

1956 Present : Weerasooriya, J., and H. N. G. Fernando, J.

J. B. L. KARUNARATNE (Chairman, Town Council,
Kochchikade), Appellant, and W. W. FERNANDO
et al., Respondents

S. C. 54 (Inty.)—D. C. Negombo, T. C. I

Housing and Town Improvement Ordinance (Cap. 199)—Refusal by Chairman to approve building plans—Scope of right of appeal—By-laws—Sections 5, 7, 16, 86.

By-laws 3 and 4 enacted under the enabling powers conferred by section 28 of the Housing and Town Improvement Ordinance provide :—

“ 3. . . . no person shall within a residential area,
except with the written permission of the Chairman erect a building for
the purpose of being used as a shop”

4. Permission to erect a new building for any purpose set out in by-law
3 shall be refused by the Chairman unless the following conditons are
fulfilled :—”

Held : (i) There is no right of appeal to the Tribunal of Appeal against the refusal of the Chairman to grant written permission under by-law 3.

(ii) Where application is made for the approval of plans for the erection in a residential area of any building referred to in by-law 3, the Chairman is bound

under section 7 of the Housing and Town Improvement Ordinance to refuse approval of the plans, unless written permission for the erection of that building has already been or is simultaneously granted in terms of the by-laws.

(iii) Every refusal to approve plans is appealable to the Tribunal of Appeal; but where the proposed building is one, for the erection of which written permission under the by-laws is required, the appeal must necessarily fail if such permission has not in fact been granted.

APPPEAL from an order of the District Court, Negombo.

S. Nadesan, Q.C., with *K. Shinyu* and *T. G. Gunasekera*, for the petitioner.

D. S. Jayawickreme, Q.C., with *Stanley Perera*, for the 2nd respondent.

Cur. adv. vult.

March 27, 1956. H. N. G. FERNANDO, J.—

The 2nd respondent to this appeal (whom I will call the "applicant") applied to the Chairman of the Town Council of Kochchikade for the approval of plans, drawings and specifications for the erection of a building within the administrative area of the town. His application was in the Form ordinarily used for the purposes of section 5 of the Housing and Town Improvement Ordinance (Cap. 199), which provides that "no person shall erect any building within the limits administered by a local authority except in accordance with plans, drawings and specifications approved in writing by the Chairman". The building proposed to be erected was described in the application as a "Mobiloil Service Station". The Chairman in reply informed the applicant that the erection of a service station "cannot be approved as the site is in a residential area".

There are in force for the town of Kochchikade "zoning" by-laws enacted under enabling powers conferred by section 28 of the same Ordinance, and it is conceded that the site on which the applicant desired to erect the service station is in a residential area and that a petrol service station is a "shop" within the meaning of the relevant by-laws:—

3. no person shall within a residential area,
except with the written permission of the Chairman erect a building
for the purpose of being used as a shop:

4. Permission to erect a new building for any purpose set out in by-law 3 shall be refused by the Chairman unless the following conditions are fulfilled:—

(Conditions, four in number, are not here reproduced).

The applicant appealed against the decision of the Chairman to the District Judge who is by section 86 of the Ordinance the Tribunal of Appeal for the area, a right of appeal being conferred by section 16

upon any person "aggrieved by the refusal of the Chairman to approve any plan, drawing or specification, or by any requirement or order of the Chairman".

It was argued on behalf of the Chairman before the Tribunal that the Chairman's letter constituted, not a refusal to approve building plans (against which there would be a right of appeal), but rather a refusal of the written permission referred to in the zoning by-laws, against which refusal an appeal to the Tribunal does not lie. This preliminary objection to the hearing of the appeal was over-ruled by the District Judge on the ground that the right of appeal conferred by section 16 was not only from a refusal to approve plans, but also "from any order of the Chairman in regard to an application for a building under the by-laws made under the Ordinance".

In my opinion the preliminary objection was rightly rejected, but not upon the ground specified by the District Judge. Section 16 occurs in a Chapter, the principal section of which is section 5 to which I have already referred. There follow provisions which enable the Chairman to require applicants to submit plans and drawings in a prescribed form or to amend plans and drawings or to submit further information or to attend for purposes of explanation. There are also provisions which empower the Chairman, in a case of unauthorised building operations, to require the person undertaking them to show cause why the building should not be removed, altered or pulled down, as well as thereafter to order any building to be removed or pulled down. There is then conferred in the penultimate section (section 16) of the Chapter, the right of appeal in the terms set out above.

In a subsequent Chapter dealing with streets, the Chairman is empowered to make certain orders against which a right of appeal to the Tribunal is conferred by a section in that Chapter. Similarly in another Chapter which empowers the Chairman to order the demolition of obstructive buildings, a right of appeal against any such order is given by provision in that Chapter. In a Chapter headed "Miscellaneous Provisions" further supervisory powers are conferred on the Tribunal of Appeal.

