HIGH COURT OF JAMMU AND KASHMIR

G.S.A. 12 Of 1997. Reported in 1998 (3) CCC 361 & CDJ 1998 JKHC 034. Judgment dated 5th March, 1998

THE HONOURABLE MR. JUSTICE G.D. SHARMA

Khajoor Singh VS. D.R. Sharma

Judgment

G.D. SHARMA, J.

(1.) The appellant has filed Second Appeal against the judgment and decree dated 30.12.96 passed in Civil 1st Appeal by the learned Addl. District Judge, Jammu whereby he has upheld the judgment and decree dated 30.12.1995 passed by the Sub Registrar, Munsiff, Jammu. The trial court had passed the decree of permanent prohibitory injunction restraining the appellant from installing Tyre-Retreading factory near the house of the respondent by shifting it from its old site in the locality known as Karan Nagar, Jammu,

(2.) On the pleadings of the parties, the following issues were raised -. (1) Whether the present suit is not maintainable? OPD (2) Whether the suit property is situated in a residential locality and defendant cannot run factory of sole retreading there? OPP (3) Whether the factory of sole retreading causes nuisance. If so, what is its effect? OPP (4) Relief?

(3.) The trial court decided all these issues against the appellant and in favour of the respondent. These findings were up-held by the First Appellate Court. The following substantial questions of law have been formulated in the memo of appeal: (1} Whether the suit is hit by Section 91 of Civil Procedure Code and therefore, liable to be set aside on that score? (2) Whether any case out-side the pleadings can be proved at the triai? (3) Whether any case of nuisance can be made out on the violation or breach of Master plan? (4) Whether in the absence of pleadings or proof of the degree of the nuisance complained of a case of nuisance can be made out? (5) Whether where any activity tantamounts to causing nuisance, it is obligatory to consider the question; whether the business activity should be completely closed down or any nuisance emanating from it. regulated by adopting certain measures before the matter is finally disposed of? (6) Whether the suit was barred by law by reason of the ouster of jurisdiction of the civil court to entertain, hear and dispose of the matter? (7) Whether the findings recorded by the courts below on issues No. 1. 2 and 3 are perverse and other-wise vitiated by fundamentally erroneous approach by both the courts below. It has been contended on behalf of the respondent that no substantial question of law is involved in this appeal and should be dismissed in limine, Heard the arguments.

(4.) Regarding the first proposed substantial question of law it has been argued on behalf of the appellant that in para 6 of the plaint.there were allegations regarding the creation of private as well as public nuisance, but no. full ingredients of the private nuisance as to how he and his family members were affected were given although in the amended plaint in para No: 6 certain averments were 'made by adding, "more' particularly by the plaintiff and his family members, who are nearest and worst affected residents". That this was un aurhorised addition in the plaint and could not be looked into in view of the findings dated 25.4.1988 recorded by the trial court. As no special loss or damage is pleaded or proved so this was not a case of private nuisance but purely of public nuisance and any proceedings to be initiated were to be regulated firstly by the procedure laid down in Section 91 of the Code of Civil Procedure. Since -this was not done so this suit is not maintainable as being violative of the mandates of law contained in Section 91 CPC and this is a serious question to be gone into.

(5.) The counsel appearing for the respondent has contended that even by ignoring the above stated addition of the ingredients of private nuisance as contained in the amended plaint in para No. 6. there were allegations which indicated that it was a case of private nuisance. He has referred to that portion where it is alleged that, "the defendant has planned to start the same trade in the entire building and in that event, the plaintiff who is residing in the nearest house shall be the worst victim of health hazard due to the factors enumerated above." He has also referred para 12 where It is alleged, "that in case the defendant succeeds in setting up the tyre sole retreading factory in that building the plaintiff and his family members and others shall suffer irreparable loss of health comfort arid convenience not to be compensated by any other means." Undoubtedly, if it was a case of public nuisance only then Section 91 CPC was attracted. From the perusal of the plaint as a whole, it transpires that the respondent had made averments of his sufferings which would have been caused by starting the trade in question. The test of a nuisance causing personal discomfort is the actual local standard of comfort and not an ideal or absolute standard. No use of one's property is reasonable if it causes substantial discomfort to other persons. In the case of Dhannalal and Anr. v. Thakur Chittarsingh Mehtapsingh it was held, that "if the defendant is found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction, although he' may be conducting his business in a proper manner arid according to rules framed in this behalf either by the Municipality or by the Government."

(6.) The burden of proof of issue No. 1 that the suit was not maintainable, was on the appellant The parties had led the evidence. The trial Court had found that respondent (plaintiff) had established that he resides at a distance of 10' from the building of the appellant and shall be

the worst victim of health hazard in case the appellant operates the Tyre-retreading business in the building. On evidence a case of private nuisance was established and this factual aspect of the case was confirmed in appeal by the 1st appellate court. In this Second Appeal such a question cannot be raised as a substantial question of law which on facts has been established and decided. On this view, it is found that this is not a substantial question of law arising in this case.

