

(1967) 06 CAL CK 0030
In the Calcutta High Court
Case No : A.F.A.D. No. 1631 of 1964

Gotham Construction Co.

APPELLANT

Vs

Amulya Krishna Ghose and Others

RESPONDENT

Date of Decision : 21-06-1967

Acts Referred:

Calcutta Municipal Act, 1951 — Section 437(1), 437(6), 537, 582, 583
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 20 Rule 6, 100, 101, 9
Evidence Act, 1872 — Section 45
Limitation Act, 1963 — Article 113
Specific Relief Act, 1877 — Section 54, 56

Citation : AIR 1968 Cal 91 : (1968) 1 CALLT 337 : 72 CWN 717

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : Lala Hemanta Kumar, Biswajit Ghose and Samir Kumar Mukherjee, for the Appellant; Chittatosh Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Bijayesh Mukherji, J.—This is an appeal by the defendant, Gotham Construction Co., a firm, against whom the trial judge, and on appeal, the appellate judge as well, have granted a decree, permanently restraining it "from creating any sound nuisance in the workshop (of the firm) at 41 Jhautola Road arising out of hammering on steel or any other plates".

2. The appellant's workshop at 41 Jhautola Road is one for "building the bodies of motor vehicles", as the averment in the second paragraph of the plaint is--an averment which the sixth paragraph of the appellant's written statement admits to be "substantially correct". Such is the admission too of the appellant firm's partner, Shri Haridas Goswami, as the 3rd witness for the defendant, in his evidence at the trial. Jhautola Road runs north to south. On the east of the road is "41" with the controversial workshop and also the residence of Shri Haridas Goswami and his family. Shri Bhudeb Sankhanidhi, the 3rd plaintiff (now the 3rd respondent), a director or Lalmohan Saha Sankhanidhi and Co., with its head

office in India, lives at the relevant time at 40 Jhautola Road on "the contiguous north and east" of which is "41". 47 Jhautola Road is the house where the first two plaintiffs (now the first two respondents) live. The first one is Shri Amulya Krishna Ghosh who deals in, and imports, printing machinery. The second one is Shri Goutam Chakravorty, a barrister, occupying as a tenant the ground-story of "47". "41", as noticed, is on the east of Jhautola Road, running north to south. "47" is on the west. According to Shri Goutam Chakravorty, the 4th witness of the plaintiffs and himself the second plaintiff, "41" is to the south-east of "47". Or is it north-west? That is what Shri Amulya Ghosh, the 8th witness of the plaintiffs and himself the first plaintiff, says: his house (which is "47", the same as Shri Goutam Chakravorty's) is to south-west of "41". Which means that "41" is on the north-east of "47". Obviously, there is some confusion somewhere; either a slip on the part of either of the two Shri Goutam Chakravorty and Shri Amulya Ghosh or a recording mistake. But that does not matter. What do matter are the following:

- A. The distance between the southern wall of "41" and the northern corner wall of "47" cannot be more than 50 to 60 yards.
- B. The width of Jhautola Road with the footpaths would be 60 feet or more.
- C. Inside of "41" there is a tin shed the distance between which and the gate of "41" would be 15 feet or thereabouts.

Such has been the evidence of the respondent, Shri Goutam Chakravorty. Shri Haridas Goswami, a partner of the appellant firm and the defendant's 3rd witness, will however put the distance between the tin shed (with brick-built walls on all sides and asbestos roofing, inside of which body-building works are carried on, according to him) and Jhautola Road as 400 feet or thereabouts.

3. This, then, is the lie of the place where the litigating parties live and one of them, the human agency of the appellant firm carries on business too as the builder of the motor coaches and vehicles. In adjudicating a cause, the instant litigation is like, resting on noise and nuisance, as alleged by the suing party, the respondents before me, such is the milieu a court cannot simply do without. There is a little more yet. And that little will unfold itself, as I state the respective case the parties come to court with--which I now proceed to do.

4. Jhautola Road and its vicinity form a residential area inhabited by highly respectable persons. But the peace and quiet of the place have been broken by the terrific sound coming out of the workshop at "41" which works every day from 8 a. m. or thereabouts to 8 p. m. or even later. A nuisance as this has been continuing since early in February 1961 when the defendant firm (now the appellant) opened its workshop at "41" where it was running only its office earlier. Repeated request to stop the nuisance yielded no result. Hence the suit on January 25, 1962,

5. The appellant qua defendant, by its written statement of April 16, 1962,

resisted such suit with more than one plea, summarised below--

First: "there is no bar in law to setting up a motor repairing and body-building garage in the locality."

Second: the workshop was "set up" right in 1958, and that too with the permission of the Corporation of Calcutta and the requisite licence too under the Factories Act, 63 of 1948.

Third: the sound emanating from the workshop, the hours of business of which are 8 a. m. to 6 p. m., is not "terrific" and, ergo, not a nuisance too.

Fourth: no request was made ever to stop "any nuisance"; nor was there any occasion to do so, nothing like a nuisance having been there.

6. Here are the findings come to by the trial judge.

One, Jhaulola Road is essentially a residential area.

