

M.K. Dasappa Vs. G. Ramachandra

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Court : Karnataka

Decided On : Aug-27-1975

Reported in : AIR1976Kant53; 1975(2)KarLJ491

Judge : K. Jagannatha Shetty, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : Civil Revn. Petn. No. 1685 of 1975

Appellant : M.K. Dasappa

Respondent : G. Ramachandra

Advocate for Def. : N. Venkatachala, Adv.

Advocate for Pet/Ap. : R.J. Babu, Adv.

Judgement :

ORDER

1. This revision petition arises out of an order granting temporary injunction against the defendant restraining him from operating his flour and oil mill by the side of the eastern wall of the plaintiff's house.

2. The plaintiff and the defendant are owners of adjacent houses. The plaintiff is having a two storied building. The defendant has installed a flour and oil mill in his own premises. The plaintiff objected before the local Municipality against the grant

of licence to the defendant. Unable to get an effective relief through the Municipality he approached the Court with a suit for injunction complaining that his eastern wall is in a great danger and in all probability, might fall down due to the vibrations caused from the operation of -the mill. He also said that the operation of the mill would cause nuisance to his peaceful life. The defendant resisted the suit by denying the above allegations and further stating that he has a right to carry on his business in his own premises. He also said that the plaintiff is having three grinders in his own premises, the working of which has not been complained of by him, whereas the plaintiff has been unnecessarily interfering in his affairs.

3. The plaintiff obtained an ex parte injunction restraining the defendant from installing the oil mill. In the proceedings for dissolving that injunction, the Court appointed a Commissioner who was an Electrical Engineer to report as to whether the running of the oil min will in any way cause damage to the foundation of the building or to the eastern wall thereon. The said Commissioner, after local inspection, reported in the negative. On considering the report and other material revealed by the affidavits, the learned Munsiff was satisfied that it was not a case for continuing the temporary injunction. Accordingly, he vacated the ex parte order. While making the order, he observed that the plaintiff's contention that running of the mill would cause nuisance to him cannot be a ground at that stage of the case as he himself is having a shop where 3 grinders are being operated. He also observed that the balance of convenience is in favour of the defendant, since he has already installed the flour mill by spending a large amount, and if he is Prevented from operating the mill, it would cause him great inconvenience.

The plaintiff appealed against the said order before the Court of the Civil Judge. During the pendency of the appeal, the parties requested the Presiding Judge to have a local inspection of the suit premises. The learned Judge acceded to the request and visited the Place along with the advocates and the parties when the mill was working. He could not notice any vibration in the common wall' but he felt slight vibration in the windows and wall as he proceeded to the upstairs of the plaintiff building. The learned Judge, however, felt his inability to express his views, whether the said vibration was in any way dangerous to the plaintiff's wall or the building. That perhaps set the parties to move the Court for the appointment of

another Commissioner. Accordingly, by consent of parties, a local Civil Engineer was appointed as a Commissioner to, ascertain the following four Points.

(1) Whether the installation of the Oil Machinery below the foundation level of the building will cause any vibration to the building of the plaintiff?

(2) If there is any constant vibration whether it would cause any damage to the eastern wall of the plaintiff and his building?

(3) Whether vibration, if any, is the cause of running the motor or installation of machinery?

(4) In case if there is any vibration, whether that vibration could be avoided by any means?

The Commission', after personal inspection, submitted a report stating as follows :

'Item No. 1:- The foundation of the Oil Machine is below the foundation level of the building by 1 1/2 feet and this causes mild vibrations to the building of appellant when the oil machine is in operation and it transmits; vibration into the ground and its surrounding area. The Eastern wall of the appellant is subjected to mild vibration from the Machine.

Item No. 2:- The intensity of the vibration is not so great as to damage the wall normally but it has its effect on the structure of the appellant for the following reasons :-

1. The foundation of the Eastern wall of the appellant has been exposed to its depth near the Rotary machine to a depth of 3'-3' and tapered towards north by the side of wall to a depth of one foot and the foundation of this wall carrying the load of three floors is subjected to direct compression and the foundation of the wall is very weak and it is built on loose ground which has very poor safe bearing capacity and the depth and width of the foundation with lime concrete bed and sac stone masonry on it is not structurally found to sustain the loads coming on the foundation. Even on account of mild vibration due to rotation of oil machine and Huller, the stability of the foundation is affected and it

may result in unequal settlement of foundation in future. Item No- 3 :- The Electric motor is 10 HP and it is mounted on a platform and secured with bolts, and nuts. There is no vibration from the motor. The rotary oil machine is installed on the mass concrete foundation and its installation details are shown in the enclosed detailed sketch. The rotary oil machine is a power driven machine and it rotates at constant revolutions with certain amount of impact and friction when the rotary is loaded with oil seeds. This causes vibrations.

Item No. 4:- The vibration could be avoided by adopting the following methods. The foundation of the machine may be isolated with a gap of 6' all-round to full depth of the foundation and gap may be filled with insulating materials like compressed cork or bitumen felt. The exposed face of the foundation of the eastern wall of the appellant would be covered by filling the trench with earth and well consolidated to arrest the vibrations from the machine. It is a pity the Municipality has not examined all the aspects of foundation and its stability and safe bearing capacity of the soil while according licence for construction of building and it appears no objections from the neighbours for installation of machinery in the premises of residential locality have not been obtained before issuing licences for small scale industries.

