1951 *Present:* **Gratiaen J.**

GUNASEKERA, Appellant, *and* MUNICIPAL REVENUE INSPECTOR, Respondent

S. C. 889—M. M. C. Colombo, 51,668

Municipal Councils Ordinance, No. 29 of 1947—" Offensive and dangerous trades "—By-laws—In what circumstances ultra vires*—Sections 148, 267, 268.*

By Section 148 (1) of the Municipal Councils Ordinance " No place shall be used within any Municipality for any of the following purposes, namely, for *boiling offal or blood, or as a soap-house, dyeing-house, . . .* or for any other trade or business which the Council may, by means of by-laws declare to be an offensive or dangerous trade or business for the purposes of this Section, except under a licence from the Council . . . "

The accused, an auctioneer, was charged with " storing furniture " in alleged contravention of a by-law which purported to declare the business of " manufacturing or storing of furniture " to be an " offensive trade or business ".

Held, (i) that the charge framed against the accused was defective because it nowhere alleged that he was *carrying on the business* of " storing furniture ".

(ii) that, in any event, the term " business of storing furniture " introduced the idea of an establishment maintained for keeping in deposit, for an agreed remuneration, a customer's furniture in a store or warehouse for temporary safe-keeping.

Obiter : A by-law purporting to have been passed by a local authority and approved and confirmed under Section 268 of the Municipal Councils Ordinance can, nevertheless, be held by a Court to be *ultra vires* if it was passed in excess of the authority of the local authority.

APPEAL from a judgment of the Municipal Magistrate's Court, Colombo.

A. C. Nadarajah, for the accused appellant.

Eric LaBrooy, for the complainant respondent.

Cur. adv. vult.

December 14, 1951. GRATIAEN J.—

The appellant carries on the business of a licensed auctioneer at premises No. 277, Union Place, within the limits of the Municipality of Colombo. It is apparently his practice to use a part of his premises for displaying the furniture of his customers pending sale by public auction on Thursday and Saturday of every week. The lots which are purchased are removed by the successful bidders from the premises, the appellant retaining a part of the purchase price by way of his auctioneer's commission. No additional charge is made for displaying any article of furniture on the premises until it is eventually sold.

On 6th June, 1951, the appellant was charged by the local authorities with the commission of an offence punishable under Section 148 (3) of the Municipal Councils Ordinance, No. 29 of 1947. The charge was framed in the following terms:—

"that you did, within the jurisdiction of this Court at No. 277, Union Place, on 20th December, 1950, without a licence from the Colombo Municipal Council use premises No. 277, Union Place, Colombo for *storing furniture* which has been declared an offensive trade or business by By-Laws published in *Government Gazette* No. 10,157 of September 29, 1950, in contravention of Section 148 (1) of the Municipal Councils Ordinance, No. 29 of 1947 and thereby committed an offence punishable under Section 148 (3) of the said Ordinance."

Section 148 of the Municipal Councils Ordinance declares as follows:—

"(1) No place shall be used within any Municipality for any of the following purposes, namely, for boiling offal or blood, or as a soap-house, dyeing-house, oil-boiling-house, tannery, brick, pottery or lime kiln, sago manufactory, gun-powder manufactory, manufactory of fireworks, or other manufactory or place of business from which either offensive or unwholesome smells arise, or for any purposes which are calculated to be dangerous to life, or as a yard or depot for hay, straw, wood, coal, cotton, bones, or inflammable oil, *or for any other trade or business which the Council may, by means of by-laws, declare to be an offensive or dangerous trade or business for the purposes of this Section*, except under a licence from the Council, which is hereby empowered, at its discretion from time to time, to grant such licences, and to impose such terms therein as to the Council may appear expedient.

(2) No licence for any of the purposes mentioned in sub-section (1) shall be given within the administrative limits of the Council under Section 5 of the Nuisances Ordinance.

(3) Every person who without a licence as aforesaid uses any place within the Municipality for any of the purposes mentioned in sub-section (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred rupees, and, in case of a continuing offence, to an additional fine not exceeding fifty rupees for each day during which the said offence is continued after a conviction thereof."

In September, 1947, the Municipal Council of Colombo passed a by-law purporting to declare the business of " manufacturing *or*, storing of furniture or manufacturing *and* storing of furniture " to be an " offensive trade or business " for the purposes of Section 148. The by-law was, in due course, approved by the Minister of Health and Local Government, confirmed by Parliament, and published by notification in the *Government Gazette*.

