SUPREME COURT

M.S. Perera
Vs.
Forest Department and Another

S.C. Appeal No 1/80 - S.C. Application No. 645/73(C.A.)
M.C. Gampaha Case No. 65797/A

Forest Ordinance as amended by Act No.13 of 1961 – section 24 the Regulation (5) made thereunder by the Minister empowering Official to perform certain acts – Ultra Vires Rule – Delegatus non potest delegare.

Accused Appellant was convicted by a Magistrate for transporting timber into or out of prohibited areas without a permit from an authorised officer and thereby contravening regulation (5)2 made by the Minister under section 24 of Forest Ordinance. Appellant moved in revision to have conviction set aside on the ground that the regulations were ultra vires the Minister's powers.

The Appellant contended that the aforesaid regulations were ultra vires and invalid as the Minister to whom Parliament had delegated power to (a) specify the area within or out of which timber could not be transported without a permit and (b) to designate the officer authorized to issue the permit. could not validly delegate that power to the Conservator of Forests.

Held: that the regulation 5(1) or (2) is not ultra vires the Minister's powers as the Conservator acts as the Minister himself and his decision is the Minister's decision and that offical is the alter ego of the Minister.

APPEAL from Judgment of the Court of Appeal.

Present: Sharvananda J., Wanasundera J. and Ratwatte J.
Counsel: Walter Jayawardene, Q.C., with Nimal Senanayake, Senior Attorney-at-Law, Kithsiri Gunaratne, (Miss) S.M. Senaratne and Saliya Mathew for the Accused - Petitioner- Appellant.
M.M. Zubair, Senior State Counsel, for the Attorney-General.
Argued on: 12th, 15th & 25th January 1982.
Decided on: 11th March 1982. *Cur. adv. vult.*

SHARVANANDA J.

The accused-appellant was charged along with another with having transported timber in a prohibited area without a permit and thereby contravened Regulation 5(2) made under the Forest Ordinance. He was convicted on his own plea and fined Rs. 100/-, while the other accused was discharged. He moved in revision to have the said conviction quashed on the ground that the Regulation in question was ultra vires and therefore his conviction and sentence were illegal. The Court of Appeal rejected his contention and dismissed the application. The appellant has preferred this appeal from the judgment of the Court of Appeal.

Section 24(1) of the Forest Ordinance (Cap. 451) as amended by Act No. 13 of 1966 provides as follows:

> "The Minister may make regulations respecting the transit of all forest produce by land or water. Such regulations may, among other matters:
>
> (a) Prohibit the transport of timber within, into, or out of any specified local area without a permit from any Forest Officer duly authorised to issue the same or otherwise than in accordance with the conditions of such permit."

The other provisions are not material for the present purposes.

The Minister made the relevant Regulation 5 published in Part I of Government Gazette No. 14710/7 of 29th August 1966. It reads as follows:

"1. The Conservator of Forests may, by notification published in the Gazette, for the purpose of section 24(1)(b) of the Ordinance specify any area as an area within, into, or out of which timber of any species specified in the notification shall not be transported without a permit issued by an officer authorised in that behalf.

2. No person shall within or out of any such area transport or cause to be transported timber of any species specified in such notification without a permit issued by a Forest Officer authorised in that behalf by the Conservator of Forests."

The notification made by the Conservator of Forests is published in Gazette No. 14710/7 of 29th August 1966.

It was the contention of senior Counsel for the Appellant that the aforesaid Regulation is ultra vires and invalid in law, as the Minister to whom Parliament has delegated the power (a) to specify the area within or out of which timber could not be transported without a permit, and (b) to designate the officer authorised to issue the permit, could not validly delegate that power to the Conservator of Forests. He based his argument on the maxim "delegatus non potest delegare" and relied on two unreported judgments which had upheld this contention. The first of these case was the case of *Wickremaratne v. Samarasinghe* et al (S.C. 1238 - 39/68, M.C. Badulla 7280 - S.C. minutes of 8th May 1970). In that case, De Kretser J., sitting alone, held that the delegation was ultra vires as offending the principle "delegatus non potest delegares." According to him, a perusal of Regulation 5 established that the Minister was thereby giving the Conservator of Forests the right to decide:

"(a) Which the specified local areas are "within, into, or out of which" timber could not be transported without a permit, and

(b) Who the Forest Officers are to whom the Conservator had given authority to issue permits."

and that these rights which have been entrusted by Parliament to the Minister by section 24 to be exercised by him personally had been wrongly delegated by him to the Conservator of Forests. He referred to the significance of section 65 of the Forest Ordinance which provides that "all regulations or rules made or approved by

the Minister under this Ordinance shall be published in the Gazette and shall thereupon have the force of law." He adverted also to section 59(e) of the Ordinance and stated that under this provision, the Minister "could not authorise the Conservator to authorise other officers to issue permits." He concluded that Regulation 5(1) and (2) were bad because of unauthorised sub-delegation.

