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IN THE PRIVY COUNCIL No. 36 of 1975

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN :

AHMAD GOOLAM DUSTAGHEER Appellant (Defendant)

- and -

THE MUNICIPAL CORPORATION OF PORT-LOUIS Respondent (Plaintiff)

CASE FOR THE APPELLANT

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1. This is an Appeal from a Judgment dated 29th April 1975 of the Supreme Court of Mauritius (Garrioch P.S.J. and Moollan J.) giving the Respondent Judgment against the Appellant for the sum of Rs 20,925.77 with costs.

2. The issue of this Appeal depends upon the following provisions of the Building Ordinance Cap. 263

450 Cap. 263.] *Building.*

Penalties for building without permit or in breach of prescribed conditions. 2/7/1937.

20.—(1) Any person who erects a building, or alters or adds to 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.

Allowing

21. Whoever knowingly suffers any [illegible] not continued

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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.

3. In January 1964 the Appellant having submitted a
P.53-L.35 plan was granted a permit for the construction of a building consisting of a ground and first floor at 49 Lord Kitchener Street, Port-Louis. In May 1967
P.55-L.5 Mr. Damoo, a Building Inspector employed by the Respondent noticed that three additional storeys were
P.55-L.12 being erected on the Appellant's building and he served a Notice on the Appellant requiring him to stop his operations until he received a permit for them. Later on the same day the Appellant handed
P.55-L.25 in an application form and two sets of plans. On 18th May 1967 following the practice then current the Appellant was instructed to pay the prescribed
P.55-L.29 fee for a permit which he did on the 23rd May idem. The receipt stated that the payment of the fee did not authorise the construction of the building
P.55-L.37 operations. Mr. Damoo visited the site on several occasions afterwards and saw that the building work on the additional floors had not
P.55-L.38 stopped. Two letters were sent, on 18th August and the 25th September 1967 respectively requesting the Appellant to submit plans drawn up by an Architect
P.55-L.42 and notices dated 10th August and 25th November 1967 directing the Appellant to stop the works were
P.65 served. The Appellant did not do so and on 24th November 1967 he was prosecuted for breach of Article 20 (1) of the Ordinance on the information that on 27th July 1967 he unlawfully made an addition of 3 storeys to a building without having previously obtained a permit. On 16th February 1968
P.67-L.1 the Appellant pleaded guilty and was fined Rs 1010
P.75 with Rs 2 costs. By letters dated 25th March 1968 and 4th April 1968 the Appellant was invited to submit an Architect's Certificate as to the soundness
P.76 of the new building and he was warned that if he failed to do so it might be pulled down. On 10th
P.67/68 July 1968 the Appellant was prosecuted for breach of Article 20 (2) of the Ordinance on the information that on 11th April 1968 "he did unlawfully erect a building contrary to plans submitted; to wit structural soundness of building"
P.69-L.7 and claiming a building permit fee of Rs 1508.70. On 9th August 1968 the information was amended by deleting the words "did unlawfully erect a building contrary to plans submitted to wit structural soundness of building" and to replace them for "having obtained a permit for erecting a

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building did unlawfully not comply with the plan upon which the permit has been granted." The Appellant pleaded guilty and was fined Rs 100. The reason for the second prosecution i.e. under Article 20 (2) was that the Respondent was not sure that a conviction under Article 20 (1) gave them the right to pull down the additional storeys. By letter dated 12th December 1968 the Appellant was told that the City Council had approved a recommendation that his extension be pulled down and after a further delay in his producing a Certificate, he was warned by a notice served at the end of February 1969 that if he did not proceed with the demolition within 15 days the Respondent would do so at his expense. The Respondent began the works on 21st March 1969.

P.55-L.54

P.80

P.56-L.10

P.56-L.20

4. Subsequently the Respondent by its Statement of Claim dated 17th August 1970 claimed the cost for the works of demolition of Rs 20,925.77. The pleadings ran to a reply to surrejoinder. The action came on before the Supreme Court of Mauritius. (Garrioch P.S.J. and Moollan J.) on 28th, 29th and 30th January 1975. For the purposes of this appeal it is not necessary to set out the evidence, and the material facts as found by the learned Judges are set out in paragraph 3 of this case. Various preliminary points were taken by the Appellant which are not relied upon in this Appeal. The Appellant then submitted that on a proper construction of Article 20 of the Ordinance the Respondent could only demolish a building or an addition on a breach of Article 20 (2) but not on a conviction under or where the facts showed a breach of Article 20 (1). The Appellant submitted that what he had done was to have built an extension to his building without having first obtained a permit, and that was the offence created by Article 20 (1) which made no provision for any demolition by the Respondent. That power only arose when Article 20 (2) was broken which was when a person having obtained a building permit either failed to comply with a condition imposed by the permit or with a plan upon which it was granted. He submitted that in his case the permit granted him in January 1964 was for a building consisting of a ground and first floor and that it had been put up strictly in accordance with that permit. The Appellant said that he had applied for a permit in May 1967 and that the complaint against him was that he had undertaken the construction of

P.1-3

P.10-17

P.57-59

P.59-L.36 - P.60-L.18

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the additional storeys without waiting for the permit and that he had contravened the provisions of Article 20 (1) and not the provisions of Article 20 (2). For those reasons the Appellant submitted that the Respondent should not be allowed to rely on his conviction to the amended
P.60-L.20 information. The Respondent submitted that it was entitled to pull buildings down on a breach of Article 20 (1) as well as Article 20 (2) and that the Appellants conviction for breaking Article 20 (2) was now res judicata.

