

LIYANAGE AND OTHERS
V
GAMPAHA URBAN COUNCIL AND OTHERS

COURT OF APPEAL,
WIJETUNGA, J. AND
S.N. SILVA, J.
C.A. APPLICATION NO. 85/90
MARCH 26, 27 AND 30, 1990.

Interpretation of statutes - Urban Councils Ordinance, Ss 36, 129, 130, 249 - Certiorari - Prohibition - Right to establish fair and market on a thoroughfare - Ultra vires - Construction of statutes conferring power.

The petitioners are traders in groceries, textiles, sundry goods, pharmaceuticals and hardware on Market Street, Gampaha. Market Street is a thoroughfare 30 feet broad. The Urban Council, Gampaha decided to run a weekly fair on this street and to this end drew up squares on a 16 foot breadth along the full length of this street for allocation to vendors. Later the width was reduced to 7 1/2 feet. The petitioners who were adversely affected sought writs of certiorari and prohibition against the Urban Council claiming that neither the Urban Councils Ordinance nor any other statute empowered the Urban Council to organize a fair or market on a thoroughfare.

Held:

(i) In construing instruments that confer power what is not permitted should be taken as forbidden. This strict doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied. Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. Acts of statutory authorities that go beyond the strict letter of this enabling provision can reasonably be considered as being incidental to or consequential upon that which is permitted. been done with a view to promoting the general legislative purpose in the conferment of power to such authorities. This is in keeping with the purposive approach to statutory interpretation. Anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by courts in an exercise of statutory interpretation.

(ii) An authority (Corporation) established by statute such as an Urban Council has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Such a statutory authority has no common law powers at all. Public roads are vested in the Urban Council so that it will exercise, perform and discharge such powers, functions and duties, as are specified in the Urban Councils Ordinance or in any other statute in relation to such roads and no more. Anything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be ultra vires with the saving that what is incidental to or consequent upon the express statutory provisions will not be ultra vires.

(iii) The Council by establishing a weekly fair on Market Street, was causing an obstruction or encroachment on a thoroughfare. The duty to establish markets, is distinct and different from the duty to maintain the thoroughfares free and unimpeded. A council cannot discharge one duty in such a way as to cut across another duty.

(iv) Certiorari issues to quash a decision which is ultra vires or vitiated by error, on the face of the record. Prohibition issues to forbid some act or decision which would be ultra vires. Certiorari looks to the past, prohibition to the future. These are remedies in public law and comparable respectively to declaration and injunction which are remedies in private law. The availability of private law remedies can never preclude recourse to the public law remedies. Certiorari and prohibition are available against a local authority in respect of administrative action.

(v) The vendors concerned who were given tickets to trade on the squares marked on Market Street, are not necessary parties. They are an unidentifiable group and have been illegally put there.

Cases referred to:

- (1) *Ashbury Railway Carriage and Iron Co. Ltd. V Hector Riche* (1875) of the Law Reports 653.
- (2) *Attorney-General V the Great Eastern Railway Co.* (1880) 5 Appeal Cases 473.
- (3) *R.V. Greater London Council, ex parte Blackburn* (1976) 3 All ER 184.
- (4) *R.V. Liverpool Corporation ex parte Liverpool Taxi Fleet Operation Association* 1972 QBD 299.

APPLICATION for writs of certiorari and prohibition

P.A.D. Samarasekera P.C. with *Jayantha de Almeida Gunaratne* for petitioners.
J.W. Subasinghe P.C. with *Miss. T. Keenawinna* for respondent.

Cur. adv. vult.

11th May 1990.

S.N. Silva, J:

The twenty Petitioners are traders carrying on business in shops, boutiques, and other establishments situated along Market Street, Gampaha. They sell a variety of items that include groceries, textiles, sundry goods, pharmaceutical products and hardware items. It is not disputed that Market Street is one of the busiest roads in Gampaha town. The 1st Respondent is an Urban Council constituted in terms of the Urban Councils Ordinance (Cap. 577) covering the area of the Gampaha town. The 2nd Respondent is the elected Chairman of the Council and the 3rd and 4th Respondents are two of its officers

The Petitioners have filed this application for a Writ of Certiorari to quash a decision of the Gampaha Urban Council to establish a weekly fair on Market Street and for a Writ of Prohibition restraining the Respondents from carrying out that decision.

