

COURT OF APPEAL**Kuruppu****Vs.****Keerthi Rajapaksa, Conservator of Forests***C.A. 338/78 – M.C. Panadura 33743*

Forest Ordinance Section 24 Regulation 5 made thereunder – Rule delegatus non potest delegare – may Minister's administrative powers be delegated?

The accused appellant was charged along with two others. The charge against the first and second accused was that they had transported logs within into or out of an area specified in the Gazette notification dated 29.8.66 without a permit from an authorized officer mentioned in the gazette.

The accused appellant was charged with aiding and abetting.

All three accused were convicted but only the accused appellant appealed.

The Defence urged that regulation 5 made by the Minister under the Forest Ordinance and published in the Gazette was ultra vires the power vested in the Minister under section 24 (1) (b) on the grounds that the regulations empower the Conservator of Forests to specify the area within into or out of which no timber of any species could be transported without a permit from an authorized officer.

HELD Regulation 5 made section 5 of Forests Ordinance is not ultra vires the Minister's powers quoting Greene M.R. in *Caltona Ltd. vs. Commissioner of Works* ".....The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of Ministers by responsible officers of the department 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.

APPEAL from Judgment of the Magistrate of Panadura.

Before: Rodrigo, J. & L. H. De Alwis, J.
Counsel: Asoka Gunasekera for the
accused-appellant.
Sisira de Abrew, State Counsel for
Attorney-General.
Argued: 29.1.1982.
Decided: 19.2.1982.

Cur. adv. vult.

RODRIGO, J.

The appellant was a Forest Officer. He was prosecuted as the third accused for aiding and abetting the 1st and 2nd accused to commit an offence under the Forest Ordinance (Chapter 451). It is alleged to be an offence under the Forest Ordinance to transport within, into, or out of, any area specified in the Gazette Notification dated 29.8.1966 any timber not excepted therein without a permit from any of the officers mentioned in this Gazette Notification. The charge levelled against the first two accused was that they committed an offence of this description – that they transported 15 logs of Hendawaka timber without a permit. None of the accused gave evidence at the trial. They were each convicted and sentenced. The first and second accused have not appealed.

The lorry that was transporting the 15 logs was signalled to be stopped by two Forest Officers of the Flying Squad of the Forest Department at a point on the Colombo - Galle Road at a place called Gorakana not far away from Moratuwa towards Panadura. The logs were found to be stamped with a seal discovered later to be the seal in the custody of the 3rd accused. He was the Beat Officer attached to the Ingiriya Forest area. He had been given the seal and was authorised to stamp tree trunks when authority is given by the Forest Range Officer to fell them on applications made by prospective purchasers. For transporting the felled trees after cutting them into logs a permit has to be obtained. The 2nd accused produced a permit when the lorry was stopped and the logs were examined. They were stamped but were found to be of a different species and description from those mentioned in the permit. The permit was consequently retained by the Flying Squad Officer and he initiated an investigation. He also seized the logs in the lorry.

At the trial this permit was not forthcoming. The Flying Squad Officer, Rajapaksa giving evidence said that somehow it has been misplaced. He, however, produced what he called a triplicate copy of the permit obtained from the Forest Range Officer's office. Permits are said to be made out in triplicate. This copy had the number of the lorry, the date of transport, name of the permit holder (2nd accused), the place from which and to which the timber is transported. It also contained the description of the logs in detail, authorised to be transported on that permit including their kind, length and girth among others. Objection was taken to the reception of this copy. But it was admitted in evidence by order of the Magistrate. I shall come back to this matter later.

If the permit handed over by the 2nd accused to Rajapaksa was the original of the triplicate copy produced in evidence there is little doubt that the logs were not covered by the permit in the hands of the 2nd accused and it follows that the logs were being transported without a permit though they were stamped. Neither the accused nor the Forest Ranger of the Department who gave evidence himself was able to speak to, leave alone produce, a permit or a copy thereof bearing the same date to cover the description and number of logs seized on this day — 1.8.71. If there was one to cover the logs seized on this day the 3rd accused would not have found it beyond his resourcefulness being a forest officer to have a copy produced. It is inconceivable that two permits would have been issued for the transport of the same number of logs but of different description, length, breadth and girth by the same officer to the same permit holder along the same route on the same day at the same time. The theoretical possibility, however, remains. But this possibility was removed by the evidence of the witnesses from the Forest Department. They testified that the 3rd accused, when called upon by them was, unable to point out the stamps of the trees that are supposed to have been felled from which logs described in the permit produced or those seized by the Flying Squad Officer were cut. The defence tried to make out that the alleged triplicate copy of the permit handed over to Rajapaksa is in fact not a triplicate copy of the permit and that the 2nd accused had a permit in respect of the logs that were seized but a triplicate copy of that permit is not forthcoming from the Forest Department for some reason better known to them. The witnesses from the Forest Department including the Forest Ranger vehemently denied this suggestion, and they asserted that the copy

that the Department is producing marked P2 is the triplicate copy of the permit that was retained by the Flying Squad.

