(8)

IN THE SEYCHELLES COURT OF APPEAL

BRENDA LAPORTE ***APPELLANT***

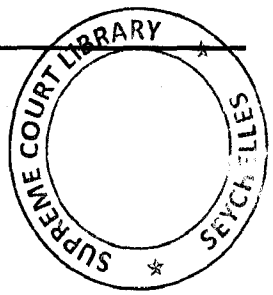
VERSUS

BERJAYA BEAU VALLON BAY ***RESPONDENT***

SCA12/2002

*(**Before:** Ayoola, P, Silungwe & Pillay, JJA)*

Mr. A. Derjacques for the Appellant
Mr. K. Shah for the Respondents



JUDGMENT

(Delivered by Ayoola, P)

Dissatisfied with the amount of damages awarded her by the Supreme Court on her claim for damages for the defendant's sewage treatment plant which had caused her damage, the appellant, Miss. Brenda Laporte, plaintiff in the Supreme Court, has appealed to this court. The substance of the appellant's claim was that the respondent's action in constructing and operating a sewage treatment plant on land adjoining her home, in front of her sitting room and bed rooms at a distance of less than 14 metres, constituted a faute in law rendering the respondent liable in law to her. The appellant alleged that she had suffered loss and damage which she particularised as follows:-

a) Emission of foul odours and smells	Rs. 50,000.00
b) Unpleasing and repulsive sight and Environment	Rs.150,000.00
c) Vile, unpleasant and dangerous Fumes and air (bacteria)	Rs. 50,000.00
d) Noise	Rs. 50,000.00

e) Loss of value of home	Rs.350,000.00
f) Moral Damages (depression, anxiety, anguish)	Rs. 50,000.00
TOTAL	Rs.700,000.00

The appellant and the respondent were adjoining property owners. The respondent is a company engaged in the tourism industry and owned at all material times an hotel known as Berjaya Beau Vallon Bay Hotel. The appellant between 1997 and 1988 built her home on her land while the respondent built on its land a sewage treatment plant which it commissioned sometime in 1998.

The learned trial judge, Juddoo, J, before whom the matter came accepted the appellant's case that there was an emission of foul smell, excessive noise and bacteria release from the operation of the respondent's sewage plant and that these *"had bordered beyond their ordinary obligations of neighbourhood"*. In the result, he found the respondent liable on the claim. In assessing and awarding damages he took into consideration certain factors as follows: as regards the emission of foul smell, excessive noise and bacteria release, the fact that the foul smell had been abated by September 2001 when one of the appellant's witnesses visited the site and that a public sewage system to serve the region of Beau Vallon in which district the adjoining properties were, was well under construction; as regards the claim for loss of value of the appellant's house, the facts that the appellant knew when she bought her land that it was situated next to an hotel "which would accommodate any machinery necessary for its operation on its premises" and that the respondent already had a smaller sewage treatment plant on its land; and, as to damages for

"unpleasing and repulsive sight and environment", the fact that the plant had been screened off with corrugated iron sheets and trees planted in the surroundings. In the result he awarded a total of R.18,000/- as damages made up as follows:-

i) R.5000 damages for emission of foul odour and smells.

ii) R.3000 for emission of bacteria.

iii) R.5000 for emission of excessive and continuous noise.

iv) R.5000 moral damages.

Having abandoned ground 3 of the grounds of appeal, learned counsel for the appellant argued grounds of appeal as follows:

i) The Honourable Judge erred in law in his finding; on the evidence that the appellant's house had not been duly and adversely affected.

ii) The Honourable Judge erred in law in failing to take into account all relevant evidence in coming to his decision on liability in respect of loss of value of the house.

iii) The Honourable Judge erred in law, in failing to take into account all the evidence and its impact on plaintiff in his assessment on quantum of damages.

iv) The Honourable Judge erred in his assessment on quantum of damages

That these were poorly formulated grounds of appeal is evident. Quite apart from the absence of particulars, it is obvious that a complaint that findings of fact are not supported by the evidence or are a result of inadequate consideration of evidence cannot be an error in law as alleged in the grounds of appeal. Learned counsel for the appellant had formulated his grounds of appeal

in obvious disregard of Rule 54(3) of the rules of this Court. Had objection been taken to the grounds by learned counsel for the respondent there probably would have been no difficulty in striking them out. However, no objection had been taken and counsel had proceeded on the footing that the appellant's grounds of complaint are properly before the court.