Two, hammering of steel sheets with hammers which vary from half a pound to four pounds is at "the root of all troubles" and comes within the category of an actionable nuisance."

Three, the defendant firm, now the appellant before me, is certainly entitled to use its property (41 Jhautola Road) in any manner it likes, but in so doing, it cannot infringe the similar rights of others, in the vicinity, in the enjoyment of their properties.

Four, the nuisance complained of commenced from the early part of 1961, only the office of the defendant firm (as distinguished from the workshop) having been at "41" from 1958.

7. On appeal, the appellate judge finds as much and a little more:

A. The fact that the defendant firm "has been picked up for a suit for actionable nuisance" though there are some other factories in the locality, "lend the plaintiffs" case a colour of truth", and their evidence, as also the evidence of the first witness for the defendant, "lead to the irresistible conclusion that the hammering sounds coming from the factory are causing substantial interference with the comforts of the plaintiffs and others residing in the locality."

B. The evidence of the plaintiffs that the workshop got going early in 1961 is there. Even if it be assumed that the workshop was where it is, since 1958, the noise proved itself to be an actionable nuisance from early in 1961, there being no evidence to indicate such noise emanating prior thereto. Delay, in the circumstances, cannot stand between the plaintiffs and the relief of a permanent injunction they pray the court for.

8. Such having been the findings, naturally the suit succeeds in the court of first instance, and an appeal taken against that comes to little. This is why the defendant firm has come up to this court in second appeal.

9. Mr. Lala Hemanta Kumar, the learned advocate appearing for the appellant, has addressed me on several points, which I proceed to examine, one by one.

10. Let the contention resting on several provisions of the Calcutta Municipal Act, 33 of 1951, be examined first. Section 436 provides Inter alia that no person shall, without the previous written permission of the Commissioner (of the Corporation of Calcutta), establish in any premises a workshop, it being open to the Commissioner to refuse to give such permission if he is of opinion that the establishment of such workshop would be objectionable by reason of the density of the population in the neighbourhood thereof, or would be nuisance to the inhabitants of the neighbourhood. Section 5, Clause (50), defines nuisance. To notice only the material part of it, in the context of facts here, nuisance includes any act which causes or is likely to cause annoyance, offence to the sense of hearing, or disturbance to rest or sleep. Section 437, Sub-section (1), Clause (b), prohibits the use of any premises for a purpose which is, in the opinion of the Corporation, amongst other things, dangerous to health or likely to create a nuisance, and provides that the opinion of the Corporation shall be conclusive and shall not be challenged in any Court. Section 438, Sub-section (2), clothes the Commissioner with the power to stop the user of any premises, causing a nuisance, if the owner or occupier thereof refuses to obey the order of the Commissioner to stop such nuisance. Section 439 confers on the Corporation the power to declare, by public notice, a specified area inside of which no person shall use any premises for a purpose which, in the opinion of the Corporation, is dangerous to health or likely to create a nuisance: just what Section 437, Sub-section (1), Clause (b). provides for. Section 537 is the section prescribing penalties Section 583 enables the Corporation, or any person who resides, or owns property, in Calcutta, to complain to a magistrate of the existence of a nuisance.

11. On the strength of such provisions, Mr. Lala Hemanta Kumar contends that whether or not a nuisance exists cannot be agitated in a court, the more so, as, u/s 548, Sub-section (3), it is within the competence of the authority, by whom any licence or written permission was granted under the parent Act, to suspend or revoke the same. Mr. Chitta-tosh Mookerjee, appearing for the respondents, reminds me of Section 9 of the Procedure Code, 5 of 1908, and submits: The instant litigation is undoubtedly a suit of civil nature, cognizance of which by the court has not been either expressly or impliedly barred, and which the court has, therefore, jurisdiction to try. Pray, do not read, in the provisions of the Calcutta Municipal Act, suspension of a remedy for tort".

12. I am clear in my mind, Mr. Chit-tatosh Mookerjee's contention must prevail over Mr. Lala Hemanta Kumar's. In the first place, Section 436 can do no duty here. It provides for a workshop "in which it is intended to employ steam, electricity, water or other mechanical power", as Sub-section (1) thereof bears. The appellant's workshop does not come within that. More, the nuisance complained of and found is noise generated by the hammering of steel sheets

