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BA RURAL LOCAL AUTHORITY

v.

B

RAM KHELAWAN

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 27th June, 10th July]

Civil Jurisdiction

C

Local government—regulations by Central Board of Health—whether *intra vires*—*delegatus non potest delegare*—distinction between delegation of legislative and administrative powers—power to control and regulate activity—not inclusive of power to prohibit unconditionally—limitation of activity to conform with regulations—Public Health Ordinance (Cap. 91) ss.6, 9, 10, 13, 39, 48, 52, 127—Public Health Regulations (Cap. 91) Regs. 45, 47, 49, 57-88, 92, 93-106, 108-116, 142, Part 8—Local Government Act 1915 (Victoria) s.198(1)—Interpretation Ordinance 1967 s.25—Dangerous Drugs Act 1920 (10 & 11 Geo. 5, c.46) (Imp.) s.7.

D

Interpretation—regulations—whether *intra vires*—unauthorised delegation of legislative powers—power to control and regulate an activity—limits of power—does not include absolute prohibition—prohibition ensuring compliance with regulation permissible—Public Health Ordinance (Cap. 91) ss.6, 9, 10, 13, 39, 48, 52, 127—Public Health Regulations (Cap. 91) Regs. 45, 47, 49, 57-88, 92, 93-106, 108-116, 142, Part 8—Local Government Act 1915 (Victoria) s.198 (1)—Interpretation Ordinance 1967 s.25—Dangerous Drugs Act 1920 (10 & 11 Geo. 5, c.46) (Imp.) s.7.

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The respondent was charged in the Magistrate's Court with (a) contravening regulation 45 of the Public Health Regulations, which provides (*inter alia*) that no person shall erect any building or add to or alter the ground floor of any building without the permission in writing of the local authority and (b) contravening regulation 92 of the same regulations, which provides (*inter alia*) that the owner of a newly constructed building shall not occupy it without first obtaining from the local authority a certificate of inspection that the building is constructed in accordance with the regulations. The local authority in each case was the appellant Authority established under the provisions of section 10 of the Public Health Ordinance, and the regulations in question were made by the Central Board of Health. Section 13 (a) of the Ordinance empowers the Board to make regulations for the "definition and regulation of the powers and duties of local authorities", and section 39(b) provides that the Board may make regulations in respect of (*inter alia*) "the construction of buildings overcrowding, maintenance and occupation thereof, and such matters relating to buildings as the Board may consider necessary." The magistrate held that regulations 45 and 92 were *ultra vires* the Board and therefore invalid. On appeal —

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Held: 1. The power given by section 13 of the Ordinance to define and regulate the powers and duties of local authorities did not empower the Board to give to local authorities powers additional to those given them by the Ordinance or by some other Ordinance; powers must be pre-existing before regulations defining and regulating them can be made.

2. Apart from section 18 of the Public Health Ordinance (which is not relevant) neither that nor any other Ordinance confers any general power upon the appellant Authority to control the erection of new buildings. A

3. Section 39 of the Public Health Ordinance does not empower the Board to delegate to local authorities any legislative power in respect of buildings.

4. Even accepting that the "permission" of the local authority required by regulation 45 is to be read in relation to the plans which it is authorised to approve by regulation 49, the Board has purported to delegate a power to legislate i.e. to decide what rules must be followed by those wishing to erect a new building. Regulation 45 is therefore *ultra vires*. B

5 (a) Regulation 92 merely delegates to the Authority the purely administrative duty of checking and certifying that a newly constructed building has been constructed in accordance with regulations. C

(b) Section 39 of the Ordinance must be construed as giving the Board power to control and regulate occupation and nothing more.