5. The Judgment of the Supreme Court was delivered on 29th April 1975. The learned Judges first described the nature of the claim setting out the material facts and then turned to deal with the submissions of the Appellant. They dismissed his arguments on the preliminary issues and then considered the construction of Article 20 of the
P.60-L.35 Ordinance. They agreed that there was a doubt as to whether the powers to pull down buildings extended to a breach of Article 20 (1) as well as (2) and said that in order to dispel that doubt it was necessary to examine the history of the
P.60-L.40 provisions. The learned Judges examined the section as originally enacted in the 1896 Building Ordinance as replaced by Ordinance No. 13 of 1915 observing that the powers to demolish clearly survived the change of wording brought about by the amendment and that the amended provision was mere clumsy
P.61-L.20 draftsmanship. Next they looked at the re-amendment made by Ordinance No. 7 of 1937 which repealed Article 13 of the 1915 Ordinance and replaced it by the wording of the present Article 20 (1). They stated that because the offence in (1) now had its own separate provision for a fine and that the sub-section now ended with a full stop it
P.62-L.30 might be thought that the two sub-sections were now independent of one another. The learned Judges
P.62-L.40 rejected that argument saying that it could not have been the intention of the legislature to alter the scope of the section as a whole or the meaning of the words "the above provisions" that they had in the original section. In support of their construction they pointed to the absurd consequences of giving the Respondent different powers under (2) than in (1). They held that the demolition powers did apply to Article 20 (1) and that the Respondent could have pulled the Appellant's building down after his conviction
P.63-L.24 under that sub-section. The learned Judges then turned to the effect of the Appellant's
P.63-L.30 conviction under Article 20 (2). Stating that a plea of res judicata would not prevent the Appellant from raising the lawfulness of his conviction in a subsequent civil action in

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Mauritian Law they said nevertheless the Respondent was entitled to rely on that conviction and that the only way the Appellant could challenge his conviction was to appeal against it. The learned Judges concluded by saying that in view of their findings it was not necessary for them to decide whether the Appellant had broken both sub-sections of Article 20 and they gave the Respondent Judgment for Rs 20,925.77 and costs. P.63-L.40 P.63-L.50 P.64-L.10

6. The Appellant respectfully submits that the Supreme Court erred in their construction of Article 20 to hold that the Respondent had powers to pull down buildings on a breach of (1) as well as (2). The Appellant further respectfully submits that the learned Judges were also wrong to say that though they were bound by no principle of res judicata the Appellant was unable to say that on the facts and on a proper construction of Article 20 he had not broken the provisions of (2) but only those of (1). The Law of Mauritius in this respect would be that applying in England before the enactment of Section 11 of the Civil Evidence Act 1968.

7. The Appellant respectfully submits that the Supreme Court disregarded the clear words of the provision and that they failed to apply the literal rule of statutory interpretation. Alternatively, if there is a doubt as to the extent of the Respondent's powers to pull down buildings, then as a penal provision it must be strictly construed against the Respondent and in favour of the Appellant. It is respectfully submitted that the two sub-sections are intended to cover different situations and that they are mutually exclusive; that either a permit is obtained for a building or alteration etc. or it is not and a person cannot contravene both by carrying out the same operation. The Appellant respectfully submits that he should have been able to say that on the facts he could not have contravened the provisions of Article 20 (2) and that the Supreme Court should have decided whether on the facts found by them he had contravened those provisions before giving the Respondent Judgment in accordance with them. On the facts so found he was in breach of Article 20 (1) and not (2) and should not be liable for the Respondent's claim. Furthermore the first conviction under (1) was res judicata and no continuing offence in the nature of additional building work could P.64 & P.65

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have been non-compliance with a condition imposed in respect of earlier building work.

8. On 8th August 1975 the Supreme Court of Mauritius made an order granting the Appellant final
P.64 leave to appeal to Her Majesty in Council.

9. The Appellant respectfully submits that the Judgment of the Supreme Court of Mauritius was wrong and ought to be reversed and this appeal ought to be allowed with costs with a direction to the said Supreme Court that they inquire into the issue whether the Appellant had contravened the provisions of Article 20 (2) for the following

REASONS

(1) BECAUSE the power to pull down an offending building arises only in respect of circumstances amounting to a breach of Article 20(2) of the said Ordinance.

(2) BECAUSE the fact of the Appellant's conviction in criminal proceedings did not preclude a defence to a civil claim that there was no contravention of the said Article 20 (2).

(3) BECAUSE the Appellant's first conviction pursuant to Article 20 (1) was res judicata and precluded a subsequent prosecution and conviction under Article 20 (2).

BARRY PAYTON

CONOR MAGILL

No. 36 of 1975

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Appellant

- and -

THE MUNICIPAL CORPORATION OF PORT-LOUIS

Defendants

CASE FOR THE APPELLANT

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