It is the case of the Petitioners that on 24-11-1989 being a Friday, the Respondents closed Market Street for vehicular traffic, drew squares on the tarred area of the road and let the space within the squares to

vendors to sell their wares from 6 a.m. to 8 p.m. A deposit of Rs. 100/- and a rental was charged by the Respondents from the vendors. The vendors sold their wares on the road upon the authority granted by the Respondents and when it got sunny they even erected temporary sheds on the road. The vendors obstructed the Petitioners and their customers. The Respondents continued to hold this fair on Market Street on every Friday after 24-11-1989. The obstruction of Market Street on Fridays caused inconvenience to the Petitioners and their customers and also loss and damage to the Petitioners. The Petitioners produced documentary evidence to establish that their income on Fridays dwindled to almost nothing due to this obstruction of Market Street.

The Respondents concede that the Urban Council decided to set up a weekly fair on Market Street on Fridays from 6 a.m. to 6 p.m. and for this purpose they initially closed Market Street for vehicular traffic. They have in their objections set out the circumstances that led to this decision and the manner in which it was carried out. At a meeting held of the 1st Respondent Council on 9-12-1988 a revenue proposal was made that a weekly fair be started at the centre of the town which would bring in a revenue of Rs. 4 lakhs for the year 1989 (R2). At a meeting held on 11-9-1989 a report submitted by the Acting Revenue Inspector of the Council regarding the proposal to establish a fair was considered and a committee was appointed to study the project (R3). The report of the committee was considered on 6-11-1989 (R4) and finally on 17-11-1989 (R5). According to the minutes of that meeting the 4th Respondent being the Acting Revenue Inspector explained to the members of the Council that already there is a decision to start the fair on 24-11-1989 and a revenue of Rs. 20,000/- per day could be obtained by letting 420 spaces to vendors. He also explained that the Council is entitled to establish markets under Section 129(d) of the Ordinance and to levy fees in terms of section 130(1)(d). The Vice Chairman of the Council expressed serious reservations regarding the proposal but it appears that the Council approved the report of the committee which recommended *inter alia*, that an extent 16 feet in width running the entire length of Market Street, in the middle of the Street, be used for allotting space to vendors. (The entire width of Market Street excluding the pavements on either side, is 30 feet). The 2nd Respondent has stated in his affidavit that subsequently these arrangements were altered "in order to mitigate the inconvenience caused by the closure of Market Street to all vehicular traffic". By that alteration the width of the area of road allocated to vendors was reduced to 7 1/2 feet and vehicular traffic was permitted on the

side of the road. However the Respondents have not produced any decision of the Council whereby the decision made on 17-11-1989 (R5) was altered.

Counsel for the Petitioners submitted that Market Street is a thoroughfare as defined in the Urban Councils Ordinance and that the 1st Respondent is empowered to act in relation to a thoroughfare only as authorised by the provisions of the Ordinance or any other statute. There is no provision in the Ordinance or any other statute that empowers the 1st Respondent to organize a fair or a market on a thoroughfare. On the basis that what is not permitted should be considered as prohibited, it was submitted that the decision of the 1st Respondent to organise the fair on Market Street is ultra vires and should be quashed by a Writ of Certiorari. Since the Respondents continue to implement this illegal decision, that they should be restrained by a Writ of Prohibition.

Counsel for the Respondents submitted that Market Street is a public road vested in the 1st Respondent in terms of section 34(b) of the Ordinance. That it is a thoroughfare as defined in section 249(1) of the Ordinance and that the 1st Respondent is the general administrative authority in relation to it. That, it is the duty of the 1st Respondent to provide public utility services including markets. That the weekly fair organised by the Respondents is nothing but a market operative for a limited period. There is no provision in the Ordinance or any other law which prohibits the 1st Respondent from establishing a fair or a market on a thoroughfare. That the fair was organised for the greater benefit of the public and that the inconvenience to the Petitioners and their customers have been minimised by opening out a portion of Market Street for vehicular traffic. Counsel also urged three grounds upon any of which, the application should fail, *in limine*. They are;

- (1) that the vendors to whom space is allotted on Market Street are necessary parties to the application;
- (2) that the Petitioners have an alternative remedy in the District Court;
- (3) that the Petitioners have failed to disclose in the papers filed that an area of about 15 feet was left for vehicular traffic.

