

Ahmad Goolam Dustagheer - - - - - *Appellant*

v.

The Municipal Corporation of Port-Louis - - - - - *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL. DELIVERED THE 7TH MARCH 1979

Present at the Hearing :

VISCOUNT DILHORNE
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by LORD RUSSELL OF KILLOWEN*]

The question in this appeal is whether under the provisions of Article 20 of the Building Ordinance Cap.263 the respondent is entitled to claim from the appellant a sum of Rs.20,925, being the cost of demolishing the top three storeys of a building erected by the appellant. The Supreme Court gave to the respondent judgment for that sum with costs.

Article 20 reads as follows:—

“ 20. (1) Any person who erects a building, or alters or adds or makes extensive repairs to an existing building, without having previously obtained a permit, shall be liable to a fine not exceeding five hundred rupees in addition to the amount payable for such permit.

(2) Any person who, having obtained a permit for erecting a building, or making any extensive alteration or addition to, or repairing a building, does not comply with any condition imposed upon him, or with any part of the plan or specification upon which the permit has been granted, shall be liable to a fine not exceeding five hundred rupees, and the Authority may further cause any building erected, or any extensive additions, alterations or repairs made in breach of any of the above provisions, to be pulled down, removed or otherwise dealt with as the Authority shall think fit, and the expenses incurred in so doing shall be recoverable against the offender.

In places in the rural districts which are not included within the limits of a village this article shall only apply to the construction of buildings intended for human habitation.”

In January 1964 the appellant applied for, with the relevant plans therefor, and was granted a permit for a two storey building on the site. Later he embarked upon erection of an additional three storeys without

obtaining any further permission, and in spite of warnings completed them. He was prosecuted for an alleged offence under Article 20(1) of making an addition to an existing building without having previously obtained a permit: he pleaded guilty and was fined. He was later further prosecuted for an alleged offence under Article 20(2) in that having obtained a permit for erecting a building he unlawfully did not comply with the plan upon which the permit had been granted: he pleaded guilty also to that charge and was further fined.

Below there was discussion on a number of points, such as the question of possible *res judicata* against the appellant resulting from the successful prosecutions. But in their Lordships' opinion the solution of this appeal is to be found in the answer to this question: does the phrase in Article 20(2) "made in breach of any of the above provisions" extend to the provisions of Article 20(1), or is it restricted to Article 20(2)?

As a matter of punctuation and lay-out it is of course arguable that the provision authorising demolition is restricted to the events within the scope of Article 20(2). But if that were so it imputes to the legislation the apparently ludicrous intention and result that if a builder obtains a permit, a power to demolish is in certain circumstances conferred upon the Authority, but if a builder breaches Article 20(1) without any kind of permit at all, the Authority has under the Article no power to rectify the situation by demolition. Their Lordships would be loth to arrive at such a result on the basis of the punctuation and lay-out of the Article.

In considering whether the mischief at which the power of demolition is aimed includes activities under Article 20(1) it is in their Lordships' opinion legitimate and proper to consider the legislative forerunners of Article 20. The judgment of the Supreme Court sets out the comparable provisions of Article 28 of the Building Ordinance, 1896, and its successor Article 13 of Ordinance No. 13 of 1915. Their Lordships do not think it necessary to repeat those provisions. It suffices to say of the former that paragraphs (1) and (2) deal respectively with "no permit" and "permit" offences, and paragraph (3) created offences under both paragraphs and provided for fines and contained a power of demolition equally applicable to both. The form adopted by Article 13 of the 1915 Ordinance was to put in paragraph (1) any "no permit" case, ending with a semicolon and "or": paragraph (2) dealt with a permit case, provided for fines in either case, and conferred a power of demolition in either case. Accordingly it is clear that under both these predecessors of the Article now under consideration a mischief at which the power of demolition was aimed was the erection, etc., of a building without any permit at all.

In 1937 by Ordinance No. 7 of 1937 paragraph (1) of Article 13 of the 1915 Ordinance was repealed and replaced by paragraph (1) as now found in paragraph (1) of the Article 20 now under discussion, which latter article repeats Article 13 of 1915 as thus amended.

The principal argument for the appellant was that the object and result of the 1937 amendment was to remove from the relevant legislation that which had admittedly existed since 1896, *viz*: the ability of the Authority in discretion to demolish in circumstances confined to those mentioned in paragraph (1). It was argued that in 1937 the legislature could not have intended to devote an entire Ordinance to the mere task of adding to the fine the very moderate sum which would have had to have been paid had a permit been sought: therefore the apparent separation of a paragraph (1) case from a paragraph (2) case must have been intended to remove from a paragraph (1) case the discretionary power of demolition. Their Lordships are not able to accept that argument, which appears to them speculative. The fact remains that "of any of the above provisions" in paragraph (2) remains as a phrase applicable to both paragraphs and

is not in its plural form appropriate to be restricted to paragraph (2). The only answer suggested was that the draftsman *ought* in 1937 to have corrected this phrase to "of this provision". But this was not done either in 1937 or in Cap.263 Article 20. Another suggestion advanced in argument was that if the Supreme Court decision was correct the draftsman would have used the phrase "any provision of *this article*", the addition at the end of the article relating to rural districts using that general reference. Their Lordships are not persuaded by that submission.

Some reliance was placed on the power under Article 78 of the Authority to make Regulations as to buildings for breach of which the Regulations might provide for fines, and the Authority might order demolition. Their Lordships cannot accept that this negatives the conclusion of the Supreme Court. Under the Ordinance (Article 7) it is made unlawful to commence construction of a building, or extensive alterations, etc. etc., without a permit obtained. Their Lordships cannot accept a construction of Article 20 which enables a person to build unlawfully without troubling to get a permit, at the trivial cost of a Rs.500 fine and the price that he would have had to pay for a permit, provided that in point of detail he did not depart from the building Regulations laid down under Article 78.

That view suffices to uphold the decision of the Supreme Court even if—which their Lordships doubt—the appellant were correct in contending that the respondent was not entitled to rely upon Article 20(2).

Their Lordships find the judgment of the Supreme Court on the crucial point entirely satisfactory and accordingly are of the opinion that this appeal should be dismissed with costs and will humbly advise Her Majesty accordingly.

In the Privy Council

AHMAD GOOLAM DUSTAGHEER

v.

**THE MUNICIPAL CORPORATION
OF PORT-LOUIS**

DELIVERED BY
LORD RUSSELL OF KILLOWEN