ORIGINAL CIVIL.

Before Ameer Ali J.

S. A. BASIL

v.

CORPORATION OF CALCUTTA.*

1940

Mar. 11, 12, 13, 14, 15, 18; *Apr.* 10, 11.

Nuisance—*Nuisance from smell—Refuse depot of municipal corporation—Inconvenience caused by vermin attracted to the depot—Statutory powers—*Injuria *caused to neighbouring house—"Least practicable nuisance"—Injunction, Form of—Continuing wrong—Loss in rental value of building—Damages—Damages pending suit and until removal of injunction—Limitation—Calcutta Municipal Act (Ben. III of 1923), ss. 371, 538—Code of Civil Procedure (Act V of 1908), s. 151.*

Under s. 371 of the Calcutta Municipal Act the defendant Corporation have to provide depots for temporary deposit and for final removal of refuse in Calcutta, provided that the powers are exercised so as to create the least practicable nuisance. The Corporation erected a refuse depot in 1933 near the Municipal Market for the temporary deposit of its refuse and for its clearance by lorries therefrom. The plaintiffs, who are the owners of a neighbouring house, complained of a nuisance due to the smell from the refuse depot and of the inconvenience and discomfort consequent on the vermin which were attracted to the clearance lorries and the yard and brought an action in 1938 for an injunction and for damages for the capitalized loss or injury to the building in letting value and in depreciation of sale value.

Held : (i) that if the Corporation had taken all reasonable care not to commit a nuisance, they would be protected notwithstanding that a nuisance might have been committed ;

Rapier v. *London Tramways Company* (1) distinguished ;

(ii) that as with reasonable care the nuisance that was caused could be minimised, the plaintiffs were entitled to an injunction and to damages ;

(iii) that the corporation would be restrained from creating any nuisance except such as was unavoidable after using all practicable means ;

Farnworth v. *Manchester Corporation* (2) relied on ;

(iv) that the claim to damages for the capital loss for the specific injury was barred by limitation;

*Original Suit, No. 1145 of 1938.

(1) [1893] 2 Ch. 588. (2) [1929] 1 K. B. 533.

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(v) that as the *injuria* was a continuing one, the cause of action arose from day to day and the plaintiffs were entitled to damages for the loss in rental value of the building for four months only prior to the institution of the suit under s. 538 of the Calcutta Municipal Act;

(vi) that under s. 151 of the Code of Civil Procedure, the Court could grant damages at the same monthly rate pending suit and also until the removal of the injunction.

ORIGINAL SUIT.

Relevant facts of the case appear sufficiently from the judgment.

S. M. Bose and *S. B. Sinha* for the defendant, Corporation of Calcutta. The nuisance complained of is the least practicable nuisance within the meaning of the proviso to s. 371. Reference may be made to *Chandra Sekhar Mukherjee* v. *Corporation of Calcutta* (1) on the interpretation of this section.

Assuming that the Corporation exceeded the limits as laid down under the above section, the plaintiffs cannot even then claim damages for more than four months as provided for by s. 538 of the Calcutta Municipal Act. The provision of the Limitation Act will not apply here.

Evidence as to damages adduced by the plaintiffs is far too remote. The principle applicable to the question as to damages is to be found in Mayne on Damages, 10th Ed., p. 42.

S. C. Mitter and *P. B. Mukherji* for the plaintiff. My contention is two fold. First, s. 371 does not apply here. It does not take away private rights either expressly or by necessary implication. The Corporation is in no better position than any other individual. *Metropolitan Asylum District* v. *Hill* (2), particularly the dictum of Lord Watson in the same case.

Secondly, even if this legal principle be not invoked in construing this section, my next point is that the onus is on the defendant to satisfy the

(1) (1939) 44 C. W. N. 194. (2) (1881) 6 App. Cas. 193, 208.

Court that the *injuria* complained of is the least practicable nuisance within the meaning of the proviso. *Manchester Corporation* v. *Farnworth* (1), and *Rapier* v. *London Tramways Company* (2).

