1927.

Present: Drieberg A.J.

HORAN *v.* NARAYAN CHETTY.

435—M. C. Colombo, 1,226.

Housing and Town Improvement Ordinance—Closing order served during lease—Allowing the house to be used for human habitation—Liability of owner—Ordinance No. 19 of 1915, s. 79.

The owner of a house, who had leased it on an indenture before a closing order was made in respect of it, cannot be convicted under section 79 (1) of the Housing and Town Improvement Ordinance of having allowed the house to be used for human habitation during the period of the closing order.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

Navaratnam, for accused, appellant.

Keuneman (with *Villava Rayen*), for respondent, complainant.

September 12, 1927. DRIEBERG A.J.—

This is an appeal by the accused-appellant from a conviction under section 79 (1) of the Housing and Town Improvement Ordinance, No. 19 of 1915, of having allowed certain dwelling houses to be used for human habitation while a closing order was operative. The accused has been fined Rs. 200, and a further sum of Rs. 10 a day from July 27, 1927, so long as the houses are occupied while the closing order remains operative.

The accused is the owner of the houses, and he leased them to K. R. N. Nagappa Chetty for a period of three years from October 1, 1924, by Indenture No. 371 of September 11, 1924. The closing order, which is dated December 23, 1925, prohibited the use of the houses from April 1, 1926; an order was also made for their alteration in certain respects as provided by section 75 of the Ordinance. This order was made in M. C. No. 5,047. The party originally named was the accused-appellant, but his agent, Somasunderam, was added, and the closing order has been made against him. Somasunderam uses the same vilasam, and it is not contended that the order does not bind the accused-appellant.

The closing order was neglected, but the appellant's agent and the lessee, Nagappa, both worked at effecting the alterations ordered, and at the time of the trial on the present charge, June 15, 1927, about two-thirds of the houses had been altered.

Before this Somasunderam had been convicted in M. C. No. 1,825 on May 18, 1926, of allowing the houses to be used in violation of the closing order, and on July 13, 1926, he was again convicted of the same offence in M. C. No. 2,629. On both these occasions he was fined on his pleading guilty, but no continuing penalty was imposed.

The charge in the present case was made on April 20, 1927. On page 2 of the record it is stated that the accused (it is not stated which accused) appeared on summons, and in answer to the charge stated that the premises had been leased to Nagappa Chetty. At the trial both the accused-appellant and Somasunderam were present, and also Nagappa Chetty.

At the trial the only question before the Court, which was whether the accused had allowed the houses to be used for human habitation, was confused with the non-compliance with the order requiring alterations. It is clear that the appellant, Somasunderam, and the lessee had interested themselves with making the alterations; the appellant said that he could not do more for want of funds. The lessee was in default and he had sued him for cancellation of the lease. The learned Magistrate says that there is no defence to the charge, all that the defendants urge is that they did not have the

1927.

DRIEBERG A.J.

Horan v. Narayan Chetty.

money to carry on the work, and that the 1st defendant's evidence "affords an unqualified admission of guilt with a plea for mercy on account of his not having the money to finish the work."

Now, this would have amounted to an unqualified admission of the offence of not carrying out the alterations ordered, but the accused were not charged with this offence, and on this admission the 1st accused, the appellant, has been convicted under section 79 (1), which has nothing to do with the order for alteration. The Magistrate in his judgment said that he did not propose to punish the 2nd accused.

As I have mentioned, the only question for decision was whether the appellant had allowed the houses to be used for human habitation during the period of the closing order. The houses were in the occupation of tenants, holding, not under him, but under Nagappa, to whom he had leased them before the closing order was made, and which lease was in force at the time of the alleged offence; at that time, therefore, the appellant had no power to eject the tenants in occupation.

Now, a person can only be said to allow a thing when he has the right or power to prevent it. This is the ordinary meaning of the word. It is also the meaning adopted by the Courts. See Darling J. in *Crabtree v. Fern Spinning Co.*[1] In dealing with the offence under rule 8 (2) of Chapter 22 of the By-laws of the Municipal Council of Colombo, of "suffering" a condemned building to be used for human habitation, de Sampayo J. said "suffering a thing to be done connotes the right or power to prevent it, and an owner of property which is legally leased to a third party with exclusive rights of possession cannot of his own force prevent, while the lease subsists, the use of the property by the lessee or any person under him." (*Labrooy v. Ramasamy Chetty et al.*[2])

The person who allowed the house to be used for human habitation is not the appellant but the lessee, Nagappa. I therefore set aside the conviction, and acquit the appellant.

Set aside.

[1] *85 L. T. 549.*

[2] *(1912) 15 N. L. R. 387.*