with hammers varying in weight from half a pound to four pounds. No mechanical power this. It is manual power. In the second place, Section 437, Sub-section (1), Clause (b), does not, in terms, apply. Indeed, it cannot. By virtue thereof, the opinion of the Corporation, that "any purpose" is dangerous to health or likely to create a nuisance, shall be conclusive and shall not be challenged in any court. Where is such opinion, even though such opinion would have recoiled on the appellant ? So, the very thing which, under the statute, is conclusive and beyond the court's scrutiny, does not exist. To spell out from this provision that even absence of such opinion ousts the jurisdiction of the court is to read into the section much more than what it bears. In the third place, the other provisions of the Calcutta Municipal Act, referred to on behalf of the appellant, do not exclude the jurisdiction of the civil court impliedly, and far less, expressly. They go their own way, without a word or even an implication about the jurisdiction of the court to try a suit of civil nature, which the litigation in hand, complaining of a tortious act, undoubtedly is. Last,--and this is indeed the last word on the subject,--the settled law now is that the exclusion of jurisdiction of the civil court is not to be readily inferred; on the contrary, such exclusion must either be explicitly expressed or clearly implied: (1) AIR 1940 105 (Privy Council) , (2) Mahendra Nath Roy Vs. Delraddi Chakdar and Another, , "a Full Bench decision, and (3) State of Kerala Vs. Ramaswami Iyer and Sons, , to quote only three out of the crowd of decisions on the point. Imagine a case converse to the one I am seized of Say, the purpose of the appellant in running a workshop here is, in the opinion of the Corporation, dangerous to health or likely to create a nuisance, and the appellant is up against the said opinion with a suit in the civil court. But exclusion of that court's jurisdiction is explicitly expressed in Section 437, Sub-section (1), Clause (b), laying down that such opinion of the Corporation shall be conclusive and shall not be challenged in any court. In the case in hand, nothing like this can be said. So, explicit ouster of the civil court's jurisdiction is not simply here. Nor do I see ouster by implication in the provisions relied on by Mr. Lala Hemanta Kumar, whether taken singly or collectively. The right to complain to a magistrate, as conferred by Section 583, does not, without more, take away the right to seek redress in a civil court. The same approach holds good mutatis mutandis in regard to other sections referred to above.

13. I, therefore, reject Mr. Lala Hemanta Kumar's contention that whether or not a nuisance exists cannot be agitated in a civil court. I hold instead, it can be.

14. Then, the contention on behalf of the appellant is; "The respondents are entitled to a suitable remedy under the provisions of the Calcutta Municipal Act noticed above, and in particular u/s 548, Sub-section (3) which, when set in motion, may lead to the suspension or revocation of the appellant's licence for the workshop, no less u/s 537 which prescribes, for infraction of Section 437, Sub-section (1), a fine of Rs. 1,000, apart from a daily fine of Rs. 100. That being so, no injunction can there be with a view to preventing a nuisance". A contention as this is rested on the following passage at page 453 of Woodroffe's

Tagore Law Lectures (1897) on the Law relating to Injunctions, 6th edition: "And it may be said, generally, that the aid of an injunction will not be extended for the prevention of a nuisance, when it does not satisfactorily appear that the person aggrieved is without adequate remedy at law". This passage, in turn, as it appears from footnote 5 thereto is rested on, a text-book apart, (i) Section 56, Clause (I) of the Specific Relief Act 1 of 1877, (ii) *Tilokchand Nathmal v. Dhundiraj Madhavurao* AIR 1957 Nag 2 and (iii) *Attorney-General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v. P. Y. A. Quarries, Ltd.* (1957) 1 All ER 894. Let these authorities, statute and cases. in support of the passage, be examined.

15. *Tilokchand Nathmal*'s case AIR 1957 Nag 2 reveals "peculiar circumstances". The wall erected by the defendants encroached on three inches" space of their neighbours, the plaintiffs. Were they to pull down the wall so erected, and to build another, leaving three inches of space that little would hardly be of any use to the plaintiffs. *Hidayatullah C. J.* (as his Lordship then was) and *Mangalmurti J.* did not, therefore, give the discretionary relief of mandatory injunction but granted instead Rs. 50 as compensation, thereby bringing the case within Section 54. Specific Relief Act 1 of 1877, Clause (c) in the third paragraph of which enables the court to grant a perpetual injunction where the invasion of the plaintiffs right is such that pecuniary compensation would not afford adequate relief. For three inches of encroachment Rs. 50 did afford adequate relief. Ergo, no injunction

16. But say that of nuisance from noise ? No money can afford adequate relief to the respondents and their neighbours who are discomfited by the hammering of steel sheets with hammers weighing up to four pounds a fact found concurrently by the two courts of facts. What to say of such hammering, even the intermittent drone of music cannot but get on the nerves of others living in the neighbourhood, no matter how fond of music they are. I am not taking into reckoning those to whom music is nothing but a compound of noise and nuisance. So, *Tilokchand Nathmal*'s case AIR 1957 Nag 2 appears to be clearly inapplicable here, on principle and facts, nuisance having been nowhere near.

17. But nuisance -- and a public nuisance at that is very much there in 1957 All ER 894 the other case listed in the footnote to the passage under consideration. There, however, the court of appeal (*Denning, Romer and Parker, L. JJ.*) upheld the injunction granted by the trial judge (*Oliver J.*) against public nuisance from vibration and dust, occasioned by the operations in a neighbouring quarry, the nuisance having not been wholly abated at the trial. It is difficult to find, in this decision of the court of appeal, any support of the passage relied on by *Mr. Lala Hemanta Kumar* from *Woodroffe's Injunction*, the original and earlier editions of which, before 1957, did not, and naturally could not, cite this case of 1957. See page 436, 2nd Edition, where the passage is the same, but the citations under footnote 6 are only a text-book and Section 56, Clause (i), of the Specific Relief Act, 1 of 1877.