(7.) The counsel for the appellant has contended that the trial court had allowed the respondent to prove its case beyond the pleadings. This contention has been countered by the counsel for the opposite side by contending that in the plaint it was averred that Karan 'Nagar is a residential locality inhabitated by high-standard persons. Respondent in his statement had lent assurance to this view which was corroborated by the then Tower Planner Vinod Malhotra, who stated that commercial activities were not permitted in that area. This was a question of fact and both the courts below have concurrently arrived at a conclusion which cannot again be made a subject matter of controversy by stating that a substantial question of law is involved. On this view of the matter, it is found that this is not a substantial question of law to be raised in this case.

(8.) The learned counsel for the appellant has contended that it requires to be seen whether a case of nuisance can be made out on the violation of the breach of Master Plan. The Chief Town Planner by Mr. Vinod Malhotra in his statement has stated that as per the Master Plan the site in question has been earmarked for residential purposes only. In cross-examination, he has admitted that he had visited the spot. This is also a question of fact determined by the trial court and the appellate court concurrently and it cannot be re-opened. In the result, it is held that this is also not a substantial question of law which requires any adjudication.

(9.) The 4th question has been raised is whether in the absence of pleadings as well as the proof of the degree of nuisance com plained of a case of nuisance can be made out. The counsel for the other-side has contended that it was alleged and proved that the alleged activity could cause allergy to skin, eyes and lungs. The respondent who himself is a Doctoru had categorically stated that the trade in question emits offensive rubber smell, high carbon smoke and foul smelling gases annchod with carbon dioxide and Carbon monoxide. That when the tyres are retreated, the noise will be generated and there will be vibrations from the machines. Air pollution will be caused by the small articles of dust and smoke which will effect the health and following diseases can be caused by the same: (a) Snipective and alergic diseases. (b) ENT and Lung disease; (c) Deafness (d) Sore throat (e) Bronchits It can affect the eyes and skin. Lack of appetite due to the foul smell. More vehicles are to be parked on spot and inflamable material will also be used for the said business.: House of the respondent

is situated at a distance of 10' and he will be the worst sufferer because of noise and pollution, prone to catching diseases alongwith his family members. There is also the testimony of Dr. J.K. Sharma, Retired Health Officer, Municipality Jammu who has also stated that in carrying out this business fumes can cause irritation to eyes, allergy in the nose, irritation in. the throat, even a cancer of lungs, in case one is exposed to fumes which are emitted over a longer period of time. He had also stated that in case the sole retreading businesses conduct in the building in question it could affect the respondent and his family members as well as the other neighbours. His evidence could not be challenged except eliciting an admission that he is distantly related to respondent. After hearing the arguments and perusing the record, it can be said that the trial court as well as the appellate court has given the findings from the pleadings and on the evidence there are concurrent findings and these findings are of fact and cannot be said as involving substantial question of law.

(10.) Question No. 5 has a relation with question No. 4 and the appellant had not led any evidence to prove that by adopting any measures the nuisance could be controlled. This cannot be said as a substantial question of law to be raised therein.

(11.) Question No. 6 is regarding the ouster of jurisdiction of the Civil Court. The plea that Air Prevention and Control Pollution Act ousts the jurisdiction of Civil Courts was 'not taken before the trial court but for the first time if was raised before the 1st Appellate court which has effectively decided it. The appellant had failed to make out a case that the site of proposed trade had been brought within the limits of that area which Section 19 of the said Act declares that it is "Air Pollution Control Area". The case simplicitor before the trial Court was of a private nuisance and permament prohibitory injunction, which after due trial was decided and before the 1st Appellate Court the judgment and the decree were up-held. No-where, it was a case falling under the ambit of Section 46 of the Air Prevention and Control Pollution Act where the question of State Pollution Board could be considered and subsequently ouster of the jurisdiction of the Civil Court could arise. This is an after-" 'thought and an exercise in futility. No substantial question of law arises out of this argument.

(12.) Question No, 7 : Both the courts, have concurrently given the findings on the basis of evidence and the law applicable and it cannot be said that the findings on issues No. 1, 2 and 3 are perverse.

(13.) Viewing the case from all its perspective it is held that the courts below have concurrently held this case of a nature of private nuisance also where the respondent could suffer special damage although other people in general or some other neighbours in particular were also prone to suffer from the business. All the controversies which had arisen from the pleadings

have been dealt with and properly decided. At this stage no substantial question of law arises for determination. In this view, the appeal is found not fit for admission and is accordingly dismissed in limine. Appeal dismissed.