

1976 Present: Sirimane, J. and Colin-Thome, J.

THE CEYLON BANK EMPLOYEES' UNION, Applicant-  
Appellant

and

THE BANK OF CEYLON, Employer-Respondent

S.C. 135/75—LT 1/32621

*Labour Tribunal—Application by union in respect of termination of services of workman—Finding that workman concerned engaged in running another business while employed under respondent—Whether breach of such workman's contract of service—Findings by Labour Tribunal against workman on a matter not part of the charge sheet served on him—Sufficient evidence on this point before the Tribunal—Findings against workman on this point also upheld.*

The appellant union made an application to the Labour Tribunal in respect of the termination of the services of one N. Devarajah, one of its members. The respondent Bank had terminated the said workman's services as from 14th June, 1967, after holding a domestic inquiry. It was held by the Labour Tribunal after a lengthy inquiry that the respondent Bank was justified in terminating the services of the said workman.

The President of the Labour Tribunal took the view that on the evidence before him the workman had actively participated in a business called "Om Parasakthi Exchange". Further that in doing so he had not only abused his position by using confidential information before the cashing of cheques but had also employed himself in some other occupation while in the employment of the respondent-Bank which had also resulted in his violating the secrecy concerning customers' accounts. It was submitted on behalf of the applicant-appellant union that the said business was not that of the said

workman but of his wife and that he was her Attorney, that even if it was his own business, it was not a money lending business and if so, there was no breach of the terms of his employment.

One of the clauses of the service agreement entered into by the said workman read as follows:—

“I will give my whole time and attention to the discharge of my duties and will observe the rules and regulations from time to time made by the Bank for the guidance of its employees.”

*Held.*—(1) That as far the running of the business of “Om Parasakthi Exchange” was concerned, there was overwhelming evidence that the said business was in fact that of the workman concerned and that he actively ran the same though it was registered in the name of his wife.

(2) That it is an implicit condition of any ordinary contract of service that a workman must devote the whole of his normal office hours to his work but that the clause from the service agreement referred to above went far beyond such a condition and laid down that the workman could not engage himself in any other gainful employment. He therefore could not engage himself in some parallel business, profession or other employment as had happened in this case. Further, in the present case the respondent Bank had made the conditions of this clause quite clear when in a circular sent out to all its employees it prohibited any gainful employment except with the sanction of the Board of Directors.

(3) That, although the complaint had been made on behalf of the appellant that the question of breach of secrecy by the said workman, which also entailed instant dismissal, was not a charge against him at the domestic inquiry, this however, not only arose as being incidental to the nature of the business carried on by this workman, but there was evidence placed before the President of the Labour Tribunal on which he could have come to the findings that he did. A perusal of the proceedings before the Tribunal showed that there was no prejudice caused to the workman on this ground.

Case referred to :

*Wessex Dairy Ltd. vs. Smith*, (1935) 3 K.B. 80.

**A**PPEAL from an order of a Labour Tribunal.

*C. Ranganathan, Q.C.*, with *K. Kanag-Iswaran, S. Mahenthiran* and *G. Kumaralingam*, for the applicant-appellant.

*S. J. Kadirgamar, Q.C.*, with *E. B. Vannithamby*, for the respondent.

*Cur. adv. vult.*

June 24, 1976. SIRIMANE, J.

This is an appeal by the applicant-appellant union on behalf of N. Devarajah from an order of the Labour Tribunal dismissing its application. The facts briefly stated are that N. Devarajah (hereinafter referred to as the appellant) was employed in the Bank of Ceylon. He was interdicted on 13.2.66 and after a domestic

inquiry his services were terminated as from 14.6.67. The application made to the Tribunal on his behalf stated that no proper inquiry had been held and that no charge was proved against the appellant. The respondent Bank took up the position that reasons were given for the interdiction and thereafter a charge sheet was served on the appellant. After the appellant's explanation was received an inquiry was duly held and the appellant afforded every opportunity of defending himself. It was after the report on that inquiry that the Board of Directors decided to terminate the services of the appellant and that the respondent Bank was therefore justified in doing so. The President of Labour Tribunal after a fairly lengthy inquiry held that the respondent Bank was justified in terminating the services of the appellant as there was overwhelming evidence which proved that the workman had committed acts of serious misconduct by violating the terms and conditions of his contract of services. In coming to this conclusion the President observed that—

“The totality of the evidence suggests that the workman actively participated in the business of the Om Parasakthi Exchange. Alabdeen, Thambirajah and the workman's wife were all figureheads. The workman had abused his position by using confidential information before cashing of cheques. The workman had also employed himself in some other occupation while in the services of the bank, what is more, in an occupation which has violated the secrecy concerning customer's accounts.”

