1972 *Present :* **de Kretser, J.**

Mrs. V. D. FERNANDO, Appellant, *and* S. W. RATNAYAKE (Inspector, Municipal Engineer's Department, Colombo), Respondent

S. C. 396/70—M. M. C. Colombo, 39936

Municipal Councils Ordinance (Cap. 252)—Sections 4, 40, 57, 267, 268, 272, 320—Colombo Municipal Council—Trees overhanging private premises—Incompetence of Council to cut them down—By-law 47 of Colombo Municipal Council By-laws—Invalidity.

In Chapter 8 of the Colombo Municipal Council's By-laws, that portion of By-law 47 authorising the Municipal Council to cut down trees overhanging, and likely to prove dangerous to, purely private premises is *ultra vires.*

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

V. Tharmalingam, for the accused-appellant.

Sinha Basnayake, for the complainant-respondent.

Cur. adv. vult.

January 3, 1972. DE KRETSER, J.—

Mr. R. D. B. Jayasekera, Acting Municipal Magistrate found the Accused-Appellant guilty of having failed to cut down a coconut tree standing in the premises owned by her after service of notice from the Municipal Council, Colombo, requiring her to cut it down in terms of By-law 47 Chapter 8 of the Colombo Municipal Council's By-laws and thereby committing an offence punishable under By-law 2.

He fined her Rs. 15 in default one week's R.I. and the Appeal is against this conviction. The first point urged by Counsel for the Accused-Appellant is that the only remedy for a breach of the provisions of Rule 47 of Chapter 8 of the By-laws is that indicated in the latter part of the Rule itself, viz. the removal of the dangerous tree by the servants of the Municipal Council at the cost of the person failing to comply with the statutory notice. This same point was before Wood Renton C.J. in the Case of *Vanderwall v. Perera*[1] reported in 2 Ceylon Weekly Reporter at page 4. In that case the Chief Justice held that disregard of requirements lawfully made under that Rule are also punishable under Rule 2 of Chapter 25 and I am in respectful agreement with that view of the matter, but that does not conclude the Appeal for Mr. Tharmalingam has submitted that this By-law authorising as it does the Municipal Council to cut down trees overhanging, and likely

[1] *(1915) 2 C. W. R. 4.*

to prove dangerous to, private property is *ultra vires* ; he relied on the case of *Nicholas v. Happawana Terunnanse*[1] decided by Withers J. and reported in Vol. 2 of the New Law Reports at page 346. In that case Withers J. said " there is always a clear line between what concerns individuals and what concerns the Public. The Ordinance sanctions, and properly sanctions, the entrance on private grounds of Municipal officers, but in every case with the object of conserving the public good or preventing harm of any sort from affecting the public. If the Municipality may step in to prevent my tree from falling on my neighbour's house in the next garden it may step in to prevent my own tree falling on my own house or to prevent some accident to myself from the ruinous condition of my own house. Legislation aimed to protect one person from the consequence of what may be a nuisance on the part of his neighbour, but which does not affect or concern the general public in the least degree, was not intended, I imagine, by the Municipal Councils Ordinance. The person who is threatened by his neighbour's everhanging tree has a simple remedy in his own hands. Hence, in my opinion, that part of the By-law in question which relates to overhanging trees in purely private places is invalid ".

In *Nicholas v. Happawana Terunnanse* the facts were that Municipal officers had come to cut down a coconut tree which grew on the premises belonging to the accused and threatened to fall on a house in the next garden. The two lands were private premises over which the public had no right of way and the relevant portions of the By-law considered in that case was in these terms :— " If any fruit tree or any part of a tree within the limits of the Municipality be deemed by the Council to be likely to fall upon any house or building or to endanger the occupiers thereof or if the same be near any road or street and likely to affect the safety of passengers going along or using such road or street it shall be lawful for the Municipal Council . . . . . ". In the instant case the tree that the Accused was required to remove according to the evidence stood on the boundary of her premises and slanted into the adjoining premises which was a house. The fruits and leaves of the tree fell on the roof of that adjoining house. The officer who gave evidence said that the tree slanted at about 45 degrees and in his opinion the roots were weak and the tree threatened to fall, if there was heavy blowing, on the adjoining house. The relevant portion of By-law 47 reads " when any tree or branch or fruit of a tree within the limits of the Municipality shall be deemed by the Chairman to be likely to fall upon any house or building and injure the occupiers thereof or whenever the same shall overhang any street it shall be lawful . . . . . ".

