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Present: Schneider J. and Jayewardene A.J.

COREA *v.* COREA *et al.*

138—D. C. Chilaw, 7,380.

Public Thoroughfares—Building along a thoroughfare—Demolition by order of District Committee—Liability of Mudaliyar—Action for damages—Ordinance No. 10 of 1861, ss. 12 and 86.

A building constructed two or three feet from the road would be one along a thoroughfare within the meaning of section 86 of the Thoroughfares Ordinance.

Plaintiff constructed a building along a thoroughfare without giving notice, as required by section 86 of the Ordinance, and was called upon by the Chairman of the District Committee to remove the building.

On plaintiff's failure to do so, the Chairman of the District Committee, with the sanction of the Provincial Committee, directed the first defendant to demolish the building, which the latter proceeded to do. Plaintiff sued the defendant and those associated with him to recover a sum of Rs. 5,000 as damages for wrongful destruction of the house.

Held, that plaintiff's right to sue the defendant was not affected by section 12 of the Ordinance.

Held, further that the Chairman of the District Committee was within his rights in ordering the demolition of the building, and that the defendant was protected from liability for his action.

"As a rule when the discharge of a public duty imposed by statute upon a person or bodies of persons involves the exercise of a discretion, which is not a merely ministerial act, if this discretion has been exercised erroneously, no action lies except upon proof of *mala fides* or indirect motive."

THE plaintiff in this action, who was the owner of a block of land at the junction of two roads, commenced building operations thereon early in the year 1922. He had not, however, given the notice required by section 86 of the Thoroughfares Ordinance, No. 10 of 1861. The matter was brought to the notice of the District Committee, Chilaw, who issued a notice to the plaintiff to remove the building forthwith. The plaintiff took no notice of the letter and the District Committee acting under the instructions of the Provincial Committee authorized the Mudaliyar, the first defendant in the present case, to proceed to the spot and demolish the buildings erected, within ten days of the receipt of the letter.

The first defendant fearing resistance and a breach of the peace took with him the second, third, and fourth defendants, who are the Muhandiram, the Inspector of Police, and the Vidane Arachchi of the place.

The plaintiff now sues them to recover a sum of Rs. 5,000 as damages sustained by him by the acts of the defendants, which acts the plaintiff says were wrongful and illegal.

The District Judge dismissed plaintiff's action, and the plaintiff appealed.

Hayley, for plaintiff, appellant.—The facts of the present case are hardly disputed and all parties are practically agreed as to them. The defendants have succeeded in the lower court on two specific points of law, viz. :—

(1) That they were not the party liable, as under section 12 of the Ordinance, the proper party to be sued was either the District Committee or the Provincial Committee.

(2) That even conceding that the action was properly constituted their action was justified under section 86.

With regard to the first point urged it cannot be seriously pressed on behalf of the respondents as the current of case law is very strongly against it. If the defendants admit that they were agents of the parties to be sued under section 12, and if as it is here, the acts committed amount to a tort, then either party may be sued for the damage, *vide, Robertson on Crown, p. 638.*

With regard to the justification it must be conceded that if any such power was vested in the Committee, it certainly was not by virtue of section 86 but by section 90, and purporting as they did to act under section 86, the act committed was *ultra vires*, and hence illegal.

The case can be carried even further. Granting to section 86, the construction which the respondents put on it by no stretch of language could it be said that the facts of the present case bring it within the powers of the section.

In the first place the section applies only to buildings *along* a thoroughfare. In the present case there is ample evidence to prove that between the site and the road there are several coconut trees. So that as ordinarily understood the present building does not abut on the road as contemplated by the section.

Furthermore the section really applies to new buildings and the evidence here discloses that there was an old site, and that the present building was really a renewal. Notice having been given in the previous instance, no notice was necessary in the present case.

Even if section 86 empowers the Chairman to pull down buildings it can only apply to encroachments, as the section comes under the general heading of Encroachments. It certainly cannot apply to a case like the present one where the building is several feet away.

The plaintiff no doubt would have been wiser if he had notified, but the absence of such notice does not entitle the other party to take such drastic steps as have been taken. In so doing they acted maliciously.

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On the question of the interpretation of the word " along " Counsel cited *Chairman, District Road Committee v. Gurunanse.*[1]

S. Obeysekera D.S.-G. (with him *M. W. H. de Silva C.C.*), for the defendants, respondent.—The contention of the appellant with regard to section 12 is wholly wrong. There the statute gives a certain remedy against a particular authority and the appellant is not entitled to resort to any other remedy. The statute says it is the District Committee or Provincial Committee that ought to be sued in such cases, and the appellant's remedy, if any, is against them.

