Naigum R.L v Nanette G

2004 SCJ 286

Record No: 5642

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Retnon Laval Naigum

Appellant

v.

Gisele Nanette

Respondent

JUDGMENT

The respondent (the plaintiff in the court below) lodged an action against the appellant (defendant in the court below) before the Intermediate Court averring that the appellant was carrying out his activities as cabinetmaker without licence in the building adjoining her house which was in a residential area. She complained that the appellant's trading activities involved the running of electrical machines which were a constant source of nuisance and **pollution** caused by **noise** and wood dust.

The appellant denied the respondent's allegations.

After having heard evidence, the magistrate found the respondent's case proved. She awarded her Rs 150,000 as damages and made an order in terms of her prayer " *prohibiting and restraining the appellant, either himself or through any of his agents 'préposés' from using the electrical machineries, sawmill, hammers and other cabinet making machineries and equipment in the appellant's premises.* "

Two preliminary issues were raised. The first concerned the objection raised by the respondent that the notice of appeal had been served outside the statutory delay of two months in violation of section 69 (4) (b) of the Court of Civil Appeal Act. The second concerned the objection raised by the appellant that the respondent's skeleton arguments had not been served and filed at the registry as prescribed by section 69 (3) (b) of the Courts Act. These objections were not pressed.

The appellant has appealed against the said judgment on no less than

8 grounds. Grounds 1 to 7 may conveniently be taken together. We do not propose to set them out *in extenso* . Suffice to say that they substantially challenge the appreciation of facts of the Magistrate.

The gist of the respondent's evidence was to the effect that she was 70 years old. In 1993, the appellant started operating his cabinet making workshop with four industrial machines. He worked on week days (from 7 a.m up to late at night) and also worked on Sundays and public holidays. In 1994, her health began to be affected by the unbearable **noise** caused by the machines and she developed heart problems which necessitated the implantation of a pacemaker. She had to stop working as a seamstress and she had been coughing and suffering from throat irritation resulting from an allergy caused by the dust and smell of thinner coming from the workshop. She left her house and went to reside at Pointe aux Sables upon her doctor's advice. For her ill-health, she called as her witness her treating doctor. There was also evidence that the appellant applied for a development permit but his application was turned down following her objection. She made several complaints to the police and to the municipal authorities with regard to the appellant's trading activities as a result of which the appellant had been prosecuted and she was called upon to testify against him in court. He was given a delay up to October 1998 to close down his workshop but he failed to do so. It was only in 1999 that he tried to abate the **noise** and dust by increasing the width and height of his wall.

The appellant adduced evidence that he opened his workshop in 1992 and worked on site only twice a week. He had ever since taken all the necessary precautions to abate the **noise** level of the machines by putting up a thick wall and double glazing enclosures. He denied that there was any dust explaining that the machines were fitted with dust extractors and admitted that he had continued operating his workshop without the required licence in order to earn his living and also despite his having been prosecuted and ordered to stop his trading activities. The report of Dr. Veeraragoo whom he also called as his witness supported his version. Dr. Veeraragoo visited his workshop in February 1998 at his request and found that there was no problem of either dust or environmental **pollution** emanating from the appellant's workshop.

We are unable to say that the magistrate made a wrong assessment of the evidence before her as a whole. She believed the respondent's evidence and was satisfied that her health condition was due to the **noise** and dust emanating from the appellant's workshop. She found that Dr. Gopaul's evidence that the respondent's heart condition called for " *physical and mental rest such as peace of mind, tranquility and serenity* " lent support to the respondent's version. We do not agree that the magistrate's finding that there was also "odour **pollution** " which admittedly had not been pleaded, had adversely influenced her to conclude that the respondent's health had deteriorated on account of

noise and dust coming from the workshop.

The magistrate had not rested content with commenting upon the demeanor of the respondent but also analysed all the evidence presented to her. She stated that he did not impress her as being a trustworthy and reliable witness. It is also clear from the tenor of her judgment that her comment on the appellant's persistence to run his workshop in defiance of the law was far from being the only factor that made her decide against the appellant.

Learned counsel for the appellant submitted that the magistrate ought not to have rejected Dr. Veeraragoo's report. The magistrate's reasons for having given little credence to it is that Dr. Veeraragoo had inspected the premises for only one hour from 10.30 hrs to 11.30 hrs on a particular day - in the absence of the respondent or the representatives of the municipal authorities - at a time when the windows and doors were closed. We are not prepared to say that her decision to question the reliability of the report in the circumstances was wrong. We must add here that counsel rightly pointed out that the magistrate had misread Dr. Veeraragoo's report and believed that there were 10 electrical machines on the premises instead on 5 machines in all. However, we find that this regrettable misapprehension on her part could not have affected her appreciation of one of the fundamental issues in the case as to whether there were **noise** and dust coming from the appellant's workshop.

Grounds 1 to 7 accordingly fail.

Ground 8 reproaches the magistrate for not having distinguished between material and moral damages. The short answer to this is that evidence was ushered in as regards both the material and moral prejudice suffered. Even if itemized originally, they were not being pressed, as can be seen from the pleadings, on the basis of real value, item by item but on a reduced global sum of Rs 500,000 in order to meet the jurisdiction of the Intermediate Court . Accordingly, the magistrate was fully justified in making a global assessment of Rs 150,000 to be awarded after having taken into account that as a result of the appellant's injurious activities the respondent could no longer earn her living, she had endured inconvenience over a period of time and the effect on her health had not been negligible. We do not find that the sum awarded is exaggerated in the circumstances.

Ground 8 also fails.

The appeal is dismissed.

Keywords: pollution, noise, residential area and dust and odour.

Legislation: Court of Civil Appeal Act and Noise Prevention Act.