

ON APPEAL  
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N:

AHMAD GOOLAM DUSTAGHEER

Appellant

- and -

THE MUNICIPAL CORPORATION OF  
PORT-LOUIS

Respondents

CASE FOR THE RESPONDENTS

RECORD

10 1. This is an appeal from a judgment of the Supreme Court of Mauritius (Garrioch, S.P.J. and Moolan, J.), dated the 29th April 1975, whereby the Appellant was held liable towards the Respondents in the sum of Rs 20,927,77, being the expenditure incurred by the latter for the pulling down of three partly completed storeys of a building erected by the Appellant in the City of Port Louis, in contravention of the Building Ordinance, with costs.

20 2. Pleadings exchanged between the parties ran from the Respondents' Statement of Claim to the Appellant's Reply to Surrejoinder and Respondents' amended Reply in limine litis.

The essence of the aforesaid pleadings can be summarized as follows :

PP. 1 to 19

(A) The Respondents, who are the Authority for enforcing, in the City of Port-Louis, the provisions of the Building Ordinance, Cap. 263, hereinafter referred to as "the Ordinance", averred that:

30 (a) In January 1964, the Appellant was granted a building permit No 502 for the construction of a building, at No 14 Lord

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Kitchner Street, Port-Louis, consisting of a ground floor and first floor as per drawing submitted by him;

(b) Without having obtained the required authorisation from the Respondents, the Appellant, in 1967, added three storeys to the said building;

(c) The Appellant was prosecuted a first time in December 1967, under S. 20(1) of the Ordinance, for having made additions to a Building without a permit and a second time in July 1968 under S.20(2) of the Ordinance, for not complying with the plan of the 1964 building permit;

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(d) The Appellant pleaded guilty on each occasion and was fined in consequence ;

(e) Although empowered under S. 20 of the Ordinance to cause the additional storeys to be pulled down, the Respondents, with a view, in the Appellant's interest, to saving the building in question, if possible, invited the Appellant to submit a certificate from a qualified and registered engineer regarding the structural soundness thereof;

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(f) The appellant failed to comply with such invitation ;

(g) The Appellant was finally summonsed on the 19th February 1969 to cause the aforesaid three storeys to be pulled down, failing which the Respondents, exercising their rights under S. 20 of the Ordinance would do so;

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(h) The Appellant having failed to comply the Respondents proceeded to such pulling down, incurring expenditure amounting to Rs 20,925.77, which they claimed from the Appellant.

(B) The Appellant, in replying to the Respondents' allegations, averred that :

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(a) Before proceeding to the erection of the additional storeys, he did apply to the Respondents for a permit and did submit a plan as required from him;

(b) On or about the 10th May 1967, he was informed by one of the Respondents' employees that his plan had been approved and he was

requested to pay for the said permit;

(c) On the 23rd May 1967, he paid the prescribed fee for the said permit;

(d) He next called on the same employee and asked him for the said permit. The latter told him that his application and plan had been approved and later delivered it to him in person;

10 (e) After paying for the permit, he started upon the construction of the additional storeys in June 1967;

(f) When prosecuted on the 2nd February 1968 on a charge of building without permit, under S.20(1) of the Ordinance, he was prevailed upon to change his plea of not guilty to one of guilty;

20 (g) After being prosecuted and called upon to submit a certificate of structural soundness in respect of his building, he did produce a certificate from one Mr McGregor, a qualified engineer;

(h) While admitting service upon him of Respondents' summons to pull down, in February 1969, he was not bound to comply therewith and objected to the Respondents' action;

(i) The Respondents' claim should be dismissed with costs.

30 (C) In reply to the Appellant's allegations the Respondents denied that :

(a) The Appellant had ever been granted a building permit in 1967 or ever been authorised to proceed with the construction of the aforesaid additional three storeys

(b) The Appellant had ever submitted any engineer's certificate of soundness regarding such storeys;

40 (c) The Appellant had ever been prevailed upon to plead guilty to any of the two charges entered against him under S. 20(1) or (2).