With regard to the scope of section 86 and the interpretation of the word " along " it need only be said that there is clear authority for the proposition that " along " means " by the side of," *vide 99—P. C. Chilaw, 11,858, S. C. Minutes, March 31, 1922; P. C. Panadure, 2,724, S.C. Minutes, June 23, 1908.* As to what is meant by a " new building," *vide Ahamah v. Goonewardene.*[2]

The mere harshness of a statute does not disentitle the persons who have been given drastic powers from using those powers. If the powers are too wide the Legislature ought to step in. The Courts have merely to give the correct construction irrespective of the consequences.

Hayley in reply—

October 15, 1925. JAYEWARDENE A.J.—

In this case the appellant sued the respondents to recover a sum of Rs. 5,000 as damages sustained by him by the wrongful and illegal destruction of a house erected on a land belonging to him. The facts which led up to the litigation are as follows:—The appellant is the owner of a land called Thanayanwatta, situated at the junction of two roads called the Compasspara and the Public Works Department road to Dandagamuwa. He has obtained a Certificate of Quiet Possession for it (P 2). In the year 1917, when the Certificate of Quiet Possession was granted there were four buildings on it. One of them marked " Dispensary " is still there. The other buildings had disappeared at some date anterior to 1922. It is stated in the evidence that there was a fence between the houses and the roads. This too is not there now, but there is nothing to show when it disappeared. At the end of 1921, or early in 1922, the plaintiff commenced to put up a building occupying more or less the same site as the three old buildings. He had not given the notice required by section 86 of the Thoroughfares Ordinance No. 10 of 1861. A headman, who had been instructed to report to the authorities whenever any building is constructed within 25 feet from the centre of a minor road and within 33 feet of the centre of a Public Works Department road

[1] *1 Cur. L. R. 164.*

[2] *5 Bal. 105.*

reported to the Vidane Arachchi, the fourth defendant (D 6) that the plaintiff was building a house about 22 feet from the centre of the Public Works Department road (Madampe–Kurunegala–Dandagamuwa road) and about 17 feet from the centre of the minor road (Compasspara), and that the building was very close to the roads. He also stated that he had ordered the builders not to continue the work without obtaining an authority to build. The Vidane Arachchi reported the matter (D 7) to the Mudaliyar, the first defendant, and stated that the building in question was very close to the Kurunegala and Compass roads. The first defendant reported the matter to his superior officer, the Chairman, District Committee, Chilaw, who issued a notice on the plaintiff requiring him to remove forthwith the building which he had erected or caused to be erected at Dumalasuriya junction without giving one month's notice in writing in breach of section 86 of the Thoroughfares Ordinance of 1861. With the notice the Chairman sent a letter (D 1) in which he stated that if the plaintiff put back the building so as to leave 33 feet from the centre of the Madampe–Dandagamuwa (Kurunegala) road and 25 feet from the centre of the Compasspara no more would be said, that otherwise, it would become necessary to take further action with a view to its removal under section 86 of the Ordinance. This was in October, 1922. The plaintiff took no notice of this letter or of the notice served on him. In January, 1923, the District Committee, Chilaw, obtained the sanction of the Provincial Committee (P 3) to demolish the building. In granting the sanction, the Chairman, Provincial Committee, asked that notice be served on the builder to remove the building. This was done by D 4 dated February 2, 1923. On March 1 by D 5 the Chairman, District Committee, Chilaw, informed the first defendant, the Mudaliyar of the District, that the Provincial (Road) Committee had sanctioned the removal of the plaintiff's building under section 86 of Ordinance No. 10 of 1861, and directed him to remove it within ten days of the receipt of the letter. On this authority the first defendant on March 6 caused the building in question to be pulled down.

The first defendant says he took the second, third, and fourth defendants, the Muhandiram, the Inspector of Police, and the Vidane Arachchi, respectively, of the place to assist him in case there was resistance and a breach of the peace. They were present at the demolition, but, took no part in it. The costs of demolition have been paid by the plaintiff. The plaintiff alleges that the defendants acted wrongfully and illegally in pulling down and removing his building, and claims the sum of Rs. 5,000 as damages. The defendants answered that they were not liable to be sued in view of section 12 of Ordinance No. 10 of 1861, and that the action should have been brought against the District Committee or the Provincial Committee and not against them, and on the merits

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they justified their action under section 86 of the Ordinance. Several issues were framed on the pleadings and the material issues raised the question of the liability of the defendants to be sued— "generally and in view of section 12 of the Ordinance," and the question whether the erection of the said building was "a contravention of section 86 of Ordinance No. 10 of 1861." These issues the learned District Judge answered in favour of the defendants and dismissed the plaintiff's action.

