

ORIGINAL CIVIL.

Before Mr. Justice Sen.

SERENE COWASJEE

v.

N. M. COWASJEE AND OTHERS.*

1936

July 31.

Residential purposes, land sold for—Erection and use of a community hall—Social and ceremonial functions—Use of a residential area—Material, social and spiritual needs of residents—Breach of covenant—Plaintiff's knowledge of and acquiescence in building of hall—Injunction.

In a conveyance of land in Rangoon there was a covenant as follows: "It is agreed and declared that as the site hereby sold falls within the residential area its use shall be restricted to residential purposes and that in the utilization of the land hereby sold the area allotted to the dwelling house together with out-houses shall be about an acre." Adjoining this site there were two other plots which the vendor had conveyed to the purchaser without any covenant as to user. The purchaser conveyed these sites measuring 3'282 acres by way of gift to the Parsee community and a community hall, a spacious and imposing building, was erected thereon. The hall was used for social and ceremonial purposes.

The plaintiff (vendor) sought an injunction restricting the use of the hall as such, and in the alternative claimed damages for depreciation in value of her surrounding lands. It was in evidence that the plaintiff's advocate who prepared the draft conveyance told the purchaser that by the clause it was intended that the land should not be used for industrial purposes. Prior to the sale of the land to the purchaser, the plaintiff was willing to sell it to a school, and in advertising the sites for sale, the plaintiff specially invited tennis and recreation clubs to buy them.

Held, that the erection of the community hall and its use as such was not a breach of the covenant. A residential area, besides containing dwelling houses, must contain buildings that would supply the material, social and spiritual needs of the residents. The hall was not different from a club, school or hotel so that it could be excluded from the term "residential area." The second part of the covenant simply meant that if a dwelling house was constructed, it was not to be within a lesser area than an acre.

Held on the evidence that the plaintiff had full knowledge that the site would be used for the erection of a community hall and of the use to which it would be put, and had acquiesced in its construction and was therefore disentitled to an injunction. *Held further* that the hall enhanced the value of the locality and so no case for damages was made out.

Sayers v. Collyer, 28 Ch. Div. 103, referred to.

1936
SERENE
COWASJEE
v.
N. M.
COWASJEE.

Aiyangar for the plaintiff.

Clark for the defendants.

SEN, J.—The Merwanji Cowasjee Hall in Campbell Road is the Community Hall of the Parsees and is an imposing structure built within a compound of 3.282 acres. The land on which this building stands was gifted to the Trustees of the Parsee Fire Temple Trust by Mr. N. M. Cowasjee, one of the Trustees of the Trust, for the construction of the Hall.

The plaintiff is the widow, executrix and sole beneficiary of the late Mr. Bomanjee Cowasjee of Rangoon who owned *inter alia* a large estate of land and buildings approached by Tower Lane from Park Road on the one side and from Campbell Road on the other and the land of the Community Hall prior to 1931 formed part of this estate. The coloured plan in Exhibit D shows the extent of the plotting of the estate of the late Mr. B. Cowasjee and it also shows a number of houses on the northern side standing upon the adjoining estate belonging to Mr. N. M. Cowasjee, the first defendant. It appears that after the death of the late Mr. B. Cowasjee his widow the plaintiff entrusted Mr. F. W. Gooch with the management and sale of the properties of the estate and also appointed him as her attorney.

Mrs. B. Cowasjee has been permanently residing in London since about 1923 and Mr. Gooch was also a resident of London. In or about 1930 Mr. Gooch was sent out to Rangoon as such attorney. Shortly after his arrival in Rangoon Mr. Gooch alleged that the first defendant had encroached upon the land of his uncle, the late Mr. B. Cowasjee. The encroachment complained of was an intermittent encroachment along the common boundary of the two estates. With a view to putting an end to this dispute the first defendant,

although he denied the encroachment, purchased from the plaintiff through Mr. Gooch sites 1 and 2 measuring 1.7 acres and 1.048 acres respectively (as shown in the coloured map) by a conveyance dated 31st January 1931. Site 1 was low lying ground and included a tank some 12 to 15 feet deep extending over the major portion of the site. After purchasing site 1 and 2 the first defendant commenced reclamation work on site 1 with the object of filling up the tank and the low lying land. He discovered that he needed more earth for his reclamation work and so he purchased through Mr. Gooch site No. 5 measuring 1.308 acres on the 10th March 1931. In the conveyance of sites 1 and 2 there is no special covenant, but the conveyance of site 5 contains the following covenant, namely :

“ It is agreed and declared that as the site hereby sold falls within the residential area its use shall be restricted to residential purposes and that in the utilization of the land hereby sold the area allotted to the dwelling house together with out-houses shall be about an acre.”

The first defendant gifted to the Parsee Trust the whole of site 5 and portions of site 1 and 2 measuring in all 3.282 acres. The Trustees of the Trust constructed the Community Hall on this site. The foundation stone was laid on the 22nd August 1933 and the building was completed by early 1934. The Hall stands mostly, if not wholly, on site No. 5. The plaintiff has instituted this suit against the Trustees of the Parsee Trust in whom the Community Hall is vested for an injunction to restrain the use of the Hall as such, upon the basis that there has been a breach of the covenant “ that the site sold should only be used for erecting a building thereon which should only be used for residential purposes.” as set out in paragraph 11 of the plaint.

