Raj Singh Vs Ch. Gajraj Singh

Second Appeal No. 1857 of 1956

Court: Allahabad High Court

Date of Decision: Sept. 3, 1957

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 100#Specific Relief Act, 1877 â€" Section 54

Citation: AIR 1958 All 335 : (1957) 27 AWR 764

Hon'ble Judges: A.P. Srivastava, J

Bench: Single Bench

Advocate: Brij Lal Gupta, for the Appellant; S.B.L. Gaur, for the Respondent

Final Decision: Dismissed

Judgement

A.P. Srivastava, J.
This appeal and cross-objection arise out of a suit to recover damages and to get a permanent injunction issued.

2. The respondent Gajraj Singh resides in the abadi of village Jalalabad and owns a grove situated on plot No. 793 of that village. The grove

contains mango, guava, kamrakh and papaya trees and used to yield a profit of about Rs. 1,000 per annum to its owner. The appellant Raj Singh

obtained a lease of plot No. 766 of the village and about four years before the institution of the suit which has given rise to this appeal started a

bhatta for the construction of bricks an that plot. According to Gajraj Singh, this bhatta is situated at a distance of about! . 200 yards from the

grove and about 100 feet from the village abadi where his residential house is situated. The Bhatta had been started in contravention of the bye-

laws framed by the District Board in that respect. The smoke from the bhatta adversely affects the plaintiff"s grove and causes damage to its trees

and fruits. The smoke has also an adverse effect on the health of the plaintiff and the other members of his family. The defendant was asked to

remove the bhatta to a place sufficiently away from the plaintiff"s house and grove. He did not comply with the request. The plaintiff, there-fore,

sued to recover Rs. 2000 as damages and claimed a mandatory injunction directing the defendant to run his bhatta at a distance of at least 500

yards from the grove and the house of the plaintiff.

3. The suit was contested by the defendant who pleaded that the bhatta had no adverse effect on the plaintiff''s grove and was not injurious to the

health of the plaintiff and the members of his family in any way. The plaintiff had not suffered any loss of any kind. He also pleaded that the suit was

barred by estoppel and acquiescence and that the plaintiff was not entitled to the injunction claimed. He alleged that the suit had been filed on

account of enmity.

4. Before the learned Munsif who tried the suit both the parties produced evidence in support of their respective contentions. The witnesses

examined included two experts produced by the plaintiff and two produced by the defendant. The plaintiff''s experts were Sri S. B. Mathur,

Smoke Inspector of the Kanpur Municipal Board, and Sri Rajpal Singh, the Assistant Mycologist, Fruit Research Station, . Saharanpur. The

defendant''s experts were Sri Teja Singh, Deputy Director of Horticulture, Central P. W. D., New Delhi and Sri G. S. Randhawa, Lecturer in

Horticulture in the Agricultural Institute at Pqosa, The Munsif himself inspected the place twice.

5. After a consideration of the entire materials on the record that were put before him, the learned Munsif recorded the following findings:

1. That the plaintiff''s grove was situated at a distance of about 200 yards from the defendant''s bhatta. The defendant''s case that the distance

between the two was about 350 to 400 yards was not correct.

2. That the grove of the plaintiff was within such distance from the bhatta of the defendant that the smoke coming from the chimney of the bhatta of

the defendant was sure to harm the grove of the plaintiff.

3. That the plaintiffs grove had actually been damaged by the smoke and the fumes coming out of the defendant''s bhatta. A large number off guava

fruits were found lying under the trees in dried and charred condition-showing that they had been affected by the smoke. The twigs and branches

of the mango trees showed signs of drying up. The guava and the papaya trees did not bear fully developed fruits. The mango fruits produced by

the trees in the grove showed signs of a disease known as the blacktip disease which was caused by the effect of the smoke. This damage to the

plaintiff''s grove was the result of the smoke of the defendant''s bhatta. It could not be attributed to the want of proper care of the grove on behalf

of the plaintiff as was alleged to be the case by the defendant.

4. That the plaintiff had not been able to prove that his health or that of the members of his family had been affected adversely by the smoke of the

defendant''s bhatta.

5. That the deft''s. bhatta was definitely a nuisance and a continuing nuisance which was likely to cause irreparable damage to the plaintiff''s grove if

allowed to continue at its present site.

6. That the fact that the plaintiff had filed a suit four years after the bhatta had been started did not disentitle him from claiming an injunction.