18. To the statutory provisions just mentioned, I now turn. It bears:

56. An injunction cannot be granted --

* * * * * (i) when equally efficacious relief can certainly be obtained by other usual mode of proceeding except in case of breach of trust;

* * * * * Can an equally efficacious relief be obtained here? Grant, the respondents, harassed and distressed by the noise coming from the appellant's workshop, move the Corporation of Calcutta under the several provisions of the Calcutta Municipal Act, Mr. Lala Hemanta Kumar refers me to. Grant too, they get the relief they pray the rating authority for. Even then, the nuisance may continue. So, they have to come to the court with a view to restraining the appellant from carrying on its workshop in such a manner as to occasion a nuisance from noise. To say so is to say that the relief obtainable from the Corporation of Calcutta is not an equally efficacious relief. Indeed, it cannot be.

19. Or take it the other way about. The respondents do not get the relief they pray the rating authority for. To the civil court they come with their dispute of a civil nature, as they must and have every right to. How say, then, an equally efficacious relief -- the accent is on "equally" -- is obtainable at the Corporation end? Why equate the two unequals -- the civil court and the Corporation?

20. It is said, the licence granted by the Corporation will then be worth nothing. That, in my judgment, is not the right way to look at the matter. Certainly the licence is worth something: grant of permission to run a workshop (as here, if that). But it does not enable the holder thereof to be licentious, using his workshop in a manner which works annoyance to the respondents and others in the neighbourhood, robs them of their quiet and gives a food shaking to their nerves day in day out for months and years together. Sure enough, the licence, if any, is no charter granted to the holder to cause all this, with impunity" and yet to deprive the persons (as the respondents are) of their common law rights, founded on tort, to move the courts of the land for redress. So let the licence if any, be kept in its proper place instead of being magnified into a charter of unrestrained rights. Such a consideration lends assurance to Mr. Chittatosh Mookerjee's contention that there can be no ouster of the respondents rights to seek redress in the civil court.

21. Again, the submission is: assuming the civil court has the power to override the Corporation of Calcutta, the licence gives rise to a presumption in favour of the appellant --a presumption which the courts below have not considered." No case of an assumption do I see here. It is not a matter u/s 437, Sub-section (1), Clause (b), of the Calcutta Municipal Act, where, "in the opinion of the Corporation", "any purpose" "is likely to create a nuisance". Had that been so, the civil court's jurisdiction might have been ousted. Since it is not so, the civil Court's jurisdiction is always there. (See paragraphs 12 and 13 ante.) Then, where is the licence on which the presumption is rested ? Exhibits A and A/1 are

the licences for 1961-62 and 1958-59 respectively for professions, trades and callings under Sections 218 and 219 of the Calcutta Municipal Act. That has little to do with a licence u/s 437. The licences for professions etc. can hardly give rise to the presumption contended for. They only serve as an acknowledgment of the holder carrying on a profession, trade or calling. Last, the evidence of a nuisance from noise has been overwhelming, as found by both the courts of facts. That being so, should any presumption lurk anywhere, it has been more than rebutted.

22. The conclusion I have, therefore, come to is that a court of law cannot stint in proffering the aid of an injunction for prevention of a nuisance from noise, complained of by the respondents who, it satisfactorily appears, are without any other equally efficacious remedy at law. So I hold, rejecting Mr. Lala Hemanta Kumar's contention formulated in paragraph 14 ante.

23. In support of the conclusion just come to, reference may be made to the Full Bench decision of the Lahore High Court in *Municipal Committee, Montgomery v. Master Sant Singh* AIR 1940 Lah 377, where, amongst other things, is emphasized the finality of a decision in the civil courts, approachable as of right by a person aggrieved by an illegal imposition of tax by the municipality, even after he has exhausted his remedy under the relevant Municipal Act -- a consideration, which it is held, demonstrates that the remedy may be "efficacious", but never "equally" so.

24. Mr. Lala Hemanta Kumar then bases his criticism of the judgments under appeal on the ground that the delay made by the respondents in instituting the suit has not been given the importance it deserves. In so doing he makes a point of the finding by the trial court of the nuisance by noise having started early in 1961, and of the finding by the appellate court about the appropriateness of the injunction granted, even if the workshop was there from 1953. To my thinking, this appears to be a pointless point. I find no dissonance in the findings come to by both the Courts, as Mr. Lala Hemanta Kumar does. Here are the findings. The trial court finds:

"..... I am clearly of opinion that the sound nuisance commenced from the early part of 1961 and not from 1958 as alleged by the defendants". ; page 11, bottom, of the paper-book.

The appellate court finds :

"Plaintiffs no doubt led evidence showing that works in the factory have started only in early part of 1961, but even if it be assumed that the factory works were started in 1958 as said by the defendant, that cannot, in the absence of proving that the hammering sounds, sufficient to constitute substantial interference with the comforts of the residents of the locality, were coming out of the_ factory since the works commenced in 1958, disentitle the plaintiff to the equitable relief on the ground of delay. Till the sounds proved to be actionable nuisance, the plaintiffs had no cause of action for this suit. When therefore according to the plaintiffs from the early part of 1961, hammering sounds were interfering with

their comforts, and there is no evidence indicating that such sounds were also emanating from the factory prior to 1961, it cannot be said that there was delay in the institution of the suit."