1936
 SERENE
 COWASJEE
 v.
 N. M.
 COWASJEE.
 SEN. J.

1936

SERENE
COWASJEE
v.
N. M.
COWASJEE.
SEN, J.

The defendants contend :

- (a) that the covenant in question was intended to prevent the use of the site for industrial purposes and meant nothing more ;
- (b) that the Hall does not offend against the covenant ;
- (c) that there is residential accommodation in the Hall ;
- (d) that there has been acquiescence on the part of the plaintiff ;
- (e) that the plaintiff is not entitled to an injunction in any event ; and
- (f) that no damages have been sustained.

The plaintiff as an alternative to an injunction has claimed Rs. 10,000 as damages being the estimated depreciation in the value of the adjoining sites 2, 3, 5, 6 and 9.

The following issues were framed :

- (1) Has there been a breach of the covenant in the deed of March 1931?
- (2) Has the plaintiff acquiesced in such breach ; if so, does such acquiescence disentitle her to the reliefs claimed in this suit ?
- (3) Is the plaintiff estopped from asking for the reliefs in suit ?
- (4) Is the plaintiff entitled to an injunction in suit ?
- (5) If not, in the alternative, is the plaintiff entitled to damages for the reasons set out in the plaint and if so to what amount ?

One of the matters for determination in this case is the meaning to be attached to the expression " residential purposes." The dictionary meaning of " residential " is " of or pertaining to residence or residents." The first defendant states that it was intended by " residential " that the land should not be used for industrial purposes and nothing more and that it was so stated to him by Miss Dantra, Barrister-at-Law, who was acting for Mrs. Cowasjee and had prepared the

draft conveyance. The first defendant stated that he objected to the insertion of this clause as there was no similar clause in the conveyance of lots 1 and 2. He says that he ultimately accepted Miss Dantra's assurance as he had no intention of erecting a structure thereon for industrial purposes.

It is not disputed that Miss Dantra prepared the draft and although she was not the constituted attorney of Mrs. Cowasjee she was in close communication with Mr. Gooch and was admittedly an advocate acting for the plaintiff. I accept the evidence of Mr. Cowasjee but I do not propose to decide this issue merely upon this consideration. There is absence of authority on this subject but if we consider the relevant facts and the surrounding circumstances it is impossible to attach to this covenant the narrow meaning which I am asked to accept by the learned advocate for the plaintiff.

It must be remembered that sites 1 and 2 had been sold without any restrictive covenant. If the Hall had been constructed on sites 1 and 2 no objection could have been raised. It is even possible that sites 1 and 2 could have been used for industrial purposes with impunity. To my mind the absence of any covenant as to sites 1 and 2 militates against a narrow construction of the covenant in dispute. I agree with the learned advocate for the plaintiff that the covenant must be read as a whole, but the language of the covenant is not so clear as not to raise a substantial doubt as to its scope and effect. To my mind it is evident upon a natural interpretation of the covenant that the use of the land was restricted to residential purposes because the site sold fell within a residential area, and it is therefore important to consider whether a Community Hall is a building which can find no place in a residential area. Now taking the town of Rangoon itself, it must be admitted that the

1936
 SERENE
 COWASJEE
 v.
 N. M.
 COWASJEE.
 SEN. J.

1936

SERENE
COWASJEE
v.N. M.
COWASJEE.

SEN, J.

Cantonments constitute a residential area and yet within that area are to be found churches, clubs, medical institutions, a hotel and even schools. I have evidence before me which I accept that Mr. Gooch prior to the sale to the first defendant was willing to sell plot No. 5 in question to a school. Is a Community Hall so different from a club, school or hotel that it could be excluded from the term "residential area"? I think the answer is clearly in the negative.

Learned counsel for the Trustees has contended with considerable force that residential areas must of necessity contain within themselves buildings used partly or in whole to cater to the material, social and spiritual needs of the residents. I am satisfied whatever may be the ultimate limits of the expressions "residential area" and "use shall be restricted to residential purposes" the Community Hall falls within those expressions. The second part of the covenant to my mind means simply this that if a dwelling house is constructed it shall not be within a lesser area than one acre; I may say at once that the language of the whole covenant is such as to suggest a set form rather than a special covenant relevant to a particular site. For instance there is nothing in the body of the deed with reference to "the dwelling house." It may be due to inexpert draftsmanship, but be that as it may, the result is in effect a covenant which cannot be construed against the Trustees in this case.

The covenant is the contract between the parties and it is relevant for me to consider what meaning the plaintiff herself attached to this covenant. Mr. Gooch had introduced the covenant when he was in Rangoon. After his return to England he was in close touch with Mrs. Cowasjee. He used to discuss her letters received by her from her agents in Rangoon and he would himself type the replies which she would approve and sign.