7. That though the plaintiff had suffered damage he had not been able to prove the exact extent of the damage. The amount claimed by him as

damages was exaggerated. He was therefore entitled to be allowed only nominal damages at Rs. 10 per annum.

6. On these findings the learned Munsif granted a decree for Rs. 40 as damages for four years at Rs. 10 per annum and also issued a mandatory

injunction directing the defendant to remove his bhatta from within a distance of 500 yards from, the grove of the plaintiff, and also issued a

permanent injunction to the defendant not to run his bhatta within a distance of 500 yards from the grove of the plaintiff. He provided that if the

defendant did not remove his bhatta within a month the plaintiff would be entitled1 to have it removed through court.

7. Both the parties went up in appeal against the decree of the learned Munsif, and the appeals were heard by the 2nd Civil Judge of Meerut. He

agreed with the findings of the learned Munsif that the defendant''s bhatta was situated within a distance of about two hundred yards from the

plaintiffs grove, that the bhatta was a nuisance and a continuing nuisance, that the bhatta had caused actual damage to the plaintiff''s grove, that the

damage was not trivial and that the existence of the bhatta was likely to further deteriorate the conditions of the plaintiff''s grove. He also was of the

opinion that no clear evidence about the actual damage caused to the trees and the fruits of the plaintiff''s orchard has been produced, but as some

damage has actually been caused the learned Munsif was justified in allowing the plaintiff nominal damages at Rs. 10 per annum. The learned

Munsif had, however, in the opinion of the learned Civil Judge committed a mistake in allowing the plaintiff to claim damages for four years instead

of three years. He, therefore, reduced the amount of damages awarded from Rs. 40 to Rs. 30, but confirmed the rest of the decree.

8. The defendant has now come up in second appeal and the plaintiff has filed a cross-objection. A number of pleas were mentioned in the memo

of appeal filed by the appellant. The only point that was, however, pressed by his learned counsel was that a mandatory injunction requiring the

defendant to remove his bhatta from its present position could have been issued only if the plaintiff established that he had suffered substantial loss

on account of the bhatta. On the finding of the learned Civil Judge himself no clear evidence about the actual damage caused to the trees and the

fruits of the orchard had been produced. No substantial damage could therefore be held to have been established and the injunction claimed by the

plaintiff should have been refused.

9. In support of his cross-objection, the learned counsel for the plaintiff urged that the evidence produced by the plaintiff about the losses suffered

by him had not been properly appreciated. There was sufficient evidence to prove that the plaintiff had! suffered a loss of at least Rs. 1,000. There

was no justification for allowing the plaintiff only a nominal damage at Rs. 10 per annum and the plaintiff should have been granted a decree for at

least one thousand rupees on account of damages.

10. The cross-objection may be disposed of first. It does not present much difficulty. The Civil Judge was the final court of facts" and the findings

of fact recorded by him must be respected by this Court in second appeal unless they are perverse, unsupported by evidence or are vitiated by an

essentially wrong approach. Both the courts below after considering the evidence produced by the parties on the question of damages have arrived

at the conclusion that on the basis of it it was not possible to uphold the plaintiff"s claim that he had suffered loss to the extent to which he claimed

to have suffered. According to the learned Munsif, the plaintiff"s claim that he had suffered a loss of Rs. 500 per annum was exaggerated and on

the evidence produced by him the extent of his loss remained unproved. The learned Civil Judge took the same view of the evidence and recorded

the conclusion:

There is in fact no clear evidence about the actual damage caused to the trees and fruits of the orchard, but it can well be believed that apart from

the fact that the fruits crop could as well have been diminished due to the old age of the trees, the drying up of the fruits due to the smoke must

have caused some damage and in the circumstances the lower court was right in granting nominal damages at the rate of Rs. 10 per annum to the

plaintiff"". It is not open to the plaintiff to request this Court to reappraise the evidence. It has not been pleaded in the memorandum of cross-

objection that the finding on the question of damages is perverse. There is no question of its not being supported by evidence and it has not been

suggested that the courts below were guilty of any wrong approach. In the circumstances I think the cross-objection has no merit and must fail.

