Present: Wood Renton C.J. and De Sampayo J.

1915.

SMITH *v.* BAWA.

1,393-1,394—P. C. Gampola, 7,669.

Cooly employed without a discharge ticket—Is the cooly bound by a contract of service to his new employer?—Harbouring cooly who had deserted the new employer who had not received discharge ticket—Ordinance No. 9 of 1909, s. 23—Ordinance No. 13 of 1889.

A cooly taken into the service of an employer in violation of the prohibition contained in section 23 of Ordinance No. 13 of 1889, as amended by Ordinance No. 9 of 1909, is not "bound" by a "contract" to serve him within the meaning of Ordinance No. 11 of 1865.

"The employer is not in law entitled to enter into any other kind of contract with a cooly except one from day to day or by the job, unless he has received the formal discharge ticket."

THE facts are set out in the judgment of De Sampayo J.

Wadsworth, for first accused, appellant.

F. J. de Saram, for second and third accused, appellants.

Drieberg, for complainant, respondent.

Cur. adv. vult.

October 13, 1915. DE SAMPAYO J.—

The accused were charged with having unlawfully harboured certain Indian coolies who had been employed on Barnagalla estate. The coolies had come to Barnagalla estate from Ovah

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estate on July 20 and deserted on July 25. The accused were alleged to have harboured them on July 26 and 27. The discharge tickets in respect of the coolies were received from Ovah estate only on July 30. At the time of the desertion the coolies' names had been entered on the check roll, but not on the estate register. In these circumstances the point was taken, when the case first came before me, that there was no legal contract of service between the complainant and the coolies, in view of the provision of section 23 (1) of the Ordinance No. 13 of 1889, as amended by the Ordinance No. 9 of 1909, and that therefore no offence was committed by the accused under section 19 of the Ordinance No. 11 of 1865, under which the present charge was laid. In support of this contention counsel for the accused cited *Scott v. Sellan Kangany*,[1] decided by Wood Renton J. Counsel also referred to my own decision in a somewhat different sense in *Robertson v. Idroos*,[2] at the argument of which *Scott v. Sellan Kangany* [1] was not cited. My judgment, however, does not quite bear on the specific point now raised, because what I had there to consider was whether for the purpose of a charge under the Ordinance No. 11 of 1865 a cooly's name must be borne on the estate register. But the point was no doubt indirectly involved; and it being a matter of considerable importance I referred it to a bench of two Judges, especially as it appeared to me that the effect of section 24 (3) of the Ordinance No. 13 of 1889 had not been taken into consideration in *Scott v. Sellan Kangany*.[1] I had in view the consideration of the question whether section 23 of the Ordinance No. 13 of 1889, as amended by the Ordinance No. 9 of 1909, had any greater effect than penalizing an employer who should take into his employ an Indian cooly before discharge tickets were received from the previous employer. In that connection I noticed (1) that that section, while prohibiting the employment of coolies without discharge tickets, and imposing a penalty for doing so, did not expressly declare the contract as between the cooly and the employer to be null and void; and (2) that section 24 (3) appeared to recognize a valid contract before the receipt of discharge tickets. Another difficulty was that section 5 of the Ordinance No. 13 of 1889, which provides that "every labourer who shall enter into a verbal contract with the employer . . . whose name shall be entered in the check roll of an estate and who shall have received an advance of rice or money from the employer . . . shall be deemed and taken in law to have entered into a contract of hire and service for the period of one month, to be renewable from month to month, &c.," had been left untouched by the amending Ordinance. In these circumstances I was inclined to consider it possible to hold, that so far as the cooly himself was concerned there was a binding contract of service, even though the employer had not observed

[1] *(1914) 16 N. L. R. 360.*

[2] *(1915) 16 N. L. R. 224.*

the requirements of the Ordinance as regards discharge tickets, and that therefore any person who should seduce from service or harbour a cooly so bound would be liable to be prosecuted under section 19 of the principal Ordinance, No. 11 of 1865.

After the further argument of the appeal, and upon fuller consideration, I agree that the above view is not correct. The policy of the later legislation on the subject of estate labour, to be gathered from the whole scope and nature of its enactments, appears intended to render illegal a contract of service except under the conditions mentioned in section 23. If section 24 (3), which speaks of a " new employer " applying for discharge tickets, be understood—as it might be, though the language is not very happy—as referring to a prospective new employer, and not to an employer who has already taken a cooly into service, then the construction of section 23 in the sense just mentioned is not irreconcilable with it. As regards section 5 of the Ordinance No. 13 of 1889, I think that, for the purpose of advancing the main objects of the later legislation, the provision of that section may be limited to mean that, when a contract has been properly entered into with a labourer as elsewhere provided, the contract in respect of duration shall be deemed and taken to be a contract for a month, renewable from month to month. This becomes clearer from the fact that the interpretation clause enacts a " labourer means any labourer and kangany . . . whose name is borne on an estate register, " and that a labourer's name will not properly be put on the register before discharge tickets are received.

I therefore agree with the Chief Justice, that when an Indian cooly is employed on an estate without the documents mentioned in paragraphs (*a*), (*b*), and (*c*) of section 23 (1) of the Ordinance No. 13 of 1889, as amended by Ordinance No. 9 of 1909, he is not " bound by any contract to serve " within the meaning of section 19 of the Ordinance No. 11 of 1865, and that any person harbouring him in such circumstances is not legally guilty of an offence under the latter Ordinance.