I feel that the rough examination of the factors considered while issuing licence in respect of the construction of building and installation of machinery at the schedule property is necessary in the interest of safety to the structure.'

Thereafter, the entire matter was considered by the learned Judge. who reached the conclusion that the vibration caused by the operation of the defendant's mill endangers the plaintiff's building which might come down on one day. He also held that the balance of convenience lies in favour of the plaintiff for issuing the injunction. So stating, he granted the injunction, the validity of which is called into question in this petition.

4. The suit involves the question whether the act or omission complained of by the plaintiff is an actionable nuisance arising out of the duties owed by the defendant who is a neighbouring occupier of the building; but I am concerned with the validity of the interim injunction, the grant of which primarily depends on the existence of

prima facie case of the plaintiff. In determining such a question, as I observed in *J. Krishnamoorthy v. Bangalore Turf Club Ltd.*, (M. F. A. No. 500 of 1974, disposed of on 13th August, 1975 = Reported in (1975) 2 Kant LJ 428) the Court should be guided more and more by the apparent strength or otherwise of the plaintiff's case as revealed by the affidavits and other materials and then has to consider the balance of convenience for the grant or refusal of the interim injunction. I also observed that the Court while considering the question of balance of convenience must pertinently put the question 'will the plaintiff suffer irreparable damage, if no injunction is granted now?'

Now, applying these principles to the facts of the present case, one cannot say that the impugned injunction was illegal.

5. In *Salmond on the Law of Torts*, Sixteenth Edition (1973) at page 53, one finds this passage:

'As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises.....'

The plaintiff is the occupier of the threatened building. The appellate Judge, after considering the report of the Commissioner, has found that there is real probability that at any time the activities of the defendant might result in actual damage to the plaintiff's house. But it was urged for the petitioner that the Court should not issue temporary injunction in a case like this, unless it is proved that there is imminent danger to the plaintiff's building. It was also urged that there is no such danger to the plaintiff's wall or the building. It is true that a temporary injunction should be avoided if there is no imminent danger to the plaintiff or to his building. But the word 'imminent' in the context need not be literally understood. If the plaintiff has to wait till the last moment, disastrous consequences might follow which the Court cannot prevent for want of time or procedural requirement. The said word, in my view, should be understood as such that the remedy sought by the plaintiff should not be premature. There is no material in the case, much less any suggestion from the defendant that any other step would avoid the proven probability of the

damage to the plaintiffs building. His suit, therefore, was not premature.

6. It was next urged for the petitioner that the foundation of the plaintiffs building is not stable as it was built on loose ground which has very poor safe bearing capacity and the intensity of the vibration transmitted to the eastern wall of his building is not so great as to damage the wall normally. Counsel also said that the plaintiff himself is having three grinders in his own premises, which in all probability might accelerate the instability of his building and the defendant should not be subjected to hardship to ensure safety to such a weak building. This contention was evidently based on the report of the Commissioner. It is no doubt true that the Commissioner in one portion of his report has stated that the intensity of the vibration transmitted to the plaintiffs building, is not so great as to damage the wall normally, but in the long run it might result in unequal settlement of the foundation of the building since the foundation of the wall is very weak. But in another portion of the report, he has also stated that the foundation of the oil machine is below the foundation level of the building by 1 1/2 feet and when the oil mill is in operation, it transmits vibration into the ground and on to the surrounding area thereby endangering the eastern wall of the plaintiff. These observations cannot be ignored at the outset. Moreover, this particular contention was not urged before the appellate Court. Even otherwise, the Court at the present is concerned only to minimize the damage to the plaintiffs building. The alleged activities of the plaintiff in his three grinders and the weak foundation beneath the threatened wall, if, true, may be a good defence at the trial for raising a plea of contributory negligence. In the context, I may aptly quote a passage from the recent judgment of Scarman, L. J. in *Hooper v. Rogers*, (1975) Ch 43 at p. 51).

'In my view, the plaintiff's position, as Co-occupier of the land where the act he complains of was done, is an irrelevant co-incidence unless it can be used to raise, a defence of contributory negligence or violent non fit injuria, neither of which is to be found in, this case. He has only to show that land at which he is the occupier is damaged, or threatened, by a wrongful act done upon a land of which the defendant is an occupier, and either created, continued or adopted by the defendant, to establish his cause of action.'

7. A case involving almost a similar Point was considered in *Hoare & Co. v. Mc-Alpine*, ((1923) 1 Ch D 167) where the plaintiff's old building was threatened by the vibration caused from the activities of the neighbouring occupant. It was contended that if the plaintiff's building was normally a stable building, the vibrations transmitted from the defendant's premises would not have any effect. Astbury, J. while rejecting that defence, declared that the plaintiffs were entitled to damages by reason of the defendant's wrongful act complained of. He observed 'Though the plaintiffs building was old there is no justification for its being physically shaken in its declining areas to a premature and untimely end by an adventurous and Powerful neighbour.' It seems to me that it is an extremely sound approach which can be applied to the instant case also.

8. Before Parting with this case, I may observe that it is open to the defendant to take suitable measures so as to prevent the transmission of vibration to the plaintiff's building, and also to avoid unreasonable noise from the operation of the mill in question. The Commissioner has already suggested certain measures. If the defendant takes adequate preventive steps and reports to the trial Court with a request to dissolve the injunction, the Court may consider that request in accordance with law.

9. In the result and with the above observation, this petition fails and is dismissed. But in the circumstances, I make no order as to costs.

10. Petition dismissed.