The Indian Law Reports

REVISIONAL CIVIL

Before S. K. Kapur, J.

NAIDER MAL,—*Petitioner*

versus

UGAR SAIN JAIN AND ANOTHER,—*Respondents*

Civil Revision No. 253-D of 1961

1965

January, 29th.

Delhi and Ajmer Rent Control Act (XXXVIII of 1952)—S. 13(1)(j)—'Nuisance' and 'annoyance'—What amounts to—Refusal to allow other occupants to use the bath-room and latrine—Whether amounts to 'nuisance' or 'annoyance'.

Held, that the term "nuisance" is derived from French word *"nurie"* which means "to injure, hurt or harm". According to Shorter Oxford Dictionary it means "anything injurious or obnoxious to the community, or to the individual as a member of it, for which some legal remedy may be found". Literally anything that causes annoyance or that works hurt or injury, harm or pre-judice to an individual or the public or anything wrongfully done or permitted which injures or annoys another in the legitimate enjoyment of his legal rights would constitute nuisance. In short anything done which unwarrantably affects the rights of the others, endangers life or health, gives offence to the senses, violates the laws of decency or obstructs the comfortable and reasonable use of property may amount to nuisance. No precise rule can be laid down as to the degree and every case must be decided on its own particular facts. Generally speaking, however, to constitute nuisance the injury caused must be real and not fanciful or imaginary. It must not be such as results only in a trifling inconvenience. A well-kept vegetable shop near a costly dwelling house or any other business which is apt to attract large number of orderly customers may constitute an undersirable neighbour but it may not, in all cases, be nuisance even if the value of the property, in certain respects, is affected. Such may be the natural and necessary consequences of living in a compactly built city and do not like smoke and offensive smell annoy everyone, but only those whose taste makes such matters repulsive to them. Similarily disregard of canons of aestheticism may be annoying to some, yet it may be difficult to hold it as constituting nuisance or annoyance. If

the other occupants are refused the use of the bath-room and latrine which they are entitled to use, it would certainly be affecting prejudicially and unwarrantably the rights of such occupants and constitute both nuisance and annoyance within the meaning of section 13(1)(j) of the Delhi and Ajmer Rent Control Act, 1952.

Application for revision under section 35 of Act 38 of 1952 of the order of Shri Udham Singh, Senior Sub-Judge, Delhi, dated the 26th September, 1960, affirming that of Shri Shiv Das Tyagi, Sub-Judge, 1st Class, Delhi, dated the 25th May, 1959, dismissing the suit of the plaintiff for ejectment but granting a decree for Rs 303-12-0, as arrears of rent to the plaintiff against the defendants.

DALIP K. KAPUR, ADVOCATE, for the Petitioner.

A. L. PATNEY, ADVOCATE, for the Respondents.

ORDER

Kapur, J.

KAPUR, J.—This civil revision under section 35 of the Delhi and Ajmer Rent Control Act, 1952, is directed against the judgment of Senior Subordinate Judge, dated September 26, 1960.

The premises in question is situate in Deputy Ganj, Sadar Bazar, Delhi. The petitioner Niadar Mal is the landlords of the said premises and respondents Uggar Sain and Padam Sain who are father and son, respectievly, are the joint tenants with respect to a part of the aforesaid premises. The petitioner landlord filed a suit for ejectment against the respondent-tenants mainly on three grounds—

(1) that the conduct of the tenants is such that it is a nuisance to the other occupiers of the same premises and they are, therefore, liable to be evicted under section 13(1) (j) of the said Act;

(2) that the tenants have acquired other premises and the plaintiff is, therefore, entitled to a decree for ejectment under section 13(1) (h) of the said Act; and

(3) that the defendants have been causing substantial damage to the property.

