1933 *Present :* **Garvin S.P.J. and Akbar J.**

JANSZ *v.* MUNICIPAL COUNCIL OF COLOMBO.

31—D. C. Colombo, 44,050.

Housing and Town Improvement—Premises abutting on lane with street lines —Alterations and additions to building—Owner's right to compensation—Ordinance No. 19 of 1915, s. 18 (4).

The owner of certain premises which abutted upon a lane in regard to which street lines had been laid by the Municipal Council applied for permission to make certain alterations and additions to his premises by erecting pillars adjacent to and outside the existing walls and upon them to erect a new structure. He was informed that the proposed building must be set back twenty feet from the centre of the sanctioned street line. He then instituted the present action to recover compensation for the damage sustained by him by reason of the refusal to permit him to carry out his building operations.

Held, that the proposed alterations and additions did not constitute a re-erection of an existing building within the meaning of section 18 (4) of the Housing and Town Improvement Ordinance and that the owner was not entitled to compensation.

Held, further, that compensation is payable under the section in respect of damage actually sustained by acting in compliance with the requirement of the law and setting the building back.

PLAINTIFF was the owner of premises bearing Nos. 13/115 and 14/115, Santiago street, Kotahena, abutting upon a lane in regard to which the Municipal Council had laid down street lines. The plaintiff, who desired to make certain alterations and additions to his premises, submitted a plan showing them to the proper authority. On receipt of this application the plaintiff was informed that his plan could not be sanctioned and that the proposed building must be set back 20 feet from the centre of the sanctioned street line. The plaintiff then instituted the present action claiming that he was entitled to compensation as he was not permitted to carry out the building operations. He claimed a sum of Rs. 2,000 which was awarded to him by the District Judge.

H. V. Perera, for defendant-appellant.—The plaintiff cannot compel us to be vested with title when we cannot in fact become so vested.

As to the question of the cause of action, there is a statutory right to compensation in certain cases. The cause of action is the non-performance of a statutory duty imposed upon the Chairman. The Chairman is only the officer appointed by the law to see that certain requirements are carried out. The requirement of the section under consideration is not the asking of a particular thing to be done, but rather a condition.

Compensation will be payable to plaintiff only in connection with a re-erection and if there is a set-back. If the building is demoblished, plaintiff will not be entitled to compensation.

The word " thereby " in section 18 (4) may refer to the " setting-back " or to the " requirements ".

The Judge's basis of assessing damages is clearly wrong.

N. E. Weerasooria, for plaintiff-respondent.—The effect of the amendment in the Ordinance of 1917 with regard to re-erection is to widen the meaning of the term " re-erection ".

Re-erection of a part of a building is an " alteration ", not a " re-erection ".

[GARVIN S.P.J.—Can a building not be " re-erected " in part ?]

It was to meet this difficulty that the amendment of 1917 was made. The phrase " Chairman may require " was intended to give a discretion. *Cf.* Public Health Act, 1875, where a discretion is given. " May require " means may require or may not require.

The value of the land must be considered as a fair assessment of damages.

H. V. Perera, in reply.

January 27, 1933. GARVIN S.P.J.—

This is an appeal from an award of compensation which purports to have been made under the provisions of section 18 (4) of the Housing and Town Improvement Ordinance, No. 19 of 1915. The plaintiff is the owner of premises bearing Nos. 13/115 and 14/115, Santiago street, Kotahena. These premises abut upon a lane which branches off Santiago street in Kotahena. The plaintiff says that he desired to make certain " additions and alterations " to his premises. He accordingly submitted a plan showing the proposed additions and alterations to the proper authority. It would seem that at this date, in pursuance of the powers vested in them, the Municipal Council had laid down street lines with a view to widening this lane and one of these lines passed through the plaintiff's premises, so that a certain portion of it now lies between these new street lines. On receipt of this application the plaintiff was informed that his plan could not be sanctioned, and upon further inquiry, he was informed that the proposed building must be set back 20 feet from the centre of the sanctioned street line. The plaintiff then brought the present action claiming that he was entitled to be compensated for what he says is the damage he has sustained. His position is that inasmuch as he is not permitted to carry out the operations which he contemplated and since, to comply with the requirement to get his building back to a point 20 feet from the street line is impossible for the reason that he has no room left, his premises have become useless to him for the purpose which he contemplated when he proposed to carry out these additions and alterations, and he claimed that the measure of the compensation payable to him should be the full value of the premises with the buildings standing thereon. He accordingly claimed a sum of Rs. 2,000 and this sum the learned District Judge has awarded him.

