

*Present* : Bertram C.J.

1921.

ZOYSA *v.* FERNANDO.

1,026—P. C. Negombo, 40,630.

*Local Boards Ordinance, ss. 60 and 61—Land Acquisition Ordinance, s. 4—Application by Deputy Chairman of Board to Government for survey of a proposed deviation of a road—Application made without formal resolution of Board—Mandate issued to surveyor—Obstruction to surveyor—Powers of Governor unfettered by section 61 of the Local Boards Ordinance.*

The Assistant Government Agent, acting in pursuance of what he understood to be the wishes of the Local Board, applied to Government that a survey should be carried out under section 4 of the Land Acquisition Ordinance, with a view to making a deviation of a road. The Board did not pass a formal resolution authorizing the deviation or authorizing the application to Government under section 61 of the Local Boards Ordinance. A surveyor, who went to survey the land, in pursuance of a mandate issued to him, was obstructed by accused, who was charged under section 183 of the Penal Code.

*Held*, that the powers conferred upon the Governor under section 4 of the Land Acquisition Ordinance were for all purposes unrestricted, and that there was nothing in section 61 of the Local Boards Ordinance to restrict them.

<sup>1</sup> (1912) 15 N. L. R. 319.

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“ It seems to me the policy of section 61 that compulsory proceedings should not be set in motion for the purpose of acquisitions by these local bodies until an attempt has been made to secure the necessary land by private treaty . . . . Nevertheless, there is nothing in this to cut down the effect of the general words of section 4 of the Land Acquisition Ordinance.”

Section 60 of the Local Boards Ordinance does not apply to the construction of a new street.

**T**HE facts appear from the judgment.

*A. St. V. Jayawardene, K.C.* (with him *Croos-Dabrera* and *Arulanandan*), for appellant.

*Jansz, C.C.*, for Crown, respondent.

December 20, 1921. BERTRAM C.J.—

This appeal raises a question of some importance with regard to the interpretation of the Land Acquisition Ordinance, No. 3 of 1876, in connection with section 61 of the Local Boards Ordinance, No. 13 of 1898. The facts are as follows :—

The Negombo Local Board had in hand the construction of a new road. The trace had been made, and the defendant had declared himself willing to make a free gift of that part of his own premises which was required for the road according to the original trace. As the road proceeded, however, it was thought necessary to make a deviation which would take the conclusion of the road through the accused's land in another direction not so convenient to the accused. He declined to give the land required for this deviation, and there was accordingly a difficulty about completing the improvement. No resolution of the Local Board was passed formally authorizing the deviation, nor was any resolution passed authorizing application to the Government under section 61 of the Local Boards Ordinance. It appears, however, that an application was made to the Government that a survey should be carried out under section 4 of the Land Acquisition Ordinance, and it seems to have been assumed that this application was made by the Assistant Government Agent as Deputy Chairman of the Board, in pursuance of what he understood to be the views of the Board. A mandate was issued, and a surveyor proceeded to the spot in pursuance of the mandate. He was obstructed by the accused, and the accused is now prosecuted under section 133 of the Penal Code in consequence of this obstruction. It is not necessary for me to consider the evidence of the alleged obstruction, as the learned Magistrate's finding of fact that there was an obstruction has not been seriously contested.

It is, however, contended, that in issuing this mandate, before any application had been made to him by resolution of the Board, the Governor was acting *ultra vires*, and that, consequently, the

accused was not obstructing a public servant in the discharge of his public functions. It was argued that the effect of section 61 of the Local Boards Ordinance is, for the purpose of all acquisitions to be made by Local Boards in pursuance of the Ordinance, to limit the generality of the powers conferred upon the Governor by section 4 of the Land Acquisition Ordinance. It was urged that while in ordinary cases the Governor can set the machinery in motion simply upon information that the land in question is likely to be needed for a public purpose, in a case under section 61 he can only do so where it appears that there is some hindrance in the way of the acquisition of the land required by private treaty and when his assistance has been invoked by resolution of the Board.

