense that would lay a good foundation for criminal proceedings for harbouring. It would be a serious and a most inconvenient construction of the law if we were obliged to hold that an employer could deliberately set at defiance the provisions of Ordinance No. 9 of 1909, and yet enforce, by virtue of a contract of service declared illegal by that Ordinance itself any of the provisions in the principal Ordinance of 1865 which cannot be regarded as covering the same ground as those of the Ordinances of 1889 and 1909.

It was argued by Mr. Tambyah, in support of the complainant-appellant's case, that the letter, which I have quoted above, from the superintendent of Ladbrooke estate to the complainant-appellant, constituted a tundu within the meaning of section 24, sub-section (1), of Ordinance No. 9 of 1909. I am not disposed to accede to that contention. The sub-section (1) speaks of a tundu being issued so as to constitute an authority by the employer of

[1] *(1911) 14 N. L. R. 131.*

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the labourer to the latter to quit his estate. The letter in question is clearly not a document of that character. But even if it were the point would not, in my opinion, help the complainant-appellant at all. It would still be the duty of the employer who issued the tundu to prepare a discharge ticket, and without such a ticket or Police Magistrate's certificate the new employer could not legally take the labourer into his service. On these grounds, I think that the appeal must be dismissed.

I am informed by the Registrar that there is no evidence in the record, and I have not, from my own examination, been able to find any, that the notice of appeal was ever served on the accused. In the present case this fact makes no difference, as the appeal has been dismissed, and the accused is in no way prejudiced. But I have recently again and again been compelled to postpone the argument of appeals from the minor courts, owing to the fact that no proof of the service of notice of the appeal has been embodied in the record. I desire, as pointedly and as publicly as I can, to call the attention of Judges of first instance to this omission, and to the great inconvenience and waste of time which it occasions to the Supreme Court. It was only after the present case had been argued for the better part of an hour that the omission was discovered, and if the view that I took of the appeal had been favourable to the complainant-appellant, all that time would have been wasted, as it would have been necessary to send the case back to the Police Court for proof of the service of notice. By the time that the case came on in appeal again, even if it did come before the same Judge, the facts would have been forgotten, and the whole ground would have had to be traversed afresh.

Appeal dismissed.