(D) The Respondents' Reply was subsequently amended P. 11 L27

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P.19 L.10

raising the following plea in limine litis :

"The jurisdiction of the Supreme Court to try and adjudicate upon the [Appellant's] Statement of Defence is excluded by the operation of Section 57 of the Building Ordinance, Cap. 263, which provides an exclusive remedy against any demolition order by way of appeal therefrom. The [Appellant], having failed to avail himself of such remedy, is de-barred from raising the issues contained in paragraphs (2) to (6) of the Statement of Defence and from moving in paragraph (7) thereof that the [Respondents'] action be dismissed with costs".

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P.18 L.30

After Counsel for both parties had agreed, on the 16th September 1974 that it would be necessary to hear evidence before the plea in limine should be argued, the case was adjourned to January 1975 for hearing. At the close of the case on the 30th January 1975, in the course of the Appellant's Counsel's address to the Court, the Respondents' Counsel stated that he would not elaborate on the point in limine as, according to him, the evidence on record was sufficiently clear for judgment to be given in favour of the Respondents.

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P.50 L.6

PP.21 to 47  
PP. 65 to 90

3. Evidence was heard in Court on the aforesaid pleadings, on the 28th 29th and 30th January 1975 and documents were produced. It is not necessary, for the purposes of this appeal, to set out the said evidence in any detail.

P.54 L.50  
P.55 L.5  
P.56 L.50

4. The Court accepted the evidence of the Respondents' witness, supported as it was, "by documents of decisive weight" and rejected that of the Appellant's.

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The Court found the following facts duly proved :

(a) In January 1964, the Appellant, having submitted a plan, was granted a permit to erect a building at No. 49 Lord Kitchner Street, Port-Louis consisting of a ground and first floor. The building was erected accordingly;

(b) In May 1967, Mr Damoo, a Building Inspector of the Respondents, on ascertaining that three additional storeys were being erected without permit on top of the aforesaid building, served a notice personally on the Appellant enjoining him to stop the construction until he obtained a permit to do so;

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(c) Later on the same day, the Appellant handed in to Mr Damoo an application form, dated 3rd March 1967, together with two sets of plans;

(d) The said plans were subsequently returned to the Appellant by Mr Damoo with a request to have them signed by an engineer or an architect ;

10 (e) On the 18th May 1967, following the practice then current, the Appellant was instructed to pay the prescribed fee, which he did on the 23rd May. The receipt delivered to him contained an express clause that the payment of the fee in no way entailed authorisation to start the construction of the building ;

(f) The Appellant at no time sent back his plans duly approved as requested;

20 (g) In spite of two letters dated the 18th August and 25th September 1967, requesting the Appellant to submit his plans duly approved, and two notices, served by usher, on the 10th August and 25th November 1967, directing him to stop the works the Appellant failed to comply and continued the works;

30 (h) In November 1967, a charge of making an addition of three storeys to an existing building without permit, contrary to S. 20(1) of the Ordinance, was entered against the Appellant. On the 16th February 1968, he pleaded guilty to the charge and was fined Rs 1010 with costs ;

(i) On the 25th March 1968 and again on the 4th April 1968, the Appellant was invited by letter to submit an architect's certificate regarding the structural soundness of his building, failing which his additional floors could be pulled down. The Appellant failed to do so ;

40 (j) In July-August 1968, the Appellant was prosecuted a second time for breach of S. 20(2) of the Ordinance, on a charge that "having obtained a permit for erecting a building, he did unlawfully not comply with the plan upon which the permit had been granted." The Appellant pleaded guilty to the charge and was fined Rs 100 ;

(k) The Court was told that the reason for that second prosecution was that the Respondents were not sure that a conviction under S. 20(1) gave them the right to pull down the additional storeys;

(l) After being summoned before the Works Committee of the Respondents in October 1968 and being once more invited to submit an architect's certificate of soundness, the Appellant, having failed to do anything about it, was notified in writing on the 12th December 1968 of the Respondents' decision to cause the said storeys to be pulled down and the costs to be charged to his account; 10

(m) By the end of February 1969, the Appellant was served with a demolition notice which he ignored, whereupon the Respondents started demolition work on the aforesaid storeys on the 21st March 1969;

