Present : Mr. Justice Wood Renton.

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RAMEN CHETTY *v.* THE MUNICIPAL COUNCIL, KANDY.

C. R., Kandy, 17,260.

Water service, cutting off—By-laws—Validity—Excessive consumption of water—By-laws 157 and 173—Ordinances Nos. 7 of 1887 and 8 of 1901, s. 6.

Section 173 of the by-laws of the Kandy Municipality, made under the provisions of section 6 of Ordinance No. 8 of 1901, does not empower the Municipal Council to cut off the water supply of a ratepayer who is not in default as regards payment of his ordinary water-rate, but has merely used a private supply of water for other than domestic purposes.

THE plaintiff, who was the owner of house No. 25, Trincomalee street, Kandy, to which a water service had been allowed by the Council some years ago, alleged that the defendant Council on or about May 10, 1908, wrongfully cut off the supply of water to the said house, and prayed for a decree restoring the water service to the said house, and also for an injunction restraining the Council from continuing to cut off the water supply and compelling its restoration. The defendant Council answered that the plaintiff had failed to comply with section 157 of the by-laws relating to water supply, in that he did not pay dues for water used in excess of his allowance during the first and second quarters of the year 1907, and that the Council was therefore justified under by-law 173 in stopping his supply of water.

The following issues were framed at the hearing :—

(1) Are the by-laws under which the defendant Council is alleged to have acted *ultra vires ?*

(2) If so, is the plaintiff barred from taking such a plea by sub-section (2) of section 6 of Ordinance No. 8 of 1901 ?

(3) If they are valid, was the Council justified under section 157 in fixing a meter on the pipe in plaintiff's premises ?

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(4) If they were, has plaintiff consumed water in excess of the amount allowed under that section for the first and second quarters of 1907 ?

(5) If so, was the defendant Council justified in cutting off the supply under section 173.

(6) What damages, if any, is plaintiff entitled to recover ?

The Commissioner of Requests (T. B. Russell, Esq.) held as follows (November 6, 1908) :—

"To take the issues one by one. On the 1st and 2nd issues Mr. Beven, for plaintiff, argued that as the Municipal Council's Ordinance, No. 7 of 1887, nowhere authorizes the framing of rules regarding water supply, the rules framed for this purpose are *ultra vires*. Against this Mr. Vanderwall for defendant Council referred me to amending Ordinance No. 8 of 1901. Section 5, sub-section (28), enables by-laws to be framed for every other purpose which the Council may deem necessary for the carrying out of the several provisions of the Ordinance. Section (*b*) enlarging the Council's powers, which shall extend to all matters about which it is expedient to make by-laws for the better carrying into effect of the objects of the Ordinance. As if this were not enough, the next section, section 6, makes all by-laws regularly proclaimed as legal, valid, effectual, and binding as if the same had been enacted in the Ordinance itself. It seems to me quite clear that these issues must be decided in defendant's favour. There is good reason to hold that the by-laws are in themselves *ultra vires*. But whether this is so or not, the plaintiff is by section 6 effectually barred from questioning their validity.

"The 3rd issue suggested by Mr. Beven was rejected by me. He wished to be allowed to prove that the Council was not justified, in the first instance, in fixing a meter in plaintiff's premises. This seemed to me not only an unnecessary issue in itself for deciding the real cause of dispute between the parties, but no mention of the intention to raise it was made in the notice of action which was served on the defendant Council.

"The 4th issue is one of fact. The defendant seems to me to have clearly proved that for the second quarter of 1907 that the plaintiff used water much in excess of the amount allowed by by-law 157. They have proved that demand was made for the value of the excess from plaintiff, and that he failed to pay it.

"Mr. Beven in his cross-examination of the witnesses suggested that there must have been something wrong with the meter owing to the great difference between the amount used by plaintiff in the first quarter and that used in the second. It is sufficient to say that no reason whatever is shown why I should accept this suggestion. It is to be presumed, in the absence of any evidence to the contrary, that the meter was in working order, and it would have been

easy, if the plaintiff seriously disputed this, for him to have got it examined by a competent engineer. It is, moreover, to be noted that, according to Mr. Chapman, any damage to the mechanism would result in the meter registering less and not more water. Mr. Chapman has produced his meter reading books and a statement from them showing the excess used by the plaintiff, and he appears to have done everything in order. The 4th issue must be decided in favour of the defendant.

" Mr. Beven laid stress on the 5th issue as the most important of them all. Even if I held against him on all the other issues, he argued that I must decide this in his favour. He contended that by-law section 173 does not authorize the cutting off of water for failure to pay for excess water consumed, but only for failure to pay water-rate. The failure to pay for excess water, he urged, was provided by the infliction of a penalty (*vide* sections 157 and 159 of the by-laws). He further urged that the action of the defendant was not justified by the concluding portion of section 173 either, as it contemplates some wrongful act, not a failure to do something.

" In answer to this Mr. Vanderwall argued, and it seems to me rightly, that section 173 is meant to deal with all acts or omissions whatever by which a person has contravened any section of the by-laws, and that in any case the plaintiff has been shown to have been guilty of 'undue consumption,' for which, if for nothing else, he is liable under the section. He further pointed out that the by-laws provide two courses of action for the Council in the matter of water consumption, either or both of which it is open for the Council to take: (1) A means of recovering the value of the water used (section 159); (2) means of punishing offenders and preventing future abuse (section 173). For these reasons I decide the 5th issue also in favour of defendant.

