
(1905) 04 CAL CK 0018

In the Calcutta High Court

Case No : Appeal From Original Decree No. 212 of 1904

J.C. Galstaun

APPELLANT

Vs

Dunia Lal Seal

RESPONDENT

Date of Decision : 12-04-1905

Acts Referred:

Citation : (1905) 04 CAL CK 0018

Final Decision : Dismissed

Judgement

Pargiter, J.—This appeal arises out of a suit for a perpetual injunction to abate a nuisance and for damages on account of the same. The Plaintiff has a garden-house ill the Manicktollah Municipality in the suburbs of Calcutta and the Defendant has a shellac factory situated 200 or 300 yards to the north-west of it. The Defendant discharges the refuse-liquid of his manufactory into a Municipal drain that passes along the north of the Plaintiff's garden, and the Plaintiff alleges, first, that the liquid is foul-smelling and noxious to the health of the neighbourhood and specially to himself, and, secondly, that it has damaged him in health, comfort and the market value of this garden property. The Plaintiff has, therefore, asked for a perpetual injunction against the Defendant to restrain him from discharging the liquid refuse into the Municipal drain and for five thousand rupees as damages.

2. The Defendant admitted that the refuse-liquid from his shellac factory was discharged into the Municipal drain, but he denied that it was noxious or that it had injuriously affected the Plaintiff's property. He said he had been conducting the manufactory in a lawful and reasonable manner from the year 1896 and that it did not constitute a nuisance. He alleged that his factory had been licensed by the Municipality and that he had not caused the Plaintiff any damage and that the Plaintiff had no cause of action against him.

3. The Subordinate Judge decreed the suit, granted a perpetual injunction and awarded the Plaintiff a thousand rupees as damages. The Defendant has now appealed and has maintained the same pleas here as he did in the first Court.

4. The first point is to ascertain the truth about the refuse-liquid and its character. The following facts appear to be clear enough from the record and have not been disputed before us. The refuse-liquid is charged with animal and vegetable matter and, if it is allowed to stagnate, the matter decomposes and the liquid becomes foul-smelling and noxious. The liquid can only be carried off by passing from west to east through the Municipal drain along the north of the Plaintiff's garden. On the north east or at the further corner of the garden, the drain passes under a culvert and the floor of the culvert is some six inches higher than the bed of the drain, so that the liquid cannot be carried off entirely and part of it is always in a stagnant state along the north of the Plaintiff's garden. The manufacture is carried on only during the months, November to March.

5. There has been considerable argument whether the refuse-liquid is noxious when it is discharged into the drain. Each party called three experts to support its contentions and we think the weight of evidence lies on the Plaintiff's side. The Subordinate Judge visited the factory on the 19th November 1903, and it seems from his proceedings that the factory was not actually working then; for, he makes no mention of the liquid being discharged nor of its flowing along the drain. He only speaks of a thick, stagnant reddish liquid in the Municipal drain and of foul water deposited in the big vats and the factory drain. In such circumstances, it is clear he did not see the factory in its ordinary working condition, and we may note that since the manufacture begins in November and he visited it not long after it began, the ordinary conditions of regular work had not then apparently developed. Even in these favourable circumstances, he says the foul water in the factory had an unpleasant odour, though it was not very offensive. We think, therefore, that there can be little doubt that, when the factory was in full working, the odour must have been much more unpleasant and could have been nothing but offensive.

6. This is in entire agreement with the opinion expressed by Dr. G. Watt in his work, *The Agricultural Ledger*, 1901-- No. 9, on Lac and the Lac Industries. In that he says at page 305, speaking of the dye-liquor--"The liquor, which evolves an intolerable odour in the factory, when evaporated to the consistence of a dry extract, is equal to some of the best oil-cakes in its manurial value." This is testimony regarding the smell of the liquid, unaffected by any legal proceedings; and it corroborates the opinion expressed by the three experts examined by the Plaintiff. Without discussing their evidence minutely, we may say that, though they were subjected to a long and severe cross-examination, yet their evidence was not materially impaired. On the other hand, of the three experts cited by the Defendant we notice that one does not personally object to the smell of Sulphuretted Hydrogen; and another has made such unbecoming remarks in relation to a Municipal prosecution in which his evidence was not relied on, that we cannot feel assured that his evidence in this case is wholly unbiassed or worthy of implicit reliance.