11. So far as the appeal is concerned it is not disputed now that the defendant"s bhatta is situated within a distance of two hundred yards from the

plaintiff"s grove. Sri Mathur, one of the experts produced by the plaintiff, stated that the smoke that came out of the defendant"s bhatta contained

vapours, solids and1 liquids being principally carbonic acid, sulphur compounds water vapour, unconsum-ed carbon and tar vapours. The other

expert, Sri Raipal Singh, said in his report that the fumes coming out of the bhatta contained sulphur dioxide ethylene, carbon mono and dioxide.

All these ingredients present in the smoke and the fumes are injurious to plant life. The experts examined by the defendant also agreed that all these

things present in the smoke adversely effected plant life. The only grounds which they put forward in support of their view that these injurious

elements in the smoke had not affected the plaintiff"s grove were that the bhatta was situated at a distance of 350 to 400 yards from the grove and

that the direction in which the grove was situated from the bhatta was not the direction in which the wind usually blew in the locality.

The first ground has been definitely negatived by both the courts and they have recorded a categorical finding that the distance between the grove

and the bhatta was only about 200 yards. So far as the second ground was concerned, as the courts below have pointed out, neither of the two

experts examined by the defendant could have any personal knowledge about the direction in which the wind usually blew in the locality nor could

they claim to be experts in that line. As has been observed by the learned Munsif, the grove is situated not exactly to the south of the bhatta but to

its south-west. Even if the usual direction of the wind is from cast to west, it is possible for the smoke of the bhatta to reach the plaintiff"s grove.

It also appears to be correct, as pointed out by the learned Civil Judge, that the wind in a particular locality cannot always be expected to blow in

a particular direction. Some time there is no breeze blowing in a definite direction and the smoke can at that time get diffused in all directions. Both

the grounds put forward by the defendant"s experts in order to show that the plaintiff"s grove could not be affected by the smoke of the

defendant"s bhatta were therefore untenable. If the smoke corn-ling out of the bhatta contain ingredients injurious to plant life and the bhatta is

situated within such a distance from the grove that its smoke can affect the trees in the grove there is every likelihood that damage was caused to

the grove by the smoke. On the question whether the plaintiff"s grove had actually been adversely affected by the smoke of the defendant"s bhatta,

both the counts below have found definitely in favour of the plaintiff. This, finding appears to be based on good evidence. The first expert examined

by the plaintiff. Sri Mathur, stated in his report.

I observed that many of the trees were in decaying condition. Guava fruits were found under the trees in dried and charred condition. Many of the

small and new plants had already died out in large numbers"".

The other expert of the plaintiff, Sri Rajpal Singh, said in his report :

Owing to the fumes of the smoke of the Bhatta the plantation of the plaintiff"s garden has very much decayed. At the time of my inspection guava

and Papita trees were bearing fruits, I specially noted that the fruits of guava and papita trees were not fully developed and were not of standard

size. Papita trees though about sixty to seventy in number were mostly dried and had no fruits, only ten or eleven papita trees had some fruits. I

saw that under all the guava trees small fruits in charred and dried condition were lying scattered which had fallen down before maturity. Many of

the mango trees were showing drying of twigs and branches; most of these branches were devoid of leaves. This can be attributed directly to the

fumes emitted from the chimney of the bhatta"".

The plaintiff stated that many fruits produced by the trees in the grove had black spots. That could be attributed to the blacktip disease of the

mangoes which, according to Sri Rajpal Singh, is caused directly by the fumes of brick kilns. The defendant and his experts made a futile attempt

to attribute this condition of the plaintiff''s grove to the old age of the trees and to the want of care of which the plaintiff was guilty in respect of

them. The courts below have, however, rejected this explanation as unacceptable. There thus appears to be no doubt that by the time the suit was

filed, the plaintiff''s grove had actually been injured by the smoke emitted by the defendant''s kiln.

12. The courts below have also found that the continued existence of the kiln at its present site was likely to further damage the plaintiff''s grove in a

substantial manner. On this point their view is supported, by the experts examined by the plaintiff. Thus, Sri Mathur said at the end of his report:

I am definitely of the opinion that if the brick kiln in dispute is allowed to run only a few years more, this garden will have its immature death"".