The case of *Chandra Sekhar Mukherjee* v. *Corporation of Calcutta* (3) does not help the defendant even on the footing that it was rightly decided. It did not interpret this s. 371 from this angle, *viz.*: interference with private property rights. Even if section 538 of the Municipal Act limits the plaintiff's damages to only four months prior to suit, the Court has ample power to award damages during the pendency of the suit down to the date when nuisance is either removed or abated. No provision in the Civil Procedure Code in terms meets a case like this, but at the same time there is no prohibitory section. That being so, in the ends of justice the Court should exercise here its inherent jurisdiction under s. 151.

Cur. adv. vult.

March 18, 1940.

AMEER ALI J. This is a suit by receivers in whom is vested the premises, formerly 23, Free School Street, now No. 6, Free School Street, and they complain of a nuisance created by the defendants in the user of what has been referred to generally as a refuse depot.

The defendants, in a manner which has not been investigated, are the owners of the Sir Stuart Hogg Market, a very well-known institution in this city, and as such they have to provide for the removal of the refuse from that market. They have done so principally by the refuse-depot in question although there is another depot on the northern side. This depot is on the western outskirts of the market.

(1) [1930] A.C. 171. (2) [1893] 2 Ch. 588, 598.
(3) (1939) 44 C.W.N. 194.

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The Free School Street depot consists of two portions, which I shall refer to separately, as a lorry or trailer-shed, and the refuse yard. In the lorry shed is an inclined ramp, the purpose of which is to provide means for the municipal sweepers to empty their hand-carts or wheelbarrows into the trailer.

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The house in question has remained vacant for some eight years, and the *injuria* complained of is the smell from the refuse, and the inconvenience and discomfort consequent on the vermin which are attracted to the lorry and to the yard. How far it is necessary to distinguish I will discuss hereafter.

Mr. Mitter, has attempted to attract me by the law, but in my opinion, in this case, I need lay down no principles. As I understand the position speaking very generally, where a public body carries on activities in the course of which a nuisance or alleged nuisance is created, on the statute, by which that body is created, three questions may arise:—

(i) Whether the statute or section (in this case, s. 371) makes any difference at all, *i.e.*, affords any protection, *i.e.*, Is the public body in the same position as any private person?

(ii) At the other extreme, whether the section or statute provides an absolute protection, whatever the public body may have done?

(iii) An intermediate position where the Corporation is protected, notwithstanding that a nuisance may have been committed, provided they have done whatever is practicable to minimise the inconvenience; in other words, whether what they have done is more of a nuisance than it need be.

The difference between position (i) and (iii) is expressed in a case which attracted my attention by reason of its analogy on the facts with that before me,

in *Rapier* v. *London Tramways Company* (1), by Lindley L. J. as follows:—

Does the Act of Parliament give power to a public body to do—

> whatever in the exercise of their discretion they may think reasonable and proper in their own interest, provided they take all reasonable care not to commit a nuisance or is it that they may do what they think right in the exercise of their own discretion provided they do not commit a nuisance.

In my opinion, disregarding all questions of onus and permissive or other than permissive powers, the section in this case puts the defendant into position (iii), and indeed this, as I understood it, was not disputed by Mr. Bose: absolute protection is not claimed.

That is all I propose to say on the question of law. That being so, the following are, the questions which fall to be considered:—

(i) What has been complained of?

A question arises whether on the pleadings as they stand the plaintiffs are entitled to complain not only of the lorry or trailer and its contents, but also of the refuse yard generally. The defendants contend that the plaintiffs have confined themselves to the refuse trailer and shed.

(ii) Have the defendants in what they have done taken all reasonable care not to commit a nuisance?

Have they done their work in such a manner as to create the least practicable nuisance?

In the course of the discussion I took the liberty of summarising the points to be considered upon the evidence in the following manner:—

(a) Choice of method—to dump or not to dump; in other word whether the system generally was a proper one.

(b) Where to dump, *i.e.*, the propriety of the site, and

(1) [1893] 2 Ch. 588, 599.

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(c) How to dump, *i.e.*, the method adopted in the user of this refuse dump.

