

In Re: Ellammal and ors.

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Court : Chennai

Decided On : Aug-09-1927

Reported in : (1927)53MLJ810

Appellant : In Re: Ellammal and ors.

Judgement :

ORDER

Jackson, J.

1. The three petitioners have each been fined Rs. 5 by the Sub-divisional Magistrate, Saidapet (confirming on appeal the judgment of the Sub-Magistrate, Poonamalee), under Sections 175 and 207 of the Madras Local Boards Act, XIV of 1920, for selling fish in an unlicensed private market.

2. Admittedly the petitioners were owners of a private market before the commencement of the Act. That being so they were entitled to the grant of a license subject only to such conditions as regards sanitation etc., as the Union (S. 188) might impose. That is the clear meaning of Section 171(3):

The Board shall grant the license applied for subject only to such regulations' etc.

and it is difficult to see how anything else could have been enacted. A private market is a private property and an Act to consolidate the law relating to local boards could hardly be an Act of confiscation. At the same time it is clearly within

the Board's competence to see that such property is enjoyed without detriment to public health.

3. Under Section 212(11) it is provided that, if orders on applications for license are not communicated to the applicant within 30 days after the receipt of the application by the President, the applications shall be deemed to have been allowed for the year. The petitioners seem to have applied for the year 1926-27 and on the 8th May, 1926, the Board passed a resolution that a license cannot be granted and communicated this information to the petitioners.

4. It is contended by the learned Public Prosecutor that this is an order on the application such as is contemplated by Section 212(11). The petitioners argue, on the contrary, that an order on an application must be a legal order within the terms of the Act and an announcement that the Board declines to perform its statutory duty is no such order. This seems to be a valid plea. The Board is bound to grant a license, and if, when it receives the application in due course, it confines itself to saying that it will not grant the license, it is tantamount to passing no order on the application. Refusal to function under the Act is not passing an order under the Act. The order must be *intra vires* and an order *ultra vires* is no order at all.

5. In these circumstances the conviction cannot be upheld. It is set aside and the fines are ordered to be refunded.

Thiruvengkatachariar, J.

6. I agree with my learned brother that the conviction in this case should be set aside; and as the question is one of some importance I shall add a few words. The Madras Local Boards Act of 1920 permits only the keeping open of a private market which was in existence before the commencement of that Act, and no new private market can be opened after the commencement of that Act. The owner, occupier or farmer of any private market has to take out annual license without which he cannot keep open the market. The license has to be applied for not less than six weeks before the commencement of the year for which it is required. If no order on the application for license is communicated to the applicant within thirty days after the receipt of the application by the President of the Board concerned,

the application, shall be deemed to have been allowed for the year or for such less period as is mentioned in the application and subject to the rules, bye-laws, regulations and conditions ordinarily imposed [See Section 171, 123 and 212 (Sub-section 11)] . In the case before us the applicants have been convicted for selling fish in a private market which was unlicensed on the date of the sale, viz., May 15th, 1926. It is not clear upon the evidence when the application for license for the private market for the official year 1926-27 was put in. So far as I can see, it was put in on the 23rd April, 1926, which would be after the commencement of the official year. Upon that petition the Union Board passed the proceedings of the 8th May, 1926, refusing the license applied for and a copy of the resolution was communicated to the petitioners and the same presumably reached them within 30 days from the date of their application. The learned vakil for the applicants therefore has raised no ground that the appellants are entitled to the benefit of the last part of Section 212(Sub-section 11). His contention on behalf of the appellants is that the order refusing the licence is illegal and ultra vires, and that unless and until a legal order is passed the application for license cannot be considered to have been properly disposed of and hence the applicants cannot be convicted under Section 175.

7. Section 171(3) which is relied on says:

The Taluk Board shall grant the license applied for subject only to such regulations as to supervision and inspection and to such conditions as to sanitation and drainage etc., as the Taluk Board may think proper.

8. It is argued that under this provision the Taluk Board, though it may impose conditions in the interests of public health, has no power to 'refuse the license and that therefore the refusal of the license cannot be held to be a valid exercise of the powers conferred on the Union Board. The learned Public Prosecutor on the other hand contends that under subsection 3 of Section 171 it is open to the Union Board to refuse a license when, in its opinion, the conditions of the market are such that the license should not be granted. The language of Section 171(3) is by no means happy, but on the whole I think that the contention of the applicants is the correct one. That conclusion is supported by the provisions of Sections 176

and 177 of the Act. Under Section 177, the Board may refuse to grant to the applicant the license applied for only when it has served a notice on the owner, occupier or farmer of the private market to do any of the things mentioned in the Clauses (a) to (f) of Section 176 and he fails within the period and in the manner laid down in the said notice to carry out any of the works mentioned in Section 176. In the present case no such action was taken by the Board under Section 176 and the refusal to grant a license cannot therefore be justified under Section 177. The reason given in the resolution of the 8th May, 1926, is that the license cannot be issued, because, in the opinion of the District Board, the location of the private market at that place is detrimental to the health of the city itself. It is no doubt within the province of the Board to close any private market if, in their opinion, it ought not to be continued in the interests of public health; but in such cases they have to do one of two things. They may give a notice to the owner under Section 176 to carry out such works as may be considered necessary for rendering a private market a suitable one, or they should acquire the owner's rights in the private market under the Land Acquisition Act in Section 180. Otherwise, it would be, as observed by my learned brother, confiscating private rights without compensation, which intention cannot be imputed to the legislature. The Board's resolution of the 8th May, 1926, has ignored all these provisions and the Board has refused the license alleging merely that they consider it undesirable that the market should be kept open there. I agree therefore that the order of the Board cannot be supported as a legal one passed in the exercise of their powers and that the conviction should be set aside.