Moothoo R v Osprey Co Ltd & Anor

2004 SCJ 308

IN THE SUPREME COURT OF MAURITIUS

CHAMBERS

In the matter of:-

MOOTHOO RAJEN

Applicant

V

OSPREY CO. LTD & ANOR

Respondents

IPO

THE PS MINISTRY OF ENVIRONMENT & ORS

Co-Respondent

Judgment

I issued an interim injunction, ex parte, in this case on 23rd day of September restraining and prohibiting the respondents from continuing with development and clearing works, constructions, the felling of trees etc. on the "pas geométriques" overlooking the property of the applicant. The basis for my taking such an extreme measure was that the averment of the applicant, supported by affidavit evidence with photographs showed that, unless and until rebutted, serious and/or unlawful environmental damage could be afoot. The photographs showed heavy bull-dozing, the uprooting of the trees and the destruction of other green vegetation.

The rebuttal did not take time to come in, in course of the inter partes process. Osprey Co Ltd was willing enough to plead as respondent no. 1. Originally, respondent no. 1 was Osprey International Co Ltd, an unknown respondent whom the applicant admitted he had mistakenly brought into cause. Respondent no 2, Soorien Sanasee Coomaren Murdy, put in an

appearance on behalf of the real company, Osprey Co Ltd. The co-respondent, the Ministry of Environment, also put in an appearance and came up with an affidavit which challenged the applicant's contention that the activities were illegal. From the state of affidavit evidence, it emerged also that the necessary permits, licences and authorizations had been given by the relevant authorities, which included respondent no 3, the District Council of Black River and co-respondent no 2, the Ministry of Housing and Lands. They were -

(a) a first planning clearance dated 21st October 2002 and a further planning clearance dated 7th January 2003 from the Ministry of Housing and Lands: see Document B and F of respondent's set of documents;

(b) a clearance dated 25th October 2002, from Ministry of Health and Quality of life on: see Document C, ibid.

(c) a clearance dated 30th October 2002 from Government Fire Services was obtained: see Document D, ibid.

(d) a clearance from the Ministry of Environment obtained on 25th November 2002: see Document E, ibid.

(e) a clearance from the Wastewater Management Authority dated 6th January 2003: see Document G, ibid.

(g) a clearance from the Ministry of Tourism acquired on 5th March 2004: Document H refers, ibid.)

It has also come out in affidavit evidence that the green light given in the case are far from blank cheques but entrenched with terms imposed on respondent no 1 and respondent no 2, which include sanctions in case of breach.

In the light of a clear rebuttal of the illegality alleged by the applicant, the basis on which I had granted the interim order no longer exists. I, accordingly, discharge the interim order issued and which has subsisted till now.

Remains now the issue of granting or not an interlocutory injunction in the circumstances pending the determination of the main case which I am told is in the process of being lodged.

SERIOUS ISSUE TO BE TRIED

My first consideration is whether there is a serious issue to be tried.

The averments in the original 18-paragraph affidavit of the applicant may be subsumed under 2 heads:

1. whether the applicant have a right to view which is being challenged;

and

2. whether the respondent is acting illegally in the circumstances without compliance with the Environment Protection Act as regards an EIA Report or a PER, the creation of nuisance and the opening of a side road in front of applicant's property.

Other points have been taken in course of oral and written submissions. I shall deal with them in their proper places.

RIGHT TO VIEW

The applicant avers that "he has always enjoyed a direct view of the ocean" which is the reason why he bought the property in 1983 – a property in the first position with sea frontage next to the "pas géométriques." He caused his residential house to be built in such a way in terms of its height, architecture, position etc that he could make optimum use of the site. However, he now finds that the respondents as lessees of the neighbouring plot have started raising a number of bungalows, comprising 40 units, so that "the direct view that (he) has been enjoying onto the ocean will be blocked by the proposed buildings which will have a height of more than 9 metres."

The two respondents deny that the circumstances show that the applicants may have acquired any "droit de vue" in the circumstances. They aver that if applicant was so deeply concerned with eternally securing his view of the ocean from his property, it was open for him to acquire a lease of the "pas géométriques" in front of his property which he did not do. In any case, the State has a right to develop the "pas géométriques," as owner of the property.

