1970
April 10
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IOSIF
PAPHITIS
v.
NICOS
STAVROU

[VASSILIADES, P., JOSEPHIDES, HADJIANASTASSIOU, JJ.]

IOSIF PAPHITIS,

Appellant-Defendant,

v.

NICOS STAVROU,

Respondent-Plaintiff.

(*Civil Appeal No.* 4842).

Nuisance—Private nuisance—Smoke and fumes due to roasting of meat ("*souvlakia*")*—Noise from loudspeaker* (*Juke-box*)*—Nuisance to occupier of residential flat above appellant's* (*defendant's*) *shop—Civil Wrongs Law, Cap.* 148, *sections* 46, 47 *and* 48*—Provisions thereof should be applied for the protection of plaintiff's* (*respondent's*) *reasonable enjoyment of his house, especially during the ordinary hours of rest—The cases of* Palantzi *v.* Agrotis (1968) 1 *C.L.R.* 448 and Symeonides *v.* Liassidou (1969) 1 *C.L.R.* 457 *followed—Findings made by trial Court unimpeachable.*

Appeal—Findings of fact made by trial Courts—Approach of the Court of Appeal.

Civil Wrongs—Nuisance—Private nuisance—See supra.

This is an appeal by the defendant against the judgment of the District Court of Kyrenia directing him not to cause nuisance by smoke, fumes and noise to the plaintiff, the occupier of the residential flat above the former's shop.

It was argued on behalf of the appellant, *inter alia*, that the findings of fact made by the trial Court cannot stand having regard to the evidence adduced ; and that the trial Court erred in the assessment of the evidence before him.

After reviewing the evidence, the Court dismissed the appeal with costs.

Held, (1). Counsel for the appellant made a strenuous and exhaustive effort to attack the trial Court's findings. In order to succeed however, in such attempt, the appellant must persuade this Court that the assessment of the evidence is erroneous and the findings of the trial Court unsatisfactory (see *Symeonides* v. *Liassidou* (1969) 1 C.L.R. 457).

(2) The matter under consideration is in our opinion perfectly clear. Rightly and reasonably the trial Court

arrived at the conclusion that the smoke and fumes from the brazier in the appellant's shop and the noise of the juke-box as operated therein, constituted a nuisance to the occupiers of the residential flat above the shop ; and that the relevant provisions of the Civil Wrongs Law, Cap. 148 (*supra*) should be applied for the protection of the plaintiff's right to the reasonable enjoyment of his house, especially during the ordinary hours of rest. (*Palantzi* v. *Agrotis* (1968) 1 C.L.R. 448 and *Symeonides* v. *Liassidou, supra* followed).

(3) The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Cases referred to :

Palantzi v. *Agrotis* (1968) 1 C.L.R. 448 ;

Symeonides v. *Liassidou* (1969) 1 C.L.R. 457.

Appeal.

Appeal by defendant against the judgment of the District Court of Kyrenia (Stavrinakis, D.J.) dated the 14th July 1969 (Action No. 313/68) whereby he was directed not to cause nuisance by smoke, fumes and noise to the plaintiff who was the occupier of the residential flat above the defendant's shop.

A. Protopapas, for the appellant.

G. N. Kaizer, for the respondent.

The judgment of the Court was delivered by :

VASSILIADES, P. : The appellant (defendant) is the occupier of a shop belonging to the respondent (plaintiff) who resides with his family in the flat above the shop. The flat is part of the building which belongs to the respondent ; we shall refer to him as the " plaintiff " and to the appellant as the " defendant ".

Defendant is a statutory tenant of the shop which came into his possession in 1961 under a lease for one year at the rent of £6.—per month. He was then using the shop as a coffee-shop. The premises are in a blind alley at Hellas Str., Kyrenia.

After expiry of the tenancy the defendant remained in possession under the same conditions until 1963, when he moved his business to another shop. About three

years later, *i.e.*, in October, 1966, the defendant returned to plaintiff's shop, under a new tenancy for possession and use of the shop as in the past. On expiry of this new tenancy, the defendant remained in the shop as statutory tenant and he is still in possession as such.

During the new tenancy the defendant enlarged his coffee-shop business by obtaining a licence for the sale of alcoholic drinks and by serving his customers with meat roasted on the spot the dish commonly known as " souvlakia ". For the roasting of the " souvlakia " the defendant uses a brazier (kebab-stall) placed at the entrance of the shop with a chimney ending near and below the window of the house where the plaintiff resides with his family. For entertaining his customers, the defendant installed in the shop an electrically operated musical instrument commonly known as " juke-box ".

