Municipal Council of Badulla

v.

Ratnayake

COURT OF APPEAL.
VYTHIALINGAM, J. AND RANASINGHE, J.
C. A. (S. C.) 263/72 (F)—D. C. BADULLA 7593/M.
FEBRUARY 14, 15, 16, 1979.

Electricity Act, (Cap. 205) section 3 (1)—Duty of licensee to supply electricity—Premises to be used for unauthorised purpose—Whether a relevant consideration in granting supply.

Damages—Breach of statutory duty—Whether licensee liable on proof of breach alone—Notice under section 307 of the Municipal Councils Ordinance—When necessary.

The Electricity Act No. 19 of 1950 makes provision for the appointment of a licencee to be charged with the duty of supplying energy to occupiers or owners of premises who satisfy certain requirements. The Municipal Council of Badulla was such a licencee. The Act also made provision for the imposition of penalties in the event of default.

The respondent made an application to the Council for the supply of energy to his premises and was required to pay a deposit. After commencement of the work but prior to its completion the Council informed him that no purpose would be served by supplying electricity to his premises since it could not grant a licence for the trade which he proposed to carry on in those premises. The deposit less labour charges was returned. The respondent sued the Council for damages for failure to perform a statutory duty.

Held

The purpose for which the supply was asked for is totally irrelevant to the consideration as to whether the Council was under a duty to give the supply. There has been a breach by the Council of a duty imposed upon it which infringes a correlative right vested in the respondent. The respondent is entitled to legal redress on proof of breach of duty alone and damages are presumed to have been sustained.

Held further

The notice required to be given under section 307 of the Municipal Councils Ordinance is necessary only when the Council is sued in respect of any act done or intended to be done under that Ordinance or any by-law, regulation or rule made thereunder. As the defendant was sued in respect of a breach of duty imposed by the Electricity Act such notice was not necessary.

Cases referred to

(1) *The Negombo Municipal Council v. Fernando, (1961) 63 N.L.R. 512.*

(2) *Woodcock et al v. South Western Electricity Board, (1975) 2 All E.R. 545.*

(3) *Corea v. The Urban Council of Kotte, (1958) 62 N.L.R. 60.*

(4) *Nallammah et al v. Vijayaratnam, (1970) 79 C.L.W. 41.*

(5) *Glamorgan County Council v. Carter, (1962) 3 All E.R. 866.*

(6) *David v. Abdul Cader, (1971) 77 N.L.R. 18.*

(7) *David v. Abdul Cader, (1963) 65 N.L.R. 253.*

(8) *Ellis v. Vickerman, (1954) 3 S.A.L.R. 1001.*

(9) *Black v. Fife Coal Co. Ltd., (1912) A.C. 149; 106 L.T. 161; 28 T.L.R. 150.*

(10) *Cape Central Railways v. Nothling, 8 S.C. 25.*

(11) *Anns v. London Borough of Merton, (1977) 2 All E.R. 492; (1977) 2 W.L.R. 1024 H.L.*

(12) *Don Albert v. Municipal Revenue Inspector, (1962) 65 N.L.R. 1; 64 C.L.W. 75.*

(13) *Weerasooriya Arachchi v. The Special Commissioner, Galle Municipality, (1967) 69 N.L.R. 437.*

APPEAL from the District Court, Badulla.

H. W. Jayewardene, Q.C., with *Laxman Perera*, for the defendant-appellant.

C. Ranganathan, Q.C., with *A. P. Niles*, for the plaintiff-respondent.

Cur. adv. vult.

April 3, 1979.

VYTHIALINGAM, J.

The plaintiff-respondent sued the defendant-appellant—the Municipal Council of Badulla, for damages for the failure to perform a statutory duty to supply electric energy to premises No. 52, Passara Road, of which he was the occupier. After trial the District Judge held with the plaintiff and entered judgment for him in a sum of Rs. 12,000 and costs. The defendant Council has appealed against that judgment and decree.

The main contention of the defendant-appellant was that the plaintiff wanted the supply of electric energy for an illegal purpose, viz. the carrying on of a trade declared by regulations to be a dangerous or offensive trade and which was prohibited in the area in which the premises were situated, and that it was therefore, under no duty to supply the electric energy. Indeed if it did, so it was argued, it would be guilty of aiding and abetting the commission of an offence by the plaintiff.