These grounds will be considered at a later stage in the judgement.

The principal submissions of learned President's Counsel appearing on both sides focus on a single issue of vires. Did the 1st Respondent exceed its power in establishing a weekly fair on Market Street? If so, should Writs of Certiorari and Prohibition issue as pleaded by the Petitioners?

The submissions of Counsel as to the issue of vires necessarily lead us to an examination of the provisions of the Urban Councils Ordinance as to thoroughfares and the powers and functions of Urban Councils in this regard.

It is common ground that Market Street is a public road vested in the 1st Respondent in terms of section 36(b) of the Urban Councils Ordinance. It is a thoroughfare as defined in section 249(1) of the Ordinance. In section 4 which sets out the core of the functions of an Urban Council, it is stated that a Council is charged with the regulation, control and administration inter alia, of public thoroughfares within the administrative limits of the town. It is the scheme of the Ordinance that the functions set out in section 4 are elaborated in the Parts of the Ordinance that follow. Thus, Part 111 of the Ordinance that spans from section 44 to section 102, specifies the rights powers and duties of a Council as to thoroughfares. It contains elaborate provisions with regard to: The maintenance and repair of thoroughfares by an Urban Council and its officers (sections 63 to 71); The regulation of the construction of buildings, boundary walls, gateways or fences along thoroughfares (section 72); The erection of temporary enclosures and fences on thoroughfares and their removal (section 73); The imposition of building limits within which no building could be constructed (section 74); The removal and abatement of obstructions and encroachments on thoroughfares by a person authorised by the Urban Council (Section 55(2), 84); Offences committed by persons who cause injuries to thoroughfares and the punishment attaching to such offences and offences of nuisance committed on thoroughfares and the punishment attaching to such offences (section 90); The power and duty to supervise and control the course and development of all public roads and paths within the town (section 49); The power to construct new roads, to widen, turn, divert or discontinue any thoroughfare (section 50) and to acquire land necessary for improvement of any thoroughfare (section 51). There are also provisions in other Parts of the Ordinance that cast general and specific duties on Councils to maintain, sweep, cleanse and light up thoroughfares (sections 35(a), 118(a) and 129(b)).

Thus it is seen that although the Ordinance vests the thoroughfares and their administration and control in the Council with extensive powers and duties in relation to them, the Council is not vested with any power or duty to establish a market or a fair on any thoroughfare or any part of a thoroughfare. It is on this basis that Counsel for the Petitioners submitted that what is not permitted should be considered as forbidden and that the decision of the 1st Respondent to establish a fair on Market Street be held *ultra vires*. This submission is based on a doctrine of Administrative Law and of statutory interpretation evolved by courts in England from the latter part of the last century.

In the case of *Ashbury Railway Carriage and Iron Co. Ltd. vs Hector Richo* (1), the House of Lords considered the validity of a contract entered into by the directors of a company, which did not come within the objects of that company as stated in the Memorandum of Association. It was held that the "contract, being of a nature not included in the Memorandum of Association was *ultra vires* not only of the directors but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it". The decision could be considered as the source of the doctrine that in construing instruments that confer power what is not permitted should be taken as forbidden. Professor H.W.R. Wade has described this proposition as the "strict doctrine of *ultra vires*" (Administrative Law 5th Edition page 216 and 217). The application of the doctrine came up again for consideration by the House of Lords in 1880, in an application for a perpetual injunction with regard to a contract entered (in this instance) by a company incorporated by statute. That is the case of *Attorney General vs The Great Eastern Railway Co.* (2). Here, the House of Lords approved the doctrine with some refinement that lend it a greater flexibility. The Lord Chancellor (Lord Selborne) restated the doctrine as follows, (at page 478):

"I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company vs. Riche* (1); It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

Professor Wade has in his book (at p.217) cited several instances, where the Courts have refused to declare invalid acts of statutory authorities that go beyond the strict letter of the enabling provision, on the basis that the acts in excess can reasonably be considered as being incidental to or consequential upon that which is permitted. It has to be so considered, with a view to promoting the general legislative purpose in the conferment of power to the authority in question, in keeping with the purposive approach to statutory interpretation. For, anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by Courts in an exercise of statutory interpretation.

