IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Ajoy Kumar Mukherjee

SA 77 of 2020

Srimanta Ghosh & Ors.
Vs.
Debabrata Ghosh

For the Appellant : Mr. Baidurya Ghosal, Adv.

Dated : 3rd February, 2022

Soumen Sen, J. (Oral): This matter has come up for admission. This appeal is arising out of a judgment and decree passed by the learned Additional District Judge, FTC-I, Lalbagh in an appeal from a judgment and decree dated 12th August, 2016 passed by the learned Civil Judge (Junior Division), Lalbagh, Murshidabad in Other Suit No. 54 of 2000.

The plaintiff filed a suit for actionable nuisance and permanent injunction. The plaintiff alleged that the defendant is an adjoining plot holder and the defendant/appellant was running a mill that caused rattling noise and vibration, and as a consequence whereof, it had caused discomfort to the plaintiff and his wife. It was alleged that the defendant was making arrangement for installing and running a mill on the said suit scheduled property with the help of 20 horsepower motor without the required licence. The rattling noise and vibration is injurious

to the health of the plaintiff and his wife, inasmuch as, it had caused discomfort to the enjoyment of the property. It is further alleged that due to the rattling noise and vibration, the son of the plaintiff could not concentrate on his studies.

The defendant entered appearance in the suit and filed a written statement. In the written statement it was alleged that the defendant was not required to obtain a 'no objection certificate' from the Pollution Control Board as the mill was running with a motor of 15 horsepower and there was no need to seek a grant of such permission from the Pollution Control Board. It is further alleged that there is a liquor shop adjacent to the house of the plaintiff and no such injuries was caused due to the same to the plaintiff in running the said mill. It was further alleged that the same has been filed out of vengeance and contain untrue statements.

On the basis of the pleadings, the Trial Court framed five issues.

Therein the most important issues were:

i) whether the activity of the defendant caused nuisance;

ii) whether the plaintiff was successful in making out a case of actionable nuisance.

The Trial Court, on the basis of evidence, decreed the suit on the ground that the defendant had failed to produce any document to show that the motor installed to run the mill is of 15 horsepower. On the contrary, during evidence it transpires that there are three types of

huller installed in the said mill: two huller of wheat grinding and husking huller and one oil seeds crusher. In the year 2007, the defendant had applied for enhancement of load of five horsepower before the electricity board and his application was accepted. After enhancement of more five horsepower load, the defendant had installed a oil seeds crusher. It, thus, revealed that over a period of time, increasingly more powerful motors were installed with augmented horsepower. It also further revealed from the electricity bill that for running the mill, about 1000 units of electricity was consumed.

The issue whether the said motors would create a rattling noise and vibration, could be available from the manufacturer's certificates and other relevant documents with regard to the features, specifications and functioning of the said motors. These essential documents were not produced by the defendant.

The learned Trial Judge, in our view, has rightly relied upon Section 106 of the Evidence Act to draw an adverse inference against the defendant for withholding such important documents, when the fact remains that three machines were in operation in the suit property and were capable of creating rattling noise and vibration thereby causing discomfort to the enjoyment of property of the adjoining owner.

The learned Appellate Court had meticulously gone through the pleadings and evidence and observed that in the event the motors have a capacity of more than 15 horsepower, the defendant would be required to obtain a 'no objection certificate' from the Pollution Control Board.

Moreover, the three mills are being run by the defendant in the schedule property with an industrial connection and it is an admitted position that the DW-1 in his evidence had admitted that the plaintiff's house is a mud-built which is adjacent to the suit schedule property and naturally, the regular vibration due to running of the machines would affect the structural stability of the house of the plaintiff. The evidence on record clearly suggests that by reason of running of the said mill, it has caused discomfort to the enjoyment of the property of the plaintiff materially.

In deciding whether in any particular case, the right of the plaintiff to comfortable and healthful enjoyment of the property has been interfered with due to nuisance, it is necessary to determine whether the act complained of is an inconvenience, materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among Indian people." (See ***Shaikh Ismail Sahib vs Nirchinda Venkatanarasimhulu and Iyah*** reported at ***AIR 1936 MAD 905***).