As I may have to point out later, the plaintiffs in the first instance appeared to confine their attention wholly to the second question, namely, site, and they seem to have considered it sufficient to point out what is obvious, that the inconvenience to them would be lessened by the refuse depot being further away from the house, notwithstanding that it might be a greater inconvenience to the public.

In considering the last question, the user of the dump, the following points have been throughout in my mind, which I think it convenient to enumerate: —(i) trailer, (ii) trailer-house, (iii) separation of refuse into animal and vegetable, (iv) yard, (v) bins, (vi) hand-carts, (vii) handling, (viii) removal in horse-cart, (ix) general supervision.

The significance of these points will become apparent, I hope, in discussing the evidence.

So much for a general view of the *injuria*.

With regard to damages, I have postponed consideration of that matter, but that if nuisance is established, some damages have ensued is not disputed.

It is convenient, first, to discuss the question—what has been complained of?

It is quite true that both in the plaint and in the evidence of Mr. Basil and Mr. Barber, the matter to which attention is mainly focussed is the trailer and trailer-house. The plaint on the other hand does refer generally to the area both described in the body and delineated in the plan.

The written statement does not appear to me to be based upon any distinction, and it must be remembered that the individual importance of trailer-house and refuse yard is largely, if not wholly, the result of the theory of separation of refuse which

does not appear in the written statement, and upon which, I think, counsel were not, until a late stage, instructed. The moment that case was made, and the photographs which form such a feature of this case, put in, the centre of interest shifts to the refuse yard and the bins just as those bins are plainly the centre of interest to the animal kingdom. In my opinion it would not be right to shut out evidence of the condition of the yard or to decide this case without a consideration of the condition and user of the refuse depot as a whole.

Next: has a nuisance been established?.

I hold in the affirmative, and my reasons will appear from my views on the main questions to be discussed, namely, was it more of a nuisance than need have been?

Before I discuss this question I must admit to having taken a greater part in the discussion than is usual for me, and I also wish it recorded that Mr. Bose bore this additional trial with his usual patience and tact. It did make the case more difficult for him. My reasons were fully appreciated by him, namely, that I considered that the plaintiffs had missed certain more important points in the case, and points which in the interests of all concerned should not be neglected. The plaintiffs' attention seemed to be rivetted upon damages, and as I have already said, confined so far as method or propriety is concerned, to the question of site. It was indeed with some difficulty that counsel could be persuaded to devote his attention to the question of bins, covers and handling.

Again it must be remembered that the importance of this was largely the result of the case made at the trial to the effect that all animal refuse was confined to the bins standing in the yard.

The case on behalf of the Corporation was, if I may say so, admirably conducted at the trial. I have,

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however, this criticism to make, that it was a case eminently calling for advice on evidence and if this case has been lost other than upon its real merits, it is due to such advice not having been taken.

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The result of not taking such advice, was that the matter was at the trial in what may be called a plastic state. However, the moment Mr. Bose saw the photographs, to which I shall shortly refer, he at any rate fully realised that the avoidable nuisance which the defendant has in this case to face is constituted by the vermin and parasites to which the refuse dump is an attraction, in particular, the vultures.

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So far as the photographer is concerned, the best results of my observation are as follows: that he did realise more than he admitted that his photographs were to represent dirt and vultures, but that save for this, there was nothing in his demeanour or otherwise to suggest that he had in any way participated in any fraud or attempt to take an unfair picture.

In my opinion, therefore, these photographs must be taken as fair, notwithstanding that they may have been taken on dates although not particularly chosen when there was a very full attendance of vultures and at times—and this, I think, is the important thing—at a time of the day when the attendance is always at its best, namely, the time of clearance.

My inference from this evidence and my findings are as follows:—

First, I think that a certain amount of animal matter finds its way into the lorry and this is because the theory of separation of animal and vegetable is not rigidly carried out in practice. To my mind, the matter is comparatively unimportant, but my view is supported by the fact that there is no logical reason for the separation. It has not been adopted, because

it is recognised that there should be a different method of treatment for animal refuse. There is no question of different bins for different classes of refuse, as, for instance, in a modern city or because the bins set upon the platform are more appropriate containers or because the corporation lorry is better for vegetables, and conservancy horse drawn carts are better for meat. The distinction is purely sociological or historical, namely, as I understand it, because originally at any rate different classes of sweepers handled different classes of refuse.

