

1977 Present : Rajaratnam, J, Sharvananda, J, and Colin Thome, J.

THE ATTORNEY-GENERAL OF CEYLON, Appellant and  
W. M. FERNANDO, HONORARY SECRETARY, GALLE  
GYMKHANA CLUB, Respondent

S. C. 502/69 (F)—D.C., Galle 3715/M.

*Subordinate legislation—Lotteries Ordinance, Section 19—Whether House of Representatives has power to pass resolution having retrospective effect.*

Subordinate legislation having retrospective effect is *ultra vires* unless the enabling Act expressly or by necessary implication authorises the making of retrospective subordinate legislation.

Section 19 of the Lotteries Ordinance provides :

‘The House of Representatives may, by resolution, impose a tax on the gross proceeds of every Lottery’.

*Held* : That the House of Representatives has not been vested, either by express words or by clear implication, with the power to pass a resolution imposing a lottery tax with retrospective effect. Accordingly the Respondent was not liable to pay the additional amounts of lottery tax claimed in respect of lotteries conducted before the date of a resolution which purported to increase the rate of lottery tax retrospectively.

*Cases referred to :*

Mixnam’s Properties Ltd. v. Chertsey U.D.C., (1963) 2 All E.R. 787 1; (1965) A.C. 765

Phillips v. Eyre, (1870) L.R. 6 Q.B. 1; 22 L.T. 869.

**A**PPEAL from a judgment of the District Court of Galle.

V. C. Goonetilleke, Deputy Solicitor-General, for the plaintiff-appellant.

No appearance for the defendant-respondent.

*Cur. adv. vult.*

October 14, 1977. RAJARATNAM, J.—

The plaintiff, as representative of the State, sued the defendant in his capacity as Secretary of the Galle Gymkhana Club for the recovery of Rs. 94,375.95 with legal interest, etc. On the first cause of action the plaintiff sought to recover a sum of Rs. 88,997.40 being additional 10 per cent. payable as lottery tax for two lotteries conducted by the Galle Gymkhana Club on 18.10.63 and 13.12.63. On the second cause of action a sum of Rs. 5,360.50 was sought to be recovered in respect of lotteries conducted on two other dates. There was no contest with regard to the claim under the second cause of action.

The main question turned round section 19 of the Lotteries Ordinance—whether this section enabled the House of Representatives to impose by resolution a Lottery Tax which has retrospective effect.

The House of Representatives by its resolution on 20.12.63 purporting to act under s. 19 of the Lotteries Ordinance resolved that "with effect from October 1, 1963, there shall be levied a tax of 40 per cent. of the gross proceeds of every lottery."

It is clear that this resolution expressly has made itself retrospective. On the other hand the question before the Court is whether under s. 19 of the said Ordinance, the House of Representatives can pass a resolution with retrospective effect.

The Section reads—

"The House of Representatives may, by resolution impose a tax (in this Ordinance referred to as a 'lottery tax') on the gross proceeds of every lottery. Such tax shall be payable by the promoter or promoters of the lottery as a debt due to the Crown".

This right was again given to the House of Representatives by s. 8 of the Lotteries Ordinance (Amendment Act No. 2 of 1954). The preamble to this Act states—

"Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled and by the authority of the same as follows", etc.

The date of assent of this Act is 23.1.1954. It will be seen that the power given to the House of Representatives is evidently an enabling power by Act No. 2 of 1954.

In other words s. 19 is the enabling power given by an Act of Parliament No. 2 of 1954 to the House of Representatives to impose a tax by resolution, that is to say, the House of Representatives derives its whole tax imposing power through this Act No. 2 of 1954 which is incorporated in s. 19 of the Lotteries Ordinance. The enabling power given to the House of Representatives is contained within the four corners of this Act and it does not specifically refer to any power to make any resolution imposing taxes with any retrospective effect.

The learned District Judge who held that the enabling section does not give any powers to the House of Representatives to impose taxes with retrospective effect by resolution quite appropriately reminded himself of the principle enunciated by Maxwell (Interpretation of Statutes, 11th Ed. at p. 206 in the Chapter on "Retrospective Operation as regards vested rights")—

"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty or

attaches a new disability in respect of transactions or considerations already past must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation”.

The legislature has not in s. 19 indicated within the content of the words therein any reference to resolutions having any retrospective effect.

On the relevant dates, i.e., on 18.10.63 and 13.12.63 the resolution that was in force for the imposition of taxes, imposed 30% on the gross proceeds. No doubt the licence reserved the right to the Crown to recover the lottery tax with retrospective effect in the event of increasing the rate of tax subsequent to the issue of licence but that does not help the Crown if s. 19 is an enabling section to prospectively impose a tax without any reference to retrospectively impose any tax. I see no reason to infer any such intention on the part of the legislature.

I find that this levy of 30% was made on 7.7.55 with effect from 8.7.55 which was prospective. On the other hand on 20.12.63 the levy of 40% was made as from October 1, 1963 (vide Hansard proceedings). It is my view that s. 19 did not empower the House of Representatives to then impose a tax with retrospective effect.

It is difficult to hold for instance that the House of Representatives the day after the assent to amendment Act, No. 2 of 1954, i.e., on 24.01.54 could by resolution impose a tax to take effect from a date before 23.01.54.