(c) Where power is given to regulate an activity a regulation purporting to prohibit the activity entirely is *ultra vires* but the limitation of an activity so that it conforms with and is not undertaken except in compliance with the regulation is *intra vires*. Regulation 92 is of the latter type and is accordingly not *ultra vires*. D

Cases referred to: *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746; *Hookings v. Director of Civil Aviation* [1957] N.Z.L.R. 929; *Geraghty v. Porter* [1917] N.Z.L.R. 554; *Mackay v. Adams* [1926] N.Z.L.R. 518; *Toronto (City) Municipal Corporation v. Virgo* [1896] A.C. 88; 73 L.T. 449. E

Appeal by a Local Authority against the dismissal by a magistrate of charges under the Public Health Regulations on a finding that the particular regulations were *ultra vires*. F

J. R. Reddy for the appellant Authority.

M. S. Sahu Khan for the respondent.

THOMPSON J.: [10th July 1969]—

The appellant, a local authority established under the provisions of section 10 of the Public Health Ordinance (Cap. 91), prosecuted the respondent in the magistrate's court of the first class at Ba. The charge consisted of the following two counts: G

First Count

STATEMENT OF OFFENCE H

"Erecting a building without first obtaining permission in writing of the Local Authority, contrary to Regulations 45 and 142 of the Public Health Regulations, Cap. 91.

Particulars of Offence

- A RAM KHELAWAN s/o Sita Ram of Yalalevu, Ba in the Western Division did on or about the 5th day of April, 1968 at Yalalevu, Ba erect a building, to wit, a lean-to dwelling without first obtaining permission in writing of the Ba Rural Local Authority.

Second Court

- B *Statement of Offence*

Occupying a newly constructed building without first obtaining a Certificate of Inspection of the Local Authority, contrary to Regulations 92 and 142 of the Public Health Regulations, Cap. 91.

Particulars of Offence

- C RAM KHELAWAN s/o Sita Ram of Yalalevu, Ba in the Western Division did on or about 5th day of April, 1968 at Yalalevu, Ba occupy a newly constructed building without first obtaining a Certificate of Inspection from the Ba Rural Local Authority."

- D At the close of the prosecution case, the learned magistrate held that Regulations 45 and 92 of the Public Health Regulations were *ultra vires* and that in consequence no offence was disclosed. In addition to making his submission that these regulations were *ultra vires*, Mr. Sahu Khan, who appeared for the respondent in the lower court as well as in this court, argued that the prosecutor had in any event failed to prove the facts constituting the offences which they purported to create. The learned magistrate, having held that the regulations were *ultra vires*, had no need to rule on this latter submission and did not do so.

E The relevant portion of his judgment reads :

"Counsel submitted that the effect of the two Regulations was to give the Central Health Board absolute power to prohibit that which the Enabling Ordinance provided should be regulated.

- F Counsel cited several cases in support of his argument but the one which impressed me as being directly in point was *Swan Hill Corporation v. Bradbury* a decision of the High Court of Australia and reported in Commonwealth Law Reports Volume 56 at page 746. The facts of this case are almost exactly the same as in the present case under Ruling. In opening his judgment Evatt J. observed 'the general intention implied in Section 198 (1) would seem to be that, when the bye-law has been made, it will lay down a general law or code or rule in relation to the purpose specified in the statute and not merely attempt to reserve to the Council itself discretions so wide that no general law or code or rule remains.' Later in his judgment Evatt J. stated 'But I am of the opinion that it (the Council) cannot lawfully arrogate to itself a general and uncontrolled power of refusing permission to build.'

- H The Judge ultimately found that the bye-law was invalid and dismissed the appeal.

I am satisfied that in the present case the same principle applies and I am driven to the conclusion that the relevant Regulations 45 and 92 are *ultra vires* and therefore invalid."

A number of cases have been cited by Mr. Sahu Khan in these proceedings, as they were in the lower court. I shall return to consideration of some of them later. At this stage I have to make the point that in all of them the court considered most carefully the terms of the enabling provisions under which the regulations, or bye-laws, under consideration had been made. Indeed it is only by construing those provisions that any court can determine whether or not subsidiary legislation or bye-laws are *intra vires* or *ultra vires*. No rule, regulation or bye-law which purports to derogate from the rights of the individual under the common law and statute law of the land is valid unless it comes within the ambit of the enabling provision. The body making the subsidiary legislation or bye-laws cannot give to itself thereby powers which are not given to it specifically, or by necessary implication, by the enabling statute or which it does not possess already by virtue of some other law.

