ARLIS APPUHAMY
v.
KAHAVIDANE

COURT OF APPEAL
SENEVIRATNE, J. AND G. P. S. DE SILVA, J.
C.A. (S.C.) 234/74 (F) : D.C. COLOMBO 2401/ZL
16, 17, 18 FEBRUARY 1983.

Nuisance — Permanent injunction — Erection of bakery — Quia timet action.

The plaintiff complained that the defendant had commenced construction of a bakery and hotel very close to her residence and that the establishment of such bakery and hotel would cause a nuisance. The action was in the nature of a *quia timet* action. A permanent injunction was also sought.

Held —

The noise, smell and smoke from running a bakery would constitute a nuisance and cause discomfort and injury to health. The action was *quia timet* in character and not based, on a nuisance which existed but an apprehended nuisance. However for this reason the action is not misconceived.

In a *quia timet* suit the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise. If there is evidence that the plaintiff's fears in regard to a threatened nuisance are not imaginary but well-founded and reasonable, a court would be entitled to grant a declaration and an injunction, in appropriate circumstances.

Although at the stage of the institution of the action, the defendant had only commenced the construction of the building, which was used as a bakery and hotel, the evidence led at the trial establishing the existence of the nuisance is relevant because this evidence was clear that the smoke and noise emanating from the bakery caused inconvenience to the plaintiff and was injurious to her health. These facts are very relevant to show that the apprehension entertained by the plaintiff at the date of the institution of the action was justified and her fears were well-founded.

The facts that there was approval of the local authority for putting up the building and a licence had been issued to run a bakery do not authorise the defendant to interfere with the use and enjoyment of the adjoining land owned and occupied by the plaintiff in such a way as to constitute a nuisance. The licences issued by the local authority to construct the building and to carry on the business of a bakery, do not *per se* afford a defence to the plaintiff's action.

Cases referred to :

1. *Attorney-General v. Corporation of Manchester* [1983] 2 Ch. 87
2. *Hewavitharana v. Chandrawathie* 53 NLR 169
3. *Naganathar v. Velautham* 55 NLR 426
4. *Selvam v. Kuddipillai* 55 NLR 426
5. *Fletcher v. Beally* 28 Ch. Div. 688
6. *Attorney-General for Canada v. Ritchie Contracting & Supply Co. Ltd.* 121 Law Times 655.
7. *Hooper v. Rogers* 1974 3 All ER 417

APPEAL from judgment of the District Judge of Colombo.

H. W. Jayewardene, Q.C. with *T. B. Dillmuni* and *Rohan de Alwis* for defendant-appellant.

C. Renganathan, Q.C. with *Gomin Dayasiri* for plaintiff-respondent.

Cur. adv. vult

25 March 1983
G. P. S. DE SILVA, J.

The plaintiff instituted this action on 14th February, 1971, alleging :—

(a) that about 3 ft. from the northern boundary of the plaintiff's land, the defendant has commenced the construction of a building to be used as a bakery and hotel on the defendant's land ;

(b) that the establishment of a bakery and hotel on the land of the defendant, will cause inconvenience and annoyance and will be injurious to the health and comfort of the plaintiff and the members of her family and as such, will constitute a nuisance to the plaintiff (paragraphs 5 and 8 of the plaint).

The court subsequently accepted an amended plaint, dated 2nd December, 1971, wherein the plaintiff prayed in paragraphs (d) and (e) of the prayer, for the following reliefs based on the cause of action pleaded in the original plaint :—

" for an order declaring that the defendant, his servants and agents are not entitled to establish, continue or carry on a bakery and/or hotel in the premises of the defendant ;

" for a permanent injunction restraining the defendant, his servants and agents from establishing, continuing or carrying on a bakery and/or hotel in the premises of the defendant ".