The plaintiff appeals. With regard to the liability of the defendants to be sued, it is clear from the evidence that the second, third, and fourth defendants took no part whatever in committing the act of which the plaintiff complains. The dismissal of the action against them must, in any event, stand. As regards the first defendant, he admits that he had the building pulled down and removed. He has committed the act of which the plaintiff complains, and the question is whether section 12 affords him any protection from liability to an action for damages, if that act amounts to a tort or wrong.

Now section 12 enacts *inter alia* that, "all suits the cause of which shall arise or accrue to any person whatsoever from or by reason of any contract or agreement or any other matter or thing, made or entered into, done, or performed by any Provincial or District Committee in the execution of the powers vested in them by this Ordinance, shall be brought by such person against such Provincial or District Committee . . . ."

But the plaintiff's allegation is that the defendants' act was *wrongful* and *illegal*. He does not admit that the act complained of was committed in the execution of the powers vested in the Committee by the Ordinance. He says that the act was in excess of the powers conferred by the Ordinance, unauthorized by law, and *ultra vires*. In view of these allegations the plaintiff was not bound to bring his action against the District Committee or Provincial Committee, although the latter also might be liable to be sued. He was entitled to bring the action against all persons who actually committed the illegal act. The Common Law liability of agents who commit torts are clearly stated in *Article 133 of Bowstead's Law of Agency, VI. Edition, p. 441* :—

> "Where loss or injury is caused to any third person or any penalty is incurred by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, unless the authority of the principal justifies the wrong, to the same extent as if he were acting on his own behalf. This article applies to public agents."

In my opinion, the plaintiff was entitled to sue the defendants in this action. They are, however, entitled to rely on the grounds on which their principals might have justified their action.

Next, we have to consider the question whether the pulling down and removal of the house was an illegal or wrongful act, or whether it can be justified under section 86 of the Ordinance.

Under that section it is not 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 Committee of the district within which the building, wall, or fence is about to be commenced. It empowers the Chairman to require in writing the removal of any such building, wall, or fence commenced without notice. It also empowers the Chairman with the sanction of the Provincial Committee to cause any building, &c., commenced or *erected* without a month's notice to be removed and to recover the costs of such removal. The first point to be decided is, was the building in question " along " a thoroughfare ? The Chairman, District Committee, Chilaw, appears to have framed some rules which he has communicated to his headmen, under which all buildings within 33 feet of the centre of a Public Works Department road and 25 feet from the centre of a minor road are to be deemed to be " along " a thoroughfare. There is no legal authority for making such a rule, although some rule defining when a building may be said to be " along a thoroughfare " appears to be desirable. However that may be, the evidence led in this case shows that the distance from the side drain of the roads to the foundation of the building was from two to five feet. The plaintiff's own witness, Mr. Murray, a licensed surveyor, admitted that the distance from the drain to the foundation might be two, four, or five feet. The burden of proving the distance between the road and his building was on the plaintiff, who contended that the building was not " along " the two roads passing by his land. This distance has not been measured, and no survey has been filed. The evidence of his witness, Mr. Murray, must be taken in the sense least favourable to his side, with the result that the plaintiff must be taken to have erected his building at a distance of two feet from the road. A building two or three feet from a road would, in my opinion, be " along a thoroughfare."

Section 86 applies whether the building is in fact an encroachment on a road or not.

The plaintiff, however, seeks to avoid the application of section 86 to his building by proof of the existence of a row of coconut trees between it and the roads. There is evidence to show that there are two old coconut trees between the foundation of the building and the Compasspara, and an old coconut tree and the stump of another tree between it and the other road. I am not prepared to say that the presence of a few trees, as in this case, prevents a building being

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considered a building along a thoroughfare, if it is in fact so. The section does not prohibit the planting of trees along a thoroughfare and it is not unusual to have trees on the sides of a road. Then it is said that the building occupied the site of three old buildings which had stood on the land in 1917, and it is contended that section 86 applies only to new buildings and not to buildings re-erected on old sites. It does not appear when these old buildings were removed. Assuming that to be so, it has not been proved that the building removed was on the old site. It is stated that it " practically " covered the old site. That is not sufficient. For it is quite possible that the new one might have been closer to the road than the old one, and it may also be that the old buildings were put up after due notice. I do not think there is anything in sections 84 to 90 which deal with encroachments to justify such a contention. Lastly, it is contended that as section 86 is one of a group of sections enacted with the object of preventing encroachments upon thoroughfares, this building which had been completed, and which stood on private land, should not have been removed by the adoption of the very summary procedure laid down in section 86. That certainly raises an important question which is worthy of serious consideration. Perhaps, if the appellant had applied for an injunction to restrain the Chairman from removing his building, when he was informed of his intention to do so, this question might have been considered by the Court, and the plaintiff's building might have been saved.

