1950 *Present:* Nagalingam J.

THE CHAIRMAN, URBAN COUNCIL, MATARA, Appellant, *and* ABEYSURIYA, Respondent

S. C. 998—M. C. Matara, 15,977

Housing and Town Improvement Ordinance (Cap. 199)—Sections 7, 13, 14—Buildings —Erection of new building—Contravention of statute—Mandatory order for demolition—Urban Councils Ordinance, No. 31 of 1939, Section 87—Refusal of mandatory order—Right of appeal.

The accused erected a new building within a limit of twenty-five feet from the centre of a road, in contravention of the provisions of section 87 of the Urban Councils Ordinance, No. 31 of 1939, and section 13 (1) of the Housing and Town Improvement Ordinance. The Chairman of the Urban Council was not agreeable to granting any concession to the accused in regard to the demolition of the building.

Held, that the Court was bound to issue a mandatory order under section 13 (2) of the Housing and Town Improvement Ordinance for the demolition of the building. It is not open to a Court to take upon itself the task of permitting a breach of an enactment on grounds that an accused person would suffer hardship or loss.

Held further, that a person dissatisfied with an order of the Magistrate refusing to make a mandatory order in terms of section 13 (2) of the Housing and Town Improvement Ordinance is entitled as of right to appeal to the Supreme Court.

APPEAL from a judgment of the Magistrate's Court, Matara.

Ivor Misso, for the applicant appellant.

D. S. Jayawickrama, for the accused respondent.

Cur. adv. vult.

December 14, 1950. NAGALINGAM J.—

This is an appeal by the Chairman of the Urban Council of Matara from a refusal of the Magistrate to make a mandatory order in terms of section 13 (2) of the Housing and Town Improvement Ordinance (Cap. 199) to compel the respondent to demolish a building erected in contravention of the provisions of sub-section 1 of the same section.

A preliminary objection was taken by Counsel for the respondent to the appeal on the ground that no appeal lay from such an order. The contention was based upon the terms of section 14. The section, however, directs that building operations shall be suspended notwithstanding

any appeal that may be preferred against any conviction or order made under either of the two sections 12 or 13. The order referred to is an order directing the removal or alteration of the building erected contrary to the provisions of the ordinance. This section, I do not think, defines any right of appeal from an order made by the Magistrate. The general right of appeal that is conferred by section 338 of the Criminal Procedure Code is not in any way affected by section 14 of the Housing and Town Improvement Ordinance. A party dissatisfied with any final order of a Magistrate is under the section of the Criminal Procedure Code entitled to appeal to this Court. The order complained of is a final order and is one which is covered by section 338, and a party dissatisfied with the order of the Magistrate refusing to make a mandatory order is entitled as of right to appeal to this Court.

The appeal is based on the ground that the learned Magistrate has erred in refusing to make the mandatory order applied for. It is urged that where it is not possible to make any alterations in the building so as to bring it in accordance with law there is no alternative but to direct the demolition of it, where a conviction has been entered against the accused person under section 13 (1) of the Ordinance. Under section 7 of the Housing and Town Improvement Ordinance an imperative duty is placed on the Chairman not to approve any plan for a building which may conflict with the provisions of the Ordinance, or of any other Ordinance. Under section 87 of the Urban Councils Ordinance, No. 31 of 1939, express provision is made that notwithstanding anything contained in the Housing and Town Improvement Ordinance it shall not be lawful for any person to erect a building within a limit of twenty-five feet from the centre of a road, referred to as the building limit. It is admitted that the building erected by the respondent contravenes this provision.

The prosecuting Inspector also gave evidence that the building has no lavatory. I take it that this reference is to some by-law framed by the Urban Council in regard to the matter, for the Inspector admitted under cross-examination that the building does not contravene the sanitary requirements under the Housing and Town Improvement Ordinance. It is also common ground that unless the entire building is set back it cannot be made to conform to the requirements of section 87 (1) (*a*) of the Urban Councils Ordinance and that no alteration can be affected so as to bring it into conformity with this provision. In regard, however, to the complaint that there is no lavatory, that is a matter which may yet be remedied by an adequate alteration being effected.