Mr. Derjacques, counsel for the appellant, argued that the learned judge's award was unfair and arbitrary. He argued that (i) the learned trial judge was in error in taking judicial notice of "a Beau Vallon Sewage System" about which there was neither averment, nor evidence and as a result the judge's finding on the quantum of damages was prejudiced by speculation, (ii) the learned judge should not have refused to award damages for the loss of value of the house when there was evidence that there was loss of R.50,000/- in regard to the land and that the house could not be rented at all, (iii) awareness of the appellant that she was building near an hotel was not a relevant factor in the assessment of damages for the damage complained of in the case, (iv) the learned judge should have taken into consideration that although the plant had been screened off, sufficient portions of the plant could still be seen and awarded damages for unsightly view.

Mr. Shah, counsel for the respondent, prefaced his argument with a submission that: *"In assessing damages the Court settles all the claims and their impact for the future once and for all at judgment day, provided that the claim (sic) is certain to continue."* In substance his submission is that the erection and operation of the sewage treatment plant by the respondent was a temporary measure pending the completion and commissioning of the Beau Vallon sewage treatment plant and that although *"at the beginning the hotel sewage plant caused more inconvenience"*, such happened at a time when the

appellant was residing in Italy and the inconvenience had since been *"greatly reduced"*. In regard to the loss of value of the appellant's house, it was submitted that this was academic because, among other things, the appellant's property was not for sale nor put up for sale. The general submission was made that the learned trial judge had properly taken the view that this was a borderline case, that there had been abatement and that the inconvenience had not been long and would not last for long.

It is right to observe at the outset that although the action had been formulated on the basis of fault in terms of Article 1382 of the Civil Code of Seychelles, what would have been more appropriate was to have founded the action on Article 1384 of that Code which provides that;

> *"A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody"*

In this case *"the thing"* in the custody of the respondent was the sewage plant and the damage caused by it consisted of the foul odours and smells emitted by it, "the unpleasant and dangerous fumes and air (bacteria)" and noise emanating from it to the detriment of the appellant, the adjoining property owner. The act of the respondent in erecting the sewage plant was not itself the cause of action but the damage consequent on the act. The damage consequent on the act being the nuisance, as long as that damage continues, a fresh cause of action arises.

In the assessment of damages for nuisance it is expedient to consider whether or not the circumstances are such in which prospective damages are

recoverable. The principle of law which is relevant is succinctly put in Vol. 2 Halsbury's Laws of England (4th Edition) para 1135 thus:

> *"A cause of action in respect of which a plaintiff is entitled and is required to have the prospective damages assessed must be distinguished from a continuing cause of action, namely a cause of action which arises from the repetition or a continuance of acts or omissions of the same kind as that for which the action has been brought. Thus where a trespass continues a fresh cause of action arises every day during which the trespass continues. Similarly, when the damage consequent on an act or omission rather than the act or omission itself provides the cause of action as for example in nuisance, then, as the action is only maintainable in respect of the damage, or is not maintanable until the damage is sustained, a fresh action will lie every time damage accrues from the act. In this case prospective damages are not recoverable, for the cause of action is not the act but the damage arising from it."*

"Prospective damages" are damages awarded to a plaintiff not as compensation for the ascertained loss which he has sustained at the time of the trial, but in respect of future damage or loss which is recoverable in law. (see Halsbury's Laws of England (4th Edition) para 1111). Notwithstanding that the cause of action is in nuisance prospective damages may well be recoverable where the nuisance has caused personal injuries or damages to chattels or property. However, where the circumstances are such that a fresh action will lie every time damage accrues from the defendant's act, the damages which are due to the plaintiff in terms of article 1149(1) of the Civil Code of Seychelles are such as would cover the loss that he has sustained at the accrual of his cause of action up to the trial.

