

1957

Present : H. N. G. Fernando, J.

M. Y. M. JALALDEEN, Appellant, and M. D. ALBERT
(Municipal Inspector of Prosecutions), Respondent

S. C. 1,221—M. M. C. Colombo, 87,289

Housing and Town Improvement Ordinance (Cap. 199)—Sections 5, 13, 19—Re-erection of building within street line—Mandatory order for demolition of building—Manner in which the discretion to order demolition should be exercised.

Where a person re-erects a building in contravention of section 5 of the Housing and Town Improvement Ordinance and it is clear that the reerection or a substantial portion of it projects beyond the street line in contravention of sections 19 (1) (a) and 13 (1) (c), an order for demolition may properly be made under section 13 (2).

The power to make a mandatory order either for demolition or alteration under section 13 (2) of the Ordinance is discretionary.

Where there has been a duo conviction under paragraph (c) of section 13 (1) in respect of an erection or re-erection of a building which is not in compliance with a substantive provision of the law, the discretion to make either a mandatory order for demolition, or for alteration, if alteration is practicable, must be exercised by the Magistrate.

A mere breach of any of the provisions of paragraphs (a), (b) or (d) of section 13 (1) will not *per se* justify the exercise of the discretionary power to make any mandatory order under sub-section (2) of section 13, unless the case is one where there has been, in addition, an erection or re-erection in contravention of an express statutory prohibition.

APPEAL from an order of the Municipal Magistrate's Court, Colombo.

J. A. L. Cooray, with F. X. J. Rasanayagam, for the defendant-appellant.

H. V. Perera, Q.C., with N. Nadarasa, for the complainant-respondent.

Cur. adv. vult.

June 7, 1957. H. N. G. FERNANDO, J.—

This is an appeal against a mandatory order made under section 13 of the Housing and Town Improvement Ordinance (Cap. 199 C. L. E.) directing the appellant to demolish a certain building situated within the Municipality of Colombo; the order followed a conviction of the appellant for having "re-erected a building, to wit:—A dwelling house at premises No. 28, Ketawalamulla Lane, within the Municipality of Colombo, in contravention of section 5 of the Housing and Town Improvement Ordinance (Cap. 199)." It seems clear that the building in question is a "re-erection", and that the re-erection or a portion of it projects beyond the street line; the appellant has not attempted to show by evidence that a major or substantial part of the building does not project beyond the street line, and I can assume that the re-erection was effected in contravention of section 19 of the Ordinance. Indeed Counsel

for the appellant has not made any submission to the contrary, but has only argued, upon the authority of the decision of de Sampayo, J. in *Bartholomeusz v. Perera*¹, firstly that the power to make a mandatory order should be exercised in discretion and not arbitrarily and *secondly* that the order should not be made in respect of a re-erection, as opposed to a new erection. With the first of these submissions I would entirely agree, but the second of them calls for a somewhat detailed consideration of the statutory provisions and the authorities.

A conviction under section 13 (1) of the Ordinance constitutes a condition precedent to the making of the mandatory order for demolition, and the offences contemplated in section 13 (1) can be roughly classed into three categories:—

- (i) The commencement, continuance or resumption of building operations in contravention of Chapter I of Part II of the Ordinance (*paragraph (a)*), or the deviation from any approved plan or specification (*paragraph (b)*); or the failure to comply with any lawful order or written direction of the Chairman (*paragraph (d)*);
- (ii) the execution of any building operation in contravention of any local by-law (*paragraph (c)*);
- (iii) the failure to remove a temporary structure within the time specified in the permit authorising its erection (*paragraph (e)*).

Category (i) is related to the provisions of sections 5, 6, and 10 of the Ordinance which impose a sort of "administrative control" over erections, re-erections and alterations by requiring, in the first two instances, the submission of plans and specifications, and in the third instance the consent of the Chairman. They ensure that building operations will not commence without prior authorisation, and that the operations are executed in accordance with the authorisation, and afford the local authority the opportunity of considering whether any proposed building operation will or will not conflict with restrictions and requirements contained in the Ordinance itself or in the building by-laws.