In his amended answer, dated 9th June, 1972, the defendant pleaded :—

(a) that the construction of the building has been duly completed and has been approved by the proper authority ;

(b) that a licence has been granted by the proper authority to carry on a bakery;

(c) that since April 1972, after obtaining a licence from the proper authority, the defendant is carrying on the business of a bakery on the premises belonging to the defendant.

The case proceeded to trial on the following issues :—

(1) Do the premises bearing No. 525/3 described in paragraph 2 of the amended plaint, dated 02.12.71, belong to the plaintiff upon Deed No. 797 referred to in the amended plaint ?

(2) Does the carrying on of the business of a bakery and/or hotel by the defendant in the premises No. 519, constitute a nuisance to the plaintiff ?

(3) Has any right of the plaintiff been or is any right being violated and/or prejudiced by the construction, establishment, continuing or carrying on of a bakery and/or hotel business in the said premises ?

(4) If any one or more of the aforesaid issues are answered in favour of the plaintiff, is the plaintiff entitled to obtain any one or more of the reliefs referred to in the prayer to the said amended plaint ?

The issues raised on behalf of the defendant, read thus :—

(5) Is the entire action of the plaintiff based—

(a) only on an apprehension of a nuisance; and/or

(b) on a *quia timet* basis ?

(6) If issue 5(a) and/or (b) are answered in the affirmative, is the plaintiff entitled to the relief he prays for ?

(7) In any event, was the construction of the bakery referred to in paragraph 6 of the amended answer, lawful ?

(8) In any event, is the defendant now lawfully carrying on the business of a bakery at the premises referred to in paragraph 6 of the said amended answer ?

(9) If issues 7 and 8 are answered in the affirmative, can the plaintiff have and maintain this action ?

The District Judge answered issues 1, 2 and 3 in the affirmative and granted the plaintiff, the declaration and the permanent injunction prayed for in paragraphs (d) and (e) of the prayer to the amended plaint. Issues 5(a) and 5(b) were answered in the affirmative while the answer to issue 6 was that the plaintiff is entitled to the declaration and the injunction prayed for in the amended plaint. The answer to issues 7 and 8

was in the affirmative for the reason that a licence has been duly obtained from the Municipal Council. However, the answer to issue 9 was that the plaintiff can have and maintain the action. The defendant has now appealed against this judgment.

The premises of both the defendant and the plaintiff are admittedly situated in an area which had been declared a residential area under the provisions of the Town and Country Planning Ordinance as far back as 1960. The plaintiff was residing in the premises in question since 1963. In her evidence, the plaintiff states :— that the bakery is situated about 10 ft. away from her house; that smoke emanates from the defendant's bakery and enters her house; that the smoke is black in colour and that it remains in the house for about 15 minutes or even more ; that this happens more than once a day ; that there are constant noises coming from the bakery, of trays striking against one another, of trays falling on the ground and of trays being scraped; that the smoke has affected her health and that as a result of the noise, her sleep at night is disturbed. Her testimony in regard to these facts is supported by witness Alwis. There is also the evidence of Dr. Sellathurai who states that the plaintiff was one of his patients and that she had complained to him about the smoke which causes difficulty in breathing and the noises that disturb her sleep. Dr. Sellathurai expressed the opinion that the smoke could cause discomfort and affect the plaintiff's health. The trial Judge has carefully considered the evidence of the plaintiff and her witnesses, and has come to a strong finding in favour of the plaintiff that the smoke, the foul smell and the noises emanating from the bakery, constitute a nuisance. At the hearing before us, Mr Jayewardene, Counsel for the defendant-appellant, did not canvass the findings of the trial Judge in regard to the existence of a nuisance. Indeed, the defendant did not lead any evidence to contradict the testimony of the plaintiff, as regards the smoke, the smell and noises which emanate from the bakery.