The second decision was *Podiratne and another v. Range Forest Officer Puttalam* (S.C. 163/72, M.C. Puttalam 11394 - S.C. minutes of 11th November 1975), which was a decision of two Judges of the last Supreme Court, where Weeraratne J., with Tennekoon CJ. agreeing, followed the decision of De Kretser J. and held that Regulation 5 was ultra vires the Forest Ordinance on the ground of alleged sub-delegation, as held by De Kretser J.

However, in the case of *R.F.O., Ratnapura, v. Nandasena* (S.C. 969/73, M.C. Ratnapura 82530 - S.C. minutes of 27 February 1975), Walpita J., with Ismail J. agreeing, disagreed with the judgment of De Kretser J. and held that Regulation 5 did not involve any delegation of legislative power that was vested in the Minister and that what was delegated was only an 'administrative power', the delegation of which power was not prohibited. This judgment of Walpita J. had apparently not been brought to the notice of Weeraratne J. and Tennekoon CJ.

Section 24 of the Forest Ordinance authorised the Minister to make regulations respecting the matters referred to in that section. Section 65 of the Ordinance vests these regulations with the force of law on their publication in the Gazette. It is not disputed that the aforesaid Regulation 5 along with the other Regulations appearing in Gazette No. 14710/7 were made by the Minister. He has exercised the power delegated to him by the Legislature. He has not delegated that function to the Conservator of Forests. All that he has done under the aforesaid Regulation 5 is to impose on the Conservator of Forests the duty or obligation of specifying the areas and the species of timber to which the regulations are to apply and to empower the Conservator to authorise Forest Officers to issue the relevant permits for the transportation of such timber.

The question in issue is whether by Regulation 5 the Minister has sub-delegated to the Conservator of Forests, his principal Forest

Department official, a part of the legislative powers vested in him by section 4 of the Ordinance, as held by De Kretser J., or merely delegated a part of his administrative powers, as held by Walpita J.

There is a strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to it. - see *King Emperor v. Benoari Lal Sarma* [1945] A.C. 14, 24. "When Parliament has specifically appointed an authority to discharge a legislative function, a function normally exercised by Parliament itself, it cannot readily be presumed to have intended that its delegate should be free to empower another person or body to act in its place." (De Smith - Judicial Review of Administrative Action, 4th Ed. at 300). It is undoubtedly true that the Minister acting under section 24 must himself discharge the duty of legislation there cast upon him and cannot transfer it to other authorities. In my view, the Minister has not by Regulation 5 delegated his legislative powers at all. By that regulation, the Minister has endowed the Conservator of Forests with the administrative power of specifying or demarcating the areas within or out of which timber or any species specified therein could not be transported without a permit and of authorising Forest Officers to issue the relevant permit.

Denning LJ. in *Lewisham Borrough Council v. Roberts* ([1949] 1 A.E.R. 815 at 824), brought out the distinction:

> "I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department. The Minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of Government."

In the same case, Jenkins J. elaborated at page 828:

> "A Minister must perforce, from the necessity of the case, act through his departmental officials, and where, ... functions are expressed to be committed to a Minister, those functions must as a matter of necessary implication, be exercisable by the Minister either personally or through his departmental officials, and acts done in the exercise of those functions are equal acts of the Minister whether they are done by him

personally, or through his departmental officials, as in practice except in matters of the very first importance they almost invariably would be done. No question of agency or delegation as between the Minister and Mr. O'Gara (the official) seems to me to arise at all."

Constitutionally there is no delegation by the Minister to his officials. When an officer exercises a power or discretion entrusted to him, constitutionally and legally that exercise is the act of the Minister. If a decision is made on the Minister's behalf by one of his officials, then that constitutionally is the Minister's decision. It is not strictly a matter of delegation. It is that the official acts as the Minister himself and the official's decision is the Minister's decision. When a Minister is entrusted with administrative as distinct from legislative functions, he is entitled to act by any authorised officer of his department. The Minister is not bound to give his mind to the matter personally. This is implicit in the modern machinery of Government. In the *Lewisham Borrough Council case* (supra), it was held that the powers there in question were not legislative but merely administrative and that the Minister was entitled to delegate them, as he did.

