1973 *Present :* **Rajaratnam, J.**

R. P. DHARMADASA, Appellant, *and* B. PETER PERERA, Respondent

S. C. 237/71—Labour Tribunal 4/M/972

Industrial Disputes Act—Section 31 B (1) (a)—Application for relief thereunder by a discharged clerk—Employer carrying on an illegal business—Whether the clerk should be refused relief on that ground alone—Considerations applicable in such an inquiry before a labour tribunal.

When the applicant-appellant, who had worked under the respondent as a clerk for eleven years, sought relief under section 31 B (1) (*a*) of the Industrial Disputes Act upon the termination of his services, his application was dismissed by the labour tribunal solely on the ground that the respondent (employer) was carrying on an illegal business, namely the acceptance of bettings on horse-racing.

[1] *(1967) 72 N. L. R. 273.*

Held, that the applicant was entitled to be heard even if he knew that his master was carrying on an illegal business, unless he was an intentional abettor in the commission of the offence of illegal betting. In such an inquiry before a labour tribunal the main test is whether the servant contracted to do something unlawful with his master.

APPEAL from an order of a Labour Tribunal.

Lalith Jayawickrema, for the applicant-appellant.

F. N. D. Jayasuriya, with *Neville Joseph,* for the employer-respondent.

Cur. adv. vult.

January 15, 1973. RAJARATNAM, J.—

The President in his order dismissing the applicant-appellant's application for relief and/or redress on the termination of his services under Section 31B (1) (*a*) of the Industrial Disputes Act states that the said applicant has worked under the respondent as a clerk for eleven years, but as the respondent's business being the acceptance of bettings on horse racing and since this is an illegal business, the applicant is not entitled to any relief. Whatever the President meant, he concludes the order with this observation "justice could not be meted out by an illegal act".

He has not paused however to consider what type of work the applicant was doing in this business and whether persons doing an illegal business in every case and always are exempt from their liabilities towards their employees, and therefore are in a more favourable position than employers who carry on a legal business. There was no evidence led, and the order was made without an inquiry as required by the Act.

Learned Counsel for the respondent submitted that the said order is according to the law as the applicant's contract of service was with the respondent to work in an illegal business concern, and therefore the applicant is not entitled to any benefit whether it be salary in view of notice or compensation in lieu of re-instatement. He has referred me to the Law of Master and Servant by Scoble (1956 Edition) which states "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 service between the 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. Thus in *Pearce v. Brooks,* 1866, 1 Ex. 213, a jobmaster failed in his action against a prostitute for the amount of the hire of a cab, where he knew that she was using the cab in her business and also what her prefession was. In regard to a contract *locatio operis* however the position may be said to be different for a laundress is entitled to sue a prostitute for the amount of her charge in washing the latter's clothes (*Lloyd v. Johnson,* 1798 I.B. and P. 340)." With great respect I find it difficult to agree with the decisions in the above cases. Both the cab driver and the laundress were respectively engaged in their lawful business of a cab driver and a laundress and there appears to be no justification for either of them to be deprived of their dues when they contract with prostitutes and keepers of gambling dens. If these decisions are correct, if what has been stated above applies to every case, then the keeper of a gambling den will enjoy the services of cooks and maids free of charge unless he chooses to pay them and prostitutes can have free rides in cabs when they are about their business although they are obliged to pay the laundress for washing their clothes. I do not think the law ever intended to make life so much easier for those who contravened the laws, and give them the immunity of diplomats.

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 engagements in a society. The law will look into each case on its own 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.

In the case of *Martin v. d'Almeida,*[1] 1936 Appellate Division (South Africa), the Court refused to extend the privilege to a wage earner of appealing *in forma pauperis* for the reason that he contracted to accept a wage less than the minimum wage laid down by the law. I find it difficult to agree that this decision applies to an application before the Labour Tribunal where the President is required by law to make a just and equitable order. In fact a just and equitable order will be against an employer who contravenes the law to his benefit whereas the servant contravenes it, if he does, out of necessity and to his detriment for the reason that he could not afford the luxury of asking for his dues under the law. The decision in this case will not apply to Labour Tribunal cases.

[1] *1936 A. D.*

The next case cited by learned Counsel for the appellant was the case of *Rex v. Brusinsky,*[1] 1940 C.P.D. 127. The facts and circumstances and the law in the case are different and cannot be applied again to the circumstances of the case under appeal from a decision of a Labour Tribunal. The decision in the case of *Manoim v. Veneered Furniture Manufactures,*[2] 1934 A.D. 237, was followed in the case of *Martin v. d'Almeida* referred to earlier. This is a judgment of Wessels C. J. With great respect the decisions in these cases were on entirely different sets of facts and different statute laws and cannot apply to a decision of a Labour Tribunal which is free to consider facts outside the contract of service as laid down in the Privy Council decision in the case of *United Engineering Workers' Union v. Devanayagam*[3], 69 N.L.R. 289, where Viscount Dilhorne observed that under the Industrial Disputes Act "it does not however follow that relief or redress obtainable on an application is obtainable only where a workman has a cause of action or that it is limited to relief or redress in respect of a breach of contract or of an obligation imposed by law." In my view where a workman is entitled to relief or redress depending on the circumstances of each case, under the Industrial Disputes Act, the President will take into consideration whether justice and equity demand that he deserves relief or redress, having due regard to the facts of each case. 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 question to be always considered is whether the applicant is so well within the pale of the offence as an offender and the offence is such that even the necessity for him to have found a means of livelihood does not wash the dirt off his hands to make him deserve some relief or redress in a just and equitable order. In my view this is the only question to be considered on this point and not the decisions which relate to legal contracts and legal causes of action decided by judges in different climes on a different set of facts, and not in Tribunals as set up under the Industrial Disputes Act of our country.

I set aside the order of the President and I remit the case back to the Labour Tribunal for a full inquiry and order. The applicant will be entitled to costs fixed at Rs. 210.

Case set back for further inquiry.

[1] *(1940) C. P. D. 127.*

[2] *1934 A. D. 237.*

[3] *(1967) 69 N. L. R. 289.*