

1935

*Present : Maartensz J.*

PARANAVITARNE. *v.* DISTRICT ROAD  
COMMITTEE, GALLE.

155—C. R. Galle, 14,041.

*Thoroughfare—Overhanging trees—Power of District Road Committee to cut trees—Claim for compensation—Ordinance No. 10 of 1861.*

A District Road Committee is entitled to cut down trees overhanging a thoroughfare in its charge without being liable to pay compensation to the owner.

**A** PPEAL from a judgment of the Commissioner of Requests, Galle.

*Croos da Brera* (with him *Abeywardene*), for plaintiff, appellant.

*H. V. Perera*, for defendant, respondent.

April 12, 1935. MAARTENSZ J.—

The plaintiff in this action sued for the recovery of a sum of Rs. 60, the value of four coconut trees which were cut down on his land by the defendant committee.

The case for the plaintiff was that the defendant committee cut down the trees in exercise of the powers vested in them by section 76 of the

<sup>1</sup> 2 C. L. W. 195.

<sup>2</sup> 19 N. L. R. 413.

<sup>3</sup> 19 N. L. R. 50.

Road Ordinance, No. 10 of 1861, and that he was entitled to compensation for the loss under the provisions of section 80.

The defendant committee in their answer pleaded that the trees were cut down as they were overhanging the District Road Committee road between Unawatuna and Heentigala and that the committee was not liable to pay compensation.

The committee did not in their answer raise the plea that the trees were cut down in exercise of the powers created by section 90 of the Road Ordinance, No. 10 of 1861, nor was it raised in the issue. It appears to have been raised in the course of the trial, for the plaintiff produced letter (P 3) dated July 8 and 9, 1932, in which the Chairman of the District Road Committee had stated with reference to the notice on the plaintiff to cut down the trees that as an act of grace he "preferred to use the provisions of section 76 of the Ordinance"—that is Ordinance No. 10 of 1861.

The learned Commissioner has rightly pointed out that section 76 does not contemplate a notice being issued to the owner of trees overhanging a road requiring him to cut them down.

He also finds that the notice was not as a matter of fact issued under the provisions of section 90 of the Ordinance. The Commissioner dismissed plaintiff's action on the ground that the trees did overhang the road and the District Road Committee was entitled, apart from the Ordinance, to cut down the trees without becoming liable to pay compensation in exercise of the common law right of an owner to remove a tree overhanging his land.

In appeal counsel for the defendant contended that the committee had cut down the trees in exercise of the powers vested in Provincial and District Road Committees by section 90 to cause the removal of obstructions in and upon any thoroughfare, and the committee so far from being liable to pay compensation was in terms of the section entitled to recover the costs which have been *bona fide* incurred in effecting such removal.

This contention is clearly untenable. Section 90 was enacted for the purpose of enabling Provincial and District Road Committees to remove or abate obstructions and encroachments specified in section 84 of the Ordinance, after taking the steps provided by the section. The obstructions and encroachments referred to in section 84, obviously do not apply to trees overhanging a road unless they constitute an obstruction to the use of the thoroughfare. There is no evidence in the case that the trees which were cut down overhung the road in question to such an extent as to impede the free use of it.

Another objection to the contention is that the committee could not proceed under section 90 independently of sections 84 and 88 with which it forms a group of sections enacted according to the sub-head to cope with "encroachments". This proposition is so plain that it hardly requires the support of authority. But authority will be found in the case of *Chairman, District Road Committee, Negombo v. Gabriel Croos*<sup>1</sup>, where Phear C.J. said :—

"It was argued on behalf of the District Committee that this section 90, not merely prescribes the course which the committee must take after the procedure laid down by sections 84 and 88 has terminated

<sup>1</sup> (1879) 2 S. C. C. 105.



in its favour, but that it is so far independent of those sections as to furnish a starting point from which alone the committee may proceed, without having taken the previous step of making a survey, and giving the owner or occupier of the premises notice of that survey, and so on, in pursuance of section 80. But to hold this would be in effect to ignore, not merely the obvious purpose of section 88, but the express words thereof, which are positive, that (in all cases) whenever it appears to the committee that a thoroughfare has been encroached upon, it shall (amongst other things) give notice in writing to the occupier of the premises, that unless within a month, &c., he or the person under whom he holds shall take legal proceedings for preventing the removal, &c., the committee will proceed with the removal, &c., in the manner provided by section 90. In view of this enactment nothing can well be plainer than that the committee has no authority to proceed with the removal in the manner provided by section 90, if it has not previously taken the steps prescribed by section 88”.

There is as a matter of fact no inconsistency between the provisions of section 76 and section 90, and there is no necessity to seek to reconcile them as the learned Commissioner has done. Section 76 is one of a group of sections enacted to empower the officer in charge of any work upon any thoroughfare, the execution of which is directed by the Governor, to do the acts specified in sections 71 to 78 in, through, or upon any land adjacent to a thoroughfare.

