

Present : Dalton J.

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CHAIRMAN, LOCAL BOARD, KURUNEGALA,
v. MEERA SAIBO.

333—P. C. Kurunegala, 24,598.

Housing of People and Improvement of Towns Ordinance—Application to deviate from building—Resolution to define new street lines—Grounds of refusal—Mandatory order to demolish building—Ordinance No. 19 of 1915, s. 18, sub-sections (1) and (4).

An application to deviate from the plan of a building, which had been previously approved and which did not contravene the provisions of section 18 (1) of the Ordinance as to street limits, cannot be refused on the ground that the local authority had resolved to define new street lines subsequent to the application.

No mandatory order for the demolition of a building should issue where the building does not contravene some provision of the law, or even where by some alteration it could be brought into accordance with the law.

THE accused was charged under section 13 (1) (b) of the Housing of the People and Improvement of Towns Ordinance, No. 19 of 1915, with deviating from an approved plan in the construction of a building, and convicted on March 7, 1925. Following on the conviction the Chairman of the Local Board applied for and obtained a mandatory order requiring him to demolish the building.

The accused appealed from the order. The facts are as follows :— In October, 1923, the appellant received permission from the Local Board to erect a one-story building on his property in Negombo road, Kurunegala. In October, 1924, it was found that he was deviating from the approved plan by putting up another story ; and he was warned that he could not do so without obtaining further permission. On November 14 he sent an application to the Board for approval of the alteration. Under the provisions of section 18 of the Ordinance, all buildings must be erected upon certain street lines. When approval was given in October, 1923, for the erection of a building, it was for a building to be erected abutting upon the street. Meanwhile it was found by the Board that it was advisable in the public interest to define new street lines for Negombo road. On February 14, 1925, the Board met, and refused appellant's application. On the same day the Board passed a resolution under section 18 (4) of the Ordinance defining the new street lines within the limits of the Local Board.

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Drieberg, K.C. (with him *H. V. Perera*), for accused, appellant.—The application to sanction the alteration was made in October, 1924, and refused three months later. The reason was that the building would interfere with the street lines, which they proceeded to define in February, 1925. Under section 9 (1) permission must be granted within two months. The Board wait for three months and arm themselves with a legal reason for refusing the application. An application for a mandatory order cannot be justified when the desire to have the building demolished was not due to considerations of sanitation, but was dictated by the pecuniary interests of the local authority (*Bartholomeusz v. Perera* ¹). It can only be made if the building does not conform to the structural and other requirements laid down by the by-laws. The discretion to refuse permission cannot be governed by economic considerations (*Regina v. The Mayor and Corporation of New Castle-on-Tyne* ²).

Refusal of permission on the ground of inconvenience in providing sewers cannot be justified (*Regina v. Tynemouth Rural District Council* ³).

The only ground for refusal here was the wish to save payment of compensation in the future. It is no legal ground either for withholding approval to build or for the demolition of the building.

H. H. Bartholomeusz, for respondent.—The Police Magistrate has held that the object of the accused was to confront the Chairman with the accomplished fact and then ask for permission. Under section 13 (1) the accused laid himself open to a conviction for deviating from the plan of the building. The same section gives the Magistrate a discretion to issue a mandatory order for demolition. As there is no evidence of the *bona fides* of the accused, the Magistrate has exercised his discretion rightly.

At the time of the conviction the new street lines had been defined. It follows that at the time of the mandatory order, the accused had built upon the street lines; and the order is justified.

The Magistrate should not exercise his discretion in favour of a person who acts contumaciously.

August 4, 1925. DALTON J.—

The appellant, Nagoor Meera Saibo of Negombo road, Kurunegala, has been called upon under the provisions of section 13 (2) of Ordinance No. 19 of 1915 (Housing of People and Improvement of Towns Ordinance) to show cause why a mandatory order directing him to demolish a portion of a building and certain appurtenances thereto erected by him should not be issued. After hearing the

¹ 7 C. W. R. 109.

² 75 Law Times 86.

³ 60 Law Times 963.

appellant, the Police Magistrate, Kurunegala, directed him to demolish the "upstairs portion of the building," together with "the sunshades and the pavement." The appeal is from that order.