Based on the foregoing analysis the legal position with regard to the application of the doctrine of ultra vires, in this respect, can be stated as follows. An authority (Corporation) established by statute such as an Urban Council has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Beyond these it is legally incapable of doing anything. For instance section 36(b) vests public roads in the Urban Council. As contended by counsel for the Respondents, vesting ordinarily connects a transfer of ownership and the Council should be considered the owner of the road. Notionally, this may be correct. But vesting, here, does not mean that the Council gets the rights attaching to ownership at common law in respect of the road. "A statutory authority endowed with statutory powers, has . . . no common law powers at all" (Wade, P.216). Therefore, public roads are vested in the Urban Council so that it will exercise, perform and discharge such powers, functions, and duties as are specified in the Ordinance or in any other statute, in relation to such roads, and no more. Anything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be considered as wholly invalid in law, on the application of the doctrine of ultra vires. However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires.

It has now to be considered whether the impugned act in this case could be taken as incidental to or consequential upon the express provisions of the Ordinance on the basis stated above. Two grounds urged by Counsel for the Respondents are relevant to this aspect of the matter. They are:

- (1) That the Council has a duty, in terms of section 136(a) of the Ordinance to establish and maintain public markets within the town and that the act of the 1st Respondent in establishing a weekly fair on Market Street should therefore be considered as legal;
- (2) that although according to the decision in A5, initially an area of 16 feet in width along the centre of Market Street was set apart for vendors and the entire street was closed for vehicular traffic by a subsequent arrangement only an area of 7 1/2 feet on the middle of the street was set apart for the vendors leaving an area of 15 feet on one side open for vehicular traffic.

It was Counsel's submission that in view of the subsequent arrangement there was sufficient space on the street for its normal use and as such the decision should not be held as ultra vires.

It is necessary to examine broadly the provisions of the Ordinance with regard to thoroughfares and the powers, functions and duties of Urban Councils in this regard in order to ascertain the underlying general legislative purpose. These provisions are referred to in a preceding paragraph of the judgment. As noted in that survey an Urban Council is established as the authority for the administration and control of thoroughfares within the limits of the town and is vested with extensive powers functions and duties in relation to these thoroughfares. The legislative purpose underlying these provisions is very clear. It is, to ensure that a Council, being the administrative authority at local level, will have the public thoroughfares within its area, free of obstructions, well maintained and improved with the passage of time. So that, the people for whose benefit these thoroughfares are meant can use them freely and without impediment, in the words of the old conveyancer, to pass and repass with vehicles laden and unladen. With the growth of population and the increase in commercial and other activity a certain degree of crowding and congestion on some thoroughfares is inevitable. But, an Urban Council cannot add to such crowding and congestion by drawing squares on the middle of one of the busiest streets and giving the space so marked of vendors to carry on their trade, however remunerative such a course of action may be to a Council. By such conduct, the Council is causing an obstruction or an encroachment on a thoroughfare being the very thing, the Ordinance requires it to remove and abate. Therefore the decision of the Council to

establish a weekly fair on Market Street is far removed from promoting the general legislative purpose underlying the provisions of the Ordinance. On the contrary, it can be seen as detracting from such legislative purpose.

The submission of Counsel for the Respondents that the decision should be held as valid because an Urban Council has a duty to establish markets as a public utility, is untenable. The duty to establish markets, is distinct and different from the duty to maintain the thoroughfares free and unimpeded. A Council cannot discharge one duty in such a way as to cut across another duty. In any event drawing squares on a public road cannot be considered as an act of establishing a market.