The question whether By-law 47 is *ultra vires* came up for consideration in the case of *Sourjah v. Hadjiar*[2] reported in 18 N. L. R. at page 31. Lascelles C.J. held that it was not competent to a Court to entertain the question of the validity of a by-law after it had been passed with the formalities required by Section 109 of the Municipal Councils

[1] *(1897) 2 N. L. R. 346.* [2] *(1914) 18 N. L. R. 31.*

Ordinance of 1910. In so holding Lascelles C.J. said " several grounds had been taken in the appeal against the conviction of the Accused. The first, which was principally pressed, is that the By-law 47 in the Chapter is *ultra vires*. It is an objection that might perhaps have had some force, if the matter had not been disposed in principle by a previous decision of this Court in *Labrooy v. Marikar* (1907) 2 A.C.R. 63. It was there held that it was not competent to a Court to entertain the question of a validity of a by-law after it has been passed with the formalities required by Section 109 of the M.C. Ordinance of 1910l By that Section it is provided that after the by-laws had been approved of by the Governor in Executive Council they are as legally valid, effectual, and binding as if they had been enacted in the Ordinance ".

By-law 47 is kept alive in the present Municipal Councils Ordinance by Section 320 which provides for the continuance of existing by-laws, and Section 267 provides for the Municipality to have the power from time to time to make by-laws as may appear necessary for the purpose of carrying out the provision of this Ordinance while Section 268 enacts that no by-law shall have effect until it has been approved by the Minister, confirmed by the Senate and the House of Representatives and notification of such confirmation is published in the *Gazette*, while sub-section 2 states that every by-law shall upon the notification of such confirmation be as valid and effectual, as if it were herein enacted.

In the case of *Gunasekera v. The Municipal Revenue Inspector*[1] reported in 53 N. L. R. at page 229 Gratiaen J. said in reference to the provisions of Section 268 what in my opinion would be equally applicable to the provisions of Section 109 of the M.C. Ordinance which Lascelles C.J. thought prevented him from considering the validity of By-law 47.

Gratiaen J. said " 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 attain 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 Court would have been expressed in less uncertain terms ".

[1] *(1951) 53 N. L. R. 229.*

In my opinion these comments of Gratiaen J. which were *obiter* in *Gunasekera v. The Municipal Revenue Inspector* clearly state what I think is the true legal position in reference to by-laws *vis-a-vis* the provisions of Section 268. It is therefore open to me to consider whether or not that portion of By-law 47 which relates to overhanging trees in purely private places is not invalid. It appears to me that the remarks of Withers J. are entirely in point and I am of the view that this portion of By-law 47 is invalid.

A perusal of Section 4 of the Municipal Councils Ordinance which sets out the functions of a Municipal Council shows that a Municipal Council is charged " 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 the promotion of the comfort, convenience and welfare of the people and the amenities of the Municipality. "

The general powers as set out in Section 40, and matters in regard to which By-laws may be made set out in Section 272 all point to the concern of the Municipality as being for the public within its limits and not for the individual in contra-distinction to the public. It is not without significance in my view that when Section 57 was enacted giving the Municipal Council the power to cut trees that overhang streets it did not also give it the power to cut down trees that overhang private premises. The conviction and sentence is set aside and the Appeal is allowed.

Appeal allowed.