Present: De Sampayo J.

1917.

BIRTELL *v.* SEVATIAN.

24—P. C. Kegalla, 22,914.

Master and servant—Leave of absence for one month—Is contract of service at an end?

An Indian cooly on a monthly contract of service obtained leave of absence for one month from his employer, and on his return to the Island took service on another estate.

Held, that he was not guilty of quitting service of his employer without leave or reasonable cause under section 11 of Ordinance No. 11 of 1865.

Where leave of absence is granted for a full month or more, the monthly contract is, as a necessary consequence, thereby terminated.

THE facts are set out in the judgment.

Cooray, for accused, appellant.

F. M. de Saram, for complainant, respondent.

January 26, 1917. DE SAMPAYO J.—

This appeal raises a very important point relating to the law of master and servant. The accused was a cooly employed on Yataderiya estate upon the usual monthly contract of service renewable from month to month. On April 5, 1916, he obtained from his employer one month's leave of absence and went to India, but instead of returning to Yataderiya estate he, in August, 1916, took service as a cooly on Higgoda estate. He has now been charged, under section 11 of the Ordinance No. 11 of 1865, with having quitted the service of his employer, before the end of his term of service, without leave or reasonable cause. There appears to be some excuse for his going to Higgoda estate, for he understood from his brother, who was also employed as a kangany on Yataderiya estate, that a *tundu* for several coolies, including himself, had been obtained, though, as a matter of fact, the *tundu* was not issued till November. The Police Magistrate, however, thinks that he had reason to know, when he went to Higgoda estate, that the *tundu* had not yet been issued, and that, therefore, he had no reasonable cause for not returning to Yataderiya estate. But it is contended by Mr. Cooray, for the accused, that the conviction in any case is bad, because at the time of the alleged offence there

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was no subsisting contract on the accused's part to serve on Yataderiya estate, and the decision in *Meyyan v. Alegamma* [1] is cited in support of this contention. I think this case is covered by that decision. For it is there held that, where leave of absence is granted for a full month or more, the monthly contract is, as a necessary consequence, thereby terminated. I find that I appeared as counsel for the complainant in that case, and I need only refer to the arguments there advanced as to what might be said in support of the contrary view. The reason for the decision is (to quote from the judgment of Burnside C.J.) that, " where, by mutual agreement, such as the master giving and the servant taking one month's leave, the service has been suspended for a month, the master is not bound to pay wages, nor the servant to render services, and consequently, at the end of the leave, there is no existing contract of service which the law can operate on and renew, and a servant who does not then return to service cannot be said to have quitted before the end of his service. " In enforcing this interpretation of the law, the learned Judge observed that if this were otherwise, leave for a year or for a number of years might be given, and the contract of monthly service held to subsist all through, which would be a *reductio ad absurdum*. I confess that I do not see that an absurdity must necessarily arise. For if the leave is given under such circumstances—the length of the leave may be one of them—as to lead to the inference that the contract of service is impliedly terminated, then, of course, the servant is no longer bound by his contract, and will commit no offence by not returning to service; but if the circumstances are otherwise, and both parties understand that the leave is only leave, and not a termination of the contract itself, there does not appear to me to be a logical or legal reason why a month's leave should be taken to have destroyed the monthly contract. If this view of the matter is correct, then the question will always be one of fact. But whatever my opinion might be, I am bound to follow *Meyyan v. Alegamma* (*supra*), which is a decision of the Full Court, and to hold that the conviction in this case, the facts of which are quite the same, cannot be sustained.

The conviction is set aside and the accused is acquitted.

Set aside.

[1] *(1891) 9 S. C. C. 156.*