Ouseph Vs. Thomas

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Court : Kerala

Decided On : Aug-05-1986

Reported in : AIR1987Ker75

Judge : S. Padmanabhan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 100 - Order 39, Rules 1 and 2

Appeal No. : S.A. No. 45 of 1986

Appellant : Ouseph

Respondent : Thomas

Advocate for Def. : M.P. Abraham, Adv.

Advocate for Pet/Ap. : T.L. Viswanatha Iyer, Adv.

Disposition : Appeal allowed

Judgement :

S. Padmanabhan, J.

1. Defendant is the appellant. The suit for injunction filed by the plaintiff was dismissed by the Munsiff, but decreed by the District Judge in appeal.

2. Plaint A schedule property is the paddy field belonging to the plaintiff. East of it, defendant is having 27 1/2 cents of paddy field which is higher in level than the plaintiff's paddy field by 8 feet. In between the two paddy fields there is a canal and a bund together having a width of 5 feet. Plaint B schedule property is land measuring 20 feet in width out of the defendant's paddy field lying adjacent to that of the plaintiff. It is alleged by the plaintiff that the defendant has dug pits in B schedule property for planting rubber. Alleging that the rubber plants when grown up will cause damage to his cultivation plaintiff prayed for an injunction restraining the defendant from planting rubber or other shady trees in B schedule property and from using B schedule property for any purpose damageous to the use of his property. The prayer for injunction was thus put very widely. The claim was resisted by the defendant on various grounds. A commission was issued and the commissioner submitted a report and sketch. Plaintiff examined some witnesses and produced documents also.

3. The report of the commissioner and the evidence of the witnesses is to the effect that if rubber is planted in B schedule property and if those plants grow up into trees at a proximity of 20 feet from the eastern boundary of A schedule property, those trees will cause shadow to A schedule property and make cultivation difficult by falling leaves and seeds. The trial Court held that what is alleged is only apprehended injury and cause of action for injunction is only when actual injury is suffered. The appellate Court held that when the trees are grown up, the overhanging branches, and the falling seeds and leaves will render plaintiff's paddy field fallow if at least a clearance of 20 feet is not maintained. The view taken by the appellate court was that there is no point in leaving the plaintiff to suffer apprehended injury. Therefore, the wide and omnibus prayer for injunction was allowed by the appellate court without any reservation at all. By the granting of such an injunction what the District Judge did was to prevent the defendant from planting rubber trees or other shady trees and using his property for any purpose which could be considered damaging to the use of the plaintiff's property. Under the cover of such an injunction even a prospective construction of a building in the defendant's property could be prevented. That means any legal and reasonable use to which the defendant is entitled to put his property could be prevented on the ground that it is damaging the use of the plaintiff's property.

4. Even according to the plaintiff and his witnesses including the Commissioner the clearance required to avoid the apprehended damage and inconvenience is only 20 feet from the eastern extremity of his property. What is the sanctity of this twenty feet is a matter that cannot be ascertained with clarity. Any how from the eastern extremity of the plaintiffs property up to the canal and its bund there is a clearance of five feel. It so, even according to the evidence adduced by the plaintiff the further clearance required is only 15 feet. But the injunction granted is regarding 20 feet out of which there is even now an admitted clearance of 5 + 5 1/2 namely 10 1/2 feet. Thus the relief granted by the District Judge seems to be more than what the plaintiff bargained for through his evidence.

5. One of the grounds alleged by the plaintiff and accepted by the District Judge is prospective damage by the overhanging branches of the rubber trees, as and whenthey grow up, making the plaintiff's paddy field fallow. In the first place that is not an existing danger or damage. We will have to assume that the rubber plants will sprout up and grow into frees and branches will overhang and even at that time the plaintiff's property will continue as a cultivable and cultivating paddy field. So also we will have to assume that such branches will cause difficulties to the cultivation at that point of time. Many things can happen in between. Sometimes rubber plants may not grow up. They may get destroyed by natural reasons. Defendant may sometimes cut them away and re-convert the property into paddy field. It is also possible that the plaintiff himself may convert his paddy field into garden land and plant it with trees. If any of these contingencies happens there may not be any possibility of any danger, damage or nuisance. Then how can we assume with certainty that in future some damage is going to happen and therefore it has to be restrained by an injunction even now. Even if the plaintiff has any legal right the question of that legal right being affected in order to afford a cause of action will arise only when the right is affected.

6. Let us assume that trees will grow up and branches will overhang. Better remedy than the one to which the plaintiff may be entitled to at that time cannot be claimed by him now even conceding that he has got a cause of action on the basis of the apprehended future damage or nuisance. Protruding or overhanging branches are in the air and they may not amount to encroachment or trespass. It

will only constitute a nuisance, damage or inconvenience. When he incurs no damage, inconvenience or nuisance, he has no cause of action. The legal position regarding the rights of such an owner of land who is damaged or inconvenienced by such overhanging branches is now well settled. He can call upon the person who cause the nuisance to remove the branches and abate the nuisance. He can approach a court of law for getting the nuisance abated or for realisation of damages as the case may be. Even without doing any of these things and even without issuing notice, he can abate the nuisance himself by cutting the overhangingbranches provided he does not trespass upon the neighbour's land. Even entry into the land for that purpose may be permitted if there is threat of imminent danger justifying immediate action.

