

Present : Dalton J.

1926.

ANDERSON v. SINNATAMBY.

763—P. C. Anuradhapura, 59,700.

Local Board—Power to make by-laws—Supervision and control of dairies—Refusal of licence to sell milk—Ordinance No. 13 of 1898, s. 56.

The power given to a Local Board under section 56 (5) of the Ordinance No. 13 of 1898 to make by-laws for the supervision and control of dairies enables such authority to refuse a licence to sell milk, on failure of the applicant thereof to comply with the regulations, governing the issue of such licence.

A PPEAL by the Solicitor-General from an acquittal by the Police Magistrate of Anuradhapura.

The Inspector of the Local Board of Anuradhapura charged the accused with keeping a dairy without an annual licence from the Chairman of the Local Board in breach of a by-law framed by the Board. The by-law, for as it was material to the present case, is as follows :—“ No person shall, within the limits of the Local Board, keep any dairy without an annual licence from the Chairman, Local Board, which licence the Chairman is hereby empowered to refuse to any person failing to comply with any of the following rules or any existing Local Board rules providing for the regulation and control of the places aforesaid”

The learned Police Magistrate held, that the by-law was *ultra vires* of the Ordinance, and discharged the accused.

Mervyn Fonseka, C.C., for Solicitor-General, appellant.

Joseph, for respondent.

February 10, 1926. DALTON J.—

This appeal raises a question as to the validity of certain by-laws made on August 5, 1922, by the Local Board of Anuradhapura under the provisions of section 56 of Ordinance No. 13 of 1898 (Local Boards Ordinance), as amended by Ordinance No. 27 of 1916.

The Inspector of the Local Board lodged a complaint against S. Sinnatamby of Anuradhapura for keeping a dairy without an annual licence from the Chairman of the Local Board in breach of by-law 1 set out below. The Magistrate held, that the by-law was *ultra vires* of the Ordinance, and discharged the defendant. From that decision the Solicitor-General appeals.

The by-law in question in its material parts, is as follows :—

(1) “ No person shall, within the limits of the Local Board, keep any dairy without an annual licence from the Chairman, Local Board, which licence the Chairman is hereby empowered to

1926.
DALTON J.
*Anderson v.
Sinnatamby*

refuse to any person failing to comply with any of the following rules or any existing Local Board rule providing for the regulation and control of the places aforesaid Such licence shall further be subject to such fees as the Local Board shall from time to time determine with the sanction of the Governor in Council."

The by-laws purport to be made under the powers given by section 56 of the Local Boards Ordinance, section 56 (5) providing for the making of by-laws is as follows:—" (5) and for supervision and control of private markets dairies "

Section 11 of the Interpretation Ordinance enacts certain general provisions with respect to powers given to any authority to make rules. By sub-section (1) (d) of that section it is provided that power to make rules for regulation, supervision, protection, or control shall include power to make rules—

- (1) For the issue of licences for the purpose of such regulation, supervision, protection, or control ; and
- (3) For the refusal of licences in cases of non-compliance with the provisions of any rule so made.

This sub-section (1) (d) was enacted in 1916 as a result, so Counsel states, of the decision in *Perera v. Fernando*¹ where Pereira J. and De Sampayo A.J., Wood Renton C.J. dissenting, held, that it is *ultra vires* of a Sanitary Board constituted under the Small Towns Sanitary Ordinance, 1892, to make a regulation under a section of that Ordinance requiring vendors of fish at places other than a public market established by the Board to take out licences for the sale of fish. This case arose, be it noted, out of an Ordinance other than the one in question here. It is, however, referred to in the Magistrate's judgment, from which I understand, that he came to the conclusion that the by-law was *ultra vires* relying on this decision and upon the decision in *Sanitary Inspector v. Harmanis*.² It is upon the latter case that Mr. Joseph relies in his argument for the respondent together with two English decisions to which I refer later. *Sanitary Inspector v. Harmanis (supra)* was decided in 1917 after the Interpretation Ordinance had been amended by the insertion of section 11, sub-section (1) (d) to which I have referred above. It also arose in respect of by-laws made under the Small Towns Sanitary Ordinance, 1892, and not under the Local Boards Ordinance. The Sanitary Board of Galle purporting to act under section 2 (2) of the Ordinance made a rule in 1911 forbidding the sale of fish without a special licence of the Board at any place outside the public market. In holding that the rule, whether made before or after the amendment to the Interpretation Ordinance in 1916, was *ultra vires* of the Ordinance, Shaw J., following *Perera v. Fernando (supra)* in that