My second finding is that the system adopted does afford undue opportunities for the attendance of parasites, big and small with consequent disposal of remains.

With regard to the removal to the bins it is hardly a part of this case although that matter may have to be investigated in considering an alternative, or what one might call "a thorough" system of removal. That is more a matter for the public than for the plaintiffs.

I find that the bins themselves were not proper receptacles.

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With regard to the question whether the intervention of vermin such as described can constitute a nuisance I hold in the affirmative and this not only from the point of view of health but also from the point of view of psychology. This reminds me that Mr. Bose suggested in cross-examination that the only class of tenant which the plaintiffs could obtain for this residence was what he calls women of a particular class. Be that so, it makes to my mind no difference. I cannot believe that those who sacrifice at the shrine of Venus desire to be attended by the ill-omened fowls of Mars.

There is the evidence of the Principal of the Free School that the vultures come into collision with the

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small boys. The small boys cannot get out of the way of the vultures or *vice versa*. We are perhaps unduly prejudiced against vultures. Vultures on the outskirts of an Indian village in the small hours of the morning is one thing, vultures on the outskirts of the New Market in the middle of the day is another thing. There is a time and place for the obscene.

With regard to health, no expert evidence has been given. But I take the view that vermin and parasites of the various species that attend this refuse dump must inevitably be injurious to those living in close proximity.

My fourth finding is that notwithstanding difficulties a considerable improvement could be made.

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The result is that the plaintiffs are entitled to succeed. With regard to damages the matter will remain over, and if not settled I will have to deal with it.

With regard to an injunction, subject to hearing counsel, I do not propose to make the common order. I have drafted the lines of the special order and I shall welcome the assistance of counsel in putting it into shape.

I wish it to be remembered that this is not a victory obtained over a public enemy but a stricture upon the public of Calcutta for not performing satisfactorily their civic duties.

If good results, the money will have been well spent, but the damages which are ordered are damages which Mr. Sinha and myself among others will pay.

The form of the injunction which I propose to pass is upon the following lines which I should like counsel to consider, restraining the defendants from dumping refuse in the trailer or in or about the trailer or in or about the trailer shed and refuse yard

in the manner complained of and in particular so as to expose animal and other organic refuse so as to (a) attract vermin and parasites, (b) permit of loss and leakage, (c) emit noxious odours without providing more suitable receptacles and vehicles and an improved system of transport.

I shall, therefore, adjourn the matter in order to enable counsel to consider their position in regard to the question (i) of damages and (ii) of injunction.

The plaintiffs are entitled to costs. With regard to costs, counsel for the defendants has asked me to reserve that matter until the other matters have been disposed of, but in case it be forgotten, I certify that it is a fit case to warrant the employment of two counsel.

April 11, 1940.

Two matters remained over and were considered yesterday. The first, and to my mind the more important was the form of injunction; the second, damages.

In point of fact, in this case certain somewhat important questions do arise with respect to the claim for damages, and I shall give my decision, notwithstanding that I may not have given that aspect of the matter as full consideration as it requires.

Dealing first with the question of injunction, I indicated to counsel my desire to put the injunction in such a form as would first suggest to the defendants how they might, in my view, abate the nuisance and secondly, in such a form as would not embarrass the defendants in any attempt to carry out the necessary changes.

In this respect I have, as I expected, received the utmost assistance from both Mr. Bose and Mr. Sinha on behalf of the Corporation, and substantially, with certain amendments which I shall note and explain,

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I have adopted Mr. Sinha's draft. It is based upon a decided case, *Farnworth* v. *Manchester Corporation* (1).