7. Our conclusion on all the evidence adduced is that when the Defendant's

factory was in full working, the refuse-liquid when first discharged into the Municipal drain was offensive, that it contained animal and vegetable matter, that decomposition cannot but have begun soon after it was discharged, that the liquid was subject to evaporation in the drain during the dry months which constituted the working season, that it became thick and sluggish in a very short time, and that the organic matter accumulated in the drain and gave off a stench which was highly offensive and noxious. That is, we find, that the refuse-liquid constituted a legal nuisance when discharged, and created a serious nuisance in its passage through the Municipal drain.

8. The Defendant made some attempt to prove that the stench arose not from his refuse but from the insanitary condition of the Plaintiff's garden. Now, it is quite possible and not improbable that the garden was not always kept in a thoroughly sanitary condition, but that does not explain this stench. The Subordinate Judge's proceeding recording what he found on his visit is very clear about this. The stench was plainly different from that caused by the want or disregard of ordinary sanitation. Moreover, the evidence of the Plaintiff's witness Mr. Mumford, who lives about half a mile further away and yet suffered so unpleasantly from the stench that he took the trouble to trace it to its source at the factory, corroborates this.

9. The Defendant has however contended that the refuse-liquid is not noxious when it leaves the factory; that the refuse may become noxious if it stagnates; that the stagnation is really due to the faulty nature of the Municipal drain, which cannot carry the liquid off speedily and efficiently because of the partial block at the culvert; that if the Municipality would put the drain into good condition, there would be no nuisance; and that he cannot, therefore, be responsible for those injurious consequences.

10. Comparing these contentions with the findings which we have already expressed, it is clear that the essential question at issue in this suit is this: Whether the Defendant is at liberty to discharge into this Municipal drain such a refuse-liquid as we have described. We are of opinion that he can claim no such right.

11. In the first place, the Municipality did not admit that the Defendant had any such right, for it prosecuted him twice for allowing the refuse-liquid to flow into the drain, first, in the year 1897, and again, not long afterwards. The Defendant, it appears, gave a promise that he would not allow the liquid to flow into the drain and the prosecution (apparently the first one) was withdrawn. For a few months, he turned the liquid into a pit which he dug, but afterwards he reverted to the old practice of discharging it into the drain. In the second prosecution, he was convicted and fined. The Municipality tried to prevent the discharge of the liquid into the drain first by blocking the mouth of the drain, and afterwards by putting up an iron plate with masonry, but both these preventions were broken and removed. From these facts it appears that the Municipality tried to enforce the Municipal law against the Defendant but succeeded only partially and

ultimately gave up the contest.

12. Since then it is proved by the evidence on both sides that the Defendant has spent a very large sum of money, more than two lacs of rupees, in enlarging and improving this factory. It is clear, therefore, that a very much larger quantity of refuse-liquid has lately been poured out into the drain, and that, if the liquid constituted a nuisance in its early state, the result must be very much worse now.

13. It appears from the evidence that the Municipal drain is not a sewer and is not intended to carry off whatever people may choose to discharge into it. It is only a kutchra drain and is intended for the mere drainage of surface water. For these purposes, the slight, obstacle to the flow of the drainage water at the culvert is of little or no importance; for the small quantity of drainage water held back by that obstacle is not offensive and soon evaporates. But the discharge of the Defendant's refuse-liquid into the drain alters the position entirely. This liquid charged with organic matter quickly thickens by absorption into the ground and by evaporation It becomes sluggish, and decomposition soon begins. Its diminished flow causes the decomposing matter to sink and settle, and the thick layer of decomposing sediment cannot pass off. In such circumstances, the discharge of the refuse-liquid must necessarily create a nuisance of the worst kind.

14. All these circumstances have been well-known to the Defendant and he has not only done nothing to abate the nuisance but has rather intensified it by increasing the discharge. He cannot shift the responsibility on to the Municipality by contending that, if the Municipality would improve the drain so as to carry off all the refuse quickly, there would be no nuisance. This contention rests on a serious misconception of the rights and duties created under the Municipal law. No private person can claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off, and then throw on the Municipality an obligation to alter the drain in order to remedy the nuisance that he has produced; nor can he say that other persons must meanwhile put up with such nuisance.

15. The Defendant's action consists of two parts; first, he has discharged the refuse-liquid into the drain; and, secondly, he has done so knowing that it cannot be efficiently carried away, but must stagnate, decompose and give off an offensive and intolerable stench.