Mr. Nadarajah has submitted that, on the authority of *Jayasuriya v. Rupesinghe* [1], it is open to this Court to declare the by-law *ultra vires* of the Municipal Council on the ground that the storage of furniture was *in fact* neither " offensive " nor " dangerous " in the sense in which these terms are commonly understood. But the present case is concerned with a legislative enactment entirely different from that which Jayawardene J. was there considering. Under the Small Towns Sanitary Ordinance of 1892 a Sanitary Board was empowered to frame by-laws " for the regulation of dangerous or offensive trades " but not to decide for itself whether a trade was, in fact, dangerous or offensive. Section 148 of the Municipal Councils Ordinance, on the other hand, expressly empowers the local authority, by means of by-laws, to " declare " a trade or business " to be an offensive or dangerous trade or business " for the purposes of the Section. The present case is therefore more analogous to *Tennakoon v. Muttuwappu* [2] which I shall have occasion to discuss later. For the present I am satisfied that the appellant's complaint of *ultra vires*, in so far as it is based on the grounds specifically urged by Mr. Nadarajah, cannot be sustained. Such a plea, if available at all, must rest on different considerations. But I am content to *assume* that the by-law was *intra vires* the powers delegated by Parliament to the Council.

There remain for consideration certain other questions which were raised during the argument. Mr. Nadarajah has argued.

(1) that the charge framed against the appellant is defective because it nowhere alleges that he was *carrying on the business* of " storing furniture ".

(2) that there is in any event no evidence from which it would be legitimate to infer that the appellant was in fact carrying on such a business within the meaning of the by-law.

I have come to the conclusion that both these submissions are entitled to succeed.

Section 148 certainly empowers the local authority to declare a trade or business to be offensive or dangerous even if, in the opinion of a Court of law, it contains none of the elements of offensiveness or of danger. But as Drieberg J. points out in *Tennekoon v. Muttuwappu* (*supra*) the local authority *had no power and did not purport to declare what is not a trade or business to be a trade* or business. The by-law concerned has declared *the business* of storing furniture (*and not the storing of furniture simpliciter*) to be an offensive or dangerous trade or business. It is therefore essential that the prosecution in presenting a charge framed

[1] *(1924) 26 N. L. R. 321.* [2] *(1932) 1 C. L. W. 229.*

under Section 148 should specifically allege and prove that the accused person was *carrying on a business* of the kind which had been declared to be offensive or dangerous. The preliminary observations of Bertram C.J. in *Jayasekera v. Silva* [1] are very pertinent in this connection. In my opinion, therefore, the case against the appellant fails *ab initio*.

I can hardly imagine that either the Municipal Council which passed the by-law *or* the Minister who approved it *or* Parliament which confirmed it could have intended to regard as a potentially " offensive or dangerous business " the perfectly legitimate and innocuous activities of an auctioneer who displays his customers' furniture in his auction rooms before he puts it up for sale. The term " business of storing furniture " introduces the idea of an establishment maintained for keeping in deposit, for an agreed remuneration, a customer's furniture in a store or warehouse for temporary safe-keeping.

The by-law under consideration must, in fairness to the Municipal Council, to the Minister and to Parliament itself, receive an interpretation which is, as far as possible, consistent with the policy of the legislature which enacted Section 148. I am content to say that in the present case the evidence adduced at the trial does not prove that the appellant has carried on any trade or business which can reasonably be construed as the business of " storing furniture " in contravention of the by-law. In my opinion the appellant is entitled, quite apart from the issue of *ultra vires*, to succeed on both the grounds to which I have referred.

My decision has so far proceeded upon the assumption that the by-law unler consideration was *intra vires* the legislative powers delegated to the Municipal Council under Section 148 (1) of the Ordinance. But I must not be understood to hold that this assumption is correct. The question is, I think, of sufficient importance to call for some general observations as to what I conceive to be the proper function of local authorities in respect of by-laws purporting to have been passed under the Ordinance.

Section 4 charges each Municipal Council " with the regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and the amenities of the municipality ". Section 267 empowers each Council to make such by-laws as may appear necessary *for the purpose of carrying out the principles and provisions of the Ordinance*. Section 148 (1) is a special illustration of this delegated legislative authority, and the validity of any by-law must in each case be tested with reference to the purposes which it purports to serve.

Section 148 (1) appears in that part of the Ordinance which authorises and empowers a Council to promote and secure *the public health within its municipal limits*. Accordingly, this Chapter deals with subjects such as drainage, latrines, insanitary buildings, conservancy and scavenging, nuisances, infectious diseases, and, finally, " offensive and dangerous trades ". It is in relation to the last named subject that Section 148 (1) appears.