(n) Between March and June 1969, Mr. McGregor, a qualified building engineer, intervened on behalf of the Appellant, proposing to carry out checks and test of soundness of the Appellant's building. Pending such checks and tests, all demolition work was, by agreement, suspended by the Respondents until the 29th June 1969 when Mr McGregor informed them by letter that, due to the Appellant's extreme uncooperativeness, he was withdrawing from the case and no longer considered himself in charge thereof ; 20 30

(o) The Respondents thereupon resumed demolition work and completed same, incurring expenditure totalling Rs 20,929,77 in doing so;

(p) The Respondents were entitled to obtain judgment in the said sum.

5. Of the various points made in law by the Appellant before the Supreme Court of Mauritius, the only one relied upon in this Appeal concerns the construction and legal effect of S. 20 of the Building Ordinance, Cap. 263, The said section reads as follows : 40

"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.

10       "(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 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."

20       "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."

6.     The Appellant submits to the Court that, on a proper construction of S. 20,:

30       (a) The Respondent's power of demolition of any building erected in contravention of the Ordinance was limited to breaches of S. 20(2) viz. the erection of a building contrary to any condition imposed or contrary to any part of the plan on which the building permit has been granted,

(b) Any breach of S. 20(1), viz. the erection of a building, or the extensive addition to an existing building, without permit, did not confer on the Respondents any such power of demolition;

(c) On the facts of the case, the Appellant had committed a breach of S. 20(1) but not of S. 20(2);

40       (d) The Respondents had therefore no power of demolition in the present case and had acted ultra vires in pulling down the Appellant's building.

7.     The Respondents, on its part, submitted that;

(a) The power of demolition extended to cases under S. 20(1) as well as to cases under S. 20(2) of the Ordinance;

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(b) In any event, the Appellant had committed breaches of both S. 20(1) and S. 20(2);

(c) Furthermore, by pleading guilty to the prosecution entered against him for breach of S. 20(2) and being properly convicted thereof, the Appellant was debarred from questioning the legality of his conviction and of the demolition order under S. 20(2), by effect of the res judicata principle;

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8. The Court, agreeing that the wording of subsection (2) of S. 20 allowed of a doubt as to the extent of the powers of the Respondents. proceeded to the construction of S. 20(1) and (2) and held that, on a recourse to the ancestry of S. 20,;

(a) subsection (3) of S. 28 of the Building Ordinance of 1896 made it quite clear that the demolition powers of the Authority extended to offences against the provisions of both preceding subsections, i.e. (1) building without permit and (2) building contrary to permit;

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(b) the change of wording in S. 13 of the 1915 Building Ordinance, which replaced S. 28 of the 1896 Ordinance, did not affect the purport of the penalty provision. The way in which the penalty and the definition of the Authority's demolition powers was made to appear to be part of the second subsection of S. 13 which dealt with cases of building contrary to permit, was manifestly clumsy draftsmanship and insufficient to warrant any suggestion that such penalty and demolition powers were intended to be restricted to an offence against that subsection only. So, under both S. 28 of the 1896 Ordinance and S.13 of the 1915 Ordinance, in the phrase "made in breach of any of the above provisions", the "above provisions" related to both subsection (1), building without permit and subsection (2), building contrary to permit.

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(c) The new wording of S. 20 of the 1937 Building Ordinance, which replaced S.13 of the 1915 Ordinance, providing a separate penalty in each of its two subsections,

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together with a full stop ending subsection (1), building without permit, and the mention of demolition powers solely in subsection (2), building contrary to permit could not be due to an intention of making both subsections self-contained and independent of each other, thus depriving the Respondents of any demolition powers under subsection (1), building without permit.

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9. The Court held that the above interpretation of Section 20(1) and (2) was clearly confirmed by (a) the textual interpretation of the words "the above provisions" in subsection (2), which could not have any other meaning than under the previous Ordinances on the subject, and (b) the absurd consequence which would ensue upon a different construction, viz. empowering the Respondent to get rid of a structure erected contrary to permit but depriving it of any such power in the case of a structure erected without permit.