Admittedly the defendant Council was the licensee appointed under the provisions of the Electricity Act, No. 19 of 1950. It was charged with the duty of giving and continuing to give a supply of energy to occupiers or owners of premises within the area, fulfilling the requirements of the Act and the conditions of the licence. Section 33 (1) of the Act provides that "A licencee shall, upon being required to do so by the owner or occupier of any premises situated within one hundred and fifty feet from any distributing main of the licensee in which he is for the time being required to maintain or is maintaining a supply of energy for the purposes of general supply to private consumers, give and continue to give a supply of energy for those premises in accordance with the provisions of the licence and of the regulations....."

Section 64 (1) makes provision for penalties to be imposed on the licensee if he makes default in supplying energy to any owner or occupier of premises to whom he is required to supply energy by or under the provisions of the Act or of his licence. The licensee when, it enters into a contract for the supply of electric energy is precluded from imposing on the consumer conditions or terms which are not authorised expressly by the provisions of the Act or by regulations framed in accordance with the provisions of section 46 of the Act—*The Negombo Municipal Council v. K. M. J. Fernando* (1).

It is not in dispute that the premises in suit is within one hundred and fifty feet from a distributing main of the licensee.

It is also necessary that the person applying for supply should be either the owner or the occupier of the premises to which the supply is sought. And in this context "occupier" means a lawful occupier and not, for instance, a mere squatter—*Woodcock et al v. South Western Electricity Board* (2). Some attempt was made to argue that the plaintiff was not the owner or occupier of the premises in question. But the evidence clearly establishes and the trial judge was right in holding that the plaintiff was the occupier of the premises. The soil belonged to some Tamil people and one R. M. Appuhamy converted the premises to a motor garage after his application to do so (D3) was allowed. The plaintiff said that he took the premises on rent from Appuhamy and that he was in charge of the premises and that his things were there in the premises. This evidence was not controverted by any other evidence.

It was not the defendants' case that the plaintiff was for any other reason not qualified to receive the supply of electric energy to the premises in question. He made his application (P3) sometime in February 1968 and he was asked to pay a sum of Rs. 530 which he deposited and the defendant accepted in respect of the estimated cost of the necessary installation and supply of electric energy. Work was commenced thereafter and the line was constructed. As there was delay and failure to complete the work the plaintiff protested and ultimately sent the letter P1 through his lawyer in November 1968. He received the reply dated 20th November, 1968, that the Council was not legally in a position to grant a licence to carry on the trade of milling paddy in the area which had been proclaimed as a residential area and no useful purpose would be served by supplying electricity. They returned a sum of Rs. 499.03 less labour charges out of the deposit of Rs. 530 made by the plaintiff.

Ordinarily a trade which is dangerous or offensive can be carried on provided a licence is obtained for that purpose. Because such trades may be a hazard to the safety of persons and property in the area and may affect the health, comfort and well-being of its residents the local authority considers it appropriate that by-laws should be passed to regulate such trades and prescribe conditions under which such trades can be carried on in safety. But in some cases there may be a total prohibition against carrying on of such trades in any given area.

In the instant case the by-laws D7 of the defendant council provided that no person shall carry on, within the limits of the Council, in any place any dangerous or offensive trade

without an annual licence from the Chairman which licence the Chairman shall issue to all persons complying with the conditions provided for the issue of such licence. Originally the milling of paddy was not declared to be an offensive or dangerous trade. But in the regulations D8 made in 1948 an offensive or dangerous trade was defined to include "the milling of paddy, wheat or kurakkan or any other grain, by machinery". At that time therefore a person could carry on the trade of milling paddy provided he obtained a licence for that purpose.

In 1952, however, a zoning scheme for an urban development area comprising the administrative limits of the Badulla Urban Council was approved by the Minister (D1) under section 28 (3) of the Town and Country Planning Ordinance (Cap. 269). Admittedly the premises in question fell within an area reserved under the scheme for residential buildings. Part V of the regulations sets out that no person shall within a residential area erect a new building (Reg. 2 b) or re-erect or extend or use an existing building (Reg. 4) for carrying on a dangerous or offensive trade enumerated in the Fifth Schedule. The only exception is in respect of a building which was already being used for this purpose prior to the coming into force of the order. The premises in question was not so used. Item 23 in the Fifth Schedule is "the milling of paddy, wheat, kurakkan or grain by machinery". So that now within this area one could not carry on this trade under any circumstances.

