BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 349/13

In the matter of :-

BONOMALLY RAM Bhagwat Parsad

Appellant

v/s

Municipal Council of Curepipe

Respondent

DETERMINATION

The present appeal lodged before the Tribunal on 7th February 2013 is against a decision taken by the Municipal Council of Curepipe (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for extension at ground floor at 47, Charles Regnaud Street, Curepipe as TV 7338 No.23. The grounds for refusal were set out in a letter dated 22nd January 2013 as follows:

"1. Construction already put up & building already occupied. Complaints have been received to the effect that building has been put up on access road and without setback from boundary line.

2. Proposed development will contravene Building Act, Town & Country Planning Act & Local Government Act in view of the fact that applicant has already commenced & completed the construction without permit, it would be improper to issue a BLP in those circumstances.

3. Building and structural details are contrary to norms."

The Appellant deposed under solemn affirmation and was cross-examined by the Respondent's representative, Mr. Khadaroo, building inspector. Mr. Khadaroo subsequently deposed and was also subjected to cross-examination by the Appellant.

We have duly considered all the evidence placed before us, including the Appellant's notice of appeal containing his grounds of appeal and annexure as well as the Respondent's statement of defence with its annexure.

BACKGROUND

The Appellant resides at 47, Charles Regnaud Street, Curepipe Road and he explained that his relatives live in the neighbourhood. As far back as 1990 he had got the consent from them to carry out construction and extension of his house at ground and first floor up to an area of 400 square feet. Following some personal problems between the Appellant and his uncle, one Narad Parsad BONAMALLY RAM, who is also his next door neighbour, the latter withdrew his consent and objected to any extension work that the appellant wished to do in 2011. The Respondent was informed of this objection. The Appellant also gave the evidence to the effect that he had already obtained a conditional approval for his BLUP from the Respondent and the application was approved vide a letter dated 29th January 2011, which should in fact read as 29th January 2012 since the Committee sat on 29th December 2011. The letter stipulated that proposed extension at ground and first floor had been approved provided the consent of neighbours were submitted for construction on the boundary line and access road and that there should be no opening on the access road. The Appellant stated that he was sent a reminder dated 13th February 2012 whereby he was given an extension to provide the required particulars **(DOCs A & B).** He wrote a letter of appeal on 28th February 2012 stating that he would not carry on with further construction upstairs but that he had already built the terrace downstairs and had obtained authorization of the neighbours **(Doc C).** The Appellant also produced before the Tribunal a document, which is a photocopy, allegedly showing that the objector, one Mr. Narad Parsad BONAMALLY RAM had also, amongst others, given his authorization in January 1990 for extension of his house to a total area of 400 square feet at ground and first floor level **(Doc D)**. He also produced plans and photographs of the property in lite.

The Respondent's case rested mainly on the grounds set out in their statement of defence. Mr. Khadaroo, building inspector, deponed on behalf of the Respondent to the effect that the appellant had made 2 applications for the same development in 2011 and 2012. Both applications were similar except that in the second application the appellant had made a few amendments in the plan. There was a dispute as to the date on which the committee took a decision, however this is not material for the purposes of this appeal. The Council rejected the application of the Appellant for the reasons set out above. Mr. Khadaroo also stated that a site visit was carried out and he produced photographs to show the alleged illegal extension made by the appellant on the boundary wall of the appellant and the objector, and to show that there

is a door on the access and the set back was also not respected. However the ground relating to building put up on access road was dropped.

ISSUES

1. **Illegal construction (without BLUP)**

   It is admitted by the Appellant and obvious from the facts that the extension works undertaken by him were without a Building and Land Use Permit. He admits that a store and toilets have been built and are currently in use but that the extension of the balcony is yet to be completed. His excuse is that he was unaware that he had to apply for a permit for extension.

   Section 7 of the Building Act, which regulates the issue of building without permits, stipulates that *"No person shall commence the construction of a building, or extensive alterations, additions or repairs to an existing building, without having obtained a BLUP from a local authority under* ***section 117 of the Local Government Act 2011.***"

   While ignorance of the law is no excuse, one would have thought that all law abiding citizens have a duty to find out what the law provides in respect of any development or modification that one intends to do to ones property before embarking on a project where finances are involved, the moreso when it affects the rights of one's neighbours to their peaceful enjoyment of the their property. This was clearly an illegal construction and we have therefore not been convinced of the appellant's reasoning under this limb.

