Roshan Lal and Another Vs Banwari Lal and Another

Court: Rajasthan High Court (Jaipur Bench)

Date of Decision: Nov. 30, 1985

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 100

Citation: (1986) 2 WLN 733

Hon'ble Judges: Panna Chand Jain, J

Bench: Single Bench

Judgement

Panna Chand Jain, J.
This second appeal u/s 100 of the CPC is directed against the judgment and decree dated 17th April, 1985, passed

by the learned Addl. District Judge No. 2, Alwar, camp: Behror, in Civil Appeal No. 23 of 1984, by which he confirmed the judgment and decree

dated 26th February, 1984, passed by the learned Munsif & Judicial Magistrate, Behror in Civil Suit No. 9 of 1984, dismissing the suit of the

plaintiff-appellants

2. Briefly stated, the facts of the case are that the plaintiff appellants filed a civil suit for permanent injunction against the defendants-respondents in

the Court of Munsif & Judicial Magistrate, Behror restraining the defendants from using electric hammer in their shop which is situated adjoining to

the plaintiff''s shop. It is averred in the plaint that the two shops, one owned by the plaintiffs and the another owned by the defendants, are

adjoining to each other & are separated by a thin wall. The plaintiffs are doing gold smith work in the shop and the defendants have installed an

electric hammer the shop. The defendants-respondents started hammering iron by heavy electric hammer. It is alleged that due to hammering of

iron by heavy electric hammer, the plaintiff appellants are unable to do work in their shop or sleep on the chabutra upon the shop as electric

hammer causes loud and sharp noise. It is also alleged that the noise is so loud and sharp that the plaintiffs appellants are not even able to talk with

their customers. It is also the case of the plaintiffs that due to the installation of the electric hammer the entire business of the plaintiff has been

ruined. It is also contended that one of the plaintiffs Roshan Lal has lost his audibility and it is also apprehended that plaintiff No. 2 may also loose

his audibility.

3. The defendants filed a written statement and pleaied that there is no disturbance of any kind by the use of the electric hammer. The defendants

denied all the allegations made in the plaint Upon the pleadings of the parties, the learned trial Court framed the following issues:

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4. Both the parties led evidence. The plaintiffs examined 11 witnesses and the defendants examined 6 witnesses. After appreciating the evidence,

the learned Munsif gave a finding that there is no actionable nuisance, and the suit of the plaintiffs was dismissed.

5. Aggrieved against the judgment and decree dated 26th September, 1984, passed by the learned Munsif, Behror an appeal was filed before the

learned District Judge, Alwar, who also dismissed the appeal and confirmed the judgment and decree passed by the learned lower Court, vide his

judgment and decree dated 17th April, 1985. Aggrieved by the judgment and decree of the first appellate Court, this appeal has been preferred by

the plaintiffs appellants.

6. While admitting the appeal, the following substantial questions of law were framed for consideration:

(1) Whether tortious liability arises against defendant-respondents by creating loudy noise due to installing and using electric hammer in their shop

adjacent to the shop and ''chabutra'' of plaintiff-appellants?

(2) Whether the learned Munsif was in error in laying undue emphasis on the fact that as the nuisance or noise by electric hammer has been created

in village only therefore it was not a nuisance and this is an erroneous finding?

(3) Whether both the lower Courts below have failed to appreciate scientific and expert evidence of PW 8 S.C. Gupta who stated in his evidence

that persons could not talk properly within an area of 10 feet from the spot where such kind of electric hammer is functioning. Therefore, both the

lower courts have misled this important evidence?

(4) Whether functioning of electric hammer shall create reasonably an unlawful nuisance to their neighbour in the present facts and circumstances of

the case?

(5) Whether the learned Addl. District Judge No. 2 was in error in laying down that due to conflict between the parties upon some outstanding

amount of price of Jal against PW 1 is misreading of evidence which has resulted in wrong and illegal finding ?

(6) Whether judgment and decree of both the lower Courts below are based on misreading of evidence?