What emerges from the evidence is the prevalence of a fraudulent practice resorted to by some officers of the Department. There is a concerted effort by the Government to conserve the valuable timber of our forests and to that end to educate the younger generation in particular of the need to conserve trees of rare species. This effort is frustrated by the fraudulent practices of some officers of the Department itself. This is one such instance. What appears to have happened is this: Authority is obtained on an application to cut down and remove some cheap trees. The timber described in the permit produced are of that category. But they are in fact not cut down because they are useless. Instead valuable trees are cut down (Hendawaka timber seized on this occasion is said to be very valuable) and a permit is issued to transport what purports to be the logs from the trees mentioned in the permit. To avoid detection logs from trees cut down elsewhere without authority are stamped after the trees are felled and cut into logs when the proper procedure for stamping is to stamp the trees before they are cut down into logs. Thus when a lorry is stopped by a Police Officer he is shown a permit and the stamps on the logs — care is taken to carry the number of logs specified in the permit. The Police Officer finds that the number of logs tally with that in the permit and they carry the stamp. He cannot make out one kind of timber from another and the lorry is signalled on.

That this is what happens is borne out by the evidence of Police Sergeant Mendis. On a tip off that illicit timber is being loaded into a lorry in the forest, he went there to find that, off the main road inside the forest in Ingiriya, a group of persons were loading a heap of logs into a lorry and a person, identified by him as the 3rd accused, was stamping the logs. The Sergeant had thought that because the logs were being stamped it was not illicit timber. Later on in the morning, however, the Sergeant had waited for this lorry on more information being received and seeing it coming had signalled it to stop. He then examined the logs and asked for the permit. The number tallied. They were stamped. Besides, the 3rd accused was also inside the lorry. The Sergeant recognised him to be a Forest Officer and he allowed the lorry to go. He could not make out what kind of timber it was. The 3rd accused had thereafter got off the

lorry, at some point of the journey before it was signalled to be stopped again by the Flying Squad.

I shall now turn to the reception in evidence of the alleged triplicate copy of the permit handed over to Rajapaksa by the 2nd accused. It was important for the defence to get this copy, out of the way, either on the ground of inadmissibility or on the ground that this was not a copy of the permit which the accused handed over to Rajapaksa.

It was not clear whether two of the triplicates were carbon copies. The Forest Ranger, however, had identified his own signature on the copy produced. In addition, there was in the handwriting of the 3rd accused an endorsement on the back of this copy that instructions had been carried out. This copy therefore is admissible either as primary evidence or as secondary evidence of its original. The original is alleged to be lost and therefore secondary evidence would be admissible. The matter, however, does not end there, for it is the defence case that the copy produced was not the copy of the permit retained by Rajapaksa. The burden was on the prosecution to prove that the copy produced as P2 was the copy of the permit handed over. This burden can be discharged only by producing circumstantial evidence. On a consideration of the circumstances, referred to by me earlier there can be little doubt that the triplicate copy P2 is in fact the triplicate copy of the permit handed over to Rajapaksa. I, therefore, hold that the document P2 had been rightly admitted in evidence and that the trial Judge had rightly taken the view that the copy P2 is a triplicate copy of the permit retained by Rajapaksa. I am confirmed in this view by a consideration of the evidence of Rajapaksa and the Forest Ranger who said that Rajapaksa showed the permit to him that day itself and it was with the aid of the particulars specified therein that they were able to look for and obtain its triplicate copies one of which is the document P2 produced. That the timber that was seized belonged to *Hendewaka* species has been proved through the evidence of the Government analyst and there was no serious contest that the seized timber did not belong to the species described in the triplicate copy P2.