Section 76 enacts as follows:—

“It shall be lawful for any such officer to cut and remove, and place upon any ground adjacent or near, thereto, all trees, bushes or shrubs, and all leaves or branches or roots of trees that shall grow in or overhang any thoroughfare or cause any obstruction therein, and for that purpose to enter upon any land or premises with such persons, animals, and instruments as may be necessary, and to proceed to do therein all such things as may be necessary for the cutting, lopping, or removing of such trees, bushes, shrubs, leaves, branches, or roots.”

Section 80 provides that—

“Every person who shall sustain any loss or damage by reason of the exercise of any of the powers and authorities conferred by this Ordinance upon officers in charge of works to which it is applicable shall be entitled to receive compensation for the same.”

The rest of the section is not relevant to this appeal.

Section 81 enacts—

“Every Chairman of a Provincial or District Committee, within the limits of the province or district for which such committee is assigned to act, the Director of Public Works; and every person authorized in writing by any such Chairman or Director of Public Works, shall and may by themselves, their servants, workmen, and labourers, exercise the several powers and authorities conferred by the Ordinance on officers in charge of works to which this Ordinance is applicable.”

It is true that section 76 does not provide for a notice being issued to an owner of land adjacent to a thoroughfare requiring him to cut down an overhanging tree; but it is to be presumed from the Chairman's reference



to section 76 in his letter P 3 that the trees in question were cut down in pursuance of the provisions of section 76 and section 81 of the Ordinance.

It was contended, however, that even if the trees were cut down under the provisions of section 76 the plaintiff was not entitled to compensation as the loss or damage referred to in section 80 was loss or damage resulting from the officer not performing his duties in a proper manner, and not to loss or damage resulting from acts lawfully or properly done. I am not prepared to accept this contention. But I think a distinction must be drawn between acts which would, but for the provisions of the Ordinance, constitute a trespass and acts which would not amount to a trespass under the common law.

Appellant's Counsel referred to the provisions of sections 10 and 17 of the Ceylon Telegraph Ordinance, No. 35 of 1908. Section 10 contains provisions similar to the provisions of sections 71 to 78 and section 80 of the Road Ordinance, 1861.

Section 17 provides that—

“Whenever a telegraph line has been placed under, over, along, or across any immovable property, no person who, subsequent to the date on which such telegraph line has been so placed, plants any tree or shrub which may be likely in the future to injure, impede, or interfere with such telegraph line, shall be entitled to receive any compensation should such tree or shrub or any branch therefore be cut down under the provisions of section 10”.

It was contended that the combined effect of these two sections was that compensation should be paid for trees and shrubs cut down unless they were planted in the circumstances stated in section 17.

I do not think that any inference can be drawn from the provisions of the Telegraph Ordinance. Section 10 contemplates the laying of telegraph lines, over, along and across immovable property. There is in my judgment no analogy between a telegraph line along immovable property and a road running besides such property.

In my judgment the question whether or not the defendant committee is liable to compensate the plaintiff for the trees which were cut down must be determined by ascertaining whether the committee had a right to cut down the overhanging branches apart from powers vested in it by the Ordinance.

I think it is now settled law that the owner of a land has the right to have cut down a tree overhanging his land or at least so much of it as overhangs his land without paying compensation—*Cobre Hamme v. Botego*<sup>1</sup>, *Muttiah v. Dias*<sup>2</sup>, *Malar v. Kirithatkandu*<sup>3</sup>, and *Jayasundara v. Godage*<sup>4</sup>—in the last case Shaw J. was of opinion that an order of Court was desirable but not in strict law necessary to entitle a landowner to clip overhanging branches.

In the case of *Dias v. Strong*<sup>5</sup> Clarence J. gave the plaintiff damages because the trees were cut down without an order of Court. With due deference I prefer to follow the decision of Shaw J. If this view is correct

<sup>1</sup> (1867) *Ram. Rep.* 1863-1868, p. 234.

<sup>2</sup> (1887) 2 *N. L. R.* 83.

<sup>3</sup> (1893) 2 *S. C. R.* 97.

<sup>4</sup> (1921) 22 *N. L. R.* 345.

<sup>5</sup> (1878) 1 *S. C. C.* 103.

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the defendant committee had the right to cut the overhanging part of the trees without recourse to the Courts. They exceeded their right in cutting down the entire trees. But being coconut trees whether the whole or the overhanging part was cut away makes no difference to the owner.

I am therefore of opinion, though not without hesitation, that the defendant committee is not liable and I dismiss the appeal with costs. I would have had more hesitation in coming to this conclusion if this was not the first case as far as I know in which such a claim was made under an Ordinance which has been in force for about 74 years.

*Appeal dismissed.*

