Perera v. Dharmadasa

COURT OF APPEAL.
COLIN-THOME, J. AND DE ALWIS, J.
C.A. (S.C.) 254/77 WITH S.C. 237/71—L.T. MATARA M/972.
OCTOBER 8, 1979.

Labour Tribunal—Workman employed in accepting bets on horse races—Illegal trade—Whether contract of employment enforceable—Termination of services—Right to relief—Betting on Horse Racing Ordinance (Cap. 44) sections 3, 11.

The applicant-respondent was employed under the employer-appellant as a clerk cum cashier. He did the work of accepting bets on horse racing and he received a percentage of the collection as commission. On his services being terminated, he made an application to the Labour Tribunal and obtained an order in his favour against the employer-appellant for compensation. In appeal it was submitted on behalf of the employer-appellant that as the applicant-respondent was engaged in an illegal trade such as accepting bets on horse racing he was not entitled in law to claim any relief. The Betting on Horse Racing Ordinance made it an offence to receive or negotiate a bet on a race other than a taxable bet.

Held

On the evidence in this case the applicant-respondent was engaged as an agent of the employer-appellant in work involving unlawful bets on horse racing with his full acquiescence and knowledge. The aid of the law cannot be sought for the enforcement of such a contract and the applicant-respondent was therefore not entitled to relief.

Cases referred to

(1) *Perera v. Dharmadasa, (1973) 77 N.L.R. 285.*

(2) *Pearce v. Brookes, (1866) 1 Exch. 213 ; 14 L.T. 288 ; 30 J.P. 295.*

(3) *Lloyd v. Johnson, (1798) 1 Bos. and P. 340.*

(4) *Fernando v. Ramanathan, (1913) 16 N.L.R. 337.*

APPEAL from an order of the Labour Tribunal, Matara.

J. W. Subasinghe, for the employer-appellant.
L. Jayawickrema, for the applicant-respondent.

Cur. adv. vult.

October 29, 1979.
COLIN-THOME, J.

The applicant made an application to the Labour Tribunal, Galle, that he was employed as a clerk under the employer-appellant from October, 1960 to 9th January, 1971, and that his services were unlawfully terminated. He sought compensation for unlawful termination, gratuity and back wages.

The President of the Labour Tribunal by his order dated 5.10.1971 dismissed the application holding that the applicant was employed as a clerk in carrying on an illegal trade, to wit, accepting bets on horse racing and as such the applicant was not entitled to claim any relief.

The applicant appealed against the said order and the Supreme Court by its order dated 15.1.1973 set aside the said order of the President and remitted the case back to the Labour Tribunal for full inquiry and order.

The application was thereafter taken up for hearing on a number of dates and the President by his order dated 13.9.1977 held that the applicant's services were wrongfully terminated and ordered the respondent to pay a sum of Rs. 7,200 (equal to 2 years salary) as compensation and the costs fixed at Rs. 250.

Being aggrieved by the said order the employer-appellant appeals on the following grounds :—

(*a*) that the said order is contrary to law and the weight of evidence adduced in the case ;

(*b*) that the evidence of the applicant proves that the employment was of an illegal nature and as such the application cannot be maintained in law. It was also submitted that the Supreme Court did not have the benefit of the sworn testimony of the applicant to consider the nature of the employment at that stage ;

(c) the President erred in law when he stated in his order that : 'No objections touching on the validity of the application was taken up ..... Hence, what is called for is only an examination of the evidence on record ..... ;' whereas such evidence speaks of the illegal nature of the contract ;

(*d*) in any event the compensation awarded is excessive in the circumstances of the case ; wherefore the employer-appellant prays :

(i) that the order of the President be quashed or in the alternative varied ;

(ii) that the application made by the applicant be dismissed ; and for costs and other relief.

When this matter came up before the Supreme Court on the appeal of the applicant against the order of the President dated 5.10.1971, no evidence was led at the inquiry and the Supreme Court (per Rajaratnam, J., sitting alone—vide 77 N.L.R. 285) held that as there was no evidence led the order was made without an inquiry as required by the Industrial Disputes Act—Chapter 131. In the course of the order Rajaratnam, J., made two irreconcilable observations as follows:

"Legally the main test is whether the servant contracted to do something unlawful with his master. Hiring cabs, washing clothes, cooking meals, sweeping floors, etc., are not unlawful engagements and are not contra bonos mores but on the other hand are useful engagement in a society. The law will look into each case on its facts. For instance, a taxi driver who hires his taxi and thereby knowingly assists a murderer or burglar is engaged in an unlawful business and will not be able to sue for his dues. In each case it will depend whether the servant has entered into the pale of the offence as an intentional abettor in the commission of the offence, under an agreement."

Later in the order he observed:

"I do not think that a clerk engaged in an illegal business who keeps accounts, or a cook who serves meals to those patronising a brothel should necessarily be denied of relief and redress, even where they knew that their master was carrying on an illegal business."

The learned Judge then set aside the order of the President and remitted the case back to the Labour Tribunal for a full inquiry and order and directed that the applicant be entitled to costs fixed at Rs. 210.