The facts of the case about which there is no dispute are as follows :—

In October, 1923, the appellant received permission from the Local Board to erect a one-story building on his property in Negombo road, Kurunegala. The building was to be in accordance with a plan which received the approval of the Board. In October, 1924, in the course of the erection of the building, it was found that appellant was deviating from the plan by putting up a two-story building, and he was warned that he could not do so without obtaining permission from the Chairman of the Board. This warning appears to have been conveyed to him personally by the Chairman himself. On November 14 he sent in his application to the Board for approval in accordance with the warning given him. Following the usual practice the Chairman states he referred the application to the Provincial Engineer and also to the Board's Inspector for report. The Provincial Engineer admits that the building which appellant was now erecting did not violate any of the provisions or rules of the Ordinance, but nevertheless he recommended that the application should not be granted.

Meanwhile appellant had continued with the work of the building, as he states unless he put the roof on, the work already done would suffer from the rains. Without in any way wishing to appear to express any approval of his act in deviating from the approved plan without permission, it does seem to me that when he was warned in October to obtain the Board's approval to the changes he had made, it was never suggested to him that the changes would not be approved of (assuming such approval could be withheld) if they conformed to the then existing provisions of the law.

The natural question then is, why did the Provincial Engineer, under these circumstances, recommend that the approval of the Board to the amended plan should be withheld? The answer is that sometime between October, 1923, and November, 1924, the question of street lines in Kurunegala was raised by the Board. Under the provisions of section 18 of the Ordinance all buildings must be erected upon certain street lines. Negombo road at the place in question is over twenty feet wide (see sub-section (1)), and hence when approval was given in October, 1923, to the erection of a single story building, it was in order for a building to be erected abutting upon the street.

It is open, however, to the Board to define by resolution new street lines from time to time (section 18 (4)), and it appears to have been in the mind of the Board or its Chairman that it was advisable in the public interest to define new street lines for Negombo

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road *inter alia* owing to the large increase of motor traffic there. According to the Chairman's evidence, between November 14, 1924 (the date of appellant's application) and January 7, 1925, a sub-committee of the Board was, therefore, appointed to deal with the question of street lines. The Provincial Engineer was Chairman of this sub-committee. It further appears that appellant's application was put before this sub-committee who were of opinion, in the words of the Chairman of the Board, that "the upstairs was not desirable." On February 14 the Local Board met, and then refused appellant's application. On the same day the Board passed a resolution under section 18 (4) of the Ordinance defining the street lines within the limits of the local authority. The street lines of Negombo road were thereafter thirty-three feet from the centre of the road.

It is clear, therefore, that at the time when the application of appellant was made, during the time it was under consideration, and at the time when it was refused, the street lines of Negombo road were defined by section 18 (1) at twenty feet, and not at thirty-three feet as defined by the resolution of February 14. There is nothing to show which was considered first by the Board on that date, the application or the resolution, but I think I am justified in assuming it was the application, since it had been pending so long and from a date prior to the appointment of the sub-committee. I may add, however, that even if this assumption is wrong, it does not in the result affect the case.

The grounds for the refusal of the appellant's application are given in evidence by the Chairman. There is no suggestion that either he or the Board were not actuated by the best motives. They were seeking to save a possible claim for compensation should it be necessary at some future date to widen Negombo road and acquire land and buildings for that purpose. The widening of the road had, so the Chairman states, already been taken up by him, and he, when asked if the Board had the funds, stated that the Government had large surplus balances of revenue. I must admit I cannot see that that is any answer to the question. The proposal was obviously in its earliest stages, and all that can be said is that a survey had been entered upon and a plan made showing the extent of the proposal. That was presumably necessary before any authority would consider the proposal. All that can be said then is that there was a possibility that at some future date this road might be widened, for which purpose it might be necessary to acquire the building of the appellant.

But the grounds upon which the approval or consent of the Chairman to plans or specifications of buildings or alteration therein can be withheld are strictly limited by section 7 of the Ordinance, and it is admitted that the two-story building which appellant was erecting was not in conflict with any provisions of the Ordinance. Although designed at first for one story, there

were, for example, no objections from a structural or engineering point of view to the erection of the two-story building on the original foundations. The building did not contravene the provisions as regards light, and no sanitary objections could be made to it. Nevertheless the Police Magistrate has made an order that the top story of this building, which the evidence shows must have cost between Rs. 30,000 and Rs. 40,000, was to be demolished. The grounds for this decision may, I think, be fairly put under three heads :—

- (1) An initial blunder was made in granting appellant's application in October, 1923, to erect a one-story building.
- (2) Appellant has obtained a "tremendous" advantage over others, if his two-story building is allowed to stand.
- (3) He has deliberately flouted the warnings of the local authority.