[1] *(1918) 5 C. W. R. 255.*

The Section in the first instance prohibits the carrying on, except upon conditions imposed by the Council, of certain enumerated trades or businesses whose activities are by their very nature calculated either to produce " offensive or unwholesome smells " or to be "dangerous to life ". But Parliament has recognised that an exhaustive catalogue of such activities would be difficult to achieve. Accordingly, it had delegated to each Council the power to introduce by-laws which would prohibit other trades or businesses *of a like kind* which, if uncontrolled, would be likely by reason of their offensiveness or dangerous potentialities to be injurious to public health. Parliament could not have intended that these delegated powers of legislation should be so exercised as to declare to be " offensive or dangerous " any trades or businesses which the City Fathers did not *reasonably and honestly* regard as injurious to the health of the community. I do not doubt that any by-law which, *subject to approval and confirmation under Section 268 (1)*, was genuinely intended by the Council to promote the public health would be *intra vires* the delegated powers conferred on it by Section 148 (1). In each such case, the *bona fide* decision of the local authority must, upon its final confirmation by Parliament, be accepted as " *conclusive on the point* ". *Tennakoon v. Muttuwappu* (*supra*). In other words, a Court of Law which is called upon to enforce a particular by-law must be guided by the sensitiveness of the nostrils of the City Fathers on matters relating to " offensiveness " or by their genuine apprehension that some particular activity may prove dangerous to health. The language of the Section certainly precludes the Court from substituting its own notions of what is " offensive " or " dangerous " for the declared notions, honestly entertained, of the Council on the point.

But this does not mean that in an appropriate case the right, and, indeed the duty, of exercising some measure of judicial control over delegated legislation has been withheld by the legislature which passed Sections 148 (1) and 268 of the Ordinance. If a Council purports to pass a by-law under Section 148 (1) *by exceeding the terms of the delegation conferred by Parliament*, the doctrine of *ultra vires* is immediately brought into operation. Should a Council, for instance, *purport* to declare a business to be " offensive " which is neither offensive in fact nor even believed to be so, *with the pretended purpose of safeguarding the public health but with the sole intention of collecting revenue by levying licence-fees*, then it seems to me that the by-law would be clearly *ultra vires*.

It is no doubt permissible for a Council to levy a fee as a condition precedent to the issuing of a licence for carrying on a trade or business which is otherwise prohibited by Section 148. But that is certainly not the purpose which the Section is primarily intended to achieve. For the payment of a fee cannot by itself render an offensive smell any less pungent or a dangerous activity any less injurious to residents in the locality. I have examined for the purposes of this appeal some of the trades or business *declared* by the Municipal Council of Colombo to be " offensive or dangerous ", and I would very much like to be convinced that Section 148 has not come to be regarded merely as a convenient instrument for revenue collection, rather than, as it should

be, a valuable safeguard to promote the public health. In England the practice of local authorities entrusted with similar delegated legislative functions is to invoke some consultative machinery before finally deciding whether trades should be prohibited as potentially " offensive " or " dangerous ". Whether such machinery is resorted to by any Municipal Council in this country, I frankly do not know.

It does not seem to me that the provisions of Section 268 (2) are wide enough to withdraw altogether the jurisdiction of a Court to declare *ultra vires* a by-law which has been passed in excess of the authority of a local authority. Section 268 (1) certainly introduces an additional safeguard by postponing the operation of a by-law until it has been approved by the appropriate Minister and confirmed by Parliament. But the co-existence of Parliamentary and judicial control of delegated legislation are not incongruous. As I read Section 268 (2), the notification of such approval and confirmation gives validity to the by-law only if it had in the first instance been passed *intra vires* the local authority *and not otherwise*. A by-law that is from its inception *ultra vires* cannot thereafter atain what has been described as the " high water-mark of inviolability " which attaches to a Parliamentary enactment. If it were intended that the mere confirmation, however perfunctory, of a by-law passed in excess of a Council's authority, should thereby convert it into something possessing the force of inviolable law, the withdrawal of the jurisdiction of the Courts could have been expressed in less uncertain terms. This is the conclusion at which I have arrived after an examination of the opinions expressed by the majority of the members of the House of Lords who decided *The Chartered institutes of Patent Agents v. Lockwood (1894) A. C. 347*, and *Minister of Health v. Yaffe (1931) A. C. 494* with reference to legislation analogous to the provisions of Section 268 (2) of the local Ordinance.

As I have already pointed out, it is unnecessary for the purposes of the present appeal to decide whether or not the by-law declaring the business of " storing furniture " to be " offensive or dangerous " for the purposes of Section 148 is *ultra vires*. But I will say this: for some reason which is not apparent, the by-law does not even choose to proclaim which of these *alternative* reproaches was considered more appropriate to a business activity which most human beings, I imagine, would regard as singularly inoffensive and by no means dangerous to human life. Possibly it was felt that the storing of furniture in godowns or warehouses might introduce some element of inflammability. But if that were so, one would have expected the form of licence issued under Section 148 to impose conditions which would be calculated to reduce that risk. As it is, I for my part fail to see how the mere payment of an annual fee of Rs. 250 by a warehouseman could by itself prevent a conflagration. Be that as it may, I have already decided that, as far as the present appeal is concerned, the conviction cannot stand, and, for the reasons already indicated in my judgment, I make order acquitting him.

Appeal allowed.