On the issue of "servitude de vue," what the applicant is obviously claiming tantamounts to a right of "I construct on my land. But you don't construct on yours." Such a prohibition would allow the applicant to continue enjoying an exclusive view of the ocean as he has been doing since 1983. I see his claim unwarranted. For one thing, I do not see that the content of his affidavits would entitle him to such a right. No owner may prevent his neighbour from constructing on his own land on the ground that the construction would result on a depreciation of the value of his property, so long as the constructions laws are complied with. As Précis Dalloz, "Les Biens" succinctly states on this particular issue: the right of each owner to construct is absolute and only subject to the compliance with the number of statutes that have to be complied with depending upon the type of constructions that is being raised off the ground and provided that the intention is not to cause harm:

« Un propriétaire peut, en droit commun, élever des constructions sur son terrain, à son gré, pourvu qu'il respecte les règlements et n'ait pas pour but de nuire à son voisin. » Les Servitudes, §620.

It follows, then, that the only obligation imposed on the servient tenement is that its walls do not contravene "les règlements." In Mauritius, "les règlements" are as a rule the building regulations where residential constructions are concerned: see Dupont v Societe Residence St Clement Court [1998 SCJ 365]. Where industrial constructions are concerned, they would have to comply with other types of "règlements" such as those listed above.

But there is more. In this case, the applicant is not claiming a right to view over the property of his neighbour but a right that goes well beyond: namely a right to deny the right of the neighbour to raise any construction on his property. A reading of articles 675-680 shows that by no stretch of imagination would law protect such an action.

I find, therefore, that there is no serious issue to be tried. There are other reasons for which I would decline to grant the order.

INADEQUACY OF DAMAGES

Even assuming that one could come up with an imaginative submission that there is an issue to be tried, I see the applicant would fail to pass the test of inadequacy of damages which he is bound to show to the judge in chambers. If the applicant's case is that should the building be raised, he would be for ever denied his right to view, the authorities establish that an appropriate remedy in such cases may only be obtained before the competent court, including the remedy for the leveling down of any impugned construction:

« Le propriétaire du fonds dominant peut alors, selon les cas, ou empêcher complètement son voisin de construire dans le champ des vues, ou l'empêcher de construire au-dessus d'une certaine hauteur. Lorsqu'une construction a été élevée au mépris de telles stipulations, le juge du fond ordonne à bon droit la demolition sans avoir à verifier si, en fait, l'emplacement de la construction litigieuse assure au fonds dominant un ensoleillement satisfaisant (Civ. Lre, 13 mars 1963, D. 1963. somm. 79). Le juge ne peut en pareil cas refuser la démolition et se borner à attribuer des dommanges-intérêts (Civ. 1re, 17 déc,. 1963, J.C.P. 1964. II. 13609, note C. Blaevoet, Rev. trim. Dr. civ. 1964. 569, ob. A. Tunc; 28 oct.1964. Somm. 106; 30 nov. 1965, D. 1966.)

BALANCE OF CONVENIENCE

True it is that a "servitude de vue" may be acquired. However, such a servitude that is being claimed by applicant being one of the luxury of having an open view of the ocean from his property may be acquired by express title. Even then, it is limited to the question of not building above a certain height:

« Servitude 'non altius tollendi'. Elle doit reposer sur un titre, et non sur la

seule constatation de la beauté d'un site qu'il convient de respecter (Montpellier, 5 juin 1963, Gaz. Pal. 1963. 2. 437). L'acquéreur qui s'engage, au profit de toutes les parties précisées à la convention, à ne pas dépasser une certaine hauteur, et qui bénéficie envers elles des mêmes stipulations, possède contre elles et ses ayants cause une action directe pour les contraindre au respect des engagements pris (Civ. 3e, 31 janv. 1969, D. 1969. Somm. 105; G. DUGAUD0-SAUMANDE, la démolition, sanction de l'inobservation de la servitude de no altius tollendi, note sous Trib. Grande inst. Nice, 5 nov. 1969, Actual jurid., P.II., 1971. 872; E.E. FRANK, la vue sur l'horizon est-elle protégée par la loi? Rép. Defrénois 1985, art. 33591, D. 1985, Chron. 249).

