

1932

*Present : Akbar J.*DANIEL *v.* RAYMOND.

955—M. C. Colombo, 5,179.

Municipal Council—Construction of culvert—Drain alongside a house—Duty of occupier or owner—Building of new drain—Obligation of owner—Municipal Council Ordinance, No. 8 of 1901, chapter 22.

By-law No. (1), passed under chapter 22 of the Municipal Council Ordinance, No. 8 of 1901, applies where a drain has been made or excavated alongside a house, adjoining the street; in which case the obligation is cast upon the owner or occupier not to pass over it, except by means of a bridge built according to the instructions of the Chairman.

Where the Municipality has constructed a new drain by the side of an existing drain, it has no power to call upon the owner or occupier to connect the ends of the new drain and build a bridge over it.

A PPEAL from a conviction by the Municipal Magistrate of Colombo.

Amarasekera, for appellant.

Choksy, for respondent.

May 12, 1932. AKBAR J.—

This case came up originally before me on February 22, 1932, but it was postponed by me to enable counsel for the Municipality to get further instructions. This appeal is concerned with the correct interpretation of a by-law, namely, by-law No. 1, chapter 22, of the by-laws proclaimed on October 12, 1905. Although the by-law is a long one, yet the meaning appears to be clear. As I understand the by-law, the owner or occupier of a house adjoining a street by the side of which a drain has been constructed, is prohibited from constructing or placing over any such drain any bridge, platform, building or other structure except with the written permission of the Chairman and subject to such conditions and directions as the Chairman may impose. Then the by-law goes on to say that such owner or occupier is to maintain such bridge, &c., in good order to the satisfaction of the Chairman. The penal part of the by-law provides that if any such person has access to his house without such bridge, &c., or by some bridge, &c., not constructed as aforesaid, the Chairman may give notice forthwith to the owner to construct or place or alter the same. The Chairman may also, in the event of the owner or occupier failing to

maintain in good order such bridge or structure or the drain thereunder, notice the owner or occupier to put the same in order, and if there is default on the part of the owner or occupier to observe the terms of the notice within thirty days of the service of the notice, the owner or occupier is to be deemed guilty of an offence. This is the whole by-law. It will therefore be seen that it only applies where a drain has been made or excavated by the side of a house adjoining a street. The obligation is cast on the owner or occupier not to pass over such drain except by means of a bridge, &c., built according to the directions of the Chairman. There is a further obligation on the owner or occupier of such a house to build such a bridge over such a drain upon notice by the Chairman or to alter the same on the directions of the Chairman. Further, the owner is liable upon notice to keep the bridge and the drain thereunder in good order.

Now, what are the facts in this case as found by the Municipal Magistrate? There was a culvert in existence for a considerable time past giving access to the premises of the accused. This culvert carried through it the water coming down an unbuilt drain by the side of Kanatta road. The evidence shows that this culvert and the unbuilt drain were therefore about thirty years past. The Municipality decided to build a new drain, and a drain of 15 inches diameter was built of concrete, but this new drain was not built in the centre of the old drain, but on the side of it nearest the boundary walls of the premises abutting the street. The result was that the water from the new drain could not flow through the old culvert because the drain and the culvert were not in line. All these are facts as found by the Municipal Magistrate. The judgment proceeds as follows:—"In other words, were the Municipality justified in putting the new drain out of the line of the culvert openings and then calling upon the accused to bring his culvert into line and build it anew". The learned Municipal Magistrate then goes on to say after inspecting the place that the new drain was undoubtedly an improvement on the old unbuilt drain and that the authorities had built the drain in a reasonable position. According to the Magistrate "The only question that remains is whether the existing culverts are now adequate for the new drain. Obviously they are not because, as I have shown, their openings are not in line with the new drain. There is no question that the Chairman has the power to compel the accused to supply new culverts in such a case." I do not think the learned Magistrate has applied his mind to the real point arising in the case. We are not concerned with the question whether the Municipality has acted reasonably or not in building the new drain. The learned Municipal Magistrate found that the new drain built by the Municipality was built at one edge of the old unbuilt drain and that the two ends of the new drain were left near the two openings of the culverts. The Municipal Engineer did not build the new drain right through, but called upon the accused to connect the two ends of the new drain near the culvert openings and build a bridge over it. As I read the by-law, there is no obligation on the part of the owner or occupier to build a part of a drain or to connect the two ends of a drain and to build over such a drain. There was an old unbuilt drain, and over it there was a bridge in existence for the last thirty years. There was nothing wrong with this unbuilt drain, but the Municipality built a better drain side by side with

the old drain not exactly in line with it and left the two ends near the bridge over the accused's land unconnected. Can the Municipality under the by-law stated by me call upon the owner not only to build a bridge but also that part of the drain thereunder? I do not think they have this power under the by-law. There can be no doubt of the facts stated by me above, because the notice P 1, which was served on the accused and for a breach of which he was convicted, required the accused "to construct two proper culverts of concrete pipes 15 inches in diameter, within fourteen days of the service of this notice". Mr. Choksy admitted that "culvert" meant an arched drain of bricks or masonry carried under a road, railway, or canal for the passage of water. The word "culvert" is not used in the by-law at all, and as I have pointed out there is no obligation on the owner or occupier to build any part of any drain. The only obligation with regard to a drain is that in the case of an existing drain under a bridge, he is only to put the same in order, on notice by the Chairman. The accused is not charged with interfering with the old unbuilt drain which has existed for thirty years. If the Municipality wish to get further powers so as to catch up this particular case they can easily amend the existing by-law No. 1 of chapter 22. The accused has been charged in these criminal proceedings and fined a sum of Rs. 50. In my opinion this conviction is wrong and I would set it aside and acquit the accused.

Set aside.