Mr. Jayewardene, submitted that the District Judge having answered issue 5 in the affirmative, the plaintiff was not entitled in law to the declaration and the permanent injunction prayed for

in the amended plaint. Mr. Jayewardene urged that on a reading of the amended plaint, it is clear that all that had happened as at the date of action was that the defendant had commenced the construction of a building close to the northern boundary of the plaintiff's land and such building was intended to be used as a bakery and hotel. Counsel contended that this action is a *quia timet* action based on an anticipated nuisance and referred to paragraph 8 of the amended plaint, which reads thus :—

> " The establishment of a bakery and hotel in the land of the defendant **will cause** inconvenience and annoyance and **will be** injurious to the health and comfort of the plaintiff . . . and as such, will constitute a nuisance to the plaintiff. "

On a scrutiny of the averments in the amended plaint, I am in entire agreement with Mr. Jayewardene's submission that the action is *quia timet* in character and is not based on a nuisance which existed but alleges an apprehended nuisance. However, in my view, it cannot be said that for this reason, the action is misconceived as submitted by Mr. Jayewardene, and that the District Judge was not entitled to grant a declaration and a permanent injunction. In this connection, the case of The *Attorney-General v. Corporation of Manchester* (1) is relevant. This was an action brought by the Attorney-General to restrain the defendant from establishing a hospital for persons suffering from smallpox. It was alleged that such hospital would constitute a nuisance to the inhabitants in the neighbourhood. The action was based on an apprehended public nuisance. Chitty, J., dealing with the principle on which a court acts in granting or refusing an injunction in *quia timet* actions, stated :—

> " The principle appears to be the same whether the alleged future nuisance is public or private. In one of the cases to which I have referred, the alleged nuisance was a public nuisance ; in others a private nuisance. In some, acts had been done which it was alleged, would result in future mischief or injury, but which had not already resulted in

injury or substantial damage; in others, there was mere threat or intention. But in regard to all such cases, the principle is the same. Where it is certain that the injury will arise, the court will at once interfere by injunction. . . . But the court does not require absolute certainty before it intervenes ; something less will suffice. . . . The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise. "

In support of his contention that in *quia timet* proceedings, that the plaintiff is not entitled to the relief granted by the District Judge in the instant case, Mr. Jayewardene cited *Hewavitharana v. Chandrawathie* (2) ; *Naganathar v. Velautham* (3) ; *Selvam v. Kuddipillai* (4) ; *Fletcher v. Beally* (5) ; *Attorney-General for Canada v. Ritchie Contracting & Supply Co. Ltd.* (6) and *Hooper v. Rogers* (7).

In *Hewavitharana's case* (supra), the plaintiffs alleged that they were fideicommissaries under a gift and that the defendant, to whom the interests of the fiduciary had been transferred, held the property subject to the interests of the plaintiffs as fideicommissaries. The defendant claimed to be the absolute owner of the property free of any fideicommissum. The cause of action set out in the plaint was :—

" The plaintiffs fear that the defendant may deal with the property to the prejudice of the plaintiffs by the sale of a portion of it and the institution of a partition action without notice to the plaintiffs. A cause of action has arisen to the plaintiffs to sue the defendant *quia timet,* to have themselves declared entitled to the premises described in the schedule hereto subject to a life interest in favour of the defendant abovenamed. " Gratiaen, J. in the course of his judgment, stated :—

" It seems to me that the plaintiffs have failed to prove an actual or threatened infringement by the defendant of their alleged fideicommissary rights. . . . No act or conduct on

the part of the defendant has therefore been committed or **threatened** which can be construed at this stage as an effective infringement of the alleged interests of the plaintiffs or of those to whom these interests would, in their submission, be transmitted in a certain eventuality. I would hold that, in the circumstances, no cause of action has accrued to the plaintiffs to claim the relief granted to them by the judgment under appeal. Until such a cause of action has in fact accrued, the plaintiffs are not entitled to obtain from this court, a bare declaration as to their **hypothetical rights on questions of law which still remain academic.** The legal problems now submitted for our adjudication have not yet been crystallized into a 'crisp dispute' . . . My only decision is that the plaintiff's action is premature. "