The smoke from the chimney of the brazier (kebab-stall) with the fumes of the roasted meat and the noise from the " juke-box " usually operated at a high tone started annoying the occupants of the house above the shop and became a nuisance.

The plaintiff repeatedly protested to the defendant both regarding the nuisance created by the smoke and fumes from the brazier (kebab-stall) and regarding the noise from the " juke-box ". The plaintiff complained that the nuisance became intolerable and was a case within the relevant provisions of the Civil Wrongs Law, Cap. 148. He therefore called upon the defendant to put an end to such state of affairs ; but his representations were ignored by the defendant.

The plaintiff then complained to the Police and to the Municipal Authorities who intervened in a way, by trying to pursuade the defendant to put an end to the cause of plaintiff's complaints but, unfortunately, with no result. Hence this action in the District Court of Kyrenia, filed on the 12th November, 1968. The statement of claim contains the allegations of fact upon which the plaintiff claims an injunction to abate the nuisance in question.

On the 9th December, 1968, the defendant filed his defence wherein on the one hand he alleged that it was " expressly and/or impliedly " agreed that the defendant would be making that use of the shop and on the other hand that such use did not constitute a nuisance. Further the defendant put forward several other legal contentions upon

which he denies that the plaintiff is entitled to the remedy sought by the action. Furthermore the defendant put forward in his pleading the allegation that the plaintiff in his attempt to get rid of his tenant, used various illegal means and ways such as the pouring of water and dirty fluids from his house which leaked into the shop causing damage to defendant, amounting to a total of £460 in respect of which the defendant made a counterclaim. In his reply, filed on 19.12.68, the plaintiff entirely denied the allegations upon which the defendant based his defence and counterclaim.

The action came up for hearing in March, 1969, and the trial went on (at intervals and several adjournments) until May of the same year. In the course of the trial 4 witnesses were called on behalf of the plaintiff and 5 on behalf of the defendant. After hearing addresses from learned counsel on both sides, the trial Judge reserved his judgment on the 7th May, 1969 ; and delivered a considered judgment on July 14, 1969.

In a careful and elaborate decision the learned trial Judge dealt thoroughly with the evidence adduced from both sides, and came to the conclusion that the use of the shop by the defendant, particularly the smoke and fumes from the chimney and the noise from the juke-box constituted a nuisance within the provisions of the relevant sections of the Civil Wrongs Law (Cap. 148, sections 46, 47 and 48) and held that the plaintiff was entitled to the remedies sought by his action ; and granted the injunction appearing at the end of the trial Court's judgment.

Against that judgment and order, the plaintiff filed the present appeal, based on a number of different grounds, stated in the notice of appeal. They may be summarized as follows : First, that the findings of fact made by the trial Court cannot stand having regard to the evidence adduced. Secondly that the trial Judge erred in the assessment of the evidence before him ; and thirdly, that he erred in the interpretation and application of the relevant statutory provisions.

We have heard with all due patience and attention learned Counsel on behalf of the defendant addressing us for two days, in his attempt to support his client's appeal. He made a strenuous and exhaustive effort, using every possible argument in his endeavour to attack the trial Court's judgment. In order to succeed, however in such an attempt, the appellant must persuade this Court that the assessment

of the evidence is erroneous and the findings of the trial Court are unsatisfactory. (*Costas Symeonides and Another* v. *Evanthia Liassidou* (1969) 1 C.L.R. 457). He has entirely failed in this attempt. The facts do not present any difficulty in the case before us. Rightly and reasonably, we think, the trial Judge arrived at the conclusion that the smoke and fumes from the brazier (kebab-stall) in the shop and the noise of the juke-box as operated therein, constituted a nuisance to the occupiers of the residential flat above the shop, as alleged by the plaintiff and his witnesses. And that the relevant provisions of the Civil Wrongs Law (Cap. 148) should be applied for the protection of the plaintiff's right to the reasonable enjoyment of his house especially during the ordinary hours of rest. This very matter was considered and discussed in *Palantzi* v. *Argotis* (1968) 1 C.L.R. 448 referred to in the judgment of the trial Court and in *Symeonides* v. *Evanthia Liassidou* (*supra*).

The matter under consideration, as it appears from the record before us, is, in our opinion perfectly clear ; and we found it unnecessary to call upon counsel for the respondent-plaintiff to support the trial Court's decision.

The appeal is dismissed with costs against the appellant-defendant.

Appeal dismissed with costs.