The other submission of Counsel is that only an area of 7 1/2 feet in width is given out to vendors at present although twice as much was given at first. The exact area given out is irrelevant if the decision itself is ultra vires. However, street vendors to whom space is given out cannot reasonably be expected to restrict their movements, like predetermined robots, to the squares that are drawn. They may keep their goods within these squares. But, they have to entice their customers, negotiate with the customers and the customers themselves must move from one vendor to the other. In these circumstances it would not be meaningful to allow an area of 15 feet for vehicular traffic. On the other hand such an arrangement may be fraught with danger. Therefore I do not see any merit in this submission of Counsel for the Respondents. Similarly the submission that the Petitioners should fail because they have failed to disclose in their petition that squares are drawn only on an area of 7 1/2 feet in width, cannot succeed. The exact width of the area provided to the vendors is irrelevant considering that the Petitioners challenge the entire validity of the decision to establish a weekly fair on Market Street. In any event the Petitioners have pleaded what really takes place and that is supported by photographs that are not disputed.

It was the submission of Counsel for the Respondents that the Petitioners are not entitled to the relief sought because they have failed to avail of the remedy of injunction and damages which could be put in suit by them in the District Court. This submission overlooks the distinction between remedies in public law and private law. Constitutional Law, Administrative Law and Criminal Law being the main components of what is described as public law have to be viewed distinctly from other areas of law that are mainly concerned with private rights, described as private law. In Administrative Law the principal instruments of judicial

review of administrative action are the Writs of Certiorari and Prohibition. In private law there are comparable remedies of declaration and injunction that are ordered to safeguard private rights. The following passage taken from Wade (page 546) draws a clear distinction in these comparable remedies".

"Certiorari and prohibition are complementary remedies, based upon common principles, so that they can be classed together. Certiorari issues to quash a decision which is ultra vires or vitiated by error on the face of the record. Prohibition issues to forbid some act or decision which would be ultra vires. Certiorari looks to the past, prohibition to the future. In this way they are respectively comparable to the declaration and injunction in the sphere of private law remedies."

The availability of private law remedies such as declaration, injunction and damages, that may cover some subject matter can never preclude recourse to the public law remedies of certiorari and prohibition.

In England it has been held that Writs of Prohibition could issue on local authorities with regard to purely administrative action. In the case of *R vs Greater London Council, ex parte Blackburn* (3) it was held that a Writ of Prohibition could issue on the G.L.C. to restrain it from releasing indecent films for exhibition, adopting a standard and procedure contrary to law. Lord Denning MR stated as follows:

"The prerogative writ of prohibition has, in the past, usually been exercised so as to prohibit judicial tribunals from exceeding their jurisdiction. But, just as the scope of certiorari has been extended to administrative authorities, so also with prohibition. It is available to prohibit administrative authorities from exceeding their powers or misusing them."

Similarly, in *R vs Liverpool Corporation, ex-parte Liverpool Taxi Fleet Operation Association* (4) The Court of Appeal issued a Writ of Prohibition on a local authority to restrain it from issuing new taxi cab licences in excess of the existing number of 300.

The final submission of Counsel for the Respondents was that the street vendors to whom space is given out by the Respondents are necessary parties to this application. Counsel for the Petitioners submitted that these persons are issued with tickets on every Friday by the Respondents and as such they are an unidentifiable group of persons. Further, Counsel

submitted that these vendors have no right in law to sell their wares on Market Street and that they have been put there illegally by the Respondents. I agree with the submission of Counsel for the Petitioners. The relief sought in the petition is only against a decision of the 1st Respondent and the execution of that decision by the other Respondents. Therefore, the vendors who are merely the beneficiaries of an illegal act of the Respondents are not necessary parties to this application.

For the reasons stated above, I overrule the objections raised by the Respondents. The Petitioners have made out a case for the issue of Writs of Certiorari and Prohibition against the Respondents. I accordingly direct the issue of a Writ of Certiorari quashing the decision of the 1st Respondent as contained in documents marked R4 and R5 to establish a weekly fair on Market Street, Gampaha. I also direct the issue of a Writ of Prohibition restraining the Respondents from in any way, executing or carrying out that decision. Considering the circumstances of the case I make no order as to costs.

WIJETUNGE, J: - *I agree*

Writs of Certiorari and Prohibition issued.