While it is acceptable that every little discomfort or inconvenience cannot be brought on to the category of an actionable nuisance but if such inconvenience or annoyance exceeds all reasonable limits then the same would amount to an actionable nuisance. Frequent and loud noise has been proved to trigger stress and anxiety in both adult and children – more often affecting mental health. A constant cacophony in neighbour's land causing disquietude in one's own abode is beyond a

common man's realm of expected endurance. The question as to what would be a reasonable limit in a given case will have to be determined on consideration as to whether there has been a material interference with the ordinary discomfort and inconvenience of life under normal circumstances. It is not the case of the defendants that the activity undertaken by the defendant/appellant is only one of the common occurrences in that particular locality.

The essence of nuisance is a condition or activity that unduly interferes with land use or enjoyment. Nuisance resulting in interference with one's enjoyment, one's quiet, one's personal freedom, anything that injuriously affects the senses, or could be a matter of health hazard, are some of the considerations which in our view have been properly applied by both the courts in returning a finding in favour of the plaintiff.

In ***Stone v Bolton*** reported in ***(1949) 1 All E.R. 237 at 238-239*** it is stated:

> *"Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission ; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact."*

In the instant case, it is a real interference with the comfort or convenience of living according to the standards of the average man as due of such rattling sound and vibration caused by the three machines the studies of the son of the plaintiff had suffered. Moreover it had caused substantial discomfort to the plaintiffs. In this connection it would be fruitful to refer to the principles relating to actionable nuisance laid down in ***Ram Lal vs. Mustafabad Oil and Cotton Ginning Factory and others.*** reported in **AIR 1968 P & H 399 in Paragraph 25** which reads:

> *"From a review of the case law the following principles relating to actionable nuisance may be deduced.*
>
> *1. In determining whether an actionable nuisance exists, the degree or the extent of the annoyance or the inconvenience is to be considered. For what may amount to a nuisance in one locality, may in another place and under different surroundings be deemed unobjectionable.*
>
> *2. As the precise degree of annoyance or inconvenience does not admit exact calculation, each case depends largely on its own facts.*
>
> *3. The injury or annoyance which warrants a relief against the nuisance complained of must be of real and substantial character disturbing comfort or impairing enjoyment of property. For slight, trivial or fanciful inconvenience resulting from delicacy or fastidiousness, no relief can be granted.*
>
> *4. As a general rule, but allowing for known exceptions, a nuisance involves the idea of continuity or recurrence. Such a nuisance, if continued indefinitely, will be actionable though not if indulged in only on one or two occasions.*

5. Actionable nuisance does not admit of enumeration, and any operation that causes injury to health, property, comfort to business, or public morals would be deemed a nuisance.

6. In certain circumstances and under certain conditions, even a natural tendency to cause injury, and a substantial fear or reasonable apprehension of danger, may constitute a nuisance.

7. Jarring and vibration caused to the plaintiff's premises, and noises exceeding a certain norm and interfering with the actual physical discomfort of persons of ordinary sensibilities, are deemed an actionable nuisance. They have to be of such intensity as unreasonably interfering with the comfort and enjoyment of property, although no physical injury to the health of the complaining party or his family is shown. But no fixed standard can be set as to the quantum of noise that constitutes an actionable nuisance, and it is a matter that depends upon each case's circumstances.

8. Once a noise is considered a nuisance of the requisite degree, it is no defence to contend that it was a consequence of a lawful business or arose from lawful amusements or places of religious worship." (emphasis supplied)

The learned First Appellate Court, on the basis of the appreciation of evidence noted its finding, relevant portions whereof are set out below:

"The word 'nuisance' is derived from the French word 'nuire', which means "to do hurt, or to annoy". Nuisance is an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

Private nuisance is the using or authorizing the use of one's property, of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property

or affecting its enjoyment by interfering materially with his health, comfort or convenience.

Every owner of the property is entitled to use it beneficially subject to such limitations as may be incidental to similar and beneficial enjoyment of other owners of their properties.

The maxim "sic utere tuo ut alienum non laedas" is befitting here. It postulates, so use your own property, as not to injure your neighbours. The homely phrase 'live and let live' explains the principle. It is the case of the plaintiff that the alleged mill situated at 'Kha' schedule property is on the adjoining north of the mud-built house of the plaintiff situated on 'Ka' schedule property. It is found depicted in the plaint schedule hand map. DW-1 categorically admitted that plaintiff's house is situated adjacent to their house and over his house, the alleged mill is running.

DW-1 admitted on dock that they have three machines for paddy husking, wheat grinding and mustard grinding for oil machines over their property and those are running with three different hullers.

DW-1 admitted that the mud-built house of the plaintiff is adjoining to their mill. It is undisputed that the suit property locale is a residential area.