The suit, out of which this appeal arises, was instituted on January 25, 1962.

25. True it is that while the finding of the trial Judge is terse, that of the appellate Judge is verbose. But what he seeks to convey is clear enough:

I. The workshop got going early in 1961, as the plaintiffs' evidence is.

II. Say, the workshop got in 1958, as is the defendant's case. So what? No evidence there is that the nuisance by noise had started then. No such nuisance, no cause of action for the suit.

III. Nuisance by noise early in 1961. Suit on January 25, 1962. Ergo, no delay.

26. Where then is the dissonance between the findings of the two judges? None, for all I see.

27. This is but one reason why I cannot accept Mr. Lala Hernanta Kumar's contention grounded on delay. There is still another. If I suffer a nuisance for sometime, shall I have to suffer it for ever? Quiescence is not acquiescence always. More, you cannot expect a man to make a bee-line for the nearest court, the moment a nuisance starts tormenting him. He must be given a reasonable time to think over the matter and to consult his neighbours as much distressed by the nuisance as he. Complaints to the maker of the nuisance in the hope that he will wholly abate it consume a good deal of time too. Furthermore, when three combine to bring a joint action (as here), necessarily the matter must drag. Then, funds have to be thought of and provided for. Litigation is quite an expensive affair these days. In the circumstances, the delay of a little less than a year (February 1961 to January 25, 1962) cannot stand between the respondents and the injunction they have been granted.

28. *Benode Coomaree Dossee v. Sounda-miney Dossee* ILR (1889)Cal 252, cited on behalf of the appellant, turns on its own facts and appears to be clearly distinguishable. There, the plaintiff Soudaminey or her husband Gopal Lall Mitter, so long as he was alive, did not come to court on the first opportunity after the buildings complained of had been commenced. On the contrary, they waited till the buildings were finished. In the circumstances, a mandatory injunction to pull down the buildings, to the extent of allowing the requisite light and air the plaintiff was entitled to, was refused. This can hardly be said of the case in hand resting on nuisance by noise. Nothing you have to demolish here. All you have to do is avoid the nuisance complained of and found, by pressing into service modern scientific methods, and thereby confining the noise to the workshop only. (More of which hereafter in paragraphs 41 and 42 *infra*.)

29. Consider, on the other hand, what Mr. Chittatosh Mookherjee cites : Venkatasubba Rao, J.'s decision in *C. Ramasubbier Vs. G. Muhomed Khan Saheb*

and Another, , a case on nuisance by carrying, through a drain, filthy water to a neighbour's land. The defence based upon delay is not, his Lordship holds, entitled to much weight. The reasons why his Lordship holds so, inter alia are :

(i) A case of this sort is not one of demolition or destruction of costly structures and the loss, that, for diverting the drain is negligible.

(ii) Mere delay, so long as delay does not amount to a bar by any Statute of limitation, cannot go far.

(iii) When the situation of the parties had in no substantial way been altered either by delay or by anything done during the interval, the defence founded upon time comes to little: *Lindsay Petroleum Co. v. Hurd* (1874) 5 PC 221.

(iv) The right of throwing filthy water on a neighbour's land is an easement which can be acquired by prescription, grant apart. The chances are far greater that the injured party will assert his rights in the second rather than in the first half of the prescriptive period -- a consideration which accords with one's experience of human nature : *Greenhalgh v. Brindley*, (1901) 2 Ch 324 at p. 328. (In the case in hand, the delay is not even a year, far, far short of half of the prescriptive period.)

(v) A person may be willing to submit to an injury for sometime. Only because it is so, do not infer that he wishes to put up with it for ever; the more so, conscious that he may terminate it at his pleasure, he may not complain. That is different from saying that he acquiesces in the other party acquiring a legal right to inflict the injury.

30. Such reasons apply *mutatis mutandis* to the case before me too. Thus, the contention founded on delay also fails.

31. No expert has been examined at the trial. Mr. Lala Hemanta Kumar makes that a ground of attack of the judgments under appeal. So he does on the authority of AIR 1927 236 (Nagpur) . This is a case about construction of a cess-pool and latrine from which is said to have emanated offensive smells, which caused a private nuisance to neighbours, the suing party, as the allegation was. In that context, a remit was ordered with a view to finding out how far the nuisance found as a fact was a private nuisance and what ways and means could be devised with the help of medical or sanitary experts" evidence for the prevention of such nuisance. More, it was observed :

"For a court to decide rightly whether a particular nuisance is one in that the inconvenience is only to the public or there is a special injury to a particular individual, ... expert evidence is of very great value and is an absolute necessity"

a passage upon which Mr. Lala Hemanta Kumar strongly relies. If it is thought that this is a proposition of universal application, I must respectfully express my dissent. Each case depends on its own facts. In the case in hand the evidence is overwhelming that a nuisance by noise exists. Furthermore, the finding of fact--

and a concurrent finding at that-- is just so. Sure enough, whether or no such nuisance exists is a question of fact, as Mr. Mookerjee rightly emphasizes. Still I have to direct a remit for expert evidence. The difference between an expert and a non-expert is that the former has acquired special Knowledge, skill or experience in a particular subject, whereas the latter has acquired none. But what is the subject here? The subject is: does the hammering of steel plates with hammers weighing upto four pounds create noise? Far from being beyond the range of common knowledge -- a field where experts may flourish -- it is the commonest of common knowledge, in which an expert, if any, has no advantage over a nonexpert.