13. The question is whether on the above findings the courts below were justified in issuing the injunction which they have issued against the

defendant. It is contended on behalf of the defendant that in order to get an injunction issued it was not enough for the plaintiff to prove that the

bhatta of the defendant was likely to damage his grove, or that it had damaged it to some extent. The injunction could be issued only if it was

established that the damage caused to the plaintiff''s grove was ""substantial"" and that irreparable injury was likely to the plaintiff''s grove if the bhatta

of the defendant was not removed to a longer distance from it. In this case the plaintiff failed to prove that substantial injury had already been

caused to his grove, or that irreparable injury could really be apprehended. The fact that the plaintiff had not filed a suit till about four years after

the bhatta had been started and that he could not satisfy the courts below that he had suffered the loss which he claimed to have suffered the has

been awarded only a nominal damage) showed that he had not succeeded in proving substantial damage, or that irreparable injury to his grove

could really be apprehended on account of the defendant''s kiln. In these circumstances the issue of the injunction was not justified. Reliance was

placed by the learned counsel in support of this contention on certain observation made in Salvin v. North Branchepeth Coal Company (1874) 9

Ch. A. 705 (A), Leeds Industrial Co-operative Society v. Slack 1924 A. C. 851 (B), AIR 1941 364 (Nagpur) and Behari Lal Vs. J. Maclean

and Others,

14. The fact that the plaintiff did not file a suit for about four years cannot show necessarily that his grove was not being damaged. Some time must

necessarily have elapsed before the damage could be discovered. The plaintiff says that he discovered it about two years before the suit. He then

started making objections against the bhatta. He moved the District Board to take action because the bhatta had been constructed in contravention

of the bye-laws of the Board. He has also explained that he could not file the suit earlier as he did not possess the necessary finances.

15. That the plaintiff did not succeed in satisfying the courts below that up to the date of the suit he had already- suffered a lass of Rs. 2,000 and

that he could not produce satisfactory evidence which could enable the courts to estimate the monetary value of the injury that had been caused to

the grove can also not afford any justification for the view that the grove had not been injured at all, or that the injury had not been substantial. The

injury caused may have been real and substantial even though the plaintiff was unable to prove its monetary worth.

16. It is true that before an injunction can be issued the plaintiff must prove that the nuisance to which he objects is an actionable one and that it is

apprehended to cause substantial injury to his property. The question is what meaning is to be attached to the word ''substantial'' in this context.

The word does not necessarily mean ""great"" or ""considerable"". The dictionary meanings of the word include ''real, true, nor seeming or

imaginary.'' According to ''Salmond on Torts'' (11th Edn. page 252). ""Damage that is sufficient to found an action of nuisance may consist either in

(1) some physical injury to the premises occupied by the plaintiff, or to the property of the plaintiff situated thereon or (2) some interference with

the beneficial use of these premises"".

In Halsbury''s Laws of England (2nd Edn. Vol 24) it is laid down at page 91:

As a rule, and subject to legal and equitable defences, an injunction will be granted to restrain continuance of a nuisance where the injury done by

it is substantial, or where, however slight the damage may be, the nuisance is a continuing or a recurring one, so that it would give rise to a series of

actions if no injunction were granted, or where the defendant claims the right to continue the conduct complained of, or threatens to do so ..... As a

rule, an injunction to restrain the continuance of an alleged nuisance will not be granted when the damage caused by the nuisance is trivial or not

serious or when it is of a temporary or occasional character, or when the injury can be adequately compensated by damages"".

17. It thus appears that the word ''substantial'' when used with reference to an injury caused or likely to be caused by a nuisance only means

''actual'' or ''real'' as opposed to ''trivial, not serious, tempo-rary, occasional, unimportant, imaginary or seeming''.

18. The leading case on the point is the St. Helen''s Smelting Co. v. William Tipping (1865) 11 HLC 642 (E). In that case a distinction was made

between an action for a nuisance in respect of an act producing a material injury to property and one brought in respect of an act producing

personal discomfort. It was laid down that as to the latter a person must, in the interest of public generally, submit to the discomfort of the

circumstances of the place, and the trades carried on around him; the rule would however not apply to the former kind of action. The test that was

laid down by Lord Wenesley Dale in that case for determining whether a nuisance was actionable or not was ""everything must be looked at from a

reasonable point of view. Therefore the law does not regard trifling and small inconveniences but only regards sensible inconveniences, injuries

which sensibly diminish the comfort, enjoyment or the value of the property which is affected"".

