1948 *Present :* **Nagalingam J.**

FERDINANDUS, Appellant, *and* MUNICIPAL COUNCIL, COLOMBO Respondent

S. C. 80—C. R. Colombo, 6,618

Municipal Councils Ordinance—Act done under provisions of the Ordinance—Recovery of warrant costs—Prescription—Chapter 193—Sections 138 and 263.

Section 263 of the Municipal Councils Ordinance has no application unless the act which gives rise to the cause of action is one which falls within the express ambit of some provision of the Ordinance.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

M. C. Abeywardene, for the plaintiff, appellant.

E. B. Wikramanayake, for the defendant, respondent.

Cur. adv. vult.

June 30, 1948. NAGALINGAM J.—

The dispute between the parties to this case lies within a narrow compass and the point for determination is, whether the plaintiff's claim is barred by the provisions of section 263 of the Municipal Councils Ordinance. The facts as found by the learned Commissioner are briefly these : The plaintiff sent a blank cheque to the defendant Council in payment of the rates due by him in respect of certain premises, authorising the Council to fill the cheque for the amount due from him by way of

[1] *(1937) 39 N. L. R. 175.*

rates thereon. The Council filled up the cheque for the amount which represented not only the rates proper but also included a sum of 10 per cent. on the rates on account of warrant costs. The plaintiff in this action sues for the recovery of the warrant costs which, he alleges, have been wrongfully charged to him. The circumstances under which the Council claims to have included the 10 per cent. warrant costs arise in this manner : The letter containing the cheque was posted by the plaintiff on October 30, 1947, and should have normally reached the Council at the latest by October 31. According to the Council, the cheque has in point of fact been received on November 1. It is common ground that if the rates had been paid before October 31, no warrant costs could be charged but that if payment was made after October 31, the Council would be entitled to levy warrant costs.

The learned Commissioner has found that the Council must be deemed to have received the cheque on or before October 31, and that the Council did not become entitled to claim warrant costs in consequence. The plaintiff's action, however, was dismissed on the ground that the action had not been instituted within three months of the date of the accrual of the cause of action as provided by section 263 of the Municipal Councils Ordinance. This section prescribes the time limit in regard to an action instituted against the Council for anything done or intended to be done *under the provisions of the Ordinance.*

Now, what is the act which was done by the Council which is questioned by the plaintiff ? The plaintiff has asserted the act to be the appropriation of his funds by the Council by filling in his cheque for an amount larger than was due from him. The real act that is in question is not the appropriation but the filling up of the cheque, for it is this act that has enabled the Council to appropriate the funds. Now, the act of filling up the cheque is not an act done in pursuance of the provisions of the Ordinance. It was an act done or purported to be done by the Council under the authority conferred on it by the plaintiff. The plaintiff's authority was limited to the filling up of the cheque for the amount of the rates and did not extend to filling it up for any other amount, much less to include any sum by way of warrant costs. This act of the Council was one done in excess of the authority conferred on it by the plaintiff and cannot be justified as done under any provision of the Ordinance. Section 263, therefore, has no application. The case of *Perera v. Municipal Council, Kandy,*[1] supports the construction I have placed on this section. That was a case where the Municipal Council of Kandy was sued for having taken forcible possession of land, and in delivering the judgment of the Court, Soertsz J. observed :—

> " Section 231 applies to causes of action accruing from ' something done or intended to be done under the provisions of the Ordinance '. The entering into forcible possession of another's land cannot be done or intended to be done with any propriety under the Ordinance ; at least I hope so."

On this view of the matter alone, the judgment appealed from must be set aside, but the case has been argued on the footing that the imposition of warrant costs was the act which was done by the Council under the

[1] *(1937) 17 C. L. Rec. 116.*

provisions of the Ordinance. Assuming that this contention is entitled to prevail, the defendant's position is no better. Council for the respondent Council was able to point out to sections 135 and 138 of the Ordinance, as the provisions under which the levy of 10 per cent. was made by the Council. Section 135 prescribes that where the amount of the rate is not paid within the time specified by the Chairman, a warrant signed by the Chairman shall be issued to a collector directing him to levy such rate and the costs of recovery by seizure and sale of various classes of property specified therein, which it is needless to consider for the purpose of this appeal. Section 138 goes on to specify the costs that would be leviable at various stages. It enacts under sub-section (*a*) thereof that a charge of 10 per centum on the amount of the rates due could be levied by way of costs *on the issue of a warrant.*

It has not been suggested that at the time of the receipt of the plaintiff's cheque, even assuming for purposes of argument that the cheque was received by the Council on November 1, 1947, as alleged by it, a warrant *had* been signed. It cannot therefore be said that at the time that the Council filled up the cheque, which it must be deemed to have filled at the time it received it, any warrant costs became leviable by it because no warrant had in point of fact been signed by the Chairman. In these circumstances, it is plain to see that the act of the Council in charging the plaintiff with warrant costs cannot be held to have been performed in pursuance of the provisions contained in sections 135 or 138 of the Ordinance, which are the only provisions enabling and entitling the Council to claim the warrant costs. The act of the Council, therefore, claiming warrant costs must be regarded as an act done outside the provisions of the Ordinance.

It has, however, been contended that although the act may not strictly have been performed within the provisions of the Ordinance, the act was *intended* to be done in pursuance of the provisions of the Ordinance. To construe the provision in this manner would lead to the result that an act, however irregular and however unwarranted by any provision of the Ordinance, must be regarded as justified, if one is able to point out some provision of the Ordinance which, though it may not cover the case, may remotely be regarded as the foundation for the illegal or improper act that is called in question. I do not think that this construction can be justified. If the act does not fall within the express ambit of the section, in my opinion it can neither be regarded as having been performed under the provisions of the Ordinance nor as an act intended to be performed under any such provision. If, therefore, the act of the Council claiming warrant costs is not an act done under the provisions of the Ordinance, then the act is beyond the pale of the provisions of section 263 and the time bar has no application.

In the result, the plaintiff is entitled to a refund of the sum appropriated by the Council as warrant costs. I therefore set aside the judgment appealed from and enter judgment for plaintiff as prayed for with costs both in this Court and the Court below.

Appeal allowed.