The Council now appeals and it is urged in support of the appeal that the plaintiff has wholly failed to prove that this is a case in which he is entitled to the compensation prescribed by statute. It is urged that the only provision which applies to a case such as this is the first proviso

to section 18 (4) which is in the following terms:—"Providing that in the case of a public street, where on the re-erection of any building which projects over any line so defined such building is required to be set back to such line, the local authority shall make compensation to the owner of the building for any damage he may thereby sustain". Counsel for the respondent admits that this is a case in which the plaintiff is merely seeking the compensation provided by that section, and that it is not an action for damages based upon any other ground. It is essential, therefore, to the success of the plaintiff's action that he should show that compensation is payable to him by law and that that compensation has been withheld from him. He can only do so by proving that the operations proposed were the "re-erection" of a building, that he was required to set it back, and that he thereby sustained damages.

Now what the plaintiff proposed to do is set out by him in his evidence in the following words:—"I produce the actual plan I sent up with my application P 4. On the right hand top of P 4 will be found the sites of the pillars in red which I proposed to raise in concrete or in cement, and it is on these pillars that I propose to put up the upstair, the old walls remaining while the pillars would take the weight of the upstair". It was not proposed by the plaintiff to demolish the existing building or to build upon it but merely to remove the roof and then upon a number of pillars, which he proposed to erect around the building and adjacent to the walls, to raise an upper storey. The question which arises is whether what he proposed to do was to re-erect a building within the meaning of section 18. The plaintiff himself as I have said earlier described the operations which he proposed to undertake as "additions and alterations".

In Ordinance No. 19 of 1915 as originally drawn, building operations are considered under three distinct heads, the erection of buildings, the re-erection of buildings, and the alteration of buildings, and in that Ordinance in its original form there are a number of sections in which these terms appear sometimes in immediate contradistinction to each other which are helpful in arriving at a decision as to what is meant by those terms where they have not been defined. In section 5 we have the words "No person shall erect or re-erect any building". So in section 18 we have the direction that every building "erected or re-erected shall be erected upon the line of an existing street not less than 20 feet in width, &c.". What is contrasted then is the erection of a building with the re-erection of a building. Then we have in section 6 a prohibition against the making of any alteration to any building without the written consent of the Chairman and a definition of the term "alteration", which taken together indicate that the term means and includes building operations which do not amount to the erection or re-erection of a building. I would specially invite attention to the section 6 (2) (*k*) where in the term "alteration" is included "the re-erection of any part of the building demolished for the purpose of such re-erection or otherwise destroyed". It would seem, therefore, that the re-erection of the part of a building was not a re-erection but was treated as an alteration to an existing building. These considerations lead to the conclusion that the word "re-erection" in the provisions of section 18 in its original form has

reference to the replacement of an existing building by another, substantially similar in structure to the one which it replaced. It was upon the re-erection of such a building that, as the Ordinance originally stood, the question of compensation arose. But by a later Ordinance No. 32 of 1917 certain additional provisions were made which have been inserted into the section as it originally existed and those provisions are printed in italics in the edition of the Legislative Enactments issued in the year 1923. The first feature so introduced was the enlargement of the meaning of the term " re-erection " to include operations which did not involve the entire replacement of a building by another, such as the re-erection of any wall or part of a wall forming part of the building or of any other support to the roof or the erection of any new wall or other support to the roof. It is also stated that the term " re-erection " includes the restoration of any wall or any part of a wall or of any support to a building which has been demolished or otherwise destroyed to or within a distance of five feet from the ground, but does not include any operation, which, in the opinion of the Chairman, may reasonably be considered a repair to the wall or support. It is evident that the policy of the Legislature was to prevent the circumvention of the law which prohibited the re-erection of a building which projects over any street line by the gradual progressive process of re-erecting parts of the building until in due course an entirely new building took the place of the old one, which while it continued to occupy the site within existing street lines did not offend against the provisions of the law. It is also to be gathered from what has been said by the amending Ordinance with reference to the term " re-erection " that by these lesser operations were contemplated operations in the nature of a partial restoration of the building.

Can the operation which the plaintiff proposed to undertake fairly be said to be a re-erection within the contemplation of section 18 and in particular of the proviso 1 to section 18 (4). It is not proposed to replace the existing structure by a similar new structure, nor is it proposed to replace or restore any part of the building. What is proposed in effect is the erection of pillars adjacent to and outside the existing walls and upon them to erect a completely new structure. Such an operation is not the " re-erection " of a building even if that term be understood and interpreted with due regard to the enlargement of the meaning which was brought about by the amending Ordinance No. 32 of 1917. If this conclusion be right, then the plaintiff's claim fails, for the compensation which the statute says shall be payable is only payable in connection with the re-erection of a building.