I shall now dictate the form of injunction and thereafter indicate the amendments I have made in counsel's draft and the reasons for making them :—

I. Injunction restraining the defendant Corporation from dumping refuse in the trailer, or in and about the trailer shed and refuse yard : (i) in the manner complained of, or in any other manner which permits—

(a) animal and other organic refuse to be exposed so as to attract vermin and parasites;

(b) leakage of offensive matter from the receptacle used for dumping the refuse;

(c) noxious odours from the refuse dump to be emitted,

except in so far as such results are unavoidable on using the best known methods within reason;

(ii) without providing for the collection of refuse in such receptacle and removal thereof in such vehicles and by such means of transport as may not cause damage or injury to the plaintiff or his premises, other than such damage or injury as is unavoidable on using the best known methods within reason.

II. The operation of the injunction will be suspended for one year to enable the defendant corporation to adopt such measures as they are advised, to terminate or mitigate the nuisance, provided that the suspension may be removed unless—

(*a*) the defendant corporation reports to the Court within six weeks by letter the name or names of the expert or experts whom the corporation decide to consult;

(1) [1929] 1 K. B. 533 (547) ; on appeal [1930] A. C. 171 (184).

(*b*) the defendant corporation reports progress of the measures to be taken, at intervals of three months thereafter;

(*c*) the defendant corporation will pay to the plaintiff compensation until the removal of the injunction or further order, monthly at the rate fixed for damages.

III. Liberty reserved to the defendant corporation to apply to Court to dissolve the said injunction on the defendant corporation establishing, if it be not admitted by the plaintiff, that they have exhausted all reasonable modes of terminating or mitigating the nuisance.

My comments are as follows: The provisos in Part 2 of the order were inserted by me without the consent of counsel. The object is clear.

I have allowed the corporation one year's time, notwithstanding Mr. Mitter's objections, subject to the check contained in the proviso realising as I do that the Corporation also has its difficulties.

The language of the qualifying clause to the injunction is mine and an explation of it will help to make clear my view of the law.

Mr. Sinha, in his anxiety to be scrupulously fair, used the phrase "such injury as is absolutely unavoid-"able". Persons who have followed this trial will know what that means, but it might be liable to misconstruction hereafter and I have, therefore, used the language of the suburbs to indicate my reading of the statutory phrase "least practicable nuisance". "Practicable nuisance" is not a wholly happy expression. You are not trying to create a nuisance: you are trying to avoid it. It is a contraction of the injunction to "create no nuisance, except such as is "unavoidable, using all practicable means". I have avoided the word "practicable".

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One neighbour says to another: your kitchen chimney causes a nuisance because the smoke blows down into my back garden. Forget for the moment that in private life there is no excuse for a nuisance, and, secondly, that what two neighbours call a nuisance may not be a nuisance in law. The neighbour, whose smoke is complained of, will reply: I will do everything, within reason; I will not buy an electric stove, that is out of the question, that means altering my whole house and I cannot afford it, but I will affix a cowl; I will sweep my chimney, I will use better coal; I will tell my cook not to burn rubbish; in other words, I will do everything "within reason" to see that it is not a nuisance. That, in back garden phraseology, is what I take to be the law, and I, therefore, use that phrase "means within reason" as a paraphrase.

Coming now to damages, the fact is that since September, 1933, this house has remained untenanted, and, according to the plaintiff, that is due entirely and wholly to the nuisance. I am not now on the question of fact. According to the plaint, paragraph 6, it is alleged that the nuisance is continuing *de die in diem*, with which proposition I agree. We do not now-a-days, as we used to, state at the bottom of the plaint when the cause of action arose. The procedure has this value in that, at any rate, it helps the draftsman to make up his mind about the cause of action, the starting point of limitation and the way he is to claim damages.

In this case, except in so far as the matter is covered by a claim to further reliefs, the plaintiff has claimed only special damages as for a specific injury; in other words, the capitalized loss or injury to the building inletting value and in depreciation of sale value, amounting to Rs. 30,000. Upon this turns the argument of Mr. Bose, that, since this capital loss, this specific injury took place and must be taken as completed in 1933 or 1934 or, at any rate, long before

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any starting point for limitation, the suit being filed in 1938, the plaintiff's whole claim to damages is barred.