The first ground is based upon a misapprehension of the powers of the Chairman of the local authority. There was in effect no blunder made in granting appellant's first application, if by "blunder" is meant a mistake in granting the application. It is suggested, of course, that it was open to the Board in 1923 to refuse the application, because it might be desirable at some later date to acquire the land on which the building was to be erected. But until the Board had themselves defined the street limits, they had no power to refuse the application if the building otherwise conformed to the provisions of the Ordinance and did not contravene the provisions of section 18 (1) as to limits. That was not done until February 14, 1925, as I have already pointed out. Counsel for the Board has been unable to support this ground for the Magistrate's judgment, and he very properly drew my attention to the powers of the Chairman under section 7, admitting that there was no ground that could be put forward why the application should not have been granted. The law in England is the same. Under the Public Health Acts it has been decided on many occasions that a local authority cannot disapprove plans, unless the plans are in contravention of a lawful by-law or some Statute. (*Regina v. Tynemouth Rural District Council* ¹.) The remarks I have made on ground (1) may be said to apply to ground (2) also, which has no reference to the legal aspect of the case.

The argument before me, in support of the Magistrate's order, has accordingly been based upon ground (3). Because he has deliberately flouted the warnings given him, therefore he is to be punished by demolishing the top story. There is, of course, no doubt that appellant has deviated from the plan of the building approved in October, 1923. For that he has been fined and punished (P. C. Kurunegala, No. 24,089). The argument seems to

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¹ (1896) 2 Q. B. 451.

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be, however, that he is to be further punished by being ordered to demolish part of the building without any reference to the question whether the building in fact contravenes in any way at all, any of the provisions of the Ordinance. As I have pointed out, it is admitted the building is in conflict with none of those provisions. No such punishment is provided for in the Ordinance, nor would one expect to find it there. I cannot conceive of any order for demolition being made even if some provision of the Ordinance was contravened, if by some alteration it could be brought into accordance with the law. It would be unreasonable to interpret section 13 (2) of the Ordinance otherwise. The discretion vested in the Magistrate must be reasonably and judicially exercised, and I cannot see that here his order was either a fair or proper one. (*Anthonisz v. Fernando*¹ and *Abdul Samid v. Corporation o Calcutta*.²)

I am also of opinion that when appellant was warned to apply to the Board for its approval of this deviation from the approved plan, if the intention had then been formed to define the street limits, he should have been told. Instead of that he was instructed to send in his application, which he might rightly assume would be considered on its merits. Under the provisions of section 9 of the Ordinance, that application should have been approved of or refused within two months from November 14. In spite of requests to have the matter dealt with, it was not decided until February 14. Hence all the delay was not on one side only. And lastly the only ground for its refusal was the wish to save a payment of compensation in the future should the property have to be acquired for the purpose of widening the street. This of itself is no legal ground, either for ordering the demolition of the building, or even for refusing to give approval for the application. In *Bartholomeusz v. Perera (supra)*, De Sampayo J. says—

“The desire to have the building demolished is not due to considerations of sanitation or public convenience, but it is in the pecuniary interests of the Municipal Council . . . I do not think he ought to be compelled to demolish if for reasons which have no present application.”

However commendable the motives of the Chairman and the Board may have been, they afford no legal ground under the powers vested in them, either to withhold their approval of appellant's application, or to support any request for the demolition of the building. The order of the Police Magistrate ordering the demolition of the top story of the building must, therefore, be set aside, and the appeal be allowed.

The question of the “Sunshades,” and the pavement has I understand been settled by agreement between the parties.

¹ 7 C. W. R. 58.

² 33 Calcutta 287.

The conviction of the appellant in P. C., Kurunegala, No. 24,598, on March 28, 1925, on a charge "that he on March 10 did neglect to suspend building operations" on the premises in question, in respect of which he had been convicted at an earlier date of deviating from approved plans, must be set aside, the appellant having appealed from this conviction also.

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Appeal allowed.