2. **Objection to construction on boundary line and without set back**

   The appellant's building has been constructed on the boundary line, without any setback. This evidence is uncontested. While the Tribunal can appreciate that at the time the house was built in the 90s, the Appellant had obtained the consent of the next door neighbour to build on the boundary wall, the question that needs addressing is, can a neighbour who had once given his consent to his contiguous neighbour for construction on the boundary wall be bound for his lifetime to consent to any other subsequent development on the boundary line, in other words does it amount to a 'blanket consent'?

In the case of **Dassoo & Anor v/s Baorah & Anor IPO Grand Port Savanne District Council (2013) SCJ 272**, Justice Domah granted an interlocutory injunction against the respondents who sought to add a first floor with openings on the boundary line, which were in fact contrary to approved plans. Although the respondents argued that they had a written consent dating back to 2008 whereby the appellants had given the respondents their consent to carry out a construction on their boundary wall, his Lordship commented that *"a liberal interpretation (had been) given to the authorization dated 11 December 2008.."*

As far as the law is concerned, **Article 662 of the Civil Code** provides
"L'un des voisins ne peut pratiquer dans le corps d'un mur mitoyen aucun enforcement, ni y appliquer ou appuyer aucun ouvrage sans le consentement de l'autre, ou sans avoir, a son refus, fait regler par experts les moyens necessaries pour que le nouvel ouvrage ne soit pas nusible aux droits de l'autre."

Therefore it is clear from the law that for ***any*** construction done on the boundary wall, there should be the consent of the contiguous neighbour unless it can be proven that there will be no nuisance caused to the latter.

This being the law, for the question asked above the answer lies within the provision of the law, that is *".....ne peut pratiquer dans le corps d'un mur mitoyen **aucun** enforcement... (the stress is ours)"*. For every new development on the boundary line, the contiguous neighbor's consent is needed simply because as stated above, the right to him having a peaceful enjoyment of his property may be fettered with the new development and it is only if he has no objections that the developer can contemplate developing his property. It stands to reason that mutual consent between neighbours is of utmost importance so that there is *no abus de droit*, as provided in **Art 17 of the Civil Code.**

Recently, in the case of **Khoody & Anor v/s Khoody 2014 (SCJ) 68**, their Lordships upheld the decision of the lower court, which found that there was no offence in a case of encroachment where it was done with the authorization of the contiguous neighbour, albeit a verbal one. The facts of this case are that there was an encroachment by a neighbour by 0.10 m into the setback of the contiguous neighbour. The former argued in his defence that there was a verbal agreement with the previous owner of the property who was in fact the late father of the plaintiff. This was denied by the plaintiff. The court regarded the determining issue to be whether or not there was consent, the encroachment issue being undisputed. The lower court after analyzing the evidence

adduced decided that there was consent by the previous owner and that was the end of the matter.

In the present case, the appellant stated in his grounds of appeal that with regard to his property at ground floor he had obtained the verbal consent of the previous owner, one Ms Pushpa H Bonomally Ram for the extension of the slab that was done to the existing slab. Unfortunately, at trial this issue was not canvassed at all by the Appellant in support of his case. Since this is a civil case and the rationale therefore is 'He who avers must prove', we believe that he has not been able to prove this averment hence on this score, his ground does not hold.