This holding determines the appeal. The conviction is set aside and the accused acquitted.

WOOD RENTON C.J.—

The point referred in this case to a bench of two Judges is the question whether, in view of the joint provisions of sections 19 of Ordinance No. 11 of 1865 and 23 (1) (*a*) of the Indian Coolies Ordinance, 1909 (No. 9 of 1909), the harbouring, or an abetment of the harbouring, of a cooly is punishable, where the alleged offence has been committed before the discharge ticket has been issued by the cooly's former employer and received by his new employer. There are conflicting single Judge decisions on this question (*Scott v. Sellan Kangany*[1] and *Robertson v. Idroos*[2]), and as the matter is one of considerable importance a definite ruling in regard to it is desirable.

[1] (1914) *14 N. L. R. 360.*

[2] (1915) *15 N. L. R. 234.*

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Under section 19 of Ordinance No. 11 of 1865 the cooly alleged to have been harboured must have been "bound" by a "contract" to serve the person in whose employment he was at the time of the harbouring. Section 23 (1) (*a*) of the Indian Coolies Ordinance, 1909 (No. 9 of 1909), is one of a group of sections added by that enactment to Ordinance No. 13 of 1889, and, by virtue of section 2 of Ordinance No. 13 of 1889, is to be read and construed as a part of the principal Ordinance, No. 11 of 1865. Section 23 provides that—

"(1) 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 in respect of such labourer—

"(*a*) A discharge ticket issued and forwarded to him by some other employer in accordance with section 24; or

"(*b*) In the case of a newly imported labourer, a certificate issued from the cooly depôt at Ragama in accordance with section 25; or

"(*c*) A certificate issued by a Police Magistrate in accordance with section 26.

"(2) Any employer who shall take into his employment or shall allow to be employed on any contract on his estate any labourer in contravention of this section shall be guilty of an offence, and shall be liable on conviction thereof to a fine which may extend to five hundred rupees, or to imprisonment of either description for a term not exceeding six months, or to both."

Does this section merely penalize a contravention of its provisions, or does it absolutely prohibit the act penalized, so that a cooly taken into the service of an employer in violation of the prohibition is not "bound" by a "contract" to serve him within the meaning of Ordinance No. 11 of 1865? In my opinion section 23 (1) (*a*) has the latter effect. It directly prohibits the employment of a cooly unless the discharge ticket has been not only issued and forwarded to, but received by, the employer. It is clear from section 25 (2) that compliance with the requirement of section 23 (1) (*b*), as to the forwarding of a Ragama certificate in the case of a newly imported labourer, is a condition precedent to the commencement of the contract of service, and from the language of section 26 (1), that until the issue of a certificate by a Police Magistrate, as provided for by that section and by section 23 (1) (*c*), the cooly has only an "intending employer" to deal with.

The points telling against this interpretation of the law are, in the first place, that section 5 of the principal Ordinance, which has not been modified in this respect by the later legislation, still recognizes the commencement of a contract of service when the name of the labourer has been entered in the check roll of an estate

and has received an advance of rice and money from his employer; in the second place, that section 24 (3) appears to indicate that a cooly may have a "new employer" before the formal discharge ticket is issued; and, in the last place, that, as under that section a period of five days may elapse between the application for a discharge ticket and its being forwarded, the cooly would be deprived, at least during those five days, of the right to enter into a contract of service. These considerations possess undoubted weight. But I do not think that they can prevail over the language of section 23 (1) (*a*) of the Indian Coolies Ordinance, 1909. Section 5 is earlier, in point both of date and of order, than section 23 (1) (*a*). By virtue of section 3 of Ordinance No. 13 of 1889, as re-enacted by section 2 of the Indian Coolies Ordinance, 1909, the entry of the name of the cooly on the estate register is, strictly speaking, necessary to make him a "labourer" within the meaning of section 5 of the Ordinance of 1865, and the law has been defined in this sense. See P. C. Matale, No. 37,727.[1] It appears to me that section 5 must be held to have been modified, not only to that extent, but also as regards the date at which a contract of service may begin, by the provisions of the later enactment. The words "new employer" in section 24 (3) of the Indian Coolies Ordinance, 1909, do not, in my opinion, mean anything more than "intending employer" in the sense in which that term is used in section 26 (1). The hardship to the cooly from the alleged suspension of his contractual rights for a period of five days may perhaps be overcome in this way. The Legislature has prohibited nothing but the entering into a contract under the group of Ordinances with which we have here to deal. A contractor for work "usually performed by the day or by the job" does not fall within the scope of those enactments. Now the employer is not in law entitled to enter into any other kind of contract with a cooly except one from day to day or by the job, unless he has received the formal discharge ticket, and, as I have already said, there is nothing in any of the Ordinances to prevent him from doing so. He has the right to say to the cooly in effect: "Till I receive your discharge ticket I cannot contract with you under the labour law, but in the meantime I will engage you as a servant by the day or by the job." A contract of this description will not create the special rights and duties which the Labour Ordinance have brought into existence. But it is a valid contract for all that, so far as it goes, and it will give the cooly the right to receive either the stipulated wages or reasonable remuneration for any work done by him until the provisions of section 23 (1) (*a*) have been complied with.

I agree to the order proposed by my brother De Sampayo.

Set aside.

[1] *S. C. M., May 13, 1912.*