

1930

*Present : Lyall Grant J.*PERERA *v.* SILVA.181—*P. C. Gampaha*, 11,024.*Building—Alteration to thatched building—Commence building—Road Ordinance No. 10 of 1861.*

Where the owner of a thatched building, standing by the side of a road, made a door of portable planks in front and filled in the upper part of the back and side walls so as to carry them to the roof,—

Held, that these alterations by the owner did not amount to “commencing a building” within the meaning of section 86 of the Road Ordinance, No. 10 of 1861.

A PPEAL from an acquittal by the Police Magistrate of Gampaha.

R. L. Pereira, K.C. (with *Aiyer*), for complainant, appellant.

Hayley, K.C. (with *Rajapakse*), for accused, respondent.

July 29, 1930. LYALL GRANT J.—

This is an appeal against an acquittal. The complainant-appellant is a Mudaliyar of the Western Province. Authorized by the Government Agent, he complained to the Police Magistrate at Gampaha that the accused had commenced “to reconstruct a building at the 25th mile, Kandy road, within the jurisdiction of this Court, without giving one calendar month’s notice in writing to the Chairman of the District Road Committee, Colombo, as required by section 86 of Ordinance No. 10 of 1861, as amended by section 2 of Ordinance No. 6 of 1913,” and thereby committed an offence.

At the trial the words “to reconstruct” were omitted and the charge read “did commence a building”. The learned Police Magistrate held that the provisions of section 86 did not apply to the facts of the case and dismissed the complaint. The complainant appeals with the sanction of the Attorney-General.

The accused's house stands at the edge of the Colombo-Kandy road and admittedly has stood there for many years. It is a small thatched building with mud walls. The alterations complained of are that the accused made a door of portable planks in front and filled in the upper part of the back wall and side wall so as to carry them to the roof. In doing so the accused did not encroach on the road. The relevant words of section 86 are: "It shall not be lawful for any person to commence any building, wall or fence along any thoroughfare . . . without giving one calendar month's notice in writing to the Chairman of the District Road Committee".

On appeal it is urged that any alteration in a structure is "building" and that to make any alteration is to "commence building". The words of the section are however, not to "commence building" but "to commence any building, wall, or fence". The word "building" is used as a noun and is differentiated from "wall or fence". That this is the intention of the Ordinance further appears from the fact that the section occurs in an Ordinance for the protection of public thoroughfares and in a part of that Ordinance which deals with encroachment on public thoroughfares. The aim of the section is to prevent encroachment on the road. In the present case it is admitted by the District Engineer that the alterations did not constitute any encroachment.

Two cases, however, have been cited by the appellant to show that this case falls within section 86. In *Ahamat v. Goonawardene*,¹ Mr. Justice Middleton held that a person who had raised by means of pillars the roof of his house along the public road without due notice to the Chairman of the District Road Committee committed an offence under section 86. The report does not disclose whether the pillars were erected outside the original foundations. If they were, then whether temporary or permanent they come within

the scope of the section which prohibits the placing of any temporary erections on the public thoroughfare.

In that case, however, Middleton J. expressed the opinion that the words "commence any building" must be held to include initiation of any form of building by way of altering or repairing an existing erection or building.

This case is referred to by Sir St. John Branch C.J. in *Muttetuwigama v. Silva*.¹ The learned Chief Justice expressly guarded himself against adopting the reasoning of Middleton J., but he held that a person who builds a new house upon old foundations is bound to give notice. He says: "The respondent has really put up a new building, using the old foundations, and I think that this may fairly be said to come within the enactment in question." In the case he inflicted a nominal fine of Re. 1. It may be noted that while the Crown was represented in the appeal in *Muttetuwigama v. Silva* (*supra*) there was no appearance for the accused-respondent.

In *Gohagoda v. Mutulebbe*,² Ennis J. held that extending a building did not amount to "commencing a building". He distinguished the case from *Ahamat v. Goonawardene* (*supra*) on the ground that in the latter case pillars had been built from the foundation.

The only one of these authorities which supports the appellant's case is the earliest one and there the facts appear to be materially different. The dictum of Middleton J. that the words of the section "commence any building, wall, or fence" include any alteration or repair to a building, wall, or fence has not met with the approval of later Judges. The appellant's case is entirely based on this dictum and if it is not affirmed the appeal must fail.

I am of opinion that in the present case the Magistrate was right in holding that the respondent had not "commenced any

¹ (1925) 28 N. L. R. 57.

² (1918) 5 C. W. R. 264.

¹ (1910) 5. *Bak. Rep.* 105.

building” and that he was under no obligation to notify the District Road Committee. The small alterations which he made to this building, alterations which on the testimony of the District Engineer are not encroachments, did not in my opinion amount to commencing a building.

The appeal must be dismissed.

Appeal dismissed.