The question, then, is whether, as there is a contravention of the express provision of the Urban Councils Ordinance in regard to buildings not being permitted within twenty-five feet of the centre of the road, a demolition order should follow as a matter of course. The learned Magistrate has taken a compassionate view on the ground that a valuable building, especially where the accused has expressed his willingness to take down the building without compensation at any future date if and when the widening of the road takes place, should not be ordered to be demolished. He has seen fit to take this view in view of certain decisions of this Court which he says enables him to adopt such a course.

The first case cited by the Magistrate is that of *Bartholomeusz v. Perera*[1] That was a case of re-erection of a part of a building which had fallen down, and was governed by the Municipal Councils Ordinance. The question did not arise whether there was a breach of an express provision of the law, and the judgment, therefore, has no application to the present case. In fact, in regard to re-erection of a building other considerations apply even in regard to areas in which the Urban Councils Ordinance operates. I shall advert to this presently.

The next case is that of *The Chairman, Local Board, Kurunegala v. Meera Saibo* [2]. That was a case where the judgment of Dalton J. makes it abundantly clear that the discretionary power can only be exercised "If the building does not contravene any provision of the law." The facts in that case show that the accused had obtained permission of the Local Board to erect a ground-floor building but that he had deviated from the approved plan by putting up an additional story and that the deviation did not offend any building regulation nor was there at the date of the deviation any by-law framed by the Local Board which prevented the erection of such a structure. In those circumstances it was held that a discretion might be exercised in favour of the accused and a demolition order refused.

The third case referred to by the learned Magistrate is that of *Keuneman v. Wickremenayake*[3]. and unreported case. This case undoubtedly was one where the accused had in contravention of a building plan submitted by him and approved by the Council erected his building within the building limit. There was no trial had in this case. On the invitation of the parties the Magistrate inspected the premises. At the inspection a suggestion seems to have been made on behalf of the accused person that he was prepared to enter into an agreement with the Council to remove the building claiming no compensation in respect thereof when the Council puts into force a street widening scheme. Without having regard to the provisions of the Ordinance and looking at the problem from a humane point of view the Magistrate thought that, as the Chairman himself did express his willingnes to enter into such an agreement if Colombo counsel would advise that such an agreement was possible to be entered into and as the Council's advocate had expressed his opinion that such an agreement was possible, the ends of justice would be served by inflicting a nominal fine of one rupee on the accused, and directing the accused to enter into an agreement as indicated above, the more so as the Magistrate thought that an order of demolition was "bound to cause great hardship to a poor man in respect of his living." When the matter came up to this Court, this Court affirmed the Magistrate's order declining to pass a demolition order but imposed a condition that the respondent was under a liability "to remove the encroachment if and when called upon by the Chairman when the necessity arises and also subject to no claim being preferred by the respondent for compensation." The question does not appear to have been argued as to whether such an agreement would in fact be valid and had the sanction of law.

[1] *(1919) 7 C. W. R. 109.*
[2] *(1925) 27 N. L. R. 83.*
[3] *S. C. No. 601 P. C. Matara 6,694 of 1935, S. C. Mins. 2.6.36.*

I read this judgment as laying down the proposition that where the Chairman himself agrees to allow a building which infringes the provisions of the law to stand subject to terms and conditions agreed upon between the parties, the Court would not interfere; but if the judgment is regarded as an authority for the proposition that this Court can make an order entirely repugnant to and in conflict with the express provisions of the Ordinance, I should then certainly say the case was decided wrongly and is in direct opposition to the view expressed by Dalton J. in the case of *The Chairman, Local Board, Kurunegala v. Meera Saibo* [1] which I think embodies the correct view that the discretionary power can only be exercised " if the building does not contravene any provision of the law."