Exhibit M is a letter written by Mrs. Cowasjee to her selling agents in Rangoon, Messrs. Balthazar & Sons, and is dated the 5th December 1933. In that letter speaking of the Community Hall she says :

“ I thank you for the interest you have shown in the matter of preserving the amenities of ' The Retreat ' and in reply I would say that having sold Site five for building purposes I can hardly object to the Parsee Community or anyone else putting a Community Hall on it provided it is used in such a way as not to be a nuisance to other residents on the Estate.”

Then against in Exhibit 2 which is addressed to the second defendant and is dated the 17th October 1934 she writes :

“ Another question I am asking Mr. Gooch to look into is the New Parsee Hall. Of course I know that a Parsee building was being erected on one of my sites sold to Mr. N. M. Cowasjee but it is only quite recently that it has come to my knowledge that its ' activities ' would be such as would amount to a breach of the terms under which the land was sold.”

I hold on all the evidence before me that the erection and use of the Community Hall is not a breach of the covenant and the letters quoted above confirm the view of the Court that the plaintiff never intended to contract that no Community Hall should be erected upon site 5 and the plaintiff could not have intended, and in fact did not intend, to divorce the Hall itself from its normal use. She objected to such use of it as would constitute a nuisance, but this action is not founded upon nuisance.

It was urged before me that no building would be within the covenant unless persons were in actual residence. On behalf of the Trustees it is pointed out that at page 2 of the catalogue prepared by Mr. Gooch, Exhibit D, a special invitation is made to tennis and similar recreation clubs to purchase or take on lease sites similar to site 5. If it be true as

1936

SERENE
COWASJEE
v.
N. M.
COWASJEE.

SEN, J.

1936
 SERENE
 COWASJEE
 v.
 N. M.
 COWASJEE.
 SEN, J.

Mr. Gooch says that the covenant in question was to appear in every conveyance then there would be an inherent inconsistency. Mr. Gooch counters the point by saying that he would insist on residential accommodation but refuses to answer the question whether actual residence was necessary and thereby failed to support the very foundation of his case. The Trustees have proved that there are living rooms in the Community Hall which could be occupied and used whenever required although they are not now so used. My finding on the first issue should dispose of the case, but in case I am wrong I propose to answer the other issues which have been raised.

The next issue of importance is whether the plaintiff has by acquiescence disentitled herself to any relief in the suit. There could be no acquiescence unless the plaintiff knew the position at the time of acquiescence, but if there has been acquiescence, it will be an answer to the suit as has been held in *Sayers v. Collyer* (1).

On the question of acquiescence an examination of the correspondence is material. The letters of Mrs. Cowasjee were written by Mr. Gooch and approved and signed by her. Mr. Hormasji was her agent from May 1931 to July 1933. Miss Dantra was joint agent with Mr. Hormasji and thereafter her sole agent. Balthazar & Sons were her selling agents. In or about August 1932 the first defendant expressed his intention of gifting 2 acres of land to the Trust and Mr. Hormasji, his co-Trustee and agent of Mrs. Cowasjee, wrote to her as follows on the 10th October 1932, (Exhibit E).

[His Lordship held that this letter and other correspondence showed that the plaintiff was informed that a hall with a garden would be built on the land and

used for Parsee ceremonials and functions whose nature and character were familiar to the plaintiff. In two of her letters the plaintiff approved of the building and added that it would add to the amenities of the adjacent sites. His Lordship held that the plaintiff had full knowledge of the facts, and by her acquiescence was not entitled to an injunction.

His Lordship discussed the evidence as to damages. The plaintiff alleged that she had difficulty in getting purchasers for sites near the hall and on account of it. His Lordship held that there was no evidence to support the allegation and that the defendants had successfully established that the hall had enhanced the value of the locality. His Lordship dismissed the suit with costs.]

1936
SERENE
COWASJEE
v.
N. M.
COWASJEE.
SEN, J.

CRIMINAL REVISION.

Before Mr. Justice Mya Eu.

D. K. NATH v. P. K. NATH.*

1936
Sept. 25.

Complaint—Compensation for frivolous complaint—Duty to examine all the witnesses produced by complainant—Refusal to issue commission to examine a witness—Legality of discharge—Criminal Procedure Code (Act V of 1898), ss. 250, 252.

A magistrate examined all the witnesses produced by the complainant who had charged the accused with an offence punishable under s. 380 of the Penal Code. The magistrate refused to issue a commission to examine a witness for the complainant residing in India on the ground that his evidence was not material. On the evidence before him the magistrate held that the complaint was frivolous, discharged the accused and awarded him compensation under s. 250 of the Criminal Procedure Code. The complainant applied to the High Court for revision on the ground that all the evidence he wanted to adduce had not been taken by the Court.

Held, that the magistrate had taken all the evidence that was produced by the complainant, and had rightly refused to issue a commission and therefore his order of discharge was legal and the order for compensation valid.

Shwe Zin v. Maung Tun Hla, 1 L.B.R. 44, referred to.

Parthasarathi v. Ayyar, I.L.R. 51 Mad. 337, distinguished.

* Criminal Revision No. 564B of 1936 from the order of the Second Additional Magistrate of Rangoon in Criminal Regular Trial No. 87 of 1936.