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Before me, however, only the first two grounds have been pressed by Mr. D. K. Kapur, the learned counsel for the petitioner. There was a previous litigation between the parties and it is necessary to set out certain facts relating to that, as one of the principal arguments by the learned counsel for the respondents has been that the judgment given in the previous case operates as *res judicata* against the petitioner. The petitioner filed a suit against the respondents with respect to the same premises claiming a decree for ejectment and arrears of rent. The ejectment was sought *inter alia* on the ground that the conduct of the defendants was a source of nuisance and cause of annoyance to the occupiers of other portions of the house inasmuch as they had closed the door leading to the courtyard, latrine and bath-room and did not allow the occupiers of other portions to make use of them. The respondents having acquired another residential accommodation was not made a ground for ejectment. It may not be out of place to mention that it has not been disputed that the entire ground floor except one room is in the occupation of the respondents. By judgment dated December 26, 1956, the learned Subordinate Judge, 1st Class, dismissed the suit for ejectment and *inter alia* held that (1) it was imperative on the plaintiff to show that the said bath-room and latrine on the ground floor were not in the tenancy of the defendants or in the alternative the bath-room and latrine were jointly used by the tenants on the ground floor, (2) the defendants had categorically stated that they did prevent Munshi Ram, the occupant of a room in the ground floor, from making use of the bath and the latrine but the respondents' conduct could amount to nuisance if either the bath or the latrine were not in their tenancy or that they were to be used by the tenants of the ground floor, and (3) the plaintiff had failed to prove any of the two essential factors and the tenants' conduct could not, therefore, be said to amount to nuisance or annoyance to the other occupiers of the building. The petitioner went up in appeal and during the pendency of the appeal there was a compromise between the parties and the petitioner made a statement before the learned Senior Subordinate Judge stating that he would have a new door opened from the roadside for the other tenants to enter the latrine, and they would have no right to go to the latrine through the compound. He prayed in that statement for being allowed to withdraw the appeal. On December 31,

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1957, the learned Senior Subordinate Judge by his order dismissed the appeal as withdrawn. The order of the learned Senior Subordinate Judge was as under:—

> "The parties have arrived at a compromise as a result of which the appeal has been withdrawn and is hereby dismissed. But the parties will be bound by the other terms of compromise regarding the latrine. The parties are left to bear their own costs of appeal."

After this compromise was entered into the petitioner alleges to have made an application, Exhibit P. 6, to the Municipal Authorities to allow him to open the door from the roadside but the permission was not granted. Upon the refusal of said permission the petitioner gave notice to the respondents intimating to them that the permission had been declined. The trial Court came to the conclusion that the ground of nuisance had been raised in the previous suit and decided against the landlord-petitioner and, therefore, operated as *res judicata* against him.

Mr. Dalip Kapur appearing for the petitioner has raised the following contentions: (1) the tenants-respondents had admitted that they were not allowing the use of the latrine and bath to the other occupants of the house and consequently the Courts below should have held that it constituted nuisance or annoyance within the meaning of section 13(1) (j) of the said Act; and (2) the appellate Court while discussing issue No. (1), namely, "Whether the plaintiff has sued for partial premises, if so, what is its effect", came to the conclusion that the bath-rooms and latrines were not a part of tenancy but were only being allowed to be used by the respondent-tenants and yet while discussing nuisance decided against the petitioner only on the ground that the solitary evidence of the party was not enough to prove nuisance. Mr. Kapur submits that on the admission by the respondents themselves the Court should have come to the conclusion that the allegation of nuisance stood established and should have passed a decree for ejectment, and (3) the defendant-respondents having built another house they were liable to be evicted under section 13 (i) (h) of the said Act.

Mr. Patney, the learned counsel for the respondents, on the other hand submits that (a) the judgment in the

previous suit operated as *res judicata* so far as the issue of nuisance or annoyance is concerned, (b) the defendant-respondents no doubt admitted that they did not allow the other occupants to use the latrine or the bath-room, but in view of the judgment in the previous suit and the statement of the appellant, Exhibit D. 2, dated the 31st December, 1957, he had the right to stop the other occupants from passing through the compound and consequently from using the latrine and bath-room, (c) the plea regarding the respondent having built or acquired another residential accommodation was available to the appellant at the time of filing the first suit and the right of the appellant to raise the question in the present suit was barred on the principles of constructive *res judicata* and (d) that the other house was built in 1949 by Padam Sen one of the joint tenants and was rented out immediately on its completion. The appellant was not entitled to a decree for ejectment on this ground because—

(i) the house was never available for occupation by the respondents;

(ii) it was built by one of the two joint tenants and consequently it could not be said "that the tenant has built, acquired vacant possession of, or been allotted a suitable residence.

According to Mr. Patney the appellant in his suit had not even alleged that the defendant-respondent had built a "residential premises" or that it was a suitable residence. It was for the appellant to allege and prove that the tenants had built or acquired a suitable residence.

I will deal with the points in the order in which they have been set out. Mr. Kapur has drawn my attention to Hill and Redman's Law of Landlords and Tenant 11th Edition, pages 219, 220 and particularly the passage at page 219 reading as under:—

> "Where the covenant is against any act which may lead to "annoyance, nuisance or damage", it is wider and is broken by anything which disturbs the reasonable peace of mind of an adjoining occupier. It need not amount to physical detriment to comfort, nor need the adjoining occupier be a tenant of the same lessor."