¹ (1914) 17 N. L. R. 494.

² (1907) 19 N. L. R. 339.

respect holds that section 2, sub-section (2) (d) of the Small Towns Ordinance did not authorize a rule forbidding sales outside the public market without licence, because that was not "supervision or control," but might amount to absolute prohibition of lawful sales conducted in a proper manner.

1926.
 DAYTON J.
 Anderson v.
 Sinnatambiy

In the same way the decision of the Privy Council in *City of Toronto v. Virgo*¹ is summarized as follows: A statutory power conferred upon a Municipal Council to make by-laws for regulating or governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner. The by-laws in question prohibited hawkers from carrying on their trade in certain streets, and were framed under a statutory power "for licensing, regulating, and governing hawkers" In the course of the judgment it was stated:—

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise, both as to time, and to a certain extent, as to place where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

In *Parker v. Mayor of Bournemouth*² a by-law for a similar purpose, regulating hawking on the beach, was held to be *ultra vires*, as it was held to be unreasonable, and in effect reserved to the corporation the right to refuse permission to trade to any particular person.

Basing his argument on the last three mentioned decisions Mr. Joseph urges that by-law (1) goes beyond any supervision or control, but might amount to the absolute prohibition of carrying on a dairy, which is a lawful trade, in a lawful manner. With this argument I am unable to agree, because the by-law expressly sets out the grounds upon which a licence can be refused, failure to comply with certain rules (by-laws 32-50) which deal with such matters as sanitary requirements, drainage, water, employees or animals suffering from disease, utensils, number of cows and sheds; these rules the Magistrate has held to be generally *intra vires*. These provisions are, at any rate for the most part, clearly reasonable and for the public benefit, and come with the powers of supervision and control to which the Ordinance refers. Express power as set out above is given by the Ordinance to make rules refusing licences in case of non-compliance with the provision of any rule. By-law (1)

¹ (1896) A. C. 83.

² (1902) 86 L. T. 449.

1926.

DALTON J.

*Anderson v.
Sinnatambiy*

then does not include or contemplate the possibility of an absolute prohibition of dairying conducted in a proper manner, but specifically sets out the cases in which a licence may be refused, which are, when the trade is carried on, in an unlawful manner.

The authorities cited, therefore, in support of the contention that the by-law is *ultra vires* of the Ordinance, are not applicable here, since they proceed on the ground that the by-laws which had to be construed might prohibit lawful trade conducted in a lawful manner. That is not the case here, the grounds upon which the licence can be refused being clearly restricted as I have already stated.

With respect to the power to require the payment of a fee for a licence, the Magistrate states that the provisions of section 11, sub-section (1) (d) of the Interpretation Ordinance is silent on the point. He has apparently overlooked the provision of section 29A of the Local Boards Ordinance, which gives authority to levy fees on licences granted under the Ordinance or under by-laws made under the Ordinance. The case of *Thomas v. Junis Lebbe*¹ to which he refers has no application here. It refers to Ordinance No. 7 of 1876, which was repealed by the Local Boards Ordinance, 1898.

The appeal is, therefore, allowed, the order of the Magistrate set aside, and the case will be remitted to him to decide and to adjudicate upon the facts.

Appeal allowed.