

Present: Shaw J.

1917.

SANITARY INSPECTOR *v.* HARMANIS.

118—P. C. Galle, 3,806.

By-law prohibiting sale of fish outside market without a license—Sanitary Board rules—Ultra vires—Ordinance No. 8 of 1916—Small Towns Ordinance, 1909.

The Sanitary Board of Galle purporting to act under section 2, sub-section (2), of the Small Towns Ordinance, 1909, made a rule (D2) in 1911 forbidding the sale of fish without a special license of the Board at any place outside the public market.

Held, that the rule was *ultra vires*.

“Even supposing that, in consequence of Ordinance No. 8 of 1916, such a rule could be now made, the provisions of that Ordinance do not validate a rule made in 1911. But even if such a rule were now made it would be invalid.”

THE facts are set out in the judgment.

Hayley (with him *M. W. H. de Silva*), for appellant.

Cur. adv. vult.

February 19, 1917. SHAW J.—

The accused was charged, at the instance of the Sanitary Inspector of Dodanduwa, with having at Dodanduwa, within the limits of the Sanitary Board, sold salt fish in his boutique without a license, in breach of rule D2 of the Galle Sanitary Board rules published in

¹ *S. C. Min.*, Jan. 26, 1916.

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the *Government Gazette* of May 19, 1911, and has been convicted and fined Rs. 2.50. The accused has appealed on the ground that the rule is *ultra vires*.

The question raised is an important one, and not free from difficulty, and I regret that I have not had the opportunity of hearing counsel on behalf of the respondent.

The rule, which follows rule D1, containing provisions for establishing a public market, is as follows:—" 2. After such public market shall have been established and opened, no person shall without a license granted by the Board publicly expose for sale any meat, fish, fresh fruit, or vegetables in any place within the limits of the Board other than the public market. All sales of fish by auction shall be carried on in the public market, or at a spot set apart for the purpose. Sales elsewhere are forbidden, except under a special license of the Board. "

The rule then goes on to authorize the seizure of meat, &c., exposed or hawked about for sale contrary to the rule.

Rule D8 then provides for the form and issue of the licenses at a rate to be fixed annually by the Board, not exceeding 50 cents a month. The rule purports to be made under the authority of sub-section (2) of section 2 of the Small Towns Ordinance, 1909, which provides that a Sanitary Board may make regulations, *inter alia*:—" (d) For the establishment and regulation of its own markets and levy of rents and fees therein, and for the supervision and control of private markets, bakeries, eating houses, tea and coffee boutiques, butchers' stalls, fish stalls, washing places, common lodging houses, and latrines. "

At the time the rule under consideration was made, namely April, 1911, there was no provision in force in the Colony authorizing any public body that had power to make rules for regulation, supervision, or control, to issue licenses for the purpose of such regulation, supervision, or control.

In 1912, by section 7 of Ordinance No. 22 of 1912, it was provided:—" In any rule power to regulate, supervise, and control shall be deemed to include power to issue and refuse licenses without fee for the purpose of such regulation, supervision, or control. " Under this state of the law a rule was made by the Colombo Sanitary Board in January, 1913, that came up for consideration before the Full Bench of this Court in the case of *Perera v. Fernando*.¹ That rule was as follows:—" 1A. After such public market has been established and opened, no person shall without a license granted by the Chairman of the Board publicly expose for sale any meat, poultry, fresh fish, fresh fruit, or vegetables in any place within the limits of the Board other than the public market. " The Court held that the rule was *ultra vires*, and that a person who had sold fish outside the public market without a license could not be convicted of an offense.

¹ (1914) 17 N. L. R. 494.

The main ground on which the decision in that case went was that the power to make rules for "supervision and control" contained in sub-section (2) (d) of section 2 of the Small Towns Ordinance, 1909, did not authorize a rule forbidding sales outside the public market without license, because that was not "supervision or control," but might amount to absolute prohibition of lawful sales conducted in a proper manner, and, however you read the ambiguous and obviously erroneous wording of section 7 of Ordinance No. 22 of 1912, that section only authorized rules providing for the issue of licenses when power to "regulate" as well as to "supervise and control" is given.

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This section has now been repealed by Ordinance No. 8 of 1916, and the following substituted for it:—

- " (d) Power to make rules for regulation, supervision, protection, or control shall include power to make rules—
- " (1) For the issue of licenses for the purpose of such regulation, supervision, protection, or control.
 - " (2) For the cancellation of such licenses, &c.
 - " (3) For the refusal of licenses in cases of non-compliance, &c. "

The Magistrate was of opinion that this provision authorized the rule under consideration. I am unable to agree with him.

It is clear from the decision in *Perera v. Fernando* (*supra*) that this rule was *ultra vires* when made, and that it would have been so even if made subsequent to Ordinance No. 22 of 1912.

Even supposing that in consequence of Ordinance No. 8 of 1916, such a rule could be now made, the provisions of that Ordinance do not validate a rule made by a Sanitary Board in 1911, which had then no power to make such a rule. But even if such a rule were now made, it would, in my opinion, be invalid. The Ordinance says: "Power to make rules for regulation, supervision, protection, or control shall include a power to make rules for the issue of licenses for the purpose of such regulation, supervision, protection, or control." Thus, where there is power to make rules for regulation there is power to issue licenses for the purposes for such regulation; where there is a power to make rules for supervision, there is power to issue licenses for the purpose of such supervision, &c., but the Full Court has held in the case I have cited that the forbidding of sales outside the public market without license is not supervision or control; such a rule, therefore, is still invalid under an Ordinance that, like the Small Towns Sanitary Ordinance, 1909, only authorizes rules for supervision and control.

For both the reasons I have mentioned, I think the rule under consideration is *ultra vires*, and I accordingly set aside the conviction and acquit the accused.

Set aside.