In *Naganathar's case* (supra), by Deed D1, the plaintiff's wife, to whom the Thesewalamai applied, purported during the subsistence of her marriage but without her husband's consent, to convey her separate immovable property to the 4th defendant. The plaintiff sought a declaration that the purported conveyance under D1 was void. Although the District Judge correctly decided that the purported alienation to the 4th defendant without the plaintiff's consent was void, yet he refused a declaratory decree in favour of the plaintiff on the ground that he had no proprietary interest in the separate property of his wife who was not a party to the action. Gratiaen, J., in the course of his judgment, stated :—

" ..... The learned District Judge has, in my opinion, taken too narrow a view of the jurisdiction of a court to grant relief in the form of a declaratory decree in ***quia timet*** proceedings. Cases may well occur in which such a decree would be justified to accomplish the **needs of precautionary justice for the protection even of future contingent rights** . . . On the one hand, I agree entirely that a court should not permit itself to be converted into a forum for the discussion of purely academic problems, and ought therefore to be satisfied that the declaratory decree asked for in any particular action relates to **a concrete and genuine dispute**

> **and would, if passed, serve some real purposes** in the event of future litigation between the same parties." The emphasis is mine.)

Selvam's case (supra) was one where the plaintiff who claimed to be the owner of the property described in the schedule to the plaint, alleged that the defendants, disputing his claim to be the sole owner, wanted him to pay them the value of their share of the property. The plaintiff claimed a declaration that he was the sole owner of the property. He admitted that despite the dispute as to title, he had continued to possess the property and enjoy its produce exclusively. The District Judge held that the evidence of the plaintiff did not disclose a cause of action against the defendant inasmuch as in his evidence, he has stated that he is in undisturbed possession of the land. Accordingly, the trial Judge dismissed the plaintiff's action. Gratiaen, J. held that the dismissal of the plaintiff's action was premature and in the course of his judgment, observed :—

> "An owner of immovable property is entitled to enjoy it without disturbance and without fear of unjustifiable interference from outsiders. If his enjoyment is disturbed by forcible ouster, the remedies of a *rei vindicatio* action or (in appropriate cases) of a possessory action are available to him ; **if it is seriously threatened** (as the appellant claims it has) **he may demand in *quia timet* proceedings, a declaration of his rights so as to prevent in anticipation, the apprehended invasion of his rights of ownership.** " (The emphasis is mine.)

The next case cited by Mr. Jayewardene is *Fletcher v. Beally* (supra). In this case, the plaintiff was a manufacturer of paper and his mill was situated on the bank of a river. The water in the river was used in the process of manufacture and it was essential that the water should be very pure. The defendants were manufacturers of alkali and they were depositing on a piece of land close to the river, a large heap of refuse from their works. There was evidence to show that in the course of a few years, a

noxious liquid would flow from the heap of refuse and if this liquid were to find its way into the river, it would pollute the water and make it unfit for the manufacture of paper. It was not the plaintiff's case that he had, in fact, sustained any actual injury. The defendants stated that they intended to use all proper precautions to prevent the liquid from polluting the water in the river. On the evidence, it would appear that it would take *some years* before the water gets polluted and cause injury to the plaintiff. Pearson, J. held that it was quite possible by the use of due care to prevent the liquid from flowing into the river and it was also possible that before the liquid begins to flow from the heap of refuse, some method of rendering it innocuous might be discovered and accordingly dismissed the action. This case was discussed in *Hooper v. Rogers* (supra) where Russel. L.J., in the course of his judgment, stated the principle, succinctly :—

> " In different cases, differing phrases have been used in describing circumstances in which mandatory injunctions and *quia timet* injunctions will be granted. **In truth, it seems to me that the degree of probability of future injury is not an absolute standard : what is to be aimed at is justice between the parties, having regard to all the relevant circumstances. "** (The emphasis is mine.)