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Mr. Kapur further relies on the illustrations given at page 220 of 'nuisance' or 'annoyance' which would constitute breach of covenant against causing nuisance or annoyance and submits that even the establishment of a hospital for outdoor patients is a breach of such a covenant if sensible people feel a reasonable apprehension of risk of infection or interference with the pleasurable enjoyment of their houses for ordinary purposes. Mr. Kapur also places reliance on *Ram Labhaya* v. *Dhani Ram* (1), wherein it was held that a mere encroachment of a part of the building may in certain circumstances amount to a nuisance. Term "nuisance" is incapable of exact and exhaustive definition. The word "nuisance" is derived from french word "nuire" which means "to injure, hurt or harm". According to Shorter Oxford Dictionary it means "anything injurious or obnoxious to the community, or to the individual as a member of it, for which some legal remedy may be found." Literally anything that causes annoyance or that works hurt or injury, harm or prejudice to an individual or the public or anything wrongfully done or permitted which injures or annoys another in the legitimate enjoyment of his legal rights would constitute nuisance. In short anything done which unwarrantably affects the rights of the others, endangers life or health, gives offence to the senses, violates the laws of decency or obstructs the comfortable and reasonable use of property may amount to nuisance. I do not wish to say that every inconvenience, discomfort or annoyance is sufficient to constitute a nuisance. No precise rule can be laid down as to the degree and every case must be decided on its own particular facts. Generally speaking, however, to constitute nuisance the injury caused must be real and not fanciful or imaginary. It must not be such as results only in a trifling inconvenience. A well-kept vegetable shop near a costly dwelling house or any other business which is apt to attract large number of orderly customers may constitute an undesirable neighbour but it may not in all cases, be nuisance even if the value of the property, in certain respects, is affected. Such may be the natural and necessary consequences of living in a compactly built city and do not like smoke and offensive smell annoy everyone, but only those whose taste makes such matters repulsive to them. Similarly disregard of canons of aestheticism may be annoying to some, yet it

(1) A.I.R. 1947 Lah. 296.

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may be difficult to hold it as constituting nuisance or annoyance. What then is the meaning to be given to the term 'nuisance' or 'annoyance' under section 13 (1) (j) of the Delhi and Ajmer Rent Control Act. To attempt to lay down a general principle to be observed in all cases would be a task impossible of achievement. I would only say that if the other occupants of the premises were stopped by the respondents from using the bath-room and the latrine which they are entitled to use, it would certainly be affecting prejudicially and unwarrantably the rights of such occupants and constitute both nuisance and annoyance within the meaning of the said provision. If, therefore, the matter stood at that, I would have held that the petitioner was entitled to succeed on the ground that the conduct of the tenants was such that it was nuisance or caused annoyance to the other occupiers of the same premises. The matter, however, does not end here and in my opinion the learned counsel for the respondents is right when he says that either on the principle of *res judicata* or on the principle of estoppel, the petitioner cannot be permitted to raise this question in the present suit and that matter stands concluded by the earlier judgment dated 26th December, 1956, (Exhibit D. 3) and the statement of the petitioner before the learned Senior Subordinate Judge, dated the 31st December, 1957 (Exhibit D. 2). In answer to this contention Mr. Kapur submits that normally the petitioner may have been bound by the judgment and the statement but in the circumstances of the present case he is not because he did all that was possible to have a door opened in the street, made application for the purpose to the Municipal Committee and pursued the same properly but the permission was refused. Mr. Kapur referring to *Prem Parkash* v. *Mohan Lal* (2), submits that a decree based on a compromise is like a contract and can be set aside on that ground, Short answer to Mr. Kapur's submission is that the petitioner neither raised this question in the plaint no does it appear to have been urged before the Courts below. Assuming that the decree passed by the Senior Subordinate Judge and based on the compromise could be set aside on the same grounds on which a contract can be set aside, still the petitioner was expected to plead such facts as entitle him to disregard the compromise decree and to ask for the same being set aside. In

(2) A.I.R. 1943 Lah. 268.