19. The question was subsequently considered in (1874) 9 Ch. A. 705 (A), Sir James, L. J. laid down:

The plaintiff must show substantial, or, as the Master of the Rolls expressed it, ""visible"" damage. The term Visible'' was very much quarrelled

with before us, as not being accurate in point of law. It was stated that the word used in the judgment of the Lord Chancellor was ""sensible"". -- St.

Helen''s Smelting Co. v. William Tipping (E). I do not think that there is much difference between the two expressions. When the Master of the

Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that

although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the

causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist,

for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a

plain common juryman.

The damage must also be substantial, and it must be, in my view, actual; that is to say, the court has, in dealing with questions of this kind, no right

to take into account contingent, prospective, or remote damage"".

20. It thus appears that the only thing which the plaintiff was required to show before he could gat the injunction he claimed was that some actual

visible damage, which could be seen and appreciated by a common man of average observations, had been caused to his grove. Roth the courts

below have found that the plaintiff succeeded in doing this. He proved that the twigs and the branches of his trees have dried up, that unripe guava

fruits were lying under the trees in charred condition, that his trees were not bearing fruits in the way in which they should have borne them and

(that the mango crop of the grove had started suffering from the blacktip disease. If all these did not amount to sensible and visible injury which

could be seen and appreciated by a common man, it is difficult to conceive of anything else which could. The injury was in no way contingent,

remote, prospective or trivial. It was not temporary or accidental. It is definitely attributable to the injurious effects of the smoke coming out of the

defendant''s chimney. The damage thus established was in my opinion sufficiently substantial to form the foundation of a claim for an injunction.

21. It is interesting to notice in this connection some of the early English cases in which in certain circumstances the burning of brick kiln has been

considered to be an actionable nuisance entitling the person affected to damages and injunction.

22. The earliest reported case is that of Walter v. Selfe decided in 1851 and reported in 1851-4 De G. and Sm. 315 (F). In that case it was laid

down:

That the process of manufacturing bricks by burning them on the defendant''s land, in the manner begun and now intended by him, must

communicate smoke, vapours, and floating substances of some kinds to the air is certain. I think it plain also, from the relative positions of the two

properties, that this smoke and these vapours and floating substances, the burning being to the westward of the defendant''s own house must

wholly, or to a great extent, enter and become mixed with the airs supplying the plaintiff''s house, and part at least of the garden or pleasure ground

belonging to it, and this without being previously so dispersed or attenuated as to become, imperceptible, or be materially impaired or diminished in

force. I conceive that the plaintiff''s house, and at least part of its pleasure ground or garden, must generally, or often, if the manufacture shall

proceed, be subjected substantially, as far as quality of the atmosphere is concerned, to the original and full strength of the mixture and dose thus

produced"".

The defendant was in the circumstances restrained by an injunction from burning bricks or pausing them to be burnt on his own ground.

23. Two years later following the above men-tioned case an injunction was issued in the case of Pollock v. Lester (1853) 11 Hare 266 (G) even

before the trial at law restraining the defendant from burning bricks

24. Then came the case of Hole v. Barlow (1858) 4 CB (NS) 334 (H). In that case, too, objection was taken to a brick kiln on the ground that it

was a nuisance. But the defendant tried to justify his action on the ground that he had erected the brick kiln only on a convenient and proper place

and on that account it could not be held to be a nuisance. This contention was upheld.

25. The correctness of the decision in Hole v. Barlow (H), however, came up for consideration in 1862 in the case of Bamford v. Turnley (1862)

3 B & S 66 at page 83 (I) and it was held to be erroneous. It was held that the burning of bricks by the defendant was an actionable nuisance as it

caused sensible diminution to the value and enjoyment by the plaintiff of his property. The plea that the defendant was using his own property for

pub-Be good in a manner convenient, reasonable and proper did not afford a justification for the nuisance.

26. The view taken in this case of Bamford v. Turnley (I) was again upheld in Beardmore v. Tredwell (1862) 3 Giff 683 (J) and the defendant''s

brick kiln which was situated within 340 yards of the plaintiffs mansion was held to be a nuisance and ordered to be removed to a greater distance.

The decision in Bamford v. Turnley (I) was again approved in the case of Cavey v. Ledbitter (1863) 13 CB (NS) 470 (K).

27. In Luscombe v. Steer (1867) 17 LT 229 (L) the plaintiff claimed an injunction restraining (he defendant from starting a brick kiln before it had

been brought into action. The injunction was refused as it was found that no nuisance had been committed up to the date of the action.

