The offer in the written statement is more in the nature of a voluntary undertaking and does not amount to any admission of a legal right; that undertaking is coupled with conditions which no Court of law can enforce, namely, that the plaintiff should behave in a particular way and be amenable to the defendant. No decree could be founded on such an offer.

The appeal must accordingly be allowed and the suit dismissed with costs both here and in the Court below.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row.

SHAIKH ISMAIL SAHIB (PLAINTIFF), APPELLANT,

v.

NIRCHINDA VENKATANARASIMHULU IYAH, (DEFENDANT), RESPONDENT.*

1936, April 30.

Nuisance—Actionable nuisance—Act, whether or not an—Test—Noise by loud and discordant instruments—Making of, long after hour when people ordinarily go to sleep—Actionable nuisance, if.

Where an act is alleged to amount to an actionable nuisance, the Court must decide whether in view of the ordinary standard of comfort prevailing among ordinary people living in the locality the act is one which would amount to a serious invasion of the right of a person to comfortable dwelling in his own house No doubt the question is one of degree and, in applying the law to any particular case, the Court must be

* City Civil Court Appeal No. 71 of 1935.

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guided to a great extent by commonsense and the ordinary standard of comfort prevailing in the neighbourhood. But this does not mean that it is left entirely to the neighbourhood to decide which is an actionable nuisance and which is not.

Colls v. *Home and Colonial Stores, Limited*, [1904] A.C. 179, and *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138, 165, referred to.

Where the act complained of was that, during the performance of the ceremony known as Skanda Shashti, noise was produced by loud and discordant instruments like the tom-tom, cymbals, etc., and that such noise was made long after the hour when people would ordinarily go to sleep,

held that the act amounted to an actionable nuisance.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 768 of 1934.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for appellant.

T. M. Krishnaswami Ayyar for *Ponnuswami Ayyar* and *Narayanaswami Ayyar* for respondent.

Cur. adv. vult.

JUDGMENT.

This is an appeal from the decree of the City Civil Judge, Madras, dated 8th May 1935 in Original Suit No. 768 of 1934, a suit for an injunction restraining the defendant, his servants and agents from beating tom-tom and from producing loud music in his house, No. 29, Ramanuja Ayyar Street, Old Washermanpet. The plaintiff is the owner and resident of the adjoining house No. 30. Both the houses are situated in a residential locality and the defendant's house was also used purely for residential purposes till 1932 when the downstair portion of it was set apart by the defendant for what he considered to be a charitable purpose, namely, to allow anybody who

wanted to use it temporarily for performing marriage ceremonies, pujas, etc., free of rent. The convenience of getting a building for such purposes was apparently appreciated by many people after this "charity" was established, for the defendant's own account shows that in 1933 it was used for these pujas and ceremonies for 93 days and in 1934 the number of days rose to 122, and it would indeed appear that there is every likelihood of the "charity" becoming more and more popular and the house being more and more frequently resorted to in future. The defendant's main contest was that there was no actionable nuisance as a result of the noise and the only point decided by the trial Court was whether the act complained of, that is, the production of loud music and noise in connection with ceremonies and pujas carried on in the defendant's house, amounts to an actionable nuisance.

There is really no doubt as regards the facts, and there can be no doubt that for most of the time when the defendant's downstairs is occupied for the purpose of performing ceremonies and pujas, the noise produced during night especially is a source of great suffering to the neighbours who are unable on account of the noise to get proper sleep. The learned trial Judge was prepared to believe that at least during the performance of the ceremony known as Skanda Shashti there is terrible noise during night which is sufficient to disturb the sleep of the neighbours for at least six nights. He dealt with this question as follows :

"Can we direct that during the occasion of Skanda Shashti there should not be more than a certain amount of

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noise or that the noise should not go beyond a certain period? I am of opinion that in our present state of society it is not possible to issue an injunction in such cases."

The reason given by the learned Judge is that people are superstitious and they believe that this ceremony should be performed and that shouting as loudly as possible is an essential part of the ceremony, and that Courts could not dictate to those who want to perform such a ceremony that they should not perform it in that manner. As regards the other ceremonies, especially marriages, the learned trial Judge does not doubt that there was too much music in connection with the marriages but that as marriages are performed during special months, the noise caused in connection with marriages would not be such as to amount to an actionable nuisance especially as it is only in three or four days in a month that there is such a noise. The law which the learned Judge applied to the facts of the present case appears to be contained in the following observation :

> "In order that an act may be an actionable nuisance, it must be something which the society does not tolerate."