In the present case, the Chairman is not agreeable to entering into any agreement with the accused in regard to the demolition of the building. His position is that he has no such powers vested in him by the law. I think he has properly advised himself in regard to this matter, and the language of the section is too patently clear to admit of any controversy in regard to it. I am not prepared to say that if the Chairman blatantly and openly flouts the provisions of the Ordinance by entering into an agreement which manifesty sets at naught the express provisions of the law enacted in that behalf he would not be liable in damages to any public spirited citizen who may wish to take the matter before a Court of Law. But in the absence of the willingness of a Chairman to enter into an unlawful agreement with an accused person, I do not think even this Court has the power to impose a liability on an accused person subjecting him to remove the building at a future date. Such an order would be one without any support for it in law. If, for instance, it was a case of re-erection of a building within the building limit, then ample provision exists for discretion to be exercised to allow the building to continue and for terms and conditions to be insisted upon as a condition precedent to such a building being permitted to stand without an order of demolition being made in respect of it. But where no such power is prescribed by law, an order imposing terms and conditions would be an order *ultra vires* and cannot be binding even upon the party. In this view of the matter, I do not think, even if I were disposed to grant an indulgence to the accused, I have the power to do so.

None of the cases, therefore, referred to by the learned Magistrate has application to the present problem. It cannot be too strongly emphasised that it is not open to a Court of Law to take upon itself the task of permitting a breach of an enactment of the Legislature on grounds that an accused person would suffer hardship or loss. Besides it cannot be too strongly stated that any breach of an express provision of the law must result in rendering nugatory the attempt on the part of the Legislature to develop Urban areas in such a way as to conserve the amenities of the locality.

Under section 87 (1) (*b*) of the Urban Councils Ordinance, authority is vested in the Council to grant a licence to re-erect or to make an addition to any building that may stand within the building limit. But in regard to the erection of a new building no such power is vested in the

[1] *(1925) 27 N. L. R. 83.*

Council. The Legislature, therefore, has clearly indicated its mind that while it was prepared to minimise loss and hardship to the owner of an existing building within the building limit by granting him permission either to re-erect or erect additions, it was not inclined to adopt a similar course in regard to a new building to be erected within the building limit for the first time.

I do not therefore think that there is any possibility of a Court of Law exercising any discretionary power where there has been a violation of an express provision of the Statute. Besides, the facts of this case show that it is the last case in which the discretion should be exercised in favour of the respondent. The respondent admits that he knew that new buildings had to be 25 feet from the centre of the road but he sought to justify his conduct by adding that he was personally aware that other buildings had been built on agreements with the Council along the same road. The cross-examination revealed that the buildings that were referred to by him as having been built on agreements with the Council were cases of rebuilding and that he himself then expressly stated that he knew of no new building being erected along the road. Furthermore, the evidence of the Inspector shows that on October 20, he discovered that the building had been erected. He says he immediately asked the accused not to carry on with the building operations because he had submitted no plan and had obtained no permission from the Chairman. The prosecution was promptly entered, and though a short date was obtained to serve summons on the accused, he could not be served. But when he was served on a later date, he appeared in Court and was asked by the Court not to continue the building operations. The Inspector says that the accused carried on the work notwithstanding the direction of the Court. The accused, however, denies that he did so. If what the accused says be true, it only means that between October 20, when the walls were not more than a foot high at their maximum height, and October 31, that is to say, within a period of eleven days, he was able to complete his building—a building which was stated by counsel for him to have cost about Rs. 12,000. With regard to the conduct of the accused the learned Magistrate himself says that the accused had deliberately flouted the warning given to him by the Inspector. The accused, it seems to me, has with full deliberation chosen to break the law in the belief that if he presented the Council with a *fait accompli* he would then have gained his object.

However distasteful the task may be to have to make an order of demolition, I do not think that the law should be permitted to be flouted so flagrantly and I cannot do better than quote the words of Garvin J. in the case of *Vandersmaght v. Pompeius* [1] when he refused to interfere with an order for demolition.

"As to the merits of the case, I do not think the appellant is entitled to any consideration. He had barely commenced to build when he was warned by the Inspector and the engineer to desist. He was told that the building contravened the express provisions of the regulations framed under the Ordinance and he was informed by the engineer that he doubted whether even the Chairman had power to

[1] *4 T. L. R. 61.*

give him permission to erect this building in the situation in which he proposed to built it. He was warned more than once and persisted despite these warning to complete the structure. He has deliberately set at nought the provisions of the Ordinance and has chosen to disregard the warnings of those charged with its administration. He has only himself to thank for the consequences."

I therefore set aside the order of the learned Magistrate and allow the application of the appellant and direct that a mandatory order be issued on the respondent ordering him to demolish the building complained of.

Appeal allowed.