The main ground for termination of the appellant's services was no doubt the fact that he ran the business called “Om Parasakthi Exchange” though the appellant denied this and tries to make out that it was the separate business of his wife. The evidence discloses that even his interdiction was on this ground as the Manager of the Bank had questioned him on this matter at that time. On this aspect of the case learned counsel for the appellant urged —

- (i) that the business of Om Parasakthi Exchange was not that of the appellant but of his wife and he was only her Attorney ;
- (ii) even if it was the business of the appellant it was not a money lending business ;

(iii) if it was not a money lending business there was no breach of the terms of his employment.

As regards (i) above there was overwhelming evidence (which I need not repeat here) that the business Om Parasakthi Exchange though registered in the name of the appellant's wife was really his business and that it was he who actively ran the said business, his wife having nothing whatever to do with it and being merely his nominee. The appellant had even admitted in a Magistrate's Court case that it was his business registered in the name of his wife. On the evidence led the finding that the business "Om Parasakthi Exchange" was that of the appellant and run by him was irresistible and the President could have come to no other conclusion.

As regards (ii) the submissions were based on the fact that the charge sheets served on the appellant for the domestic inquiry described the business as a "money lending business" and that one of the terms of his employment (R2) was that members of the staff must not engage in money lending and if they do they would be liable to instant dismissal. At the inquiry before the President though no doubt submissions were made that it was not a money lending business the main issue appears to have been as to whether the business of Om Parasakthi Exchange was that of the appellant or of his wife. The President did not come to a finding that the business was a "money lending" business but only that the business of Om Parasakthi Exchange was the business of, and run by, the appellant and not his wife. The business has been described as that of encashing Government, Corporation and post dated cheques. The President was of the view that the running of the business of "Om Parasakthi Exchange" (quite apart from money lending) was one (if not the main) act of misconduct which violated the terms and conditions of the appellant's contract of service which justified his dismissal. This brings us to submission (iii) mentioned above.

As regards submission (iii) the question arises as to whether the running of the business of Om Parasakthi Exchange (not regarding it as a money lending business) was a contravention of the terms of the appellant's employment. In this connection the respondent Bank produced marked R1 the service agreement entered into by the appellant and referred clause (3) thereof which reads,

"I will give my whole time and attention to the discharge of my duties and will observe the rules and regulations from time to time made by the Bank for the guidance of its employees".

There can be no doubt that the words "My whole time and attention" must be read subject to an implied limitation, but I am unable to agree with learned counsel for the appellant when he submits that this clause does not prevent the appellant from carrying on another occupation outside normal office hours, i.e. the whole time required for bank work (like overtime, etc.). If this contention is correct it means that "My whole time and attention" in the above clause must be read "My whole time and attention during normal office hours" the whole of the time required for bank work as stated above. It is an implicit condition of service in any contract that the workman must devote the whole of the normal office hours to his work. I think clause (3) referred to above goes far beyond that and it seems to me that it lays down that the workman will not engage himself in any other gainful employment. In any ordinary contract of service (without a condition like clause 3) the workman must devote the whole time for which he is paid (that is his normal working hours) in furtherance of his master's interest and not his own. This was indeed what was held in the case of *Wessex Dairy Limited vs. Smith*, (1953) 3 K.B. 80, cited by learned counsel for the appellant. This case does not help in the decision of the instant case as the condition imposed by clause 3 goes beyond the normal contract of service and stipulates something more. In my view a reasonable construction of the words in this clause would mean that the workman must not devote any part of his time to any other gainful employment. This does not mean that the workman, for instance, cannot have a poultry run at his home and sell some eggs or grows flowers for sale as a hobby during his spare time, but it certainly prevents him from engaging himself in some parallel business profession or other employment. The question whether any such engagement falls into the former or latter category is one of fact and must depend on the circumstances on each particular case. This type of stipulation is not uncommon as the same type of condition applies even to public servants who are prohibited from engaging in any other business without permission. The respondent Bank has made the conditions of this clause quite clear when it sent out a circular (R3) in 1952 to be brought to the notice of all its employees. This circular recited clause 3 and prohibits any gainful employment except with the sanction of the Board of Directors. The circular also required every employee to make a declaration that they were not so gainfully employed or if they were how long it would take to discontinue such employment. It was submitted for the appellant that there was no evidence that such declarations were in fact obtained or that the contents of this circular were brought to the notice of every employee in view of the evidence of Donald Perera that he does not remember this circular. The

evidence however discloses that this circular was sent out in the ordinary course of business and it can be presumed that in accordance with the normal practice of the bank every employee was made aware of this circular. The best evidence that this was so came from the appellant himself as seen in these passages in cross-examination :—

“ Q. I am suggesting to you that it was always your intention to run this business although it stands registered in in your wife's name ?