16. The first part of his action constitutes a legal nuisance which the Plaintiff is entitled to restrain. Carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property has been constantly held in England to be a legal nuisance against which the Courts will give relief; and the real question to be decided is whether the annoyance is such as materially interferes with the ordinary comfort of human existence (see *Directors, etc., of the St. Helen's Smelting Co. v. Tipping* 11 H. L. C. 642 (1865) *Crump v. Lambert* L. R. 3 Eq. Cas. 409 (1867); *Pollock's Law of Torts*, Ch. X).

Here, it is found that the liquid is offensive and does interfere with the ordinary comfort of the Plaintiff's occupation, and have caused him special injury. And since the Defendant has put the Municipal surface drain to a use for which it was never constructed or intended, and has thus fouled it, and the consequences are highly injurious, the Plaintiff is entitled to restrain him.

17. The second part of the Defendant's action also constitutes a legal nuisance. The Defendant is responsible for the consequences that arise necessarily out of his action. The case of *Ogston v. Aberdeen District Tramways Company* L. R. (1897) Ap. Cas. 111 (1896) has some points in resemblance with the present case. There a Tramway Company after heavy falls of snow used to clear the snow off its track and to heap it upon the side of the streets; then it scattered salt to make the snow melt in the grooves of its track in order to facilitate its own traffic, with the result that the fluid mixture of salt and snow permeated the heaps of snow and, forming a freezing compound, caused annoyance and injury to the other traffic in the streets. The Town Council did not take any immediate steps to remove the briny slush which was left upon the streets. It was held that the Tramway Company had committed a nuisance which was not sanctioned by either the general or the special Tramways Acts, and that the default of the Town Council did not affect the primary liability of the Tramway Company.

18. In that case, the Company put forward much the same propositions as have been put forward in this case. They contended that they were within their statutory rights, or that their action, if not expressly licensed by the statutes, was sanctioned by implication for the necessary purposes of the Tramway. But these pleas were disallowed. The statutes did not sanction what the Company did nor did they give the Company any right to create a nuisance. We have already pointed out that the Defendant's plea in the present case that he was entitled to discharge his refuse into the drain cannot prevail.

19. The next proposition put forward in the case cited was that the nuisance was due to the fact that the briny slush and snow were not removed with sufficient expedition; that, if they had been removed, no injurious consequences would have followed : that the duty of removal rested with the Town Council and that it was responsible for the nuisance because it neglected that duty. And Lord Halsbury (Lord Chancellor) observed as follows:--"This may be perfectly true; but it is an absolutely untenable proposition that any one may create a nuisance and shelter themselves from responsibility by suggesting that somebody else is under a legal responsibility to remove it." Lord Watson remarked : "I see no reason to doubt that the Town Council, as constituting the road authority, are charged with the removal of snow from the streets under their jurisdiction, whenever the fall is so heavy as to obstruct traffic; but I am unable to come to the conclusion that their dilatoriness in the performance of that duty will relieve the Respondents of responsibility for the consequences of their own operations. The nuisance is ultimately and mainly due to the employment of salt which is used by them and not by the Town Council. If they choose to employ means

which, if certain precautions are not observed, will lead to nuisance, they must first insure that these precautions will be taken. The Town Council are under no obligation, statutory or otherwise, to counteract the illegal proceeding of the Respondents." Remarks similar to these may well be made in the present case.

20. For these reasons, we think that the Plaintiff is entitled to restrain the Defendant from discharging the refuse-liquid of his factory into the Municipal drain. From the history of this case it appears that the Defendant has successfully resisted Municipal control, that he has enlarged his factory and that he has been discharging a greater volume of refuse-liquid into the drain. It is plain that, if no injunction is issued, there will be nothing to prevent him from aggravating the present nuisance by further enlarging his factory and discharging still more refuse into the drain. An injunction for the permanent stoppage of the nuisance is the only effectual remedy, and we have abundance of authority for issuing an injunction in the cases decided in England. With regard to the question of the damage caused to the Plaintiff, objections have been urged against the opinion formed by the Subordinate Judge. Persistence in a proved nuisance has been held in England to be a just cause for giving exemplary damages, (see Pollock's Law of Torts, 6th edition, Chap. X, 407). The Defendant has certainly persisted in spite of Municipal warning. This, therefore, is not a case in which the damages awarded should be nominal. There can be no doubt that material injury has been caused to the Plaintiff and the damages should be substantial; and, while holding this view, we think that the Subordinate Judge's estimate is reasonable and not excessive. For these reasons, we affirm the decree of the Court below and dismiss this appeal with costs.