In this context, it seems clear that the Tribunal of Appeal only has jurisdiction in respect of matters expressly committed to it by various provisions of the Ordinance and that any action of the Chairman whether it be an order or notice or a refusal to grant any species of application will not be appealable unless the right of appeal is expressly conferred. In the case of each of the Chapters to which I have referred such an express right is conferred, but in each case only in relation to the powers and duties of the Chairman under the particular Chapter. In so far as the zoning by-laws are concerned, however, there is no right of appeal expressly conferred either in the by-laws themselves or in the Chapter which empowers them to be made. If therefore the Chairman's reply to the respondent's application can be properly construed to be a refusal to grant written permission in terms of the by-laws, there would be no right of appeal to the Tribunal from that refusal.

But the application made to the Chairman in this case was not in my opinion an application for written permission under the by-laws. It was rather an application for the approval of plans submitted for approval in terms of section 5 ; and whatever be the ground on which the Chairman decided to refuse approval of the plans, his refusal was properly the subject for an appeal under section 16, and it was then for the Tribunal to determine the validity of the grounds of refusal.

Having entertained the appeal, the District Judge proceeded to hold an inquiry at which evidence was recorded, and he ultimately made order directing the Chairman to approve the plans and to sanction the construction of the petrol service station. The real question for determination in this case is whether that order of the District Judge can be supported.

Section 7 of the Ordinance directs that the Chairman "shall not approve any plan or specification of any building . . . which shall conflict with the provisions of this or any other Ordinance". Having regard to the power conferred by section 28 to make by-laws reserving any area for buildings of a specified nature and to the fact that such by-laws have to be laid before Parliament, I think that the prohibition against approval in section 7 is intended to apply (*inter alia*) in relation to buildings the erection of which would be in conflict with the provisions of the zoning by-laws. The Chairman is therefore bound to refuse approval of plans for a shop proposed to be erected in a residential area, unless the erection of the shop will by reason of permission granted under by-law 3 not be in conflict with that by-law. So far as the present application was concerned, there was no request in terms of the by-laws for the written permission of the Chairman and it is conceded that no such permission had in fact been granted.

Mr. Jayawickreme has argued that since the Chairman is the authority for both purposes, namely for approving plans as well as for granting permission under the by-laws, the application in this case was an application, both for the written permission as well as for the approval of the plans, and that accordingly the right of appeal conferred by section 16 rendered justiciable by the Tribunal both the refusal to approve plans as well as the refusal of permission to erect a shop. As I have already pointed out, there is no express provision in the Ordinance or in the by-laws which confers a right of appeal to the Tribunal against the refusal to grant permission under the by-laws; but if Mr. Jayawickreme's argument is correct, then an applicant can by incorporating his application for permission in an application for the approval of plans, secure a right of appeal which he would not have had if he had made in the first instance an application only for permission under the by-laws. I do not agree that such a situation was contemplated by the Legislature. While it may be correct that the Chairman might choose to treat an application for the approval of plans as being inclusive of an application for permission and may therefore properly grant his written permission at the same time as he approves the plans, the order which he makes in such a case would nevertheless be divisible into two parts and be referable not only to section 5 but also to the zoning by-laws. The terms of by-law 4

are unusual : the Chairman is not empowered to grant permission where certain conditions are satisfied, *but is rather enjoined to refuse permission unless the specified conditions are satisfied* : so that it would appear that even where all the specified conditions are satisfied there is yet a residuum of discretion to refuse permission. I think therefore that save in the exceptional case where the Chairman *ex mero motu* investigates the suitability of the case for the grant of written permission under by-law 4, it would be for an applicant to satisfy the Chairman affirmatively of the existence of circumstances justifying the grant of such permission ; and if no effort is made by an applicant to discharge the burden of proving those circumstances, the Chairman would be fully entitled to refuse permission on the ground that the applicant has not made out a case for permission. In the present case the applicant merely asked for approval of his plans without even a reference to the grant of permission under the by-laws, and the Chairman therefore had the right, if he did not also have the duty, to refuse the approval of the plans on the ground that the erection of the proposed building would conflict with the zoning by-laws.

Although therefore there was a right of appeal to the Tribunal against the order of the Chairman, that order had necessarily to be upheld by the Tribunal as being an order authorised or even required by section 7. For these reasons I would allow the present appeal with costs fixed at Rs. 525 payable by the applicant, and reverse the order of 2nd April, 1954, made by the Tribunal of Appeal.

In lieu of answering the questions as formulated in the case which has been stated for the opinion of this Court, I think it would be more helpful to set out our opinion as follows :—

- (1) There is no right of appeal to the Tribunal of Appeal against the refusal of the Chairman to grant written permission under by-law 3 of the “ zoning ” by-laws.
- (2) Where application is made for the approval of plans for the erection in a residential area of any building referred to in by-law 3 of the zoning by-laws, the Chairman is bound under section 7 of the Ordinance to refuse approval of the plans, unless written permission for the erection of that building has already been or is simultaneously granted in terms of the by-laws.
- (3) Every refusal to approve plans is appealable to the Tribunal of Appeal ; but where the proposed building is one for the erection of which written permission under the by-laws is required, the appeal must necessarily fail if such permission has not in fact been granted.

WEERASOORIYA, J.—I agree.

Appeal allowed.