It is no body's case that plaintiff subsequently came to nuisance adjoining the mill in question. In fact, the mill was installed later by the defendant. Even in the nuisance existed long before the plaintiff occupied his premises, does not relieve the defendant unless he is able to show that he has acquired a right as against the plaintiff to commit such nuisance complained of.

On behalf of the defendant (deceased), his son deposed in court as DW-1. On the date of evidence he was aged about 29 years. At the relevant time, when the mill was installed, he was aged about 15

years according to him. He admitted that he does not have any knowledge that occurred during the period of his father. His knowledge as regards the W/S pleaded facts, is not possible and cannot be relied upon.

DW-1 himself stated that they did not obtain any pollution certificate from the concerned authority, as they were informed by the concerned office that for running the mill with 15hp no such certificate would be required.

In a suit for actionable nuisance, it is no defence that defendant is not alone to be blamed for nuisance but there are others also. Defendant pleaded that in the area there is a liquor shop which remains open from 8am to 9pm. So, this cannot be the defence of the defendant.

Plaintiff need not prove special injury or special damage till those actually happens to him, his family and his property. Plaintiff need not call the doctor and produce medical papers as pleaded. He at the same time cannot be compelled to call any civil engineer to ascertain the damage to his house or the likelihood of such damage. Plaintiff need not prove which are the other such mills in the locality, causing any kind of injury or damage to him, in any way. In a suit for private nuisance, special injury or damage need not be proved by plaintiff. Substantial interference with the use, comfort or enjoyment of his property would be enough to establish it."

The learned First Appellate Court has agreed with the observations of the learned Trial Judge that the defendant has failed to discharge his onus by not producing the relevant documents. The relevant observations of the learned First Appellate Court are set out below:

"Having special knowledge, defendant has to prove that they approached the Board and were told that no such clearance would be required to run the mill with 15hp. The defendant failed to establish that all the three business together of husking mill, oil mill and grinding mill run by the defendant, falls under the exempted category of WBPCB parameters. S.106 of the Evidence Act lays down that where a fact is specially within the knowledge of a party, the burden of proving that fact lies upon him. If he fails to establish or explain those facts, an adverse inference of facts may arise against him. Therefore, the case decision of ***Rangammal*** *(supra) would be of no help and avail to the defendant as referred and relied upon.*

The defendant failed to prove that the mill is running with three huller machines without sound and vibration, as it is bound to occur.

That the nuisance complained of, even if confers benefit to the public at large coming over to defendant's mill, is nonetheless an actionable. Consideration of public utility cannot deprive plaintiff's rights. Under the Specific Relief Act, suit to prevent the nuisance is maintainable U/S. 38 and 39.

The mill machines are set up without complying with the requirements of PCB and without seeking necessary permission for having extended load from the concerned electric department. Nuisance is being created on account of noise and vibration due to the running of it. This causes potential danger to mud-built house of the plaintiff as also health hazard prone to the plaintiff and his family members. The sound and vibration causes mental agony to the plaintiff and his family members affecting their mental peace and sleep disturbed.

Form the evidence on record, I came to conclude that the proximate cause of plaintiff's injury is due to defendant's act and the injury or annoyance is sufficient to constitute nuisance. The ordinary use and enjoyment of his property by the plaintiff has affected. The

reaction of the plaintiff in initiating a legal action in the form of filing a civil suit is nothing unusual or abnormal. The nuisance is not of temporary but permanent in nature and definitely abatable. It is created negligently or say to the reckless disregard of the plaintiff's rights, though not intentional or with any malice.

I relied upon the case decisions of Dhannalal & Anr. Vs. Thakur Chittarsingh Mehtapsingh (AIR 1959 Madhya Pradesh 240); Radhey Shiam Vs. Gur Prasad Serma & Anr. (AIR 1978 Allahabad 86) and Datta Mal Chiranji Lal Vs. Lodh Prasad (AIR 1960 All 632).

It is no defence that the defendant is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons. Damage to the property may be caused after some time. The injury to health might become evident after some time, but it does not mean that the plaintiff should wait till such happens. Thus plaintiff may claim preventive action by the court when he apprehends such danger."

In view of the concurrent finding of the facts of both the Courts on proper appreciation of evidence, we do not find any reason to admit this appeal as it does not contain any substantial question of law.

The appeal, accordingly, stands dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

I agree **(Soumen Sen, J.)**

(Ajoy Kumar Mukherjee, J.)