Trees may be standing in the neighbour's property and the right of the adjacent owner is only to get the nuisance abated by removing the overhanging branches and nothing more. Now what is sought to be prevented is the plantation of the trees themselves. I very much doubt the availability of such a remedy. I am fortified in the above legal positions by the decisions reported in Kuppandy v. Sivasankaran, 1982 Ker LT 908, Manikkam v. Kamla, 1986 Ker LT 536 : AIR 1987 Ker 72 and Gokal v. Hamira, AIR 1936 Lah 134.

7. In my opinion the oral and documentary evidence including the report of the Commissioner are of no avail in this case. The-anticipated damage or nuisance or inconvenience is from overhanging branches as well as falling leaves and seeds.

As laid down in (1890) 24 QBD 656 an occupier of land is under no duty towards his neighbour to cut the thistles growing on his land, so as to prevent them from seeding; and if, owing to his neglect to cut them the seeds are blown on his neighbour's land and do damage, he is not liable. In Muhammad Mohidin Sait v. The Municipal Commr. for the City of Madras, (1902) ILR 25 Mad 118 a cremation ground adjacent to a residential building was held not giving rise to an actionable nuisance. The land involved in this case is in Muvattupuzha where rubber cultivation is a normal use to which properties are put. 'Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would

be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'. (Sturges v. Bridgman, (1879) 11 Ch D 852 at p. 865).

8. Every man is entitled to put his property to the normal and reasonable use permitted and not prohibited by law. Cultivation which includes planting of trees is evidently a normal and reasonable use of which an owner could put his property. A neighbouring land owner cannot prevent him from doing so unless he has a legal right so to prevent. To put itotherwise, the planting of trees must infringe softie right belonging to the neighbour. Even conceding for the sake of argument that a future, apprehended, remote damage or nuisance or inconvenience can give rise to cause of action in present, the person who seeks the remedy will have to convince the court that some of his legal rights are likely to be affected thereby. Otherwise he cannot get an injunction.

9. Right to get vertical light and air may be one of the reasons which arms a land owner with the right to abate nuisance by cutting overhanging branches which may cause shade and prevent vertical air. Every owner of land has only the natural right to light and air vertically coming to his property and not laterally. Existence of natural right to light and air coming laterally would involve a serious restriction of the natural rights of the adjacent owner to build on his land as he pleases or to cultivate the property as he pleases.

Even if a neighbour builds with a view to obstruct light he cannot complain or prevent. Such complaint or prevention could be had only if he acquires an easement by grant or prescription. Such rights would amount to a restrictive covenant by the grantor. Regarding acquisition of such prescriptive rights also there are limitations provided by law. We are not concerned with those aspects because there is no claim or evidence of such rights. (See pages 170 and 171 of Ramaswamy Iyer's Law of Torts 7th Edn.). It follows that an apprehension of shade cannot be a ground on which the plaintiff could claim injunction. If at all that is a ground it would arise only when the branches overhang and abatement of nuisance becomes necessary. The apprehension that leaves or seeds may fall in future also cannot give rise to any cause of action for injunction. Even if it will give rise to cause of action, that will only be at the time when the nuisance or

inconvenience is caused.

10. Man is a social being. He is living in society. Give and take is necessary in all human actions. Those acts necessary for common and ordinary use and occupation of land and houses may be done, if conveniently done. It is as much for the advantage of oneowner as of another. For every nuisance one complaints of as the result of the use of the neighbour's land he himself will create in the ordinary use of his land. (See page 62 of Salmond on Law of Torts, 7th Edn).

Instead of asking the neighbour to put a portion of his land fallow the plaintiff could himself put a portion of his land fallow or he can put his property to such use as will not be inconvenienced by the reasonable use to which the neighbour puts his property. The attitude must be give and take and live and let live. Planting of trees cannot affect any legal right. Legal right and the consequent cause of action for remedy will arise only when damage is caused. So long as one lives in society he will have to tolerate others.

It. In view of what is stated above, it follows that there is absolutely no basis for the argument that the finding on facts concurrently entered by the courts below cannot be interfered with by this Court in second appeal. Whether there is a legal right giving right to a cause of action is a substantial question of law on which both the courts below went wrong. The appellate court committed an illegality in granting the wide injunction prayed for by the plaintiff without any reservation. The plaintiff was not able to establish that any of his legal rights were infringed. Therefore, he had absolutely no right to get the injunction prayed for.

The second appeal is therefore allowed. The decree and judgment of the District Judge are hereby set aside. The suit is dismissed with costs throughout.