Category (ii) is related directly to conflict with the restrictions and requirements to which I have just referred, which include, for example, the provisions in section 19 prohibiting buildings within street lines and requiring buildings to abut upon a street, and the provisions in the Schedule to the Ordinance prescribing standard heights, the size of living rooms and standards of ventilation. Whereas category (i) provides a sanction for the enforcement of *procedural* requirements, category (ii) is the sanction for the *substantive* conditions and restrictions governing buildings.

Category (iii) is of a special nature the consideration of which will not assist the present discussion.

To refer now to sub-section (2) of section 13 which provides for the making of the mandatory order, it is important to note the express provision that the Magistrate *may* make a mandatory order *either* for

¹ (1919) 7 C. W. R. 109.

the demolition of the building in question or for the alteration of it in such a way as to bring it into accordance with law. In several decisions which quite rightly held that the power to make an order is a discretionary one it was apparently not realised that the Legislature, in providing that the mandatory order would not necessarily be one for demolition *but might alternatively be for a requisite alteration*, almost explicitly rendered the power discretionary. In any event the term "may" makes it quite clear that the legislature did not intend that an order for demolition should follow each and every conviction under sub-section (1) of section 13. Although several decisions of this Court have already established the proposition that demolition is not to be ordered as a matter of course, a review of them does indicate that it would be helpful to make some attempt to define the manner in which the discretion to order demolition or alteration should be exercised.

In the *Chairman, Local Board, Kurunegala v. Meera Saibo*¹ the local authority had approved a plan for the extension of a single storey building, but the appellant actually commenced erecting a building of two storeys; when warned that this was illegal without permission, he applied for the requisite permission, but this permission was withheld although the erection would not in any way have contravened the substantive provisions of law regarding buildings in the area concerned. What occurred was that, after delaying consideration of the appellant's application, the local authority decided to define a street line for the street in question and on the very same day refused to grant approval for the proposed deviation from the plan. The local authority had to admit that the erection of the two-storeyed building would have been authorised in the first instance if applied for and that at the time of the application there was no street line restriction in operation. On these facts Dalton, J. held that the refusal of permission was unlawful, and pointed out that the only purpose of seeking a demolition order was to save payment of compensation for the future in the event of street widening. The decision in the case was only that the building which the appellant had erected did not contravene the substantive restrictions as to projections within the street line for the simple reason that no street line had been defined at the time of the erection. Hence the only breach of law, if any, which the appellant had in that case committed was to deviate from an approved plan without the necessary permission. In other words the only offence, if at all, was one which I have included in category (1) above. I would agree entirely in that context that the discretion to make an order for demolition should not have been exercised.

In *Bartholomeusz v. Deen*² the complaint was that the building in question had been erected in contravention of paragraph (b) of sub-section (1) of section 19 (then section 18) of the Ordinance in that it did not abut upon a street or have all the land between one face of the building and the street reserved for the use of the building. Akbar, J., however, found that in terms of the second part of paragraph (a) of Rule 7 in the Schedule to the Ordinance, the building was one in respect of which the requirement laid down in paragraph (b) of sub-section (1) of section 19 did not apply. The pith of the decision was only that the

¹ (1925) 27 N. L. R. 83.

² (1931) 33 N. L. R. 235.

power to order demolition could not be exercised at all because no offence specified in section 13 (1) of the Ordinance had been committed; the question whether the discretion should be exercised did not therefore arise.

In the recent case of *The Chairman, U. C., Matara v. Abey Suriya*¹ a building had been erected within a limit of twenty-five feet from the centre of the road, thus contravening section 87 of the Urban Councils Ordinance, No. 61 of 1939, which fixed the building limit and accordingly contravening sub-section (1) of section 19 of the Housing and Town Improvement Ordinance. After discussion of the earlier cases *Nagalingam, J.* held that upon those facts a mandatory order for demolition should have been made, and in so doing expressed the view that where there has been a violation of an express provision of the Statute, the mandatory order must be made if applied for. It was not a case of construing "may" to mean "shall" (as counsel for the appellant thinks), but an interpretation based on the intention of the Legislature. According to my understanding, what was meant in this judgment by a "violation of an express provision of the Statute" was an offence of the type which I have included in category (ii). To take for example a building erected or re-erected within the line of an existing street, the erection or re-erection would constitute a direct violation of paragraph (a) of sub-section (1) of section 19 of the Housing and Town Improvement Ordinance; in other words the Legislature has expressly prohibited by means of that section any erection or re-erection within the street line. Accordingly if there is such an erection or re-erection, an order for demolition must be made if applied for and a Court which, because the prohibition enacted by the Legislature may seem unduly harsh or severe, declines to exercise the power to order demolition would be trespassing into the province of the Legislature. Even though the motive of the local authority in applying for demolition may in reality be the desire to avoid ultimate payment of compensation, the fact remains that the erection or re-erection is one which the Legislature has prohibited and the sanction which the Legislature has imposed must therefore be applied; the Legislature's desire that the building should not exist has to be respected by the Courts.