" It is not necessary now to decide the 6th issue regarding damages. There is a public standpipe just outside the plaintiff's door in the street, and an allowance of 50 cents a day for a cooly to bring water into the house would be not only ample, but generous. I do not believe for a moment that it cost the plaintiff so much.

" Plaintiff's action is dismissed with costs."

The plaintiff appealed.

A. Drieberg for the plaintiff, appellant.

Bawa for the defendant, respondent.

Cur. adv. vult.

July 19, 1909. WOOD RENTON J.—

I agree with the learned Commissioner of Requests that in view of section 124 (2) of the Municipal Councils Ordinance, No. 7 of 1887, as re-enacted by section 6 of Ordinance No. 8 of 1901, and of the

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decisions of the Supreme Court in *La Brooy v. Ismail*[1] and *Colombo Municipal Council v. Uduma Lebbe Marikar*,[2] and *cf. Institute of Patent Agents v. Lockwood*,[3] the validity of the by-laws of the Municipal Council of Kandy, on which the decision of the present case depends, cannot be questioned here. But I do not think that rule 173 of those by-laws empowers the Municipal Council to cut off the water supply of a ratepayer who is not in default as regards payment of his ordinary water-rate, but has merely used a private supply of water for other than domestic purposes. Rule 173 authorizes the application of that drastic remedy in three cases: (i.) Default of payment of "the water-rate" fifteen days after it has become due; (ii.) the doing, or causing or permitting to be done, of anything in contravention of the by-laws in the chapter (Chapter XII.) of which rule 173 forms a part; (iii.) the wrongful failure—I am citing only the material words —"to do anything which ought to be done for the prevention ..... of undue consumption." Can the failure of a ratepayer to pay the excess which rule 157 of the by-laws enables the Council to charge for undue consumption be brought under any one of these three classes? In my opinion it cannot. (i.) It is not a "water-rate." It possesses none of the periodicity or recurrence, which, in the ordinary sense of the term, is an inherent characteristic of a "rate." Moreover, rule 132 draws a distinction between the "water-rate" which the Municipality of Kandy is authorized to impose and "other sums" leviable under the group of rules, which includes rule 157. (ii.) The appellant's failure to pay the excess here in dispute is not "the doing, or causing, or permitting to be done," of anything in contravention of the by-laws. It is an omission, and not an act. (iii.) The words "wrongful failure to do anything which ought to be done for the prevention ..... of undue consumption" refer, and must be limited, to omissions to comply with rules framed for the direct purpose of preventing undue consumption. The chapter of the by-laws which includes rule 173 contains a variety of provisions in which the words I am considering find a clear field of application. Moreover, the by-laws themselves provide the mode in which these excess charges are to be recovered. Rule 159 enacts that the sums recoverable under either of the two next preceding by-laws (including, of course, rule 157) "shall be recovered in the manner provided by sections 281 and 282 of 'The Municipal Councils' Ordinance, 1887,' as if the same were expenses directed to be paid by the said Ordinance." Sections 281 and 282 of Ordinance No. 7 of 1887 provide for the ascertainment of the amount of such "expenses" by the Municipal Magistrate, and their recovery, in case of default, as "fines." In effect, the Municipal Council is now seeking to utilize rule 173 as sanctioning an additional—and no doubt more effective—mode of securing the

[1] *(1906) 1 A. C. R. 38.*
[2] *(1907) 1 Leader L. R. 9.*
[3] *(1894) A. C. 347.*

payment of the charges in question. I do not think that rule 173 will bear the construction that the Commissioner of Requests has put upon it. In the present case the excess claimed is only Rs. 19·89. The excess charge provided for by rule 157 is Re. 1 per 1,000 gallons excess. If the respondent's contention is right, a householder who owed, or was alleged to owe, a rupee in respect of an excess charge of this description, and who made default in paying it, would be liable, at the discretion of the Municipal Council, to have his entire water supply cut off on six hours' notice (rule 174). Much stronger language than is to be found in rule 173 would be necessary for the creation of a penalty so wholly out of proportion to the offence.

The proceedings of the Council in the present case have been sufficiently startling. No attempt was made to enforce payment in the way that the by-laws prescribe. The evidence of Mr. Jayetilleke, the Secretary of the Municipal Council, in cross-examination on this point, is worth quoting. "I demanded from the plaintiff about March, 1908, the amount due on Rs. 21·87, *i.e.*, Rs. 19·89, plus 10 per cent. costs for excess water used. Rs. 19·89 was first demanded, and when not paid, a warrant was issued, and the 10 per cent. charge was entered in the warrant ..... The amount was not paid. On May 6, 1908, I issued a notice on the plaintiff warning him that the water would be stopped if he did not pay his excess. The request was not complied with, and I therefore stopped the supply ..... In everything I did I acted under the orders of the Council, and not on my own initiative. These amounts have to be recovered as fines, not by distress. The warrant, as a matter of fact, is irregular. The plaintiff should have been summoned to Court." In re-examination, Mr. Jayatilleke naïvely adds: "Because the warrant was not regular, no effort was made to enforce it." By the admission of its Secretary, the Municipal Council of Kandy has acted as illegally in the earlier, as I hold it to have acted in later, stages of this case.

I set aside the decree appealed against, and direct that judgment be entered for the appellant in terms of paragraphs (3) and (4) of the prayer in his plaint. The appellant must have all costs of these proceedings here and in the Court of Requests.

Appeal allowed.