But it is impossible to contend, in view of the words of section 86 which empowers the Chairman of the District Committee with the sanction of the Provincial Committee to cause any building commenced or *erected* without notice, to be removed, that the Chairman, District Committee, Chilaw, was not within his strict legal rights in acting in the way he did.

The words of the section are absolute and unqualified, and the consequences of disobeying its requirements are drastic, but when it is alleged that the persons concerned in carrying out its provisions have acted illegally and wrongfully, their conduct must be tested by the powers conferred on them by the Legislature, and not by suggestions that they might have acted more equitably in the particular instance. If the section works hardly in a case like the present, it is for the Legislature and not for the Courts to give relief. In my opinion, the plaintiff's building was " along " or " alongside " a thoroughfare within the meaning of section 86, and the first defendant did not act illegally or wrongfully in removing it at the request of the Chairman, District Committee, Chilaw. Even if it be held that the building was not " along " a thoroughfare, owing to its distance from the roads or on any of the grounds put forward by the appellant, the question remains whether the first defendant is liable in damages for his act. As I have said before, the defendants can plead in justification any defence that would have been

open to the District Committee. Then, would the District Committee be liable if it had taken the mistaken view that the building was "along a thoroughfare," and caused it to be removed? It is not suggested that the Committee or its Chairman acted *mala fide* or otherwise than honestly in this matter. The plaintiff had more than one opportunity of objecting to the removal of the building. Two notices were issued asking him to remove the building. He took no action on these notices.

As a rule when the discharge of a public duty imposed by statute upon a person or bodies of persons involves the exercise of a discretion which is not a merely ministerial act, if the discretion has been exercised erroneously, no action lies except upon proof of *mala fides* or indirect motive: *Partridge v. The General Medical Council*;[1] *Attorney-General v. Hooper*.[2] In a local case under this very Ordinance where the plaintiff sued the Provincial (Road) Committee for excessive assessment in connection with the opening of a new road, this Court said—

> "The Supreme Court is of opinion that the plaintiff is not entitled to recover. No malice or *mala fides* is imputed to the defendants, and it appears that, in assessing the various amounts on the proprietors, of the several estates in the district, they acted honestly and to the best of their judgment and ability." (*Tytler v. The Provincial Road Committee for the Central Province.*)[3]

The House of Lords acted on this rule in the case of *Everett v. Griffiths*,[4] and Lord Moulton explained the principle clearly in his judgment at pages 695–696. He said—

> "Now it must be borne in mind that no charge of bad faith or malice is made against either of the defendants, nor was there a scintilla of evidence adduced at the trial on which any such charge could be founded. Both the defendants must, therefore, be taken to have acted in good faith throughout . . . . ."
>
> . . . . If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle, of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public, and then to leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision. In the opinion of some of the

[1] *L. R. (1890) 25 Q. B. D. 90.*
[2] *L. R. (1893) 3 Ch. 483.*
[3] *(1867) Rama. (1863–1868). p. 287.*
[4] *L. R. (1921) A. C. 631.*

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noble Lords whose opinions have been already given this is expressed by saying that you cannot attack a man for doing a judicial act without alleging and proving malice or *mala fides*. I wish to avoid the use of the words " judicial act," not because I think them unsuitable, but because there are varying degrees of protection given in respect of the performance of judicial acts according to the judicial position of the person performing them, and I wish to avoid any discussion as to matters of this kind and to rest my judgment directly upon what I believe to be the universal rule applicable in all cases, which is, that which I have stated above."

The defendants are entitled to appeal to this rule of law and to ask that they be protected against an action for damages resulting from an act done by them on orders given by their principal in the exercise of a discretion, it may be erroneous, but, nevertheless, fair and honest.

In my opinion they are entitled to be so protected. For these reasons I hold that as neither the Provincial nor the District Committee would be liable to be sued for damages in the circumstances of this case, their agents, the defendants, would equally not be liable, and that the action against them has been rightly dismissed.

The appeal is also dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.