The defence, however, urged that the regulation (5) made by the Minister under the Forest ordinance and published in the Government Gazette on 29.8.66 is ultra vires the powers vested in him under s. 24(1)(b). The regulation empowers the Conservator of Forests to

specify areas within, into, or out of which no timber of any species unless excepted can be transported without a permit issued by an Authorised Officer. It is said to be ultra vires on the principle of "delegatus non potest delegare".

The submission has received judicial consideration before and the result is conflicting decisions. While de Kretser, J took the view in *Wickremaratne - R.F.C. Moneragala v. W.D. Samerasinghe et al*(1) that the regulation is ultra vires on the principle of the above maxim. A Bench of two Judges in *R.F.O. Ratnapura v. P.A.D Nandasena* (2) took the opposite view and held that the regulation was intra vires. Weeraratne, J with whom Tennekoon, J, as he then was, agreeing, followed de Kretser, J in *Podiratne & Another vs. R.F.O. Puttalam*.(3) The case in which the Bench of two Judges disagreed with de Kretser, J was, however, not brought to the notice of Weeraratne, J and it was therefore not considered in that case. All these cases then came to be reviewed by Vythialingam, J (with Victor Perera, J agreeing) in *H.S. Perera v. Forest Department*.(4) He says that the maxim is not a rigid rule which admits of no exception and the mere designation of an officer to specify any forest area from which transport of timber is prohibited is not a delegation of rule making power reposed in the Minister by the legislature but a delegation, if at all, of an administrative function.

Wade is quoted as saying(5) "that the rule cannot, however, be carried to the point of requiring a Minister of the Crown to give his mind personally to all the things he is empowered to decide. In empowering Ministers to act Parliament well knows that in very many cases the effective work must be done by departmental officials. If an Act provides, as so many Acts do, that the Minister may do this or that, if satisfied that it is desirable, the power may be exercisable by an official of the department for whom the Minister is responsible to Parliament; it may suffice that the official is satisfied and the Minister may never have known of the matter at all."

Then *de Smith* puts the matter in this way: "Special considerations arise where a statutory power vested in a Minister or a department of State is exercised by a departmental official. The official is the alter ego of the Minister or the Department and since he is subject to the fullest control by his superior he is not usually spoken of as a delegate The Courts have recognised that duties imposed

on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department' In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statutes but may act through a duly authorised officer of his department."

Greene, M.R. had to consider in *Carltona Limited v. Commissioner of Works* whether a notice requisitioning the plaintiff's property sent by a departmental official of the Minister of Works and Planning on behalf of the Minister on a letterhead of the department was valid notice. The contention was that the Parliament had vested in the Minister the power to requisition property and it is the Minister himself who had to bring his mind to bear on such an important question affecting the rights of subjects and therefore it was not open to the Minister to delegate such decision making power to a subordinate officer. Greene M.R. observed at page 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 ever 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 Ministers. 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 Ministers by responsible officers of the department. Public business could not be carried on if that were not the case 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."

Then in the case of *Hussein v. The Tribunal of Appeal under the Licencing of Traders Act*⁽⁸⁾ the question arose as to whether it was competent for the Minister to delegate to the Director of Commerce the power of appointing Licencing Authorities such as Government Agents. It was conceded in that case that the Minister could appoint the Director of Commerce as the licencing authority but it was contended that it was not competent to him to give power to the

Director of Commerce himself to appoint others as Government Agents to be licencing authorities. This contention was upheld taking the view that empowering the Director of Commerce to appoint licencing authorities himself was a delegation of power specially vested in the Minister by Parliament.

Regard being had to the views expressed as set out above in the authorities I hold that the Regulation (5) made under s. 24(1) (b) of the Forest Ordinance is not ultra vires the Minister's power.

For the above reasons I affirm the conviction and sentence and dismiss this appeal.

L.H. DE. ALWIS, J. — I agree.

Appeal dismissed

References:

1. S.C. 1238-9/68 - M.C. Badulla 7280; S.C. Minutes of 8.5.1970.
2. S.C. 969/75 - M.C. Ratnapura 82529; S.C. Minutes of 27.2.1975.
3. S.C. 163-164/72 - M.C. Puttalam 11394; S.C. Minutes of 11.11.75.
4. C.A. 645/75 - M.C. Gampaha 65797/A; C.A. Minutes of 31.10.78.
5. Administrative Law, P.52.
6. Judicial Review of Administrative Action. 2nd Ed. pp. 290 & 291.
7. 1943 (2) All E. R. 560.
8. 65 NLR 63.