The enabling s. 19 was enacted at a time when the Act had to go through both the House of Representatives and the Senate before the assent. A resolution of the House of Representatives *per se* had no legal validity without the enabling s. 19 of the Lotteries Ordinance which was introduced by amendment Act, No. 2 of 1954.

Therefore we have to examine the scope and content of s. 19 which is silent with regard to any resolution carrying any retrospective effect. The fact that the resolution clearly intended a retrospective effect does not mean that s. 19 enabled such a resolution. Section 19 is the parent provision, so to say, and *per se* the said section is prospective, as Maxwell states (p. 215—12th Ed. on Interpretation of Statutes)—

“Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the Statutes were passed unless a retrospective effect was clearly intended”.

If s. 19 did not have such an intention, it cannot be said that the resolution enabled and passed thereunder could have a retrospective effect. The retrospective part is therefore outside

the scope of s. 19, which came into existence by the amendment Act No. 2 of 1954.

The appeal preferred by the Attorney-General must therefore fail. The judgment and decree of the District Court is affirmed and the appeal is dismissed without costs.

SHARVANANDA, J.—

I agree that the appeal should be dismissed without costs. Since the question involved is of some Constitutional importance, I set out below my reason for holding why the resolution of the House of Representatives dated 20th December, 1963, purporting to give retrospective effect thereto, is *ultra vires* and void.

A clear distinction has to be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in a resolution passed by the House of Representatives, a limb of the Legislature. A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation, the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made.

Subordinate legislation is always liable to be attacked by Courts on the ground that it is *ultra vires*, that it goes beyond the powers conferred by the enabling statute on the rule-making agency. Such subordinate resolution may be *ultra vires* by reason of its contents or by reason of procedural defects.

In this case, the Attorney-General, in paragraph 8 of the plaint, averred that—

“ the House of Representatives, by its resolution passed on 20th December, 1963, under section 19 of the Lotteries Ordinance, resolved that ‘with effect from 1st October, 1963, there shall be levied a tax of 40 per cent. on the gross proceeds of every lottery’ .”

In his answer, the defendant took up the position that the resolution of the House of Representatives referred to above was *ultra vires* in that “section 19 of the Lotteries Ordinance did not empower the House of Representatives to impose by resolution a lottery tax having retrospective effect”. It is always open to a defendant to raise the question of *ultra vires* by way of defence if proceedings are taken for the enforcement of any provision of a subordinate legislation.

The doctrine that subordinate legislation is invalid if it is *ultra vires*, is based on the principle that a subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legisla-

tion is fundamentally of a derivatory nature and must be exercised within the periphery of the power conferred by the enabling Act. If a subordinate law-making authority goes outside the powers conferred on it by the enabling statute, such legislation will *ipso facto* be *ultra vires*. “The various special grounds on which subordinate legislation has been said to be *ultra vires* and void—e.g., because it is unreasonable; because it is uncertain; because it is repugnant to the general law or to some other statute—can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute.”—per Diplock, L. J., in *Mixnam's Properties, Ltd. v. Chertsey U.D.C.* (1963), 2 All E. R. 787 at 799.

It is competent for a Legislature to enact laws which have retrospective operation. Even when Parliament enacts retrospective laws, such laws are however “*Prima facie* of a questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried upon the faith of the then existing law”.—per Willes, J., in *Phillips v. Eyre* (1870), L.R. 6 Q.B.1. The Courts will not therefore construe statutes to have retrospective operation unless such a construction appears very clearly in terms of the statute or by necessary implication. When the validity of delegated legislation having retrospective operation is raised, the Court will inquire further, whether the power to make regulations having retrospective operation falls within the scope of the enactment from which it purports to derive its authority. The preliminary question is whether Parliament has authorised such retrospective legislation. It will depend on the language employed in the statutory provision which may, in express terms, empower the agency to frame a rule or regulation with retrospective effect. But where such language is not to be found, no rule or regulation which can operate with retrospective effect can be made.

The Court will examine subordinate legislation strictly and confine it precisely within the limits of the enabling legislation. Thus, power to legislate by regulation in a manner which may impair the liberty of the subject, or impose some form of taxation, which would have retrospective effect, or which would exclude the subject from access to the Courts, will not readily be implied.

Section 19 of the Lotteries Ordinance which enables the House of Representatives to impose a tax by resolution reads as follows :—

“The House of Representatives may, by resolution, impose a tax on the gross proceeds of every lottery.”

Neither by express words nor by clear implication has the House of Representatives been vested with the power, under section 19 of the Lotteries Ordinance, to pass a resolution imposing a lottery tax with retrospective effect. Therefore, the retrospective effect sought to be given by the resolution passed on 20th December, 1963, was beyond the powers of the House of Representatives which derived its rule-making authority from section 19 of the Lotteries Ordinance. The tax-levying power of the House of Representatives can be exercised only in respect of lotteries conducted after the passage of the relevant resolution in the House. A resolution made under the statutory authority of section 19 of the Lotteries Ordinance can become part of the law of the land only from the date of such passage. Hence, the defendant will not be liable for the additional amounts of lottery tax claimed on the basis of the aforesaid resolution on the lotteries conducted prior to 20th December, 1963.

COLIN THOME, J.—

For the reason stated by my brothers Rajaratnam, J. and Sarvananda, J., I agree that this appeal should be dismissed without costs.

*Appeal dismissed.*

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