Any "servitude de vue" so expressly established should of necessity set out both the existence and the extent of that right. As French doctrine concludes after commenting a court decision:

"Si la servitude a été établie par un titre, disposant expressément que le propriétaire du fonds servant ne pourra obstruer en aucune manière les vues, aussi loin que le regard se prolonge, la stipulation doit être observée, et il s'agit alors d'une veritable servitude non aedificandi, ou non altius tollendi, si, du moins, le titre a établi à la fois l'existence et l'étendue de la servitude (Civ. 12 janv. 1948, D. 1948. 202; comp. Req. 10 fév. 1908, D.P 1908.1.416. »

Short of that express stipulation, a "servitude de vue" has that limited meaning that one may not raise any obstruction within the statutory distance between properties. As has been urged by case-law and doctrine:

« Il est admis aujourd'hui qu'à défaut de convention expresse, l'acquisition de la servitude de vue n'entraîne, pour le propriétaire sur le fonds duquel elle porte, que la prohibition d'élever, à une distance de l'ouverture moindre que la distance légale, des constructions ou obstacles qui détruiraient ou gênaient la vue acquise, que celle-ci l'ait été par la destination du père de famille ou par la prescription. Les servitudes non aedificandi et non altius tollendi étant, en effet, des servitudes non apparentes, elles ne sont pas susceptibles d'être crées par destination du père de famille ou par prescription (V., par ex., Civ. 12 janv. 1948, préc.; 29 juin 1921, Gaz. Pal. 1921. 2. 375; Montpellier, 5 juin 1963, préc.)"

Accordingly, on the issue of "servitude de vue," it cannot be gainsaid that the applicant has fallen short of showing that he has acquired a "servitude de vue" in the circumstances.

NON COMPLIANCE WITH ENVIRONMENT PROTECTION ACT

Mr S. Mohamed made the non compliance with the Environment Protection Act the main thrust of his case. He alleged fraud perpetrated on the public by the authorities when he submitted that permissions and permits had been granted spuriously in the matter. He also submitted on

the authority of Société United Docks v Government of Mauritius [1981 MR 500] that property had a wide definition and applicant entertained a legitimate expectations of his continuing enjoyment of his right to see the ocean horizon from his residence which he has been enjoying since the eighties. He also avers that if development was on the cards, the State should have made an offer to the applicant first. I do not think he was serious in these two submissions which he underplayed for that of violation of environmental laws.

He urged that the respondent should have complied with the requirement of an EIA or a PER and that the authorities have acted in breach when they granted authorizations for a development project comprising a hotel without the requirement of an EIA or a PER. He saw a subterfuge in the manner the respondents and the authorities have acted in that they used the term "bungalow" when what was being raised was a hotel which required compliance with an EIA or PER.

Mr S. Patten rightly pointed out that when the law was changed in 2002, it came with a change of shift as well. In the old law, section 13 provided that any person who started an undertaking without an EIA licence committed an offence and an undertaking as listed in the First Schedule did not include the construction of a hotel. In the new law, on the other hand, the comparable section 15 provided that no person shall be required to provide a preliminary environment report or an EIA in respect of any activity or project other than an undertaking. The list of undertakings as given in the First Schedule included an inland hotel which now requires a Preliminary Enquiry Report (PER). So does a housing project and apartments of 20 units and not more than 50 units. A coastal hotel, for its part, needs an EIA licence. So does a housing project and apartments of above 50 units. No mention is made of a bungalow complex.

Mr S. Mohamed submitted that 50 units means 50 beds so that this project which comprises 9 buildings with 8-7 residential bungalows serviced by a restaurant, a swimming pool and a recreational center is in fact a hotel being passed on as a bungalow for the sole purpose of circumventing the law on the application of a PER or an EIA.

Mr S. Mohamed also submitted that it looks disquieting that works had started apparently in 2000, according to the applicant's own saying. Yet the authority for the project was not given until April 2004 with an express mention that there should be no construction before that date. It is worth noting that both the previous legislation and the present one allow for preliminary works in view of an eventual project submission, subject to the observance of certain conditions.