7. Shri Rajendra Soni, learned counsel for the appellants, submitted that the judgment and decree of both the Courts below are based on

misreading of evidence. His submission is that it is an admitted position that the two shops run by the plaintiffs and the defendants are separated by

a thin wall, coupled with the fact that the hammer with electric appliance is used by the defendants then it is but natural that hammering will cause

noise and it would cause discomfort to the neighbours, or to a person who resides there and carries on business. His further submission is that the

plaintiffs produced an expert, Shri S.C. Gupta (PW 8), whose testimony is unshakable and who has categorically deposed that when he visited the

shop he could assess that persons could not talk properly within a distance of 10" from the spot where electric hammer was functioning. He further

submits that the use of the electric hammer per se leads to the conclusion that it creates noise and the same is an actionable wrong. In order to

substantiate his contention, Shri Soni relied upon various authorities. He cited Hulas Rai Vs. P. Sohan Lal, In that case, the plaintiff and the

defendant were the next door neighbours with only a partition between their two houses. The defendant started the business of making iron pans.

In the course of his business the pans had to be hammered and hammers, weighing two seers and more, were used in the process. The learned

District Judge, in that found that this hammering caused noise which materially interfered with the comfort of the plaintiff in the occupation of his

house. The learned District Judge, in that case, held that it was sufficient to entitle the plaintiff to an injunction. The Allahabad High Court confirmed

the finding recorded by the learned District Judge. On the basis of aforesaid authority, Shri Soni submitted that the proposition of law laid down in

the said case is applicable to the present case also.

8. In Dhannalal and Another Vs. Thakur Chittar Singh Mehtap Singh, , it was held that the abnormal noise produced by the flour-mill materially

impaired the physical comfort of the occupants living nearby and, as such, amounted to actionable nuisance. It was a case where. A erected the

flour-mill at a distance of 8'' to 9'' from the house of B. In that case, the following principles were laid down:

(1) Constant noise, if abnormal or unusual can be an actional nuisance if it interferes with one''s physical comforts;

(2) The test of a nuisance causing personal discomfort is the actual local standard of comfort and not an ideal or absolute standard;

(3) Generally unusual or abnormal noise on defendants''s premises which disturbs sleep of the occupants or the plaintiff''s house during night or

which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiff''s house, or which cannot allow the occupants

of the plaintiffs house to carry on their ordinary work, is deemed to be a noise which interferes with one''s physical comforts;

(4) Even in a noise locality if there is substantial addition to the noise by introduction of some machine, instrument or performance at defendant

premises, which materially affects the physical comforts of the occupants of the plaintiffs house then also the noise will amount to actionable

nuisance;

(5) If the noise amounts to an actionable nuisance, the defence that the defendant is making a reasonable use of his own property will be

ineffectual. No use of one''s property is reasonable if it causes substantial discomforts to other persons;

(6) If the defendant is found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them

and may be restrained by injunction although he may be conducting his business in a proper manner and according to the rules framed in that behalf

either by the Municipality or by the Government. The latter defence can be effective in a case of public nuisance but not in that of a private

nuisance;

(7) If an operation on the defendant''s premises cannot by any care and skill be prevented from causing a private nuisance to the neighbours, it

cannot, be undertaken at all, except with the consent of those injured by it.

9. The learne counsel for the appellants placed reliance on Gotham Construction Co. Vs. Amulya Krishna Ghose and Others, . In that case, the

lower court gave finding that the noise from the workshop constituted nuisance. The allegations in that case were that the workshop was in the

residential area inhabited by highly respectable persons and the peace and quiet of the place was broken by the tenant sound coming out of the

workshop which works every day from 8 a.m. to 8 p.m. or even later.

10. In Datta Mal Chiranji Lal v. L.L. (4) the injunction was granted restraining the defendants from running flour-mill. It was alleged in that case

that the running of the flour-mill amounted to a private nuisance. It was also alleged that it caused a lot of nuisance and vibration so that the plaintiff

and the members of his family found it difficult to reside in their house it also caused grant inconvenience and discomfort to them. The plaintiff in

that case used the upper two storeys for the resdential purposes and the ground-floor for a shop. It was the case of the plaintiff that the defendant

established an electric flour mill adjacent to the plaintiff''s houses. The Allahabad High Court, in the facts and circumstances of that case held that

the running of the mill caused inconvenience and serious discomfort to the plaintiff and the residents of his house and its running amounted to a

private nuisance which could not be permitted. The learned counsel for the appellants submits that on facts and on proposition of law this ruling is

sufficient to pass a decree in favour of the plaintiff, it is applicable on all fours in the facts and circumstances of the case.