By reason of the principles of law which have been stated above, it seems clear that the facts that the nuisance complained of would come to an end upon the commissioning of the "Beau Vallon Sewage System" or that the nuisance complained of was abated in 2001, after the cause of action had accrued are not relevant factors to consider in the assessment of the damages to which the appellant was entitled at the time the cause of action accrued. Such would have been relevant had prospective damages been claimed or recoverable in the circumstances of the case. Further, the facts that the respondent had an hotel on its land and that it had maintained a sewage plant on the land but further from her land before the appellant bought her land are not relevant factors in the assessment of damages for the interference with her ordinary physical comfort in the enjoyment of her property.

In regard to the damages awarded by the trial judge, we are not certain that his assessment of damages had not been influenced by factors which he should not have taken into consideration. In the result, we think this is a proper case in which we could exercise our jurisdiction to interfere with the award.

In regard to the items of damages for which he declined to make any award, we are of the opinion that the Learned Judge came to a correct decision. His finding that the seweage plant had been "effectively blockaded by corrugated iron sheets and trees have been planted in the surroundings" is supported by evidence and has, in our judgment, not been effectively challenged. Besides, it is doubtful if an unsightly view constitutes an actionable nuisance. What is certain is that when an unsightly view and environment had been screened off and what is left behind the screen is left to the imagination of the owner of the adjoining property, for instance, as to the

activities behind the screen whatever discomfort he gets from his imagination would not be basis for a cause of action. The Learned Judge was right in refusing to award any damages for loss of value of the appellant's house even though we are unable to agree with the reasons he gave, namely: that the appellant was aware that the land she bought was situated next to the hotel. The appellant was entitled to expect when she bought the land that the respondent would exercise rights over its property with due regard to the rights of the appellant. Once nuisance had been found by the learned trial judge the line of enquiry should have been directed to the question whether or to what extent such nuisance had diminished the value of the appellant's adjoining property. However, no award of damages can be made under this head because there was no averment in the plaint that the value of the house had been lost and to what extent and there was no evidence from which a reasonable tribunal could come to the conclusion that loss of value of the appellant's property had occurred by reason of the nuisance found.

It is now left for us to consider what is reasonable compensation to the appellant for loss of comfortable enjoyment of her property. There is no doubt that by reason of emission of foul smells and odours there had been a material interference with her physical enjoyment of the property for which she should be compensated. The damages are to be determined by the duration and severity of the interference. In this regard the evidence of the appellant is material. She described, among other things, how she was assailed by "very bad smell" with toilet odour of human waste emanating from the plant, how she had to go to her mother's house for dinner because she could not stay in her house which had to be closed to keep the odour out. This interference with comfortable enjoyment of her property, went on from 1998 to the time the action was instituted in 2000. In our view, on the totality of the evidence, a

small fraction of which had been highlighted, the appellant is entitled to damages of more than R.5,000/-. We think an award of R.15,000/- would be a fair and reasonable compensation. Taking all the evidence into consideration we think the award for moral damages should be increased from R.5,000/- to R.10,000/- to compensate for her distress.

On the whole we think this appeal succeeds in part and that the damages awarded to the appellant should be varied, as increased above. In the result we substitute judgment for the appellant in the sum of R.33,000/- with interest and costs for damages awarded by the learned judge. Judgment is hereby entered for the appellant in the sum of R.33,000/- with costs. The appellant is entitled to costs of this appeal.

JUSTICE OF APPEAL *JUSTICE OF APPEAL*

Dated this 11th *day of April 2003*