Mr. Mitter contends that, as the *injuria* continues, he can claim capital loss at any time, however many years may have elapsed between the *injuria* and the suit. With that proposition I am not prepared to agree. In my view, this is a case where the cause of action arose from day to day, where the *injuria* arose from day to day.

Mr. Bose points out that Mr. Mitter has not claimed damages on this basis, and reminds me that although I offered Mr. Mitter the opportunity of a formal amendment to ask for such damages and he declined the opportunity. I shall allow him to make that claim under the general claim for further relief and I will not shut it out although I think the matter should have been more fully considered. On this basis, the basis of continuing wrong and what I may call day to day damages, what is the starting point of the limitation? Mr. Mitter suggests it is prescribed by Art. 36.

The point argued by the Corporation is that into the Limitation Act we have to read a special Article of limitation created by the special Act, namely, s. 538.

Mr. Mitter has contended that this is not a substituted section. I referred Mr. Mitter to s. 29(2) of the Limitation Act. He contends that, although the suit must be filed within two months under s. 538, yet damages are claimable under Art. 36.

In my view, if, under Art. 36 or s. 23 of the Limitation Act, a claim to damages is barred before the period of limitation fixed in the Limitation Act, it is equally barred on the lapse of the period prescribed in the special Act. In other words, we are to ascertain the position on the Limitation Act, with the special section read into it.

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If this be right, the terminus *a quo* for damages is four months prior to the date of the suit. As already indicated, the argument on this point on the part of the plaintiff has not been of the fullest nature. I did not have discussed before me by the plaintiff's counsel ss. 23 and 24 of the Limitation Act. I have assumed to be applicable the principles suggested in Mayne on Damages, p. 530, have proceeded on a general impression of the matter on the sections.

Another question arises as to the *terminus ad quem* of damages. In England, the difficulty of granting damages until the hearing and during the continuance of the wrong was appreciated, and there is a special rule, O. 36, r. 58. In India there is no such rule and, as far as I can see, the only provision under which this Court ever grants damages or has granted damages for a period after the filing of the suit is in the special case provided for by O. XX, r. 12 of the Civil Procedure Code. I have, therefore, considerable doubts whether I have jurisdiction to make any decree as asked by Mr. Mitter, and whether this is a matter which comes within the s. 151 of the Code, but as the plaintiff is debarred from claiming damages for the period from August, 1938, to January, 1940, I propose to do so, and also because, if I do not, it means another suit every four months in the future.

I now come to the question of fact, and the parties have preferred to leave it to me rather than go to an inquiry, the additional cost of which would certainly exceed any difference which might, on the quantum of damages, be allowed by me, and that which might be allowed upon a more minute examination.

I have taken into account the following matters.

Locality. I infer on the evidence that the particular locality was declining in attraction.

As regards the state of repair, the house was, I think, generally deteriorating. Repairs to the extent of rupees two or three thousand were done. I do not

rule that they were done, as suggested by the defendant, wholly with an eye to the suit; but I do not think that, nuisance or no nuisance, they were sufficient or appropriate to make this house readily lettable. There is the inference to be drawn from the two alternative schemes. There is the inference to be drawn from the delay in filing the suit.

On the other hand, it is to my mind certain that the proximity of the nuisance was one of the main reasons, though not the whole reason, for the house becoming unlettable.

I think the fair amount at which to assess the damages, being the amount of loss in monthly rental value due to the nuisance, to be in the neighbourhood of Rs. 200.

There will, therefore, be a decree for damages at that figure for four months prior to the suit, for the period from the institution of the suit until to-day, and from to-day until the removal of the injunction or further order.

With regard to this last period, the matter is also covered by the special condition which I have inserted in the part of the order which operates as a stay. The figure will remain at Rs. 200.

The plaintiff is entitled to costs, including reserved costs, which includes the costs of the *de bene esse* examination.

Suit decreed in part.

Attorneys for plaintiff: *N. C. Mandal & Co.*

Attorney for defendant: *T. C. Mitra.*

G. K. D.