11. In Radhey Shiam Vs. Gur Prasad Serma and Another, a suit was filed for permanent injunction restraining defendant No. 1 from installing and

running a flour-mill in the premises occupied by defendant No. 1. The plaintiffs alleged that a portion of the first floor of the said premises was

occupied by plaintiff No. 1 as a tenant. Just below that portion lay the shop of defendant No. 1 on the ground floor. It was also alleged that

defendant No. 1 operated upon on oil expeller machine his shop for about six months and thereafter he planned to instal a flour mill there also. The

installation of flour mill was opposed by the owners of the said building as also by plaintiff No. 1 on the ground the at they would lose their peace

on account of rattling noise of the floor mill and their health would be adversely affected if the flour mill was allowed to be run. On a reappraisal of

the evidence adduced by the parties, the appellate Court recorded a finding that having regard to the locality and the situation of the property and

the class of people who inhabited the same, it appears that the running of the impugned machines seriously interferes with the physical comfort of

the plaintiff-appellant and the members of the family in the occupation of his house according to the ordinary notion prevalent among reasonable

men and women. In the aforesaid case, reliance was placed on Dhanna Lal v. Chittar Singh (supra). The principles laid down in Dhanna Lal''s case

were followed and the Allahabad High Court held that the plaintiffs were rightly held to be entitled to injunction claimed by them Shri Soni referred

to English cases also to substantiate his contention. In Halsey v. Esso Petroleum Co. Ltd. WLR(1961) 1 683 damages were awarded to the

plaintiff as the Court found that the plaintiff''s life had been made a misery for five years by the constant noise, dirt and commotion from the oil

depot near their house. In this case, injunction was granted. In Bone v. Seals (1975)1 All ER 787, the plaintiffs had been disgusted for twelve

years by the naureating smell from a village pig farm, and the judge awarded them 500 Pounds per year, a total of 6,000 Pounds each and also

granted injunction.

12. Shri Soni, learned counsel for the appellants, also, placed reliance on the cases referred to in the Law of Torts by Shri M.N. Shukla, at page

269 : Soltan v. De Held (1851) 2 S . NS 133, Christie v. Duvey (1893) 1 Ch 316, and Palmer v. Hoder (1963) CLY 2233.

13. Shri Soni also referred to the law of Tort by Winfield & Foloicz, 11th Ed. In Chapter 15 the subject of Nuisance has been dealt with. In

England noise is now principally governed by Part III of the Control of Pollution Act 1974, replacing the noise in the A batement Act, 1960.The

enforcement of these provisions is in the hands of public bodies (commonly the local authority) and they do not generally give rise to civil liability.

However the principal remedy sought by most victims of nuisance is an injunction to prevent its continuance.

14. Shri R.P. Goyal, learned counsel for the respondents, submitted that both the courts below have recorded a finding that nuisance is caused to

the plaintiffs by using the electric hammer by the defendants in his shop for doing his business. Consequently, the finding cannot be assailed in the

second appeal. Shri Goyal also placed reliance on AIR 1981 707 (SC) , wherein their Lordships of the Supreme Court held as under:

It is a well settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact. As the two

Courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere

with the said finding.

It is true that a finding of fact should not be disturbed in second appeal. But, the question that requires to be considered is, whether in a given case

nuisance is or is not established, is a mixed question of law and fact. In Bhanwar Lal and Another Vs. Dhanraj, this Court laid down the principle

of law that nuisance is a legal wrong i.e. injury caused to an individual and that can be determined on the given set of facts by the application of the

legal principles on which the question has to be judged whether any nuisance was caused or not. In this view of the matter, 1 am of the opinion that

the question whether in the facts and circumstances of the case any nuisance is caused or not by hammering of the iron sheets by means of electric

hammer used by the defendants is a mixed question of facts and law. Shri Goyal submitted that in order to consider whether nuisance has been

caused or not, the nuisance should be substantial. And further that it should be substantial not merely with reference to the plaintiff, but it must be of

such a degree that it would be substantial to any person occupying the premises of the plaintiff, irrespective of his position in life, age or state or

health. To substantiate his contention, Shri Goyal, learned counsel for the defendants, has placed reliance on Behari Lal v. James Maclean AIR

1924 All 392. In that case, it was held that the noise produced by the engine was a source of same inconvenience to the persons residing there;

but, at the same time, held that a flour mill worked by a gas engine was already in existence in that locality and from the fact that such flour mill

existed in other parts of the town, the learned Judges were of the opinion that no reasonable case for removal of the flour mill or oil engine had

been made out in the case.