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10. The Court therefore held that the Respondent could legally have proceeded to the demolition of the additional storeys after Appellant's conviction under subsection (1) of S. 20, i.e. building without permit.

11. With respect to the question whether the Appellant had committed a breach of subsection (2) of S. 20 or not, and to the issue of res judicata, the Court held that, while a judgment of a criminal court could not be admitted in a civil action as evidence of the truth of the matter decided by that Court (Gorpatur v. Koorshur. M.R. 1951, 31) the Respondents, under S. 20 of the Ordinance, derived their demolition powers from the very conviction of the contravener and that, once the latter had been convicted of an offence against the relevant provision of the section, he could not, unless he appealed from such conviction, be heard to say that the Respondents' action was unlawful on the ground that he had not committed the offence concerned.

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12. Having reached that conclusion, the Court held that the need did not arise to decide whether the erection of the three additional floors by the Appellant was in violation of subsection (2) as well as of subsection (1) of S. 20 of the Ordinance.

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13. The Court, on the strength of the above findings, gave the Respondent judgment for Rs. 20,925.77, with costs.

14. The Respondents respectfully submit that :

(a) The Supreme Court were right, in their construction of S. 20, to hold that the Respondents had power to pull down buildings on a breach of subsection (1) as well as of subsection (2);

(b) the Supreme Court rightly interpreted S. 20 and drew correct inferences both from the historical evolution of the successive Building Ordinances, from 1896 to 1937, and from the textual interpretation of the section;

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(c) the Supreme Court were right in their assessment of the absurd consequences which would flow from any different construction and rightly considered this as fully confirming their construction of the said section.;

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(d) No doubt could subsist after the close and careful scrutiny of the said section by the Supreme Court and their construction thereof and the Appellant is not entitled to the benefit of any doubt in that respect.

15. The Respondents respectfully submit that the Supreme Court were right to hold that, although they were not bound by any principle of res judicata, the Appellant, once convicted under subsection (2) of S. 20 of the Ordinance, could not be heard to say that, on the facts and on a proper construction of S. 20, he had not broken the provisions of subsection (2) but only those of subsection (1) and that the demolition of his building under subsection (2) was therefore illegal and ultra vires.

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16. The Respondent further respectfully submits that (a) subsections (1) and (2) are not mutually exclusive and that both of them could logically and lawfully apply to the facts of the case as found by the Court and (b) the prosecution and conviction of the Appellant under subsection (1) of S. 20 did not constitute res judicata so as to prevent him being subsequently prosecuted and convicted under subsection (2) thereof.

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17. Finally, the Respondent respectfully submits that the Court were right in holding that, being given their finding as to the legal effect of Appellant's conviction under subsection (2) of S. 20, there was no need to decide whether he had contravened the said subsection or not.

10 18. On the whole, the Respondents respectfully submit that the Judgment of the Supreme Court of Mauritius was right and should be confirmed and that this Appeal should be rejected with costs for the following

R E A S O N S

1. BECAUSE the power to pull down an offending building arises in respect of circumstances amounting to a breach of either subsection (1) or subsection (2) of S. 20 of the Ordinance.
- 20 2. BECAUSE the mere fact of the Appellant's conviction in criminal proceedings under S. 20(2) of the Ordinance precluded any defence that the Appellant had not contravened S. 20(2).
3. BECAUSE the Appellant's first conviction pursuant to S. 20(1) was not res judicata so as to preclude a subsequent prosecution and conviction under S. 20(2).

30 In the alternative, should the Board find that the Supreme Court were wrong in holding that, in the light of their finding in law, there was no need to decide the third question whether the erection of the three additional floors by the Appellant was in violation of both subsections (1) and (2) of S. 20 of the Ordinance or not, it is respectfully submitted that the case should not be referred back to the Supreme Court of Mauritius and that this  
40 third question should be determined, on this Appeal, by the Board.

ANDRÉ RAFFRAY Q.C.

JEAN PIAT

No. 36 of 1975

IN THE PRIVY COUNCIL

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Appellant

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CASE FOR THE RESPONDENTS

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SLAUGHER AND MAY  
35 Basinghall Street  
London EC2V 5DB

Solicitors for the Respondents