To a question put by the bench, the appellant sought to convince us that the extension that he has done up until now to his building falls within the 400 sq feet for which he had received the authorization of Mr. Narad Bonamally Ram in 1990. We have unfortunately not been convinced of this point. Firstly, he has not brought any evidence before this Tribunal in support of the averment that after the extension the building still falls within a total floor area of 400sq feet. **Documents E and F** produced by the Appellant are essentially plans of his building drawn up Nov 2011 and in December 2012 which are a contradiction in itself. We shall deal with this under the next limb. However, it suffices to say at this point, that the pre-existing building (without the extension) had a floor area of less than 400 sq ft, and that with the extension the gross floor area still did not exceed 400 sq ft. Furthermore, there is inconsistency in his evidence. On the one hand, he stated *"La construction qu'il m'avait autorisé, il y avait un garage que j'avais fait pour 400 pieds carré mais je n'avais pas complété les 400 pieds carré. Ce que j'ai ajouté, ca fait toujours partie de ces 400 pieds carré. Il a autorisé pour une extension de 400 pieds carré."* On the other hand the authorization letter he produced, marked **Doc D**, stipulates that the authorization is for the purposes *"de construire un batiment (agrandissement a sa maison) don't la superficie au rez-de-chaussée couvrira 400 pieds carrés avec pareille superficie a l'étage..."* If we have to take the literal meaning of the document, and there is no reason why we should not, the whole surface area of the floor upstairs and downstairs could be extended to 400 sq feet and NOT that the garage alone could be extended to 400 sq feet.

A further inconsistency in the appellant's version stemming from the same statement is that on the one hand, he stated that his uncle had in fact already authorized him to carry out this extension but then he also repeatedly stated that he knew very well that, he would never obtain the uncle's consent to the extension because he is not on good terms with the said uncle. This statement, apart from showing inconsistency, we

believe, is also a highly self-incriminatory statement from the appellant which explains that the appellant knew all along ever since he started the extension that he did not and would not have the consent of his contiguous neighbour on whose wall he was carrying construction works.

3. Building and Structural details are contrary to norms.

It is the contention of the Council that the plans that were submitted by the appellant are contrary to the extension work that was actually effected on the locus. It is borne out in evidence that in fact 2 applications were made by the Appellant which were considered by the Council, in 2011 and 2012 respectively. It is the contention of the Respondent that the amended plans submitted in 2012 showed a drawing of the extension but was marked as "existant", where as it was the extension proposed in 2011 for which the Appellant had not yet obtained the relevant BLUP. In essence, what the Appellant sought to do was to pass off the illegal construction as "existant building".

We have carefully analyzed both versions. Mr. Khadaroo gave evidence that it was after an inspection had been carried out by the building inspector of the Council that the latter was apprised of the fact that Appellant had already illegally constructed the recent additions to his building and constructed on the common wall. Appellant, on the other hand, was very evasive and stated that he didn't know he had to apply for a BLUP where as in fact he had applied for one and given a conditional BLUP but subsequently the time delay given to him to get the clearances had lapsed. It was only following a complaint by Mr Narad Parsad Bonamally Ram that the building inspector went on the locus and made a 'constat' of the state of affairs. We are of the view that the Appellant's evasiveness renders his testimony devoid of credibility. Furthermore the discrepancies in the documents E and F produced by the Appellant as part of his case reinforces his lack of credibility as a witness. Doc E was drawn up in Nov 2011 shows the layout of the ground and first floor with the proposed extension whereby the area is given as 17.63 sq m for each floor.Doc F was drawn up in Dec 2012, that is, after the illegal construction had been carried out on the ground floor and part of the first floor. But miraculously we noted that despite the extension made, the layout of the ground floor seems to have reduced in size with an area of only 8.87 sq m and the first floor's area also diminished to 15.87 sq m, that is, without the extension if we have to go by the version of the Appellant. These documents not only seem to be contradictory but they are also in contradiction with the version of the Appellant who stated that he had carried out the extension to the whole extent downstairs but stopped the construction upstairs after the visit of the planning inspector so as not to be in breach of the law.

Now Documents G1 and G2 produced by the Appellant himself give lie to Doc F in that it can be clearly seen from the 2 photographs that the ground floor, if not having the same floor area, has a slightly bigger floor area than the first floor.

For all the reasons set out above, we find that all the reasons given by the Municipal Council for having refused the application are justified. The appeal is therefore dismissed. No order for costs.

Determination delivered on 29th May 2014 by

Mrs. J. RAMFUL	**Mrs. B. KANIAH**	**Mr. S. KARUPUDAYYAN**
Vice President	**Assessor**	**Assessor**