15. In Abdul Jabar Butt Vs. State of Jammu and Kashmir, , it was held that in order to constitute an act of nuisance, there must be interference

with the use or enjoyment of land, or of some right over or in connection with it, causing damage to the plaintiff. It was also held that every little

discomfort or inconvenience cannot be brought on to the category of actionable nuisance. In that case, the complaint that the factory was the

source of nuisance of the plaintiff''s property was not held proved.

16. In Rampalat Shaw Vs. Corporation of Calcutta, , it was held that before directing removal of nuisance, the court must order its abatement or

prevention. The allegations in that case were that the workshop was creating nuisance of sound and smoke by the running of the mill and that it was

a source of danger to life, health and property of the adjoining neighbours.

17. In Girdhari Lal v. Smt. Mahaden Sharma RLW 1968 401, which was a case in which the defendant was running flour-mill and oil mill with the

permission of the Municipality and, this Court observed that complete stoppage should not be made as it would amount to avoidable loss.

18. Reference was also made to Behari Lal v. James Macleean (supra) in the case cited above RLW1968 401.

19. Mr. Goyal, learned counsel for the respondents, placed reliance on the following passage from Anand & Sastri''s Law of Torts, 4th Edition,

1980, which appears at page 832-833:

Nuisance is a mixed concept, partly subjective and partly objective. What is a nuisance to one may not be a nuisance to another and what again,

may appear to be repugnant to one class, may not be so to another, [n short, it is a relative term depending entirely upon the environment, taste,

habit and the standard of living of the residents. It is observed by philosophers that noise is the sign of civilization. Upon ultimate analysis there must

always be some noise which is the price we have to pay for progress. It will accordingly be impossible to eliminate all noise and smell in a welfare

state and absolute and undisturbed peace may well be the peace of the grave yard. The incidence of nuisance, therefore, is to be projected on a

bigger canvas and approached from broader stand-points, which are but the concommit-tants of an industrial age, before one can arrive at a just

and proper determination thereof. It has truly been observed by Mr. Justice M. Gardie that ""all law must progress or it must perish in the esteem of

man."" Eith the progress of civilization, the concept of law and its outer periphery must extend so that it may keep pace with the mounting needs of

society.

20. I have given my thoughtful consideration to the respective submissions made by the learned counsel for the parties and have carefully gone

through the various citations referred to above.

21. In Hulas Rai Vs. P. Sohan Lal, the Court was pleased to grant injunction as there was finding that hammer caused noise which materially

interfered with (he comfort of the plaintiff in occupation of his house. Similarly, in Dhannalal and Another Vs. Thakur Chittar Singh Mehtap Singh,

the lower Courts recorded a finding that the abnormal noise produced by the flour-mill materially impaired the physical comforts of the occupants

of the adjacent house and, as such, the High Court confirmed the above finding held that it -amounted to actionable nuisance. Similar was the

position in the case of Gotham Construction Co. Vs. Amulya Krishna Ghose and Others, in which a decree for permanent injunction was granted

and the High Court confirmed the same and the finding recorded by the trial Court and the appellate Court was not disputed and, the contention

that no expert was examined was repelled. If the cases referred to by the learned counsel for the respondents are taken into consideration it would

be clear that the same position was there that injunction was not granted because of the finding of fact recorded by the courts below. In the present

case, the learned Munsif recorded a finding that the five witnesses examined by the defendants, who were running their shops nearby, have

deposed that no nuisance is caused on account of the use of hammer. The learned first appellate Court has also appreciated the entire evidence on

record and believed the testimony of the witnesses produced by the defendants as they were from the same market where the shops of the

plaintiffs and the defendants were situated. The learned first appellate Court also critically appraised the evidence of the plaintiffs and held that

Raghu.vir Singh (PW 4) was not having any shop in the said locajity. Similar was the case with regard to Bhagirath (PW 5) and Ramniwas (PW 6)

who had no shop in the same market. The learned first appellate Court also placed Makhan Lal (PW 7), Niranjan Lal (PW 9), Madan (PW 10)

and Ramavatar (PW 11) in the same category, as none of them had their shops in the nearby area.