32. Again, in AIR 1927 236 (Nagpur) the material on record was not sufficient to decide the case from the point of view (i) whether the nuisance was public or private and (ii) whether or no the owner of the privy would take scientific precautions to ensure the safety of the health of the inmates of the injured party's house. Can this be said of the litigation I am seized of? The material I see, the material upon which the courts of facts come to the finding of fact on the existence of a nuisance by noise, is sufficient to decide that it is a private nuisance by all means affecting the three suing individuals at the date of the suit. And in order to be a public nuisance, it is not necessary that every member of the public must be affected; it is sufficient to show that a representative cross-section of the public has been injuriously affected. See 1957 All ER 894 (supra). The material on record, which includes the evidence of persons of the neighbourhood complaining of noise and nuisance, makes the existence of a public nuisance so probable too. But, this litigation being what it is, it is hardly necessary to go to that length. Thus, no remit is called for, to have expert evidence on the question whether the nuisance found here is private or public. Nor do I need any expert evidence to ascertain whether scientific precautions are to be taken or not to make the workshop a noise-proof one. Once the finding is that there is a nuisance by noise, as it is here, it is for the appellant to abate such nuisance wholly by resorting to such method which will not allow the noise to travel beyond the workshop. And the appellant does claim that that has since been done : para. 41 infra. Still a remit. I find it impossible to hold so.

33. Then, why this blind faith in experts whom Jessel, M. R. described in *Lord Abinger v. Ashton* (1873) 17 Eq. 358, as remunerated witnesses available on hire to pledge their oath in favour of the party who has paid them. First and last, the court is an expert of all experts and can need no opinion evidence of an expert in order to determine whether hammering of steel plates by hammers up to 4 pounds creates a terrific noise or not and whether such nuisance can be wholly abated or not by treating the workshop with the well-known method of acoustics. The contention on lack of expert evidence must, therefore, fall.

34. Still another criticism of the Judgments under appeal is that neither of the two courts has considered the following:

A. The workshop inside of 41 Jhautola Road, with a shed over it, is 400 feet away

from its gate: just what Shri Haridas Goswami says in his evidence.

B. The distance between the southern wall of "41" and the northern corner wall of "47" is, say, 50 yards : not more than 50 or 80 yards, as Shri Goutam Chakravorty says in his evidence. 50 yards make 150 feet.

C. So, the distance between the workshop and "47" is some 550 ft. Ergo, the volume of noise, unable to do this distance, cannot constitute a nuisance.

35. One answer to such a criticism is that the two courts of facts have found as a fact, upon the oral evidence, that the noise from the workshop does constitute a nuisance. What to say of the plaintiffs and their witnesses, residing in this residential locality, even two of the defendant's witnesses, Ahmed Ali (No. 1), residing at 48 Jhautola Road for 10 years, and Md. Israil (no. 5) of 49 Jhautola Road about 100 yards away from "41", speak of the noise from the workshop at "41" having been within their earshot -- a noise which, they admit, they do not like. Upon the whole of the evidence including this from the defendant's side the fact found by the two courts of facts in existence of a nuisance by noise. I have, therefore, no jurisdiction even to interfere with this finding of fact. Another answer is -- and it is the answer returned by Mr. Mookherjee --that there is nothing unusual in the noise of the type the evidence discloses travelling a distance of even 450 feet, if that. The probability, indeed, is that the distance is much less. There is still one more answer. The appellate judge does weigh in his mind the evidence of Shri Goswami, the 3rd witness of the defendant on the distance of 400 ft. between the work-shop and Jhautola Road where the gate of "41" is. See page 23 of the paper-book and paragraph 12 of the appellate judgment.

36. That failure to consider material evidence does make an error of law is beyond argument, though Mr. Lala has been good enough to cite a decision of mine : Mohammad Safique Vs. Union of India (UOI) and Others, , in support of this obvious proposition. The difficulty for the appellant is that failure to consider material evidence is not seen. So, this criticism fails too.

37. Again, a point is made of the institution of the suit in hand by three plaintiffs only, even though some residents of this residential locality pledge their oath to complain of nuisance by noise. I consider this to be destitute of merit. Because the very existence of nuisance depends on "the number of houses and concourse of people." If such residents were not called as witnesses, the carriage of the plaintiffs' case would have been open to the comment that they are a group of hypersensitive people making a lot of noise about a so-called noise which other people in the same area pass by.