The Public Health Regulations relate to a wide range of subjects, from the duties of Medical Officers of Health to laundries, butchers' shops and garbage pans. They also include parts relating to the proceedings of local authorities and to buildings. They are stated to have been made under the provisions of sections 6, 13, 39, 48, 52 and 127 of the Public Health Ordinance. Of these sections the only two which need to be considered in respect of Regulations 45 and 92 are sections 13 and 39. Part VIII of the Regulations, the part relating to buildings is shown as being made under the provisions of section 39; by virtue of the provision of section 25 of the Interpretation Ordinance, 1967, however, that subsidiary legislation shall be deemed to be made in exercise of all powers thereunto enabling, the Regulations would be valid if within the ambit of section 13 even if outside that of section 39. It is necessary, therefore, to consider the provisions of both sections. The sections are:

"13. The Board may, subject to the approval of the Governor in Council, from time to time make regulations for —

- (a) the definition and regulation of the powers and duties of local authorities and of the officers thereof;
- (b) the proceedings and place of meeting of local authorities and of committees thereof."

"39. The Board may, with the approval of the Governor in Council, from time to time make regulations under this Part of this Ordinance which may be applicable to the whole of Fiji or any defined part of Fiji in respect of —

- (a) the type, position, construction and maintenance of privies and the number of privies to be provided in respect of any particular class of buildings;
- (b) the construction of buildings including the sites, plans, building lines, air space, drainage, access, materials, workmanship, ventilation, overcrowding, maintenance and occupation thereof, and such matters relating to buildings as the Board may consider necessary."

A Under the provisions of section 13 the Central Board of Health has power to make regulations to "define and regulate" the powers and duties of local authorities and their officers. To define powers means to state their precise bounds. The powers must be pre-existing before the regulations defining and regulating them can be made. This section does not enable the Board to give to local authorities powers additional to those given by the Ordinance or by any other statute. The Ba Rural Local Authority exists only by virtue of the provisions of section 9 of the Ordinance; there are no statutory provisions other than those contained in the Public Health Ordinance which give it any powers, or impose on it any duties, in respect of buildings. Unless, therefore, the general power to control the erection of new buildings in its area can be found to have been given to the Authority by any provision of the Public Health Ordinance, the Board had no power to make a regulation under section 13 to define such a power. I have carefully read the provisions of the Ordinance and there is none which gives the Authority general power to control the erection of new buildings. Section 18 prohibits the erection of any building on land not filled in and levelled to the satisfaction of the Authority. But, once the site has been made satisfactory, there is no further power vested in the Authority to control the erection of a building on that land.

D It is necessary, therefore, to turn to section 39 to ascertain whether that section enables the Board to make regulations giving the Board the power generally to control the erection of new buildings. There is no reference whatsoever in that section to any powers to be vested in local authorities.

E It is, of course, a necessary part of the day-to-day administration of many regulations that they should be supervised and policed by individuals or bodies. It is well-recognised that a person, or body, to which the power has been given to make subsidiary legislation, can empower its own officers or other persons to supervise the working of its regulations and to make the administrative decisions necessary to carry them into effect. This was stated by Turner J. in *Hookings v. Director of Civil Aviation* [1957] N.Z.L.R. 929 at 935 in the following manner:

F "Many regulations leave their actual administration in hands of officers or officials, and every citizen is constantly faced with the obligation of obeying administrative decisions made in the course of the detailed carrying out of regulations properly formulated." He then proceeds to contrast such regulations with those which "purport to give him legislative powers".

G It is not lawful, however, for a person to whom a power to legislate has been delegated to delegate any part of that power of legislation unless he is expressly empowered to do so. This was well expressed by Sim J. in *Geraghty v. Porter* [1917] N.Z.L.R. 554 at 556 as follows:

H " In making regulations such as these the Governor-General is exercising a delegated power of legislation. Such a delegated authority must be exercised strictly in accordance with the powers creating it: 27 *Halsbury's Laws of England*, 124; and in the absence of express power to do so the authority cannot be delegated to any other person or body. The rule on the subject is expressed in the

maxim *delegatus non potest delegare*, and is of general application, although the cases in which for the most part it has been applied have been those arising out of the relation of principal and agent.”

A

There are, therefore, two questions which require to be answered :

- (1) Does section 39 empower the Board to delegate to local authorities any legislative power in respect of buildings?
- (2) If not, is the power given by Rules 45 and 92 a legislative or an administrative power?