Finally, Mr. Jayewardene relied on the following dicta in the judgment of Lord Dunedin in *Attorney-General for the Dominion of Canada v. Ritchie Contracting and Supply Co. Ltd.*(6) :—

> " But no one can obtain a *quia timet* order by merely saying 'Timeo' ; he must aver and prove that what is going on is calculated to infringe his rights. "

On a consideration of these decisions, it would appear that whether a court is justified in granting the relief, be it an injunction or a declaration, in *quia timet* proceedings, would depend very largely on the facts and circumstances of each particular case. If there is evidence that the plaintiff's fears in regard to a threatened nuisance are not imaginary but well-founded and reasonable, a court would be entitled to grant a

declaration and, an injunction, in appropriate circumstances. It is true, as submitted by Mr. Jayewardene, that at the stage of the institution of the present action, the defendant had only commenced the construction of the building which was used as a bakery and a hotel, only subsequently. While it is correct that rights of parties are generally determined as at the date of action, I find myself unable to agree with Mr. Jayewardene's further contention that the evidence led at the trial in regard to the existence of a nuisance (as opposed to a threatened nuisance) is irrelevant. The evidence is that within a fairly short period of time, the building had been completed and the business of a bakery was being carried on. There is clear evidence that the smoke and the noise emanating from the bakery, caused inconvenience to the plaintiff and was injurious to her comfort and health. These facts are very relevant to show that the apprehension entertained by the plaintiff, as at the date of the institution of the action, was justified and her fears were well-founded. The evidence led at the trial, without objection, of the existence of a nuisance, confirmed the fears of the plaintiff, as was stated by the District Judge in the course of his judgment. I accordingly hold that such evidence was relevant and warranted the reliefs granted to the plaintiff in respect of the carrying on of the business of a bakery.

The next submission made by Mr. Jayewardene was that since the building was put up with the approval of the local authority and the business of a bakery was being carried on, upon a licence issued by the appropriate authority, the defendant was engaged in a lawful business. Counsel urged that it was not open to the plaintiff in this action, to challenge either the validity of D2 which is the permit issued by the Colombo Municipal Council, for the construction of the building in question, or the validity of the licence in respect of the bakery (D10).

On the other hand, Mr. Ranganathan submitted that the plaintiff was not seeking in these proceedings, to challenge D2 and D10. The real question is whether D2 and D10 afford a defence to the plaintiff's action. In short, Mr. Ranganathan's contention was that neither D2 nor D10 constitutes a licence to

commit a nuisance. With this submission, I agree. It is to be observed that paragraph 6 of D2, expressly states thus :—

> " This permit will not prejudice the rights of the adjoining owners. "

The issue of the licence D10 in respect of the bakery, does not authorise the defendant to interfere with the use and enjoyment of the adjoining land owned and occupied by the plaintiff in such a way as to constitute a nuisance. In this context, it is relevant to note the provisions contained in the Regional Planning Scheme for Colombo, made under the Town and Country Planning Ordinance, and published in the Gazette marked P3. Part IV of this scheme, deals with residential areas. There is here an express prohibition against the executive authority granting permission to erect a new building to be used as a commercial building unless such authority is satisfied that " the use for which the building is intended, must not create any kind of nuisance whatsoever. " I, therefore, hold that the licences issued by the local authority to construct the building and to carry on the business of a bakery, do not *per se* afford a defence to the plaintiff's action.

On the evidence, it is clear that the smoke and the noise complained of, proceeded from the bakery **and not from the hotel.** The relief granted by the District Judge in terms of paragraphs (d) and (e) of the prayer to the amended plaint is in respect of " the bakery and/or hotel ". This is not in accordance with the evidence accepted by the trial Judge. I would, therefore, amend the judgment and decree under appeal, by confining the declaration prayed for in paragraph (d) and the permanent injunction prayed for in paragraph (e) of the prayer to the amended plaint, **to the bakery** only in the premises of the defendant. Subject to this variation, the appeal is dismissed with costs.

SENEVIRATNE, J. — I agree.

Decree varied
Appeal dismissed.