38. A grievance is then made of the appellant having been singled out for an action to nuisance, though there are other such workshops in the locality. The learned appellate judge has considered this only to hold that this circumstance lends the plaintiffs' case "a colour of truth" and that "the evidence of P.Ws. (the plaintiffs' witnesses) sufficiently establishes" the causing of "substantial

interference with the comforts of the residents of the locality" by "the hammering noise". I see no error of law here. That apart, the point here is : does or does not your workshop occasion a nuisance by noise? The answer is: it does. So, that is the end of this litigation. About other workshops, the evidence is too meagre to sustain a firm finding in favour of the appellant. I therefore, see little substance in this grievance.

39. True it is, as Mr. Lala submits, that Shri Sankhanidhi, the 3rd plaintiff, unable to bear the noise, left 40 Jhautola Road on or about February 20, 1962 -- hardly a month after the institution of the suit on January 25, 1962. So what? One of the three plaintiffs left the nuisance long after the cause of action and a little after the institution of the suit. But the nuisance has not left the area nor the remaining two plaintiffs and others of the locality. So, the injunction appealed against stands.

40. The form of injunction (quoted in the first paragraph of this judgment) has been complained of. But it has lime to be complained about. The form is just the form given in form No. 14 In Appendix D to the Procedure Code. (See paragraph 41 infra.) That apart, the principle, a court of law goes, by, is to do justice to both the parties, if it can. The form of injunction granted secures just that. It saves the plaintiffs and others living in the locality from being discomfited by nuisance from noise. It keeps too the business of the defendant-appellant intact, provided care is taken, as must be and can be taken, by scientific method to keep the noise within the limits of the workshop. Otherwise, with no injunction, should the nuisance start over again, one more suit has to be instituted. With the injunction, however, no possibility of a nuisance will be there, and no necessity of a fresh suit either. This is as it should be. The more so, because of two additional considerations. One, a nuisance as this is not inevitable. It can be avoided by the exercise of proper skill and care, as it is said to have been avoided. Two, the past conduct, before the suit, of Shri Goswami in paying scant attention to the complaints of the respondents tends to show irresponsibility, not an irrelevant consideration where the granting of an injunction is concerned. See 1957 1 All ER 894 (supra).

41. Indeed, it has been urged before me on behalf of the appellant that in terms of order dated May 22, 1964, issuing a rule on the respondents to show cause why execution of the impugned decree should not be stayed, and order dated August 4, 1964, of this Court, making the aforesaid rule absolute, during the carriage of the present appeal, a sound-proof workshop has since been erected. If that is so, nothing to say of the fact that such interlocutory order does not decide the appeal, but is subject to the result of the appeal, the nuisance has been wholly abated. And the appellant has little to be worried about. Execution, if levied under Order 21, Rule 32, of the Procedure Code, will then come to little. Why, therefore, as Mr. Mookherjee rejoins, press this appeal at all, form no. 14 in appendix D to the Procedure Code containing a paradigm of what a decree for injunction against private nuisance should be like: only restraining the defendant

from doing an act so as to occasion a nuisance to the plaintiff.

42. Mr. Lala, however, will not allow the matter to rest here. He makes a spate of submissions which I examine below seriatim :

(i) No opportunity has been given to the ant to abate the nuisance. I am afraid, that cannot be said upon all I see here. The requisite opportunity is right there in the form of the order itself combined with all that has happened since. Abate the nuisance by erect-ing a sound-proof workshop, as you say you have done, and the decree for injunction can do you no harm. In vain, therefore, has reliance been placed on the following passage from Woodroffe's Injunction, 6th Edn., at page 456:

"The words of an Injunction against causing a nuisance ought not to be so drawn as to shut out all scientific attempts to attain the de-sired end without causing a nuisance".: (12) Fleming v. Hislop ILR 11 AC 686. Time has thus cured the defect, if any, in tha order drawn up.

(ii) By parity of reasoning, it is much too much to say that the injunction is oppressive, as contended for. Mr. Lala sees "total annihilation of the appellant's business." Mr. Mooker-jee docs not. Nor do I. The business will go strong, if not stronger still, with a modern noise-proof workshop.

(iii) In Chiragdin v. Karim Baksh 64 Ind Cas 169 cited on behalf of the appellant, an injunction was issued restraining the defendants from working their factory between 10 p. m. and 6 a. m. An injunction in that farm caused unwarranted and unnecessary hardship, closing the factory for 8 hours. Partial "annihilation of the business" is here. So, the injunction was altered restraining the defendants from carrying on the work in the lactory in such a manner so a.s to occasion a nuisance to the plaintiff. Here the injunction appealed against is just so.

(iv) "Where injury to private rights results from the construction of works which have been authorized and which have been executed with skill and care, the party injured must look for his remedy to the proviso for, compensation if any, within the Statute authorizing the works, and, if there be no such proviso, he is without remedy.": page 457 of Woodroffe's Injunction Ibid. But this passage holds good in the case of nuisance by incorporated companies having compulsory powers to take lands and construct works, as the beginning of the paragraph (wherefrom it is quoted) makes it clear. This has little to contribute to the case in hand.