A. I do not agree with that.

Q. Why could you not have had Alabdeen transfer the business in your name ? Was there anything preventing you from doing so ?

A. Because the bank's regulations do not permit a member of the staff to run a business. It permits the wives of employees to run a business.

Q. You know very well that if Alabdeen's business was transferred into your name and if you were personally running it you would be contravening the Bank's regulations ?

A. Yes.

Q. That was quite clear in your mind ?

A. Yes.

Q. You also know that if Alabdeen's encashment of cheque business was transferred into your name and you ran it you would be liable to dismissal from the Bank's service for contravening the regulations ? ”

and

“ Q. I suggest to you that your wife was just a figurehead put forward by you for this business ?

A. It is not so.

Q. I suggest to you that you put forward your wife as a figure-head because the bank's regulations prohibited you from running this business of encashment of cheques ?

A. That is not correct.

Q. You admit that if you did run this business in your name and if you were detected you would be dismissed ?

A. Yes.

Q. And, you knew, that if you ran the business yourself and if you were caught and dismissed, that was a dismissal that you could not complain against?

A. Yes."

So that it is abundantly clear that the appellant was well aware of the contents of the circular and also knew that in running the type of business he did he was contravening the terms and regulations of his employment. The Om Parasakthi Exchange which the appellant ran did business which ran into thousands and thousands of rupees each month and the evidence accepted by the President showed that the appellant had given instructions that before cheques of rupees five hundred and over were cashed he had to be consulted. This necessitated the witness Alaudeen contacting the appellant frequently during office hours and the appellant checking on customers' accounts sometimes before giving his approval. In view of these matters the conclusion of the President that the appellant was engaged in running the business of Om Parasakthi Exchange in contravention of the terms of his employment alone is sufficient to justify the termination of his services.

Learned counsel for the appellant also complains that the question of breach of secrecy which also entails instant dismissal was not a charge made against the appellant on the charge sheet served on him for the domestic inquiry. This matter however arose as being incidental to the nature of the business carried on by the appellant and the instructions given by him to Alaudeen. The appellant denied the allegation of Alaudeen that the latter had to consult the appellant before cashing cheques for Rs. 500 and over and that the appellant would go inside the bank and then come and tell Alaudeen whether to cash the cheques or not. It was open to the President on the evidence placed before him to draw the inference that the appellant used his position in the Bank to check on customers' accounts and instructions and we cannot say that he was wrong in drawing that inference. The complaint of learned counsel for the appellant that the appellant was taken by surprise on the question of breach of secrecy is not supported by the proceedings at the inquiry before the Tribunal. No such complaint was made before the Tribunal nor was any application made for time to meet this allegation. On the contrary the appellant denied this allegation in his evidence but the President found against him. The inquiry before the Tribunal lasted a number of days and there could not have been any question of surprise. We do not see that any prejudice was caused to the appellant on this ground.

The last matter on which the President found against the appellant was that he had issued two cheques without sufficient funds to meet them. It would appear that the appellant had two bank accounts No. 1 and No. 2. Account No. 1 was solely for the purpose of meeting his standing order to the bank to pay the insurance premium on his insurance policy which he had kept as security with the bank for an overdraft obtained by him. The premium had to be paid once in six months and the bank had an interest in keeping this policy alive as they held it as security for the overdraft. It was found that funds in No. 1 account were insufficient to meet the premium and the bank had therefore transferred the money from the appellant's No. 2 account to the No. 1 account to meet the said premium. The bank did not inform the appellant of this transfer. It was in these circumstances that the two cheques issued by the appellant on his No. 2 account were dishonoured. The mandate signed by the appellant when he opened the accounts with the bank gives the bank the necessary authority to transfer funds from one account to another without prior notice to the appellant. So that on a strict construction of the terms and conditions on which these accounts were opened the bank was justified in the transfer it made without informing the appellant. In these circumstances the appellant should have known that funds would have been transferred from his account No. 2 to account No. 1 to meet the premium on the insurance policy and therefore refrained from issuing any cheques without checking the balance to his credit in account No. 2. It can therefore be said (though somewhat technically) that the appellant had issued cheques without funds and the finding of the President on this account cannot be said to be wrong. The circumstances show however that these two cheques were not dishonestly issued without funds but issued bona fide in the belief that the funds in his No. 2 account would meet them. This ground alone would certainly not be a sufficient justification for the termination of the appellant's service but as stated earlier the main ground (which was a very substantial ground) was that he ran the business of Om Parasakthi Exchange and thereby contravened the terms of his employment.

On a consideration of the totality of the evidence placed before the President we are unable to say that he has in any way mis-directed himself or come to a wrong conclusion. The appeal is dismissed with costs fixed at Rs. 157.50.

COLIN THOME, J.—I agree.

*Appeal dismissed.*