At a subsequent inquiry before the Labour Tribunal both the applicant and the respondent gave evidence. From the evidence of the applicant it transpired that he had been working under the respondent from October 1960 to 9th January, 1971, as a clerk cum cashier. During this period the respondent operated a bucket shop business from Colombo and he had agents in Galle, Ahangama, Weligama and Matara. He was given a car with a driver to perform his duties which were to collect the racing sheets from Mukthar in Colombo and distribute them in the outstations. He used to leave Colombo in the morning taking with him the summaries showing the advance bets placed and

the payment money. He distributed the fresh betting cards and the summaries. In the evening he kept the money with him and took the betting chits to Colombo. He used to deposit the money in the Bank of Ceylon. The day's collection amounted to about Rs. 6,000. There was work right through the year except on four days, that is, during the Christmas holidays. On week days there were English races, while on Sundays there were French races. He was paid at the rate of Rs. 300 a month, but actually he received only Rs. 275. Rs. 25 was kept back in lieu of Provident Fund to be paid at the termination of his services. He was also paid Rs. 15 as batta a day, although he did not mention this in his application. With batta his salary worked up to about Rs. 750 a month. He was in custody of all the respondent's cash.

Under cross-examination he stated that the work he did was to accept bets on commission and he handed over the bets to others such as Mukthar. When he gave the collections to the respondent he received 10% commission. He himself had placed bets and had won Rs. 6,000 once. He knew how to calculate winning chits. He knew this from the time he attended school. He had been convicted and sentenced to jail for 5 years for throwing acid at his wife. He knew that the police raided bucket shops and had filed actions against bucket shop owners. But he stated that he was not aware whether his work was illegal or legal.

The respondent in his evidence stated that the applicant worked under him from 1960 to 1971 and he was in continuous employment except for the period of 5 years during which he served a term of imprisonment. In the early '60s races were banned in Ceylon and after that he accepted bets for races conducted in India. Thaha and Mukthar accepted bets for races conducted in England. The police had once stopped the car in which the applicant was travelling but he managed to escape. Since that time he had instructed the applicant to bring only the chits with him, and for the money collected in Matara to be kept by him.

The main submission of learned counsel for the employer-appellant was that as the applicant was engaged in an illegal trade, such as accepting bets on horse racing, he was not entitled in law to claim any relief.

In *Pearce and another v. Brooks* (2), it was held that one who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject matter of

the contract to an immoral purpose cannot recover upon the contract. It is not necessary that he should expect to be paid out of the proceeds of the immoral act.

The defendant, a prostitute, was sued by the plaintiffs, coach builders, for the hiring of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payments; but the jury found that they knew her to be a prostitute, and supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men. Held, that the plaintiffs could not recover. In this case Pollock, C.B., stated: "Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is ex turpi causa non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

In *Lloyd v. Johnson* (3), the plaintiff was employed to wash clothes for the defendant, who was a prostitute, knowing her to be such. It was held that the use to which the clothes might be applied, could not bar the plaintiff of an action for work and labour. In this case the bill of particulars showed that the articles washed consisted principally of expensive dresses and some gentlemen's night caps. Buller, J., observed that it was impossible for the Court to take into consideration which of these articles were used by the defendant to an improper purpose, and which were not.

Norman Scoble in the Law of Master and Servant in South Africa—(1956 Edition) at page 94, has observed, referring to the above cases, that: "It is essential that the purpose or object of an agreement of service should be one recognised as enforceable in law, that is to say, it should not be illegal or contra bonos mores. There can, therefore, be no effective contracts for domestic services between an owner of a gambling den and his cook or maid employed therein if the cook or maid was aware of the illegal objects of their employer and could thus be said to be associated with him in his unlawful purpose."

Section 512 of the American Restatement reads:

> "A bargain is illegal within the meaning of the Restatement of this subject if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."

Weeramantry in the Law of Contract, Volume I, para 341, has stated that: "a contract would be invalid for illegallity if it

contravenes some specific provision of the Ordinance."—vide *Fernando v. Ramanathan* (4) ; quoting Wessels, s. 682 ; Digest 3.19.2 at para 346 he adds : "However it is not only at its formation that the contract must be legal : it must be so also at the time of performance, for unless it is legal at the time of performance it has no binding force ;" and at page 397 he observes : "The effect of illegallity is to render the contract null and void It follows that no action can be based on such a contract .. .. The principle that no action may be based upon an illegal contract is one common to Roman, Roman Dutch and English Law."

Under the Betting on Horse Racing Ordinance—Chapter 44, section 3 (3) (*b*) :

"Any person who receives or negotiates a bet on a horse race other than a taxable bet, shall be deemed to bet unlawfully at a horse race and shall be guilty of an offence."

Under section 11 of this Ordinance :

"Every person guilty of an offence under this Ordinance shall, on conviction after summary trial before a Magistrate, be liable :

(*a*) for a first offence, to a fine not exceeding Rs. 1,000 or, in default of payment of such fine, to imprisonment of either description for a term not exceeding one year ; and

(*b*) for a second or subsequent offence, to a fine not exceeding Rs. 2,000 or to imprisonment of either description for a term not exceeding 2 years, or to both such fine or imprisonment."

In the instant case there is ample evidence that the applicant-respondent was engaged as an agent of the employer-appellant in work involving unlawful bets on horse racing with his full acquiescence and knowledge. The maxim ex turpi causa non oritur actio, lays down the principle that no action can be founded upon a tainted transaction, so that the aid of the law cannot be sought for its enforcement. The basis for this rule is that the law does not encourage or condone participation in a crime or its abetment.

For these reasons we quash the order of the President of the Labour Tribunal. There will be no order as to costs.

DE ALWIS, J.—I agree.

Appeal allowed.