In my view, Mr S. Mohamed's passionate rhetoric is not borne out by the facts of the case. The authorities are the best judge of what is a hotel and what is a bungalow complex. If the legislator either in the previous law or

the new law for that matter opted not to require a PER as regards the construction of a housing project or apartments of between 20-50 units nor an EIA for a housing project or apartments above 50 units, the court may not arrogate itself a wisdom greater than what the legislator is deemed to have in matters of legislation. The legislator has still given the authorities power under section 17 so that where "any project or activity not specified in the undertaking under the First Schedule, is likely by reason of its nature, scope, scale and sensitive location to have an impact on the environment " the Minister may request the proponent to submit a PER or an EIA. The three reports attached to his affidavits, aside the fact that they constitute hearsay inasmuch as the "experts" have filed no affidavits themselves may at best be relevant for some consideration by the Minister under section 17. Its urgency and importance in this case before me have not been shown.

Accordingly, I do not see the applicant justified in claiming that the respondents and the authorities have been guilty of subtlety, subterfuge or fraud. If I had to align myself with any interpretation between "unit" connoting "bed" and unit connoting "apartment," as submitted by Mrs Manna, it is more reasonable that Mrs Manna's submission would be the one to retain. Mr S. Mohamed compared the taxation legislation of the United Kingdom for the definition of "hotel" to come to reach the conclusion that the bungalow complex should be termed a hotel. On the assumption that his conclusion is warranted, I do not think such a foreign import is justified in our local law and context. As regards the submission on the legislations referring to the Outline Scheme, it is worth noting that they are subsidiary legislations which may not take precedence over the Environment Protection Act 2002. There is no suggestion that respondent no 3 has not taken its legislation into account in giving the approvals which befall upon it to give. Nor do I consider it a serious submission that the lease is void for having been granted near a village, all the more so when this issue was not joined and it has all the characteristics of being an afterthought. I agree with Miss Carrim who appeared for respondent no 3 that this was not a case where an EIA or a PER was required, still less, mandatory as per the law applicable .

Now as regards the creation of a road in front of the property of the applicant, it is worth noting that, if that is true, the road is being taken on the property of the respondents no 1 and 2 and not on the property of the applicant. As regards nuisance created by development works, it has not been shown that they constitute an actionable "faute" in the circumstances where the lessee is attempting to exploit an industrial lease which has been granted to it for the purpose of raising of the ground his complex of residential bungalows with amenities for food and recreation.

DELAY IN MAKING THE APPLICATION

There is another reason why I would decline to make the order prayed for.

The preliminary activities of the respondent started way back in April 2000. That included de-rocking of the place with the use of excavators and lorries. Heavy open works continued in December 2002. A public notice dated 26 October 2002 was published in L'Express and Le Mauricien newspapers inviting objections, if any, from the public. There is affidavit evidence that works started as early as July 2004 on site. Aside the fact that these matters were not disclosed to me, they constitute inexcusable delay in seeking the equitable jurisdiction of the judge in Chambers.

After completion of submissions last week, both learned Counsel submitted further materials which made useful reading, especially those produced for the definition of hotels, bungalows and boarding house as found in English law and the dictionary, the texts of the law applicable (GN 159 of 2001 and the Outline Scheme), The Pas Geometiques Act and the applicable subsidiary legislations by Mr S. Mohamed. Mr Patten also sent copies of the following cases: Hermic v Compagnie des Magasins Populaires Ltee [1981 MR 183]; Ramgutty & Co. Ltd v Hanumanthadu [1981 MR 340]; Tengur v The Minister of Education & Scientific Research & Ors [2002 SCJ 48]; Quedou v State of Mauritius [2004 SCJ 40] as well as the extracts from Wade & Foryth, Smith Woolf & Jowell and Fordham on the issue of legitimate expectations. As rightly pointed out by Mr S. Patten, this is not a case where legitimate expectations would apply.

I am thankful to both Counsel for their industry in delving into so much of the law. They have been enlightening for my decision.

For the reasons stated above, I decline to grant the interlocutory order. The application is set aside with costs.

S.B. Domah

Judge

16 November 2004

For Applicant: Mr S. Mohammed of Counsel, instructed by Mr Attorney D. Luchmun

For Respondents: Messrs V. Balamoody and S. Patten, instructed by

Mr Attorney S. Mardemootoo

For Co-Respondent: Miss S. Carrim of Counsel, instructed by

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