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Present: Lyall Grant J. 1927.

HORAN *v.* ADAMJEE.

720—M. C. Colombo, 3,959.

Housing of the people and improvement of towns—Unfit for human habitation—Closing order—Ordinance No. 19 of 1915, s. 96, and rule 4 in schedule.

Where a person is served with a closing order under section 74 (1) of the Housing of the People and the Improvement of Towns Ordinance, the Municipal Authorities have no power to apply to buildings erected before 1915 rule 4, contained in the schedule to the Ordinance.

THE appellant was served with a closing order under section 74 (1) of the Housing of the People and Town Improvement Ordinance, 1915, in respect of premises of which he was owner. With the order a plan was served on him, indicating what the appellant had to do to render the building fit for human habitation. He carried out some of the alterations indicated in the plan but failed to comply with all the instructions. He then applied to the Chairman to certify that the premises were fit for human habitation. Upon his refusal he applied to the Municipal Magistrate to determine the closing order. The Magistrate refused to do this, and the appeal is taken from his decision.

R. L. Pereira (with *Canakeratne* and *H. E. Garvin*), for appellant.—All that the Police Magistrate had to see was that rule 3 had been complied with. This we have done. Our contention is that the room does comply with this rule because the windows abut on the open air " indirectly " through an open verandah.

1—J. N. B 37931-1,000 (9/54)

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Section 96 specifically refers to rule 3 as being the only rule which has to be complied with to render a building fit for human habitation. There is no section of the Ordinance which applies rule 4 at all.

The Magistrate clearly finds that the buildings are quite sanitary and fit for human habitation, and that the only omission is a technical compliance with rule 4. This rule does not apply to old buildings.

Hayley (with *N. K. Choksy*), for the respondent council.—If the order had been only under section 74 of the Ordinance, then the owner could not make alterations without himself submitting plans, &c. But in this case the appellant was given specific directions in the earlier proceedings, in which the closing order was made as to what alterations he had to make to render the buildings fit for human habitation and he did not then object. The plan served on him then indicated all the alterations he was required to make. His present application is for a revocation of the closing order without complying with all these directions. That cannot be done.

In view of the definition of " this Ordinance " in section 2, the Chairman cannot consent to a revocation if the building will continue to contravene any provisions of the Ordinance, that is rule 4 of the schedule.

Rule 4 is only a provision for a specific case falling under rule 3. The two are inseparable. It only applies to the windows referred to in rule 3. *Yabbicon v. King.* [1]

The licensing authority cannot vary a bye-law or sanction an alteration which would contravene a bye-law.

June 1, 1927. LYALL GRANT J.—

This is an appeal against an order made by the Municipal Magistrate of Colombo. The facts are briefly as follows: In December, 1925, the appellant was served with a closing order made under section 74 (1) of Ordinance No. 19 of 1915 in respect of certain premises of which he was the owner. The order was in the usual form of a closing order in respect of houses declared to be unfit for human habitation by reason of construction, lighting, and ventilation.

It prohibited their use for human habitation from and after March 1, 1926, and until " such time as the Chairman shall certify in writing that the said dwelling houses have been rendered suitable for human habitation or until such time as the Magistrate shall determine this closing order, under section 74 (5) of Ordinance No. 19 of 1915," and the Municipal Magistrate further ordered improvements in accordance with the plan served on the owner.

[1] *(1899) 1 Q. R. 444.*

With the order a plan was served on the appellant indicating what the appellant had to do to render the habitation fit for human habitation.

The appellant carried out some of the alterations indicated in the plan but failed fully to comply with the instructions. He then applied to the Chairman of the Municipal Council to certify that the dwelling houses had been rendered fit for human habitation. This the Chairman refused to do. Thereupon on September 31, 1926, the appellant applied to the Court to determine the closing order. The Municipal Magistrate refused to do so, and it is from this decision that the present appeal is taken.

The principal grounds upon which it was argued that the Municipal Magistrate ought to have granted the application were:—(1) That the only question for decision was whether the premises had been rendered fit for human habitation, and (2) that the Municipal authorities had no power to apply to buildings erected previous to 1915 (as these buildings admittedly were) any of the rules contained in the schedule to the Ordinance with the exception of rule 3, which by section 96 (1) is expressly applied to such buildings. It is not disputed that the buildings as they now stand comply with the requirements laid down in rule 3 of the schedule, unless rule 4 is to be considered as part of rule 3.