It was urged that what are referred to by the plaintiff as additions and alterations are rightly called additions and alterations and come specially under the provisions of section 7 (2) which provides that " where any proposed alteration in any building involves the addition of any room or storey to the building, the Chairman may refuse to consent to any such alteration unless the whole building or any part thereof is brought into conformity with this or any other Ordinance ".

The operations which the plaintiff proposed are either the erection of a new building or possibly the alteration of an existing building. It is immaterial under which head they come since in neither case does the

law give the plaintiff a right to compensation where under the law he is not permitted to carry them out. In the latter case his remedy if any was to appeal to the Tribunal of Appeal, constituted by the Ordinance.

The point was next raised that the plaintiff had, even if this be treated as a re-erection, failed to establish his right to compensation. He has not set back his building, and it is urged that the statute only provides for the payment of compensation to an owner of a building for any damage which he has actually sustained by setting back his building. It was argued on the other hand that the right to compensation arose when the Chairman required the building to be set back to the street line and this argument is based largely upon the wording of the paragraph which by Ordinance No. 32 of 1917 was inserted immediately above proviso No. 1. The paragraph is in the following terms:—" Where application is made for sanction to re-erect any building which projects beyond any street line so defined or to re-erect any part thereof which so projects, the Chairman may require that such building shall be set back to the street line ". It is urged that there is a discretion vested in the Chairman to require the building to be set back or alternatively to permit it to be re-erected between the street lines and that the right to compensation arises whenever he requires a building to be set back. But all the Legislature has said is that the Chairman may require a building to be set back ; nowhere has it said that the Chairman may permit a building to be erected between street lines. It is not easy to see what exactly was in the mind of the draftsman when this provision was inserted. It may merely be that inasmuch as prior to that date the term " re-erection " was limited to the case of a re-erection of the entire building it was thought necessary to say that the requirement that any such re-erection where the building projected between the street lines and involved its being set back applied not only to the case of a re-erection of the entire building but even to the re-erection of any part which projected into the street line. Even if it be supposed that the Chairman has a discretion to permit the re-erection of a building so that it projected over the street line, the intimation by the Chairman that he was not prepared to exercise that discretion in favour of a person is not an order with which that person must comply. He was free to remain where he was so long as he abandoned his intention to re-erect the building. But we are concerned with the words of the first proviso which existed in the form in which it now exists prior to the enactment which it is argued gave the Chairman a discretion to permit the re-erection of a building within street lines. The word " required " as it appears in the proviso had no reference therefore to any such supposed discretion. The words of that proviso indicate clearly that the right to compensation comes into existence only in connection with the re-erection of a building in any case in which the provisions of the law require that in the event of such re-erection the building must be set back. The requirement is the requirement of the law and the purpose of the provision is to enable a person who has sustained damage by complying with the requirement of the law to obtain compensation, and the compensation contemplated is compensation for the damage which a person actually sustains by acting in compliance with the requirement of the law and setting his building back. This it seems to

me is the meaning which must be attached to this proviso if effect is to be given the word "thereby". It is inconceivable that the Legislature intended that compensation should be paid to the owner of a building in any case in which he chose to say that he desired or proposed to re-erect a building which the law says he cannot re-erect except in conformity with the provisions of section 18 (1). To interpret this section as giving a right to compensation in any case in which a person asserts that he wishes to re-erect a building would be to place the local authority in the position of having to pay compensation to any and every person who may choose to say that he wishes to re-erect an existing building.

Lastly, it should be noted that the compensation which is payable is the compensation "for the damage he may thereby sustain". The plaintiff's claim is based as I have already said upon the assumption that notwithstanding that the buildings of which he is the owner are still standing and that he is still enjoying the rents and profits derived from them, he is entitled to be compensated upon the basis that the whole of these premises have no further value to him. The District Judge, on the other hand, appears to have assessed the damages, though he arrived at exactly the same figure, upon the basis of the profits that he might have made if he was permitted to carry out the operations which he proposed to do and not upon the ground that he has sustained any damage by being compelled to set back the building on re-erection. In the result the plaintiff has been awarded a sum which upon his own showing is equivalent to the highest offer which he has received from a person who proposed to purchase the land and the building as well. This is not, in my judgment, the correct basis for the assessment of damages but it is hardly necessary to say more upon this point for the reason that the plaintiff has in my opinion wholly failed to show that this is the case of the re-erection of a building or that he has sustained any such damage as is contemplated by the Ordinance.

I think therefore that this appeal must be allowed and the plaintiff's action dismissed with costs both here and below.

AKBAR J.—I agree.

Appeal allowed.