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the circumstance I hold that the statement of the petitioner and the consent decree passed by the Senior Subordinate Judge do raise an estoppel between the parties, and the petitioner cannot be permitted to re-agitate the matter in the present suit. It is well established that a judgment based on consent is as much intended to put a stop to litigation between the parties, as a judgment which results from the decision of the Court after the matter has been fought out to the end in so far as the matter is actually dealt with by the consent decree. The question in all such cases is whether the consent decree did settle the issue between the parties. Reference to the order of the learned Senior Subordinate Judge which has been reproduced above would show that the question whether or not the other occupants could be permitted to pass through the compound and use the latrine and bathroom, was finally settled between the parties In the circumstances the respondents were entitled to stop other occupants from passing through the compound and consequently it cannot be said that the respondents were obstructing the other occupants in the legitimate enjoyment of their legal rights. If the other occupants had no right to pass through the compound or use latrine and the bath-room, the obstruction by the respondents cannot constitute nuisance or annoyance within the meaning of section 13(1)(j) of the said Act. In this view I need say no more on the second contention of Mr. Kapur regarding the effect of the admission by the respondents that they were in fact obstructing the other occupants from using the latrine and bath.

Now I come to the third contention of Mr. Kapur that the defendant-respondents having built another house were liable to be evicted under section 13(1)(h) of the said Act. I might here deal with the objection of the learned counsel for the respondents that the petitioner cannot raise this question as his right to do so is barred on the principle of constructive *res judicata.* Before the petitioner can be held estopped from raising the plea, the respondent are bound to show that the facts on which such plea might have been raised by the petitioner were within his knowledge at the time of the institution of the first suit. In case such facts were not within his knowledge at the time of the former suit, it cannot be said that the party may have raised it in the earlier suit. The want of

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knowledge, however, must be about facts, and a plea not raised owing to wrong view of law cannot be permitted to be raised in subsequent litigation. Reference is made to *Mithoolal Girdharilal* v. *Babu Jainarayan Bahadurlal and others* (3), wherein it has been held that a plea which the plaintiff in the subsequent suit ought to have taken in the previous suit is barred and the fact that he had no knowledge of the fact which he ought to have pleaded is of no avail if with due diligence he could have discovered the fact in the previous suit. In *Fakir Chand* v. *Ekkari Sarkar* (4), it was held that the plaintiff being unaware of the deed of gift, and there being no circumstances which would put the plaintiff on enquiry as to the deed of gift, or which would lead the plaintiff to the discovery thereof at the time he instituted the first suit, the plaintiff was not hit by the rule of constructive *res judicata*. There is nothing in the present record to show that at the time of instituting the previous suit the petitioner knew about the respondents having built a house. There is also nothing to show that there were any such circumstances as would put the plaintiff, to an enquiry or if the petitioner had exercised due diligence he might have obtained knowledge of the fact that the respondents had built for acquired another residential accommodation. I do not, therefore, agree with the objection of the learned counsel for the respondents. Again the fact that only one of the two joint tenants built the house may not be conclusive against the petitioner. There may be cases where house built or acquired by one of the joint tenants may be available to the other and in those circumstances it may be possible to contend that the other joint tenant has also acquired possession of a suitable residence. The lower appellate Court has come to the conclusion that since the house built by Padam Sen respondent is not available to the defendant-respondents for residential purposes it cannot be held that they have built or acquired vacant possession of a suitable residence for them. The respondent Padam Sen appeared as a witness and stated that he had built a house in 1949 and let out the same to the tenants at that very time and the same was not available for his residence. The learned counsel for the petitioner submits that where a tenant has built a residence for himself it is immaterial for the purposes of section 13 (1) (h) whether or

(3) A.I.R. 1941 Nag. 346.
(4) 42 C.W.N. 560.

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not it is suitable for residence or whether or not he has acquired vacant possession of the same. According to the learned counsel even if the words "suitable residence" have to be read with "built" also it is not necessary that the tenant should have acquired vacant possession. It is enough if he has built suitable residence. Merely because a tenant has built a house, would in my opinion, not provide a ground for ejectment within the meaning of section 13(1) (h) of the Act for if that wide construction were placed on the section, the tenant would be liable to eviction even if he built a house anywhere in India. The words "suitable residence" must, therefore, be read with all the terms, namely, 'built,' 'acquired vacant possession of', or 'been allotted'.