22. The general view laid down by the jurists is that in order to judge whether nuisance has taken place or not, the political, social and economic

situation prevailing in a country as well as the subjective standards of the persons affected will have to be taken into consideration. All these

considerations, however, are judged from an objective stand point. It is also true that a section of people have the feeling, whether justified or not,

that in order to make legitimate grievances redressed, it is necessary to make a nuisance of themselves to be heard or taken note of. Nuisance,

however, must continue judged from a robust common sense point of view. The ""principles which have been deduced from the authority by the

Madhya Pradesh High Court in the case of Dhannalal and Another Vs. Thakur Chittar Singh Mehtap Singh, are quite sound and on the basis of

which one can determine whether a nuisance is actionable or not.

23. It is well established principle that two modes, however, cause inconvenience to the persons with dainty and elegant modes and habits of living

may not cause similar inconvenience to the persons accustomed to the life in the disturbed portion of the town. A discomfort to be actionable

should be substantial. The nature of the interference is to be examined in each case in the light of the circumstances of the place where the thing

complained of actually occurs and the degree of inconvenience caused must deter mine the nature of the relief to the person complaining may be

entitled to. If a man lives in a town; it is necessary that he should subject himself to the consequences of those operations of trade which may be

carried on in the immediate locality which are actually necessary for trade and commerce and also for the enjoyment of the property and for the

benefit of the inhabitants of the town or the public at large. In fact, the whole of the law of private nuisance represents an attempt to preserve a

balance between the two conflicting interests, that of one occupier in using his land as he thinks fit and that of his neighbour in the quiet enjoyment

of the land. Everyone must endure some degree of noise, smell etc., from his neighbour otherwise the modern life could be imposed & such a

privilege of interfering with the comfort neighbour is reciprocal. What amounts to nuisance has very aptly been described in Anand & Sastri''s Law

of Torts, quoted above. Nuisance is incapable of exact definition. It must, howeler, depend on facts and circumstances of each case. The injuries

and annoyance which warrants relief against the nuisance complained of must be of a real and substantial character, disturbing comfort or impairing

enjoyment of property for slight trival or fanciful inconvenience resulting from delicacy or fact idiousness, no relief can be granted.

24. If the entire evidence, allegations and counter allegations made by the parties are looked into, one comes to the conclusion that some

inconvenience is positively caused to the defendant; but there is no evidence to prove that the disturbance or the noise produced by hammering

would be so substantial so as to render the house practically uninhabitable for as ordinary people without serious discomfort. The neighbours have

been examined on behalf of the plaintiffs as well as on behalf of the defendants. Some witnesses produced by the defendants are quite positive in

their depositions that no inconvenience is caused to them. It is true that some witnesses produced by the plaintiffs had made a statement that

inconvenience was caused on account of noise It is an admitted position that this part of the locality where the plaintiff resides and carries on his

business is a mixed colony where there is a market as well as residential houses. As already discused above, in such circumstance a balance is to

be struck. In Girdhari Lal v. Smt. Mahadevi Sharma (supra), it was observed that the complete safety of the mill would result in evitable hardship

to the defendants & some restrictions were imposed by this Court. Undoubtedly, it was a case where the observations were made while deciding

an application under Order 39, Rule 2 CPC. But it would not make any distinction if some principles are followed to strike a balance in the facts

and circumstances of the case. It is considered that it will be just and proper if the defendant is allowed to run the shop where hammering of iron

sheet is done during the period between 8 a.m. to 8 p.m. i.e. he will not use the electric hammer during the night i.e. between 8 p.m. to 8 a.m. It is

an admitted fact that the electric motor which is being used for hammering iron is of 1 HP. In case, horse-power is increased or any other act is

done which increases the nuisance, the plaintiff will be at liberty to file a separate suit complaining the nuisance to the appropriate Court for his

redressal

25. In such circumstances, I modify the decree and judgment passed by the learned lower court. The appeal is partly allowed. The suit filed by the

plaintiffs is decree to the extent indicated above. The parties are left to bear their own costs.