

SOMAPALA FERNANDO
v.
S. C. FERNANDO

COURT OF APPEAL
FERNANDO, J., AND
EDIRISURIYA, J.
CA NO. 86/94 (F)
HC NEGOMBO NO. 34/93
MC MINUWANGODA NO. 1860
JUNE 06, 2002

Code of Criminal Procedure Act, No. 15 of 1979, sections 98 (1) and 98 (1) (b) – Trade injurious to health or physical comfort of the community suppressed – Public nuisance as opposed to private nuisance.

The respondent complained that petitioner is about to construct a brick kiln close to the respondent's house, and that if constructed it would emit smoke and pose a threat to the health of the inmates of the house, the smoke would cause loss of his property and the burning of tyres close to his house would cause pollution of the environment. The Magistrate's Court discharged the appellant. The High Court acting in revision quashed the order of the Magistrate's Court and directed the Magistrate to order the petitioner to demolish or terminate operations, and remove the brick kiln.

Held :

- (1) The letter allegedly signed by several persons, complaining of a threat to the health of the neighbours produced in evidence should be treated as hearsay evidence, as none of the signatories has been summoned to testify.
- (2) The address of the signatories were written by the prosecution witness (1). Thus, a doubt arises as to the authenticity of the document.
- (3) The evidence does not show that the smoke emitted or likely to be emitted affects those who live in the vicinity (s. 98 (1) (b)).
- (4) The evidence shows a private nuisance as opposed to a public nuisance.

APPEAL from the judgment of the High Court of Negombo.

Case referred to:

01. *Saram v. Seneviratne* – 21 NLR 190.

Sunil F. A. Cooray with Chitrananda Liyanage for appellant.

Wijedasa Rajapakse, PC, with *Dammika Abeygunawardena* for complainant petitioner-respondent.

Cur. adv. vult.

December 13, 2002

EDIRISURIYA, J.

On 04. 04. 1992 the complainant petitioner-respondent in this case⁰¹ complained to the Divulapitiya Police that respondent, respondent-appellant was about to construct a brick kiln close to the complainant petitioner-respondent's house; that the said brick kiln if constructed would emit smoke and pose a threat to the health of the inmates of the house; that the smoke would cause loss to his property. Another allegation against the petitioner was that he was burning rubbish and tyres close to the respondent's house and the smoke and foul smell from such burning caused pollution of the environment.

The officer-in-charge of the Divulapitiya police states that¹⁰ though the appellant was warned not to pollute the environment he disregarded such warning. Therefore, the Magistrate's Court case No. 54158 was filed by the police against the appellant. However, as the complainant was not present in court the appellant was discharged.

Thereafter, the officer-in-charge, Divulapitiya police filed a fresh report dated 07. 07. 1992 under section 98 (1) (b) of the Criminal Procedure Code against the appellant.

The Additional Magistrate of Minuwangoda after inquiry discharged the appellant and terminated the proceedings against him. The²⁰

respondents made an application to the High Court of the Western Province (held at Negombo) seeking a revision of the said order of the learned Additional Magistrate.

The learned High Court Judge of the Western Province by his judgment dated 14. 10. 1994 allowed the said application and quashed the order of the learned Additional Magistrate dated 01. 10. 1993. He directed the Magistrate to order the petitioner to demolish or terminate operations of the brick kiln he is carrying on or intends to carry on. Also he directed the Magistrate to order the removal of the said brick kiln.

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Section 98 (1) (b) of the Criminal Procedure Code Act reads thus:

“98 (1) Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit –

(b) that any trade or occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed or prohibited.

such Magistrate may make a conditional order that the person carrying on such trade or occupation shall within a time to be fixed by such order –

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(ii) suppress or remove such trade or occupation.”

The witnesses No. 1 and No. 2 who are husband and wife have testified to the fact the smoke emitted by the brick kiln posed a threat to the health of the neighbourhood though not a single neighbour has given evidence to the effect that the smoke emitted is injurious to the health of the community.

In his order the learned Additional Magistrate refers to a letter marked P5, allegedly signed by several persons which was produced in evidence by the prosecution. This letter says that if the petitioner

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is allowed to operate the brick kiln the smoke emitted therefrom could be a threat to the health of the neighbours.

On a perusal of the aforesaid document the learned Additional Magistrate has found that the addresses of the signatories were written by prosecution witness No. 1 himself. Thus, a doubt arises as to the authenticity of the said document. Further, none of the alleged signatories has been called to give evidence either with regard to the placing of the signatures or that the smoke emanated from the kiln is a nuisance.

This document should be treated as hearsay evidence in view of the fact that none of the signatories has been summoned to testify. 60

The Additional Magistrate refers to the document marked D2 produced by the petitioner signed by 33 neighbours before the Grama Seva officer of the area. This Grama Seva officer has given evidence in court but was not asked a single question on the correctness of the document (D2).

In the circumstances the learned Additional Magistrate has concluded that the prosecution has not proved that the smoke which the brick kiln emits or likely to emit could be injurious to the health or the physical comfort of the community. 70

The learned Additional Magistrate has cited several authorities in support of the view that the term public nuisance contemplated in section 98 (1) (b) is not a nuisance which affects the public in general but one which affects only those who live in the neighbourhood.

In the case of *Saram v. Seneviratne*⁽¹⁾ adverted to both by the learned High Court Judge and the learned Additional Magistrate, Justice Sampayo held that noise caused by cooperating business affected all those who dwelt in the vicinity, viz. those occupying houses in Charles Place, Bagatalle Road and Alfred Place.

In the instant case evidence does not show that the smoke emitted or likely to be emitted from the said brick kiln affects those who live in the vicinity. 80

The learned High Court Judge has misdirected himself by holding that as the appellant had not obtained a licence for the brick kiln from the Central Environmental Authority or the local authority the brick kiln is a nuisance. The learned High Court Judge has misdirected himself by holding that since the appellant has not complied with the direction of the Central Environmental Authority requiring there to be a distance of 200 meters between the kiln and the respondent's residence the kiln is a nuisance.

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The issue to be decided by the learned Magistrate was whether on the evidence led there was sufficient proof that the smoke emitted or likely to be emitted from the brick kiln affected those who live in the vicinity and not whether the appellant had obtained a licence from the local authority or the Central Environmental Authority or whether the appellant has complied with the directions of the Central Environmental Authority which is a different issue altogether.

The above items of evidence may have been useful if there was initially evidence to show that the smoke emitted or likely to be emitted was causing a nuisance to the residents in the vicinity. The evidence led at the Magistrate's Court at best goes to prove a private nuisance as opposed to a public nuisance the only witnesses being the husband and wife.

I agree with the submission of the learned counsel for the petitioner that the only question to be decided by the learned High Court Judge was whether an order adverse to the appellant under section 98 (1) (b) was warranted in terms of the evidence led at the inquiry.

• For the aforesaid reasons I set aside the order of the learned High Court Judge and affirm the order of the learned Additional Magistrate.

FERNANDO, J. – I agree.

Appeal allowed.

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