1931 *Present:* **Akbar J.**

BARTHOLOMEUSZ *v.* DEEN.

613—M. C. Colombo, 2,078.

Housing and Town Improvement Ordinance—Application for mandatory order to demolish building—Building not abutting on street—Special rule for tenements—Exercise of Chairman's discretion—Ordinance No. 19 of 1915, s. 18 (1) and rule 7 (a) in the schedule to Ordinance.

Where an application was made for a mandatory order for the demolition of a building on the ground that the building did not conform to section 18 (1) (*b*) of the Housing and Town Improvement Ordinance, which requires that every new building must either abut upon a street or have all the land between one face of the building and the street reserved for its use,—

Held, that the section had no application to tenements for which special provision is made under rule 7 (*a*) of the schedule to the Ordinance.

A mandatory order should not be asked for unless the Chairman or some superior officer of the Municipality, to whom his powers had been delegated, is satisfied that the order for demolition is justified in the particular circumstances of the case.

APPEAL from an order of the Municipal Magistrate of Colombo.

The facts appear from the judgment.

H. V. Perera (with him *Iyer* and *Haniffa*), for accused, appellant.

N. Nadarajah (with him *Abeysekera*), for complainant, respondent.

November 2, 1931. AKBAR J.—

This is an appeal from an order of the Municipal Magistrate ordering the accused to demolish the building on premises No. 109/5 at Maradana belonging to him under section 13 (2) of Ordinance No. 19 of 1915. Under that section when any person is convicted under sub-section (1)

the Chairman may apply to the Magistrate for a mandatory order and the Magistrate may on such application order the demolition of the building. It will be seen from the section and from certain cases decided by the Supreme Court, namely, *Anthonis v. Fernando*[1], and *Bartholomeusz v. Perera*[2], that such demolition order does not follow as a matter of course on the conviction of the accused for an offence under sub-section (1) of that section. As Mr. Justice de Sampayo stated, " A mandatory order asked for is not a matter of course. The accused person has a right to show cause against it and the Magistrate is bound to exercise his discretion." The question in this appeal is, as was pointed out in the second case mentioned above, whether the Magistrate had exercised his discretion properly. In the case of the *Chairman, Local Board, Kurunegala v. Meera Saibo*[3] it was held that no mandatory order for the demolition of a building should issue where a building does not contravene some provision of the law, or even where by some alteration it could be brought into accordance with the law. If we apply these principles to the present case we find the following facts proved:—The accused was convicted and was fined Rs. 25 for erecting the building in question without the permission of the Chairman. The prosecuting inspector stated that the main objection against the building was that the building did not abut on a street as required by section 18, sub-section (1) (*b*), which states that every building erected after the commencement of that Ordinance was either to abut upon a street or to have all the land between one face of such building and the street reserved for the use of the building. The prosecuting inspector admitted that except for this objection the building complied with all the other requirements of the Ordinance. He also admitted that the old building was of wattle and daub and the new building was of masonry. He further admitted that the building was 35 to 36 feet in length and that it was a block of tenements and that it would probably be used by the labouring classes. He further admitted that the Chairman had not visited the spot. It was pointed out to the Municipal Magistrate that section 18 (1) (*b*) was a section of general application but that the effect of it was relaxed in the case of " ranges or blocks of buildings wholly or mainly adapted to be inhabited in tenements by persons of the poorer or of the labouring classes " in the sense set forth in rule 7 (*a*) in the schedule to the Ordinance. The Magistrate states in his judgment that although he is not prepared to agree that rule 7 in any way over-rides or supersedes the provisions of section 18, it is merely supplementary to that section. I cannot understand his reasoning as I think rule 7 (*a*) applies to the present case. If it is supplementary it cannot be ignored. It is a well known principle of law that when there is a general provision of law and a later provision applying to a special case the later provision will be regarded as an exception and applicable to the special case mentioned. I have no doubt in my mind that rule 7 (*a*) in the schedule is applicable to the building in question on the admissions of the prosecuting inspector. Rule 7 (*a*) is as follows:— " The following special provision shall apply to ranges or blocks of building wholly or mainly adapted to be inhabited in tenements by persons of the poorer or labouring classes: Every face of any such range or block

[1] *7 C. W. R. 58.* [2] *27 N. L. R. 83.* [3] *7 C. W. R. 109.*

which is less than 100 feet in length shall be provided with adequate direct access to a public street from each tenement to the satisfaction of the Chairman."

As I have stated, the inspector admitted that these tenements were 35 to 36 feet in length. Therefore the ground on which the prosecuting inspector applied for a mandatory order, namely, that the building does not abut on a street or have all the land between one face of such building and the street reserved for the use of the building, does not apply and the application for a mandatory order fails at the very beginning. The evidence shows that rule 7 (*a*) was not even thought of by the Municipal authorities as affecting the present case. The Magistrate was taken by the parties to show that there was adequate access, but he seems to have been satisfied that the access being over lands of others it was not direct access as required by rule 7 (*a*). But this surely is the wrong test to apply. It is the Chairman who must be satisfied and not the Magistrate; and the Chairman never thought of rule 7 (*a*). The demolition order was of serious consequence to the accused as it means the destruction of valuable property and the total loss of the ground on which the buildings stand; and such an order should not have been allowed, when as in this case the only ground on which the Municipality asked for such an order was shown to have failed. The prosecuting inspector admitted that the Chairman had not visited the place and the fact that the Municipal authorities never thought of applying rule 7 (*a*). Their view that only section 18 (1) (*b*) applied was entirely wrong. I cannot see how in these circumstances the demolition order can be allowed to stand. Owing to the serious consequences of such an order such an application has to be applied for by the Chairman under section 13 (2). It is true that under section 242 of Ordinance No. 6 of 1910 the Chairman is authorized to delegate any of his duties or powers to be peformed and exercised by any other officer generally authorized thereto in writing by the Chairman. Mr. Nadarajah contended that as the application for the demolition order bore these remarks at the bottom :—

" I authorize this application.

(Sgd.) H. E. NEWNHAM,
Chairman, Municipal Council,
and Mayor of Colombo."

this was a sufficient compliance of section 13 (2) of Ordinance No. 19 of 1915. That may be so but even in the matter of this plaint the Magistrate states as follows:—" It will be noticed that the plaint in this case has been carelessly framed; the number of the case in which the accused was convicted and the number of the premises in question having been omitted." These facts mentioned by the Magistrate coupled with the admission that the Chairman had not visited the spot and the absence of any evidence to prove that the Chairman had ever delegated his powers under rule 7 (*a*) to some one to see that there was adequate and direct access to a public street in the case of tenements show, to my mind, the careless manner in which this demolition order has been applied for. Such orders having serious consequences should not be asked for unless the Chairman or some superior officer of the Municipality to whom his

powers had been delegated is satisfied that the demolition order is justified in the particular circumstances of the case. What we find here is an application faulty in material respects signed by a person who calls himself the prosecuting surveyor of the Municipality and the application authorized by the Chairman. As I have already pointed out, it never entered the minds of the Municipal authorities that rule 7 (*a*) had any application at all to the present case. In fact the admissions had to be extracted from the surveyor in cross-examination. I think the mandatory order issued in this case is not justified on the facts or the law and that the Magistrate has not exercised his discretion properly. I would set it aside and allow the appeal.

Appeal allowed.