I do not so read the two enactments. It seems to me that the powers conferred upon the Governor under section 4 of the Land Acquisition Ordinance are for all purposes unrestricted, and that there is nothing in section 61 of the Local Boards Ordinance to restrict them. I will go so far as to say that, in view of the terms of the latter section, the appropriate time for the Governor to take action is after the matter has been formally brought to his notice by resolution of the Board. It seems to be the policy of section 61 that compulsory proceedings should not be set in motion for the purpose of acquisitions by these local bodies until an attempt has been made to secure the necessary land by private treaty. The same formula is used both in the Municipal Councils Ordinance, No. 6 of 1910, and in the new Local Government Ordinance. These Ordinances contemplate that it should be represented to the Governor that the land is required for some public purpose within the sphere of the Board, and that there is a hindrance to the acquisition of the land. I do not agree with the learned Magistrate that "hindrance" here can be interpreted as meaning "probable hindrance." Nevertheless, there is nothing in this to cut down the effect of the general words of section 4 of the Land Acquisition Ordinance. It may, in certain cases, be thought convenient there should be a preliminary survey before the question is formally considered by the Board and before the owner is approached with a view to a voluntary purchase. Even though no resolution of the Board has been passed, I see no reason in law why a Chairman, who is acquainted with the policy of the Board and anticipates that such an acquisition may be required, should not represent to the Governor that the land is likely to be needed for a public purpose, with a view to obtaining the fullest possible information for the Board on the subject. At the same time, as even a preliminary survey may involve interference with private rights of property, it is more in accordance with the spirit of the Ordinance that he should obtain the formal resolution of the Board before approaching the Governor.

It seems to me a matter within the discretion of the Governor whether he should act at this point, or whether, in view of the special

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provisions of section 61, he should require to be satisfied that a hindrance has actually arisen, and that his assistance has been invoked by a formal resolution before he would take any steps in the matter. In other words, while the provisions of section 61 suggest matters for the consideration of the Governor in the exercise of his powers under section 4, they do not of themselves fetter his discretion in the exercise of those powers nor derogate from the generality of the words which section 4 employs.

As the question of the powers of the Board in relation to the construction of new streets was discussed in the argument, I should like to add a few words on that subject. It was assumed that in order to construct a new street the Board must act under section 60 and obtain the sanction of the Governor in Executive Council for that purpose. The word "open" was assumed to apply to the constructor of a new street. It was considered that the words "it shall be lawful for the Board . . . . to . . . . open . . . . any street" had this meaning. I confess that I doubt the correctness of this interpretation. The word "open" in the connection in which it is used "widen, open, enlarge, or otherwise improve any street" refers, in my opinion, to operations of the same nature as those covered by the words "widen" and "enlarge." It applies to an improvement of an existing street. The reason why the sanction of the Governor in Executive Council is thought necessary is that the public have certain rights over existing thoroughfares, and that local bodies should not be allowed to do anything affecting existing thoroughfares without the sanction of the executive. The right to construct new streets is not expressly conferred upon the Board, but it is implied by chapter II., by-law 2, of the model by-laws contained in Schedule D. This by-law is derived from section 71 of the Roads Ordinance, 1861. The incidental words "intended street" imply the power of the Board to construct a new street. The by-law applies, in my opinion, to cases in which the Board has already by a resolution adopted and expressed an intention to construct a new street. I have not observed any provision which would authorize a preliminary survey for the purpose of forming a plan for the construction of a new street by a local authority. The only way in which this can be done, as it seems to me, is by application to the Governor under section 4 of the Land Acquisition Ordinance. No doubt it is not in every case that such a preliminary survey is necessary, and in view of the wide powers given to the officer acting under the section, and the interference with private rights which such a survey may involve, the Governor would no doubt take this circumstance into consideration before ordering such a preliminary survey, but his discretion in the matter is free and unfettered.

For the reasons given, I dismiss the appeal.

*Appeal dismissed.*