The case may be different if a building only partially contravenes the street line restriction as, for example, when a part only of the erection or re-erection is within the street line. In such a case section 13 (2) requires the Magistrate to consider whether an alteration of the building in such a way as to bring it into accordance with law is possible or practicable, and if so he would exercise his discretion in favour of the alteration rather than order demolition of the entire building. As *Dalton, J.* observed in *The Chairman, Local Board, Kurunegala v. Meera Saibo*² "no demolition order would be made even if some provision of the Ordinance was contravened if by some alteration it could be brought into accordance with law."

I should now refer to the case of *Bartholomeusz v. Perera*³ where there had been a re-erection on a portion of a building which had fallen down

¹ (1950) 52 N. L. R. 349.

² (1925) 27 N. L. R. 83 at p. 88.

³ (1919) 7 C. W. R. 109.

and where the accused had re-erected that portion within the street line laid down by the Municipal Council. Clearly in that case there had been a violation of a provision of law prohibiting re-erectations within a street line. The argument submitted to this Court on behalf of the Council was that the Magistrate had no discretion in the matter and that he was bound to make an order for demolition if the Council was satisfied of the necessity for demolition. I agree entirely that that argument had to be rejected in so far as it denied any discretion to the Magistrate, but with great respect I would dissent from the further view expressed by de Sampayo J. that no mandatory order under section 13 (2) should have been made at all. The ground stated for that view was that the desire of the Council to have that building demolished was purely in the pecuniary interest of the Council and that the line of street was wholly imaginary and would not pass into actual fact until some indefinite time. I might add that the street in question, Lauries Road, Colombo, has not yet been widened to the prescribed line of street. But I would respectfully point out that the decision in that case ignored the fact that the re-erection within the street line constituted a clear breach of section 13 (1) (c) of the Housing and Town Improvement Ordinance and that accordingly, as was later pointed out by Nagalingam, J., the failure to order demolition of the projection amounted to a licence to the accused in that case to flout the prohibitions imposed by the Legislature.

I should perhaps add some observations as to cases where the only breach in question is the failure to submit plans and specifications in compliance with law or a deviation from some approved plan. While such a breach would render an offender subject to conviction under section 13 (1) for a breach of paragraph (a) or (b) thereof, the conviction would not *per se* empower a Magistrate to make any mandatory order under section 13 (2) and such an order would only be made if, in addition, the erection itself contravenes some substantive provision of law to which I have referred in category (ii).

To summarize, I would hold—

(a) that the power to make a mandatory order either for demolition or alteration under section 13 (2) of the Ordinance is discretionary;

(b) that where there has been a due conviction under paragraph (c) of sub-section (1) of section 13 in respect of an erection or re-erection of a building which is not in compliance with a substantive provision of the law, the discretion to make either a mandatory order for demolition, or for alteration if alteration is practicable, must be exercised by the Magistrate;

(c) that a mere breach of any of the provisions of paragraphs (a), (b) or (d) of section 13 (1) *per se* will not justify the exercise of the discretionary power to make any mandatory order under sub-section (2) of section 13, unless of course the case is one where there has been, in addition, an erection or re-erection in contravention of an express statutory prohibition.

In the present case as I have already pointed out the only evidence is that the entire re-erection is within the street line, and upon the

principles which I have attempted to enunciate, the order for demolition was properly made and is accordingly affirmed. I would, however, set aside the order of the Magistrate condemning the appellant to pay costs fixed at Rs. 262/50. There is no provision in the Criminal Procedure Code which authorised the making of that order for costs.

Order affirmed.