In his application P3 in cage 8 the plaintiff had stated that the "supply will be required for business purposes for a paddy huller". The question is whether the defendant is, by or under the provisions of the Act or the terms of his licence, entitled to refuse to supply the electric energy on the ground that the purpose for which it is required is to enable the plaintiff to carry on a trade which he is not entitled to carry on and that no useful purpose would be served by giving the supply. There is, under the Electricity Act, a duty cast on the licensee to give and continue to give the supply to an occupier or owner of premises who is otherwise qualified to ask for it.

Mr. Jayawardene for the defendant-appellant submitted that the trial Judge confused between the grant of a power and the imposition of an obligation in the nature of a duty with a corresponding right in another. In analysing the scope of the provisions of section 33 of the Electricity Act, H. N. G. Fernando, J. said at page 517 in the case of *The Negombo Municipal Council v. K. M. J. Fernando (supra)* "without reproducing again the language of that section which is framed in the form of the

imposition of an obligation on the licensee, that section, in my opinion, amounts to nothing less than provision which confers upon the occupier of premises in proximity to a distributing main a right to be given a supply of energy *in accordance with the provisions of the licence (granted by the Minister to the local authority) and of the regulations made* under the Act. In other words, an occupier has a right to point to the provisions of the licence and to regulations under the Act and to insist that if his case falls within the scope of those provisions, the local authority must give and continue to give a supply of energy for his premises, and if the authority makes default in doing so the authority is liable to be prosecuted and punished under section 64".

Besides, quite apart from prosecuting the licensee under section 64 the occupier or owner of the premises who is qualified to receive the supply can enforce the performance of the duty by the licensee by means of a writ of mandamus. Thus in the case of *Corea v. The Urban Council of Kotte* (3) in issuing a writ of mandamus for the performance of this duty by a licensee Sansoni, J. pointed out at page 63 "The basis of the petitioner's application is section 33 (1) which casts a duty on a licensee, when he is required to do so by the owner or occupier of any premises situated within 150 feet from a distributing main, to give and continue to give a supply of energy for those premises and to furnish and lay any service lines that may be necessary for the purpose of supplying that energy. There is a duty cast upon the first respondent by the Act and it is a duty which the petitioner is entitled to enforce by mandamus when there has been a refusal to carry it out".

He said earlier that he did not think that a criminal prosecution under section 64 is an alternative legal remedy to mandamus and certainly it is not as convenient, beneficial or effectual as the remedy that the petitioner had sought in that case, for he was more interested, naturally, in obtaining a supply of electricity to his premises and the institution of criminal proceedings would not avail him in that respect. So that unless there was something to the contrary in the provisions of the licence or in the regulations made under the Act the defendant was under a duty under the Act to give or continue to give, and the plaintiff had a right to receive, the supply of the energy. We have not been referred to any provisions in the licence or in the regulations made under the Act, to the contrary.

The purpose for which the supply is asked for is totally irrelevant to the consideration as to whether the defendant was

under a duty under the Act to give the supply. The supply of electric energy is to the premises and not for a purpose. Indeed in his application P3 it was totally unnecessary for the plaintiff to have stated that the purpose of the supply was to operate a "paddy huller". It was not one of the particulars asked for by the defendant. The application is in a cyclostyled form cage 8 of which is as follows :—"8. Supply will be required for DOMESTIC, BUSINESS * purposes". At the bottom of the form against the asterisk are the words "strike out whichever is inapplicable". So that all that plaintiff need have done was to strike out the word DOMESTIC. He need not have added the words "for a paddy huller". If this was a material requirement the defendant council would have included it in the form itself.

That the defendant council did not consider the purpose for which the supply was required was material is shown by another circumstance. It accepted the plaintiff's application in the form in which it was submitted even though the purpose for which the supply was required was stated to be for operating a paddy huller. It called upon the plaintiff to deposit a sum of Rs. 520 and after he had done so it commenced the work and laid out the lines. It was sometime later that it refused to give the supply on the ground that milling of paddy could not be carried on in that area. It was not as if the defendant was unaware of this at