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The answer to the first question is, without doubt, that section 39 empowers the Central Board of Health to legislate by making regulations but does not enable it to empower any other person or body to do so.

In order to answer the second question it is necessary to examine exactly what regulations the Board has made “in respect of the construction of buildings” and “matters relating to buildings” and whether the Authority’s function under the regulations is merely to apply those regulations and ensure that others do so or to exercise its own discretion on matters which are not regulated by any regulations.

C

In *Mackay v. Adams* [1926] N.Z.L.R. 518 the court had to consider the validity of a regulation, contained in a set of regulations, under which a controlling authority was empowered to give written permission in respect of particular motor-lorries, or particular classes of motor-lorries, for them to travel in excess of the limit of the speeds laid down by other regulations of the same set. In that case it was held that the regulation was *intra vires*. Sim J. set out the distinction between these circumstances and those in *Geraghty’s* case in the following passage (p.522):

D

“ There is nothing in this view which conflicts, I think, with the decision in *Geraghty v. Porter*, for in that case there was a complete delegation to the registering authority of the power of determining the manner in which the identification marks were to be fixed and to be rendered distinguishable. Until the registering authority had settled that, the regulation could not operate in any way.”

E

Regulation 45 of the Public Health Regulations reads :

“45. No person shall erect any building or add to or alter the ground plan of any existing building or carry out repairs costing more than thirty pounds to any building without the permission in writing of the local authority or any person duly authorised to act on its behalf.”

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Regulation 47 provides for the making of applications to local authorities outside township areas for permission to erect a new building, etc. and for the local authorities to have power, in respect of such applications, to call for plans of construction and drainage. They are apparently not obliged to call for them.

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Regulation 49 is then in the following terms :

“49. The local authority may approve such plans, elevations, sections and specifications, or specify the alterations which shall be made in the same before granting such approval :

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Provided that, unless the local authority within one month from the receipt of any such application accompanied by plans, elevations, sections and specifications, notifies its approval of the same, or specifies the

A alteration which shall be made as aforesaid, the local authority shall be deemed to have approved thereof, subject to the building therein referred to being in conformity with the provisions of this Part of these Regulations :

Provided also that any such approval shall be deemed to have lapsed unless the building therein referred to is commenced within six months from the date of such approval."

B Regulations 57 to 88, 93 to 106 and 108 to 116 contain a large number of provisions relating to the construction of buildings and the work to be carried out appertaining thereto. There is, however, no reference to these regulations in Regulation 49, except in the proviso; the local authority's power to specify alterations which must be made to the plans is not restricted to requiring that the plans be altered to comply with those regulations. If it were so restricted it could, in my
C view, properly be held that the power delegated to the local authority was only a power to supervise and police those regulations to ensure that they were complied with. As there is no such restriction, however, the local authority could require a plan to be altered not in order to make it comply with those regulations but so that it would conform to some view held for the time being by the local authority, possibly a mere whim or based on lack of adequate expert knowledge or experience.

D It is by no means certain that the "permission in writing" required by Regulation 45 is the approval of the plan under Regulation 49. There is no reference in Regulation 45 to Regulation 49. However, even if it is accepted that that is how Regulation 45 should be construed, as has been urged by the learned Crown Counsel, I have no doubt that by Regulation 49 the Central Board of Health has purported to delegate
E to local authorities a power which it has itself no power to delegate, that is the power to legislate, to decide what rules must be followed by those wishing to erect a new building. Regulation 45 is, therefore, *ultra vires*. Accordingly I uphold the decision of the learned magistrate in respect of count 1 and dismiss the appeal in respect of that count.

Regulation 92 reads :

F "92. The owner of a newly constructed building shall not occupy, use or permit to be occupied or used, such building without first obtaining from the local authority a certificate of inspection in the form set out in the Second Schedule hereto that the building is constructed in accordance with these Regulations."

G This is a very different type of provision from that contained in Regulation 45. All that has been delegated is a duty to the local authority to check and certify that a newly constructed building has been constructed in accordance with regulations regulating the construction of buildings. This is a purely administrative duty. No legislative power has been delegated.