The rationale of the principle has been lucidly explained by Lord Greene MR. in *Carltona, Ltd. v. Commissioner of Works* [1943] 2 A.E.R. 560 at 563.

"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the minister by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such officials is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for any

important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers being responsible to Parliament will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

Thus, if a decision is made on the Minister's behalf by the Conservator of Forests, then that constitutionally is the Minister's decision. It is not strictly a matter of delegation; it is that the Conservator acts as the Minister himself and his decision is the Minister's decision. That is the normal way in which executive business is done. The official is the alter ego of the Minister.

Looked at in the light of the principles enunciated above, it appears to me that the delegation in question in the present appeal is not a delegation of legislative power or function. There is nothing in the nature of entrustment of legislative power by that section - at most there is a delegation of administrative function or power only. It related simply to specifying the area and the species of timber to which the regulations are to apply; it further delegated to the Conservator of Forests the power to authorise particular Forest Officers to issue permits for the valid transportation of timber. There is, so far as I can see, nothing in the nature of legislation in such a reservation. In my view, De Kretser J. had not addressed his mind to this aspect of the matter. He had failed to draw the distinction between delegation of legislative power and conferment of administrative powers on his principal departmental officer, viz. the Conservator of Forests, and had thus come to misapply the maxim "delegatus non potest delegares" to the provision in Regulation 5. As Walpita J. in his judgment pointed out, "one cannot expect the Minister in the midst of his manifold duties to take upon himself personally the task of specifying or demarcating the areas or the species of timber to which prohibition applies. This administrative matter has to be passed on to his Departmental officials, for whose actions he is responsible to Parliament. Regulation 5 only makes this clear. It is also not a matter of such vital importance to which it can be said he must give his personal attention."

Mr. Jayawardene addressed us on section 65 of the Forest Ordinance, which provides that:

> "All regulations or rules made or approved by the Minister under this Ordinance shall be published in the Gazette and *shall thereupon have the force of law.*"

and submitted that this section does not preclude judicial review of the vires of the Regulation. He questioned the correctness of the view expressed by Lord Herschell in *Institute of Patent Agents v. Lockwood* (1894 A.C. 347) that the purpose of such a section was to give subordinate legislation the same effect as an Act of Parliament. In *Ran Banda v. River Valleys Development Board* (71 N.L.R. 25), this question was considered and Weeramantry J. held that the clause that the Regulation shall be "as valid and effectual as though it were herein enacted" did not confer validity on a regulation which was outside the scope of the enabling powers. I agree with Weeramantry J. that formulae such as contained in section 65 do not bar the Court from reviewing the validity of the Regulation on the ground of being in excess of the statutory authority. This question was recently considered by the House of Lords in *Hoffmann-La Roche v. Secretary of State* ([1974] 2 A.E.R. 1128) and the majority of the Court held that the Courts have jurisdiction to declare an order made by statutory instrument to be invalid, even though, in accordance with the requirements of the enabling legislation, it has been approved by both Houses of Parliament. Lord Morris stated the position thus at page 1140: "Whereas the Courts of Law could not declare that an Act of Parliament was ultra vires, it might be possible for the Courts of Law to declare that the making of the order (even though affirmatively approved by Parliament) was not warranted within the terms of the statutory enactment from which it purported to derive its validity." The view expressed by Lord Denning MR. in the Court of Appeal in the same case [1973] 3 A.E.R. 945 at 954, 955 that "an order made by statutory instrument acquires the status of an Act of Parliament" was disapproved by both Lord Diplock and Lord Cross of Chelsea.

In my judgment, De Kretser J. in *Wickramaratne v Samarasinghe et al* S.C. 1238 - 39/68, M.C. Badulla 7280 (S.C. minutes of 8th May 1970) erred in holding that Regulation 5(1) and (2) was ultra vires on the ground of sub-delegation of legislative power; the view expressed by Walpita J. in *R.F.O., Ratnapura v. Nandasena* (S.C. 969/73, M.C. Ratnapura 82530 - S.C. minutes of 27th February 1975)

represents the correct legal position respecting the validity of Regulation 5.

I hold that the aforesaid Regulation 5(1) and (2) is not ultra vires and I affirm the judgment appealed from and dismiss the appeal.

Wanasundera J. – I agree.
Ratwatte J. – I agree.

Appeal dismissed