The part of the Ordinance which more particularly deals with insanitary dwellings is chapter 4 of Part III.—the part of the Ordinance dealing with remedial measures. That chapter imposes upon the local authority a duty to ascertain by inspection whether any dwelling house is unfit for human habitation, and if a dwelling house appears to the Chairman to be unfit for human habitation, the further duty is imposed of applying to the Magistrate for an order prohibiting the use of such dwelling house for human habitation till it is " rendered fit for such habitation."

Section 75 provides that the Magistrate, if he is satisfied that the dwelling house in respect of which the order is made cannot be made fit for human habitation without the execution of such alterations as he may specify, may direct the owner to carry into effect the execution of such alterations as may be so specified.

In the present case the Municipal Magistrate ordered the execution of the alteration set out in a plan. No objection was taken at the time to the plan.

If the appellant before the order was made was of opinion that these premises could be rendered fit for human habitation by the alterations which he has now carried out, he could have taken exception to the plan. He did not do so, but he afterwards came forward and asked the Magistrate to make in effect what was a variation of his original order. If the Magistrate on this application being made to him had taken the ground that he had already

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decided that the premises were unfit for human habitation unless and until the alterations indicated were carried out, it would have been difficult for this Court to interfere with his discretion.

The Magistrate, however, does not base his decision to continue the enforcement of his closing order on this ground. He says "I do not deny, and Dr. Aserappa, the Assistant Medical Officer, himself does not deny, that they appear to be perfectly good tenements and that they appear fit for human habitation."

He bases his decision on the grounds that the premises do not comply with rule 4 of the schedule, which requires a space of 15 feet between the buildings.

It is therefore necessary to consider the question whether rule 4 applies to buildings erected before the promulgation of the Ordinance, the alteration of which has been ordered under chapter 4.

Section 96 provides that a room which does not comply with rule 3 of the schedule shall be deemed to be unfit for human habitation. It is clear, therefore, that it is the duty of the Chairman and the Magistrate to insist on any room not complying with this rule being altered so as to comply with the same.

Reference has been made in argument to a proviso in sub-section (2) of this section, which the appellant claims has the effect of enlarging the discretion of the authorities.

As I read that proviso, it applies solely to the period of five years, during which the operation of the section is suspended in the case of old buildings. Its effect with that of sub-section (2) generally is now exhausted.

The appellant's main argument is: If a room complies with rule 3 of the schedule and is not on other grounds considered to be unfit for human habitation the Magistrate has no power to make a closing order. The argument for the respondent is alternative. He claims in the first place that when an old building has been found to be insanitary and unfit for human habitation, the Court has power to order such alterations as may be necessary to comply with the requirements imposed upon buildings erected after the date of the Ordinance. Section 7 provides that the Chairman shall not consent to any alteration in a building which would conflict with the provisions of the Ordinance. "Ordinance" by the definition clause includes the whole of the schedule, *i.e.*, it includes rule 4.

I do not think section 7 has any application to the present case. It occurs in Part II. of the Ordinance, which deals with preventive measures and has reference to section 6, which forbids a person making alterations without the Chairman's consent. I cannot see that it has any application to alterations ordered by the authorities to be carried out under chapter 4 of Part III.

The only power given by that section is a power to order such alterations as are required to render dwelling houses fit for human habitation.

It is contended alternatively that rule 4 is really a part of rule 3, and that when section 96 refers to rule 3 it must be taken as referring to rules 3 and 4. This argument has been accepted by the learned Magistrate, and it was argued on appeal that it is impossible to read rule 3 apart from rule 4.

The rules are certainly closely connected. Rule 3 (*d*) requires such habitable room to be provided with doors or windows opening into an external open space.

Rule 4 provides that where such window is situated on the side or interior face of a building the external open space shall be of certain dimensions.

Section 96 declares that a room that does not comply with rule 3 shall not be fit for human habitation, and I am asked to rule that it is a necessary implication from this that the external open space referred to in rule 3 must have the dimensions given by rule 4.

Section 96 is a restrictive and penal provision. If the Legislature had intended that non-compliance with rule 4 should *ipso facto* render a building unfit for human habitation, it would have been perfectly easy for it to have said so.

It would be a very dangerous rule of construction if when the Legislature has selected one rule out of several to carry with it penal consequences, it is to be understood as having implied that non-compliance with any other rule which is not mentioned is to have the same consequences. It is quite possible for a room to comply with the requirements of rule 3 though it does not comply with those of rule 4, and in these circumstances I think it would be very unsafe for a Court to say that the Legislature intended the expression " rule 3 " to mean " rules 3 and 4."

I do not think that any consent originally given by the appellant to the plan shown to him affects the question which is one of the Magistrate's powers.

As the Magistrate considers that the buildings are now fit for human habitation, he ought to determine his closing order, and the proceedings are returned to him for the purpose of doing so.

Set aside.