H Mr. Sahu Khan has submitted, however, that the regulation is *ultra vires* because it prohibits occupation, whereas section 39 of the Ordinance empowers the Board only to regulate it. Section 39 is poorly drafted: it is not even grammatical. It does not specify the purpose for which regulations may be made, only the subject-matter to which they must relate. Although power can be given by the legislature to

make regulations which do not merely regulate an activity but actually prohibit it — e.g. regulations made under the provisions of section 7 of the English Dangerous Drugs Act, 1920 — such power needs to be given specifically or by necessary implication. Where the power given is vaguely stated, it cannot be taken to include the power to prohibit an otherwise lawful activity and so to restrict the liberty of the subject, unless this is a necessary implication of the enabling section.

Thus, insofar as section 39 empowers the Board to make regulations “in respect of overcrowding”, it is a necessary implication that it has power to make regulations defining the stage at which buildings are deemed to be overcrowded and to prohibit the overcrowding. But this does not mean that the power given to make regulations in respect of occupation extends to prohibition of occupation, except to the extent that such occupation constitutes overcrowding.

In my view, section 39 must be construed as giving the Board power to control and regulate occupation, nothing more. Where power is given only to regulate an activity, a regulation purporting to prohibit it entirely is *ultra vires*. This is well established by the line of cases starting with *Municipal Corporation of the City of Toronto v. Virgo* [1896] A.C. 88, to which reference was made by learned counsel for the respondent both in the lower court and in this court. However, the regulation of an activity frequently necessitates the limitation of the activity so that it conforms with regulations made and is not undertaken except in compliance with those regulations. If activity were permitted which did not comply with such regulations, the activity could not be said to be regulated. Such limitation is, in fact, prohibition of the activity except insofar as it complies with the regulations. Prohibition of this type must be contrasted with both unconditional prohibition and prohibition conditional upon something other than non-compliance with the regulations. These latter types of prohibition are *ultra vires* a power to regulate the activity; the former type is *intra vires*.

It is necessary to examine Regulation 92 to ascertain which type of prohibition it imposes. If it had read simply that the owner should not occupy a newly constructed building unless it had been built in accordance with the regulations, there could, I consider, have been no doubt that such prohibition was *intra vires*. But it prohibits occupation unless a certificate has been obtained from the local authority that the building has been inspected and is constructed in accordance with the regulations. There is no other provision relating to the manner or time for the inspection but it is clear that, provided the building has been constructed in accordance with the regulations, the local authority cannot refuse to issue the certificate. If it fails to do so, or delays unduly, it can doubtless be compelled by the courts to give the certificate. This provision, therefore, does not change the type of the prohibition. It is not an unconditional prohibition; nor is it conditional on something other than non-compliance with the regulations. It is, therefore, not *ultra vires*.

I turn now to the question whether the evidence adduced by the prosecution in the court below was sufficient to establish *prima facie* the offence charged in the second count. Mr. Sahu Khan has submitted that there was no evidence that the respondent was the owner of the building

- or that he was occupying it on the date stated in the charge. The
- A prosecutor, a health inspector, gave evidence that he found the newly erected building occupied and that, when he spoke to the respondent at the market, the respondent told him that he had built because he had no place to go. In my view, there is one inference only that can be drawn from this remark, namely that the respondent was the owner of the building and was the person occupying it. The prosecutor also gave evidence that, at the time when he was giving evidence, the building
- B was still occupied. The use of the word "still" indicates continuity. If there had been a break in occupation and then repetition the word "again" would have been used instead of "still". The prosecutor clearly meant that the occupation to which he had previously referred, i.e. that observed first in January, had continued up to the time of the trial and was still continuing. He was not cross-examined to suggest that there had been a break in occupation. There was, therefore, *prima facie* evidence that the occupation was taking place on the intervening date
- C specified in the charge, 5th April.

The appeal in respect of the second count must, therefore, be allowed. The order dismissing the case and acquitting the respondent in respect of that count is set aside. I order that this case be remitted to the magistrate's court of the first class at Ba and direct that it be proceeded

D with therein on the basis that the prosecution has established *prima facie* that the respondent committed the offence charged in the second count.

Appeal allowed on second count — remitted to Magistrate's Court.