28. In Roberta v. Clarke (1868) 18 LT 49 (M) a brick kiln was held to be a nuisance and it was observed that

It was not necessary to prove that any special sickness resulted to the plaintiff or his family from the effluvia arising from the brick burning, nor that

the vapour was more than usually injurious or offensive. It had been held at law that brick burning carried on in an ordinary way was a nuisance to

persons living within the limit affected by it, and 240 yards was no extreme limit for the smoke and vapour to extend"".

An injunction was therefore issued restraining the defendant from continuing the brick kiln.

29. In Dunston v. Neal (1885) 1 TLR 462 (N) objection was taken to the noxious smell arising from the defendant"s brick field, both on the

ground of its being a nuisance to health and that it caused injury to the plaintiff"s crops. On the evidence it was found that the injury to the crops

was not proved, but on being satisfied that the noxious smells could be perceived at the plaintiff"s premises and to such an extent as to render the

occupation of their house uncomfortable and unenjoyable the defendant was restrained by the injunction from the burning of bricks in such a way

as not to interfere with the comfort of the plaintiff.

30. In Barcham v. Hall (1870) 22 LT 116 (O), a new brick kiln had been constructed at a distance of about 100 yards from the plaintiff"s house.

An old kiln had been worked near the place for about 50 years. The plaintiff objected to the new kiln on the ground of its being a nuisance and his

objection was upheld. It was observed that prima facie a brick kiln within a hundreds yards in front of mansion house would be a nuisance unless

the process for burning the bricks was one of unusual kind. Upon the evidence it was held that the plain, tiff had sustained substantial injury to his

health and comfort by the construction of the new kiln and an injunction was therefore granted

31. Keeping in view the proximity of the defendant"s kiln to the plaintiff"s grove, the fact that the grove had already received sensible or visible

injury, that if the kiln was continued the plaintiff could reasonably apprehend further injury to his trees, that the injury already caused was not trifling

or imaginary and that the future injury that could be apprehended was by no means remote or contingent, I think in the circumstances of the present

case the courts below were justified in granting to the plaintiff the injunction which he claimed.

32. Out of the four cases relied on by the learned counsel one has already been referred to. The remaining three do not appear to be of any help.

Thus in the case of 1924 AC 851 (B), the question that arose for decision was entirely different. The defendant in that case threatened obstruction

to the ancient lights claimed by the plaintiff. The plaintiff sued for an injunction to prevent the threatened injury. The court below instead of granting

an injunction decided to award damages, and the only question which was taken up to the House of Lords wa,; whether in a case of that kind the

court had jurisdiction to award damages in lieu of an injunction. It was held by a majority that it had. The question whether in a particular case an

injunction should be issued or damages should be awarded depends upon the facts and circumstances of each case, and the case cannot be

considered to be an authority for the proposition that in every case where an injunction is claimed to prevent a threatened injury instead of issuing

an injunction the court must necessarily award damages. The case is also distinguishable from the one in hand on the ground that the present case is

not only of a threatened Injury. In this case the plaintiff has already suffered an injury and can reasonably apprehend that he will suffer further injury

if the defendant"s kiln continues.

33. The case of ILR All 297: Behari Lal Vs. J. Maclean and Others, related to a flour mill worked by an oil engine behind the house of the plaintiff.

The plaintiff objected to it on the ground that the working of the mill caused trouble to the occupants of his house and interfered with their business

and ordinary physical comfort. It was contended that on that account it was a nuisance. The case was thus again of a nuisance affecting the

personal discomfort of the plaintiff and was not an action for a nuisance in respect of an act producing material injury to his property. The test laid

down by Lord Westbury in St. Helen"s Smelting Co. v. William Tipping (E) in respect of actions relating to personal discomfort was applied and it

was held that the plaintiff had not produced sufficient material to justify the court in holding that any substantial interference with his physical

comfort and convenience had been made out. His suit was, therefore, dismissed. The observations made in the case do not appear to be

applicable to a case like the present which relates to a nuisance causing material injury to the plaintiff"s property.

34. The case of AIR 1941 364 (Nagpur) is distinguishable from the present one on the same ground.

35. The learned counsel for the appellant has therefore not been able to make out any case for interference with the decree passed by the learned

Civil Judge.

36. Both the appeal and the cross-objection must therefore fail. They are accordingly dismissed with costs. The stay order is discharged.