In other words, according to the learned trial Judge, the law is to be found in the opinion of the people in general about the act which is alleged to be an actionable nuisance. Applying this statement of the law to the facts of the case, the learned Judge was of opinion that there was no actionable nuisance and he accordingly dismissed the suit but without costs. The plaintiff appeals.

In this appeal by the plaintiff, objection has been taken to the statement of the law on the subject of actionable nuisance by the learned

trial Judge and I think the objection is well-founded. It is not quite correct to say that an act will be an actionable nuisance only if society does not tolerate it. No doubt the question is one of degree and in applying the law to any particular case, one must be guided to a great extent by commonsense and the ordinary standard of comfort prevailing in the neighbourhood. But this does not mean that it is left entirely to the neighbourhood to decide which is an actionable nuisance and which is not. It is the Court that has to decide whether, in view of the ordinary standard of comfort prevailing among ordinary people living in the locality, the act is one which would amount to a serious invasion of the right of a person to comfortable dwelling in his own house. As stated by Lord HALSBURY in *Colls* v. *Home and Colonial Stores, Limited*(1) :

"A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance, which will give a right of action."

That is a question of fact to be decided by the Court in each case. It is enough to refer to the latest case on the subject, *Vanderpant* v. *Mayfair Hotel Co.*(2), where the law on the subject is stated thus :

"Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthful enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered

(1) [1904] A.C. 179. (2) [1930] 1 Ch. 138, 165.

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with and a nuisance thereby caused, 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 obtaining among English people."

The only change in this statement of the law which is required to make it applicable to this country is to substitute the word "Indian" for "English". In the particular case before us, it is clear that the noise is so much that it prevents people in the neighbourhood from having proper sleep during nights. Sleep is not the luxury of a few but is a necessity of mankind generally, and repeated disturbance of natural sleep must necessarily cause a great deal of discomfort and even suffering. I can quite believe the plaintiff when he says in his evidence that as a result of this noise a child of his died in the house. It is almost a torture to prevent a sleeper from sleeping, and when this torture is repeated, it is quite probable that there may be danger to health and even to life. Sleep is human nature's daily medicine, and disturbance to sleep is not a matter of complaint only to people of refined susceptibility, but to everyone, whether in Tondiarpet or elsewhere. There can be no doubt that the noise in the present case is not produced by ordinary music but by loud and discordant instruments like the tom-tom, cymbals, and so on, and when such noise is made long after the hour when people ordinarily go to sleep, it must necessarily amount to an actionable nuisance.

The present case is moreover one in which we are not dealing with the ordinary user by a man of his dwelling house or the performance of ceremonies

therein on his own behalf or by himself. This is a case in which the defendant has caused to be concentrated in his house the noise that would otherwise be distributed among many houses. This concentration of noise must necessarily be a very great affliction to his neighbours, and in my opinion it is no answer to say that it is all done for the sake of charity. Charity which involves so much suffering to one's neighbours does not seem to deserve much encouragement, and certainly it is not a defence to an action for injunction in respect of an actionable nuisance. The defendant himself has stated in his evidence that he does not want any noise to be made between 11 p.m. and 3 a.m., and so this is not a case in which he would be personally inconvenienced in any way if loud music is prohibited at least between 11 p.m. and 3 a.m. This interval is however in my opinion too short. The interval should be at least six hours. The defendant however prefers that the six hour interval during which loud music or noise should be prohibited should be between 10 p.m. and 4 a.m. instead of 11 p.m. and 5 a.m. On the whole, I do not see any reason why in this matter his preference should not be accepted. It is not unreasonable, and there is no particular reason why the hours of sleep should not be put one hour earlier, for even according to the plaintiff the people in this locality generally go to bed by 8 or 9 p.m., and if noise is prohibited after 10 p.m., it would be more convenient in my opinion to the people in the neighbourhood, even though the plaintiff personally for reasons of his own would prefer the prohibition to be between 11 p.m. and 5 a.m.

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I am of opinion that the learned trial Judge was wrong in coming to the conclusion that the plaintiff had not established an actionable nuisance. The acts complained of have been fully proved and they certainly amount to an actionable nuisance, and the only remedy in such a case is to grant an injunction. The injunction will be in the following terms : that the defendant, his servants and agents be hereby prohibited from producing any loud noise or loud music such as would disturb the sleep of the neighbours at any time between the hours of 10 p.m. and 4 a.m. There will be a decree accordingly and the decree appealed from will be set aside. The plaintiff will be entitled to get the costs of his appeal from the defendant (respondent). There will be no order as to costs in the trial Court.

A.S.V.