The learned counsel for the respondents submits that the petitioner in his plaint did not even allege that the respondents had built a residential house or that it was suitable for their residence. Submits the learned counsel that unless the question of acquisition of a suitable residence had been put in issue at the instance of the petitioner, the respondents were not obliged to lead evidence or prove that the premises were not suitable for their occupation. Mr. Kapur, on the other hand, contends that the petitioner alleged in the plaint that the respondent had built a house and let it out. In view of this allegation made in the plaint and in view of the admission by respondent No. 2 Padam Sen, it was for the respondents to prove that that house was not suitable for their residence or that though built by respondent No. 2, it was not available for occupation to respondent No. 1, who is the father of respondent No. 2. Mr. Kapur submits that these facts were within the special knowledge of the respondents and, it was, in view of section 106 of the Indian Evidence Act, for them to prove that the house was not suitable and/or available. The learned counsel submits that respondent No. 1 did not even appear in the witness box and every inference should be drawn against him. He relies on *Governor-General in Council and others* v. *Mahabir Ram and another* (5), *Ramkrishna Ramnath shop* v. *Union of India* (6), *Indian Trade and General Insurance Co., Ltd.* v. *Union of India* (7), and submits that just as in the case of entrustment of goods to rail- dealt with, it was for the respondents to place all the

(5) A.I.R. 1952 All. 891.
(6) A.I.R. 1960 Bom. 344.
(7) A.I.R. 1957 Cal. 190.

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way for transportation it is for the railway to place all the material before the Court showing how the goods were dealt with, it has for the respondent to place all the materials before the Court, including their account books showing who built the house and who provided the finance for the same. It is no doubt true that onus to prove facts within the special knowledge of a party must be on him but in a case like the present the plaintiff must first allege that grounds exist entitling him to a judgment. It was in my view for the plaintiff to allege that the respondents have built or acquired vacant possession of a suitable residence for themselves and are, therefore, liable to be evicted. The petitioner did not, in my opinion, allege all the facts necessary to constitute a ground for eviction of the respndents. All that he said in the plaint was that respondents have built a house and let it out. It was for the petitioner to allege that the house was suitable for their residence. In the absence of a proper plea by the petitioner it would not be open to me to investigate whether all the requirements of section 13(1) (h) of the said Act were met and whether the construction of a house by respondent No. 2 entitles the petitioner to a decree for eviction. In *Nevile* v. *Hardy* (8), the Court was concerned with clause (d) of sub-section (1) of section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which enabled an order or judgment for the recovery of possession of any dwelling house to which the Act applied to be made where "the dwelling house is reasonably required by the landlord for occupation as residence for himself . . . . and the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects is available". It was contended on behalf of the landlord that the onus was on the lessee. Peterson, J., said "But that would mean that the lessee had to satisfy the Court that alternative accommodation reasonably equivalent as regards rent and suitability in all respects, is not available." Those, however, are not the words of the clause; the words are "that alternative accommodation" of the kind specified "is available". In my opinion, therefore, it is for the landlord who seeks possession to satisfy the Court by positive evidence that alternative accommodation of the kind specified "is available".

(8) (1921)1 Ch. 404.

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Mr. Kapur has drawn my attention to *Bazalgetee* v. *Hampson* (9), a decision which was referred to before Peterson, J., in the arguments by the plaintiff's counsel. The provision which fell for consideration in that case was "the premises are reasonably required by the landlord for the occupation, of himself . . . and the Court after considering all the circumstances of the case, including especially the alternative accommodation available for the tenant, considers it reasonable to make such an order or give such judgment. Avory, J., observed, "the tenant cannot sit down and do nothing but wait until the landlord has found alternative accommodation for him. The onus lies on the tenant to show that he has done his best to secure alternative accommodation". In my opinion having regard to language of section 13(1)(h) of the said Act it is for the landlord to show that the tenant has built or acquired vacant possession of "a suitable residence". The landlord not even having alleged that the house built was "suitable residence" the point must be decided against the landlord In view of this it is not necessary to go into the question whether it was for the petitioner or the respondents to prove the nature of interest, if any, of respondent No. 1, in the house or whether non-availability of vacant possession provided a good defence to the tenants.

I must also notice another submission made on behalf of the respondents. It is contended that the lower appellate Court has on evidence found that only one of the two joint tenants have built the house. It cannot, therefore, be said that "the tenant has . . . built . . . a suitable residence" within the meaning of section 13(1) (h) because in case of joint tenancy "tenant" in the said provision must mean all the joint tenants. Regarding acquisition of vacant possession, the learned counsel submits that it has been found by the lower appellate Court that the house is not vacant and consequently section 13(1)(h) of the said Act does not in any manner aid the petitioner. In my opinion it is not necessary to decide these questions also, since the petitioner did not allege that the house built by respondent No. 2 is suitable for the residence of the tenants.

In the result the petition fails and is dismissed. There will, however, be no order as to costs.

B.R.T.

(9) [1920] 36 Times L.R. 240.