(v) "In cases ot private nuisances a court ot equity will balance the inconvenience likely to be incurred by the respective parties in exercising its discretion to grant or withhold relief; and where greater harm would result from enjoining than from refusing to enjoin, the injunction will be refused." : Section 417, page 863, of A Treatise on Injunctions by Spelling, (1901). In view of all that goes before, it is impossible to say that "greater harm would result from enjoining than refusing to enjoin." On the contrary, "refusing to enjoin" is likely

to cause incalculable harm to the respondents, and others living in the locality. Not that it has to be proved that the health of the plaintiffs and others of this locality braving the nuisance has in fact gone down a lot. See *Datta Mal Chiranjilal Vs. L. Ladli Prasad and Another*, a case Mr. Mookerjee cites. And "enjoining" will mean, for the appellant, an added expense, to start with, plus not much of a recurring expenditure. The appellant cannot be, and is not, sore on it. A noise-proof workshop, I am told, has already been erected. More, in the latter half of the 20th Century, you cannot go back to the 18th Century. Regard must be had to modern conditions and knowledge. *Andreac v. Selfridge and Co., Ltd.* (1937) 3 All ER 255. Mr. Mookerjee refers me to, reveals that even a judicial personage must have to move with the times. Bennet, J. at the trial did not regard, for example, excavation of a site to a depth of 60 ft. for erection thereupon a steel framework etc. as the normal use of land by people in England. Sir Wilfrid Greene, M. R., however, delivering the judgment of the Court of Appeal, saw nothing abnormal and unusual in that, and observed :

"It seems to me that, when the rule, as indeed it is a rule, speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on, new inventions and new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies."

Time goes on here too. The method of constructing a factory or a workshop has not been stabilised for ever here as well. Run a workshop by all means in a residential area. But then make it noise-proof through the latest scientific method, as you say you have done, so as not to occasion a nuisance to your neighbours. Thus, an equitable balance-sheet works entirely in favour of the respondents living in the locality.

(vi) *The Shammugger Jute Factory v. Ram Narain Chatterjee*. ILR(1887) Cal 189 relied on by Mr. Lala, seems to carry the appellant no further. It does no more than reiterate the principle (just extracted out from Spelling's great work) upon which rests the granting or withholding of an injunction. In the facts of that case, the order of the District judge refusing to grant an injunction at the instance of a co-owner restraining another co-owner from building a jute mill, but awarding money damages, is upheld. How far refusal to grant an injunction to a co-owner up against a co-owner permanently altering the character and condition of the common land by raising a building can be regarded as good law today does not fall to be considered here. See, for example. *Israil v. Samser Rahaman*. 18 CWN 176 : (AIR 1914 Cal 362) *Ashutosh Roy Vs. Chairman of the Commissioners, Rampore Boolia Municipality*, and cases of that class, where removal is directed of buildings, constructed on a common land in defiance of the other co-sharer's protest, or it is held that the refractory co-sharer may be ordered to pull it down and restore the site to its original position. Suffice it to say that *Shammugger Jute Factory's* case. ILR 1887 Cal 189 can have no application to this litigation founded on nuisance.

(vii) Equally ineffective for the purpose of this case is the decision of R. C. Mitter, J. in *Nirmal Chandra Sanyal and Another Vs. Municipal Commissioners*, where the defendant municipality all but succeeded, because of statutory Indemnity, in spite of its hackney carriage stand having been a veritable nuisance; it went down, only because of the Calcutta Hackney Carriage Act 1 of 1919 having not been in force at Pabna and thus no consequential statutory indemnity having been there too. What was extended to the Pabna municipality was the Hackney Carriage Act 2 of 1891 which, however, was repealed by the 1919 Act and could not, therefore, have been in force in 1919 and much more in July 1933 when the cause of action arose. It is plain to be seen that this case cannot reach the litigation in hand. Here the appellant has no statutory authority to construct the workshop and necessarily no statutory indemnity too. More, as pointed out by his Lordship, an injunction is the usual and proper remedy in the case of a continuing nuisance (as here).

(viii) The unreported decision dated March 7, 1967, of T. P. Mukherji, J. in Cr. Revn. Cases Nos. 1061, 1062, 1106, 1107 and 1260 of 1965 (Cal) *Narayani Press v. Jethalal Jadavji* has been cited in vain too. The ratio of the decision is absence of a legal trial, On merits as well, removal of all the establishments from the premises in question is found to be unjustified, only because three printing presses out of so many "create some sound". An idle citation this has nothing to do with the case in hand.

(ix) Limitation of 3 months for prosecution of most of the statutory offences under the Calcutta Municipal Act (vide Section 582 referred to by Mr. Lala) cannot certainly be limitation for the suit here.

43. This exhausts all I have been addressed on by Mr. Lala Hemanta Kumar. And I find myself unable to accept any one of his submissions.

44. In the result, the appeal fails and do stand dismissed with costs.

45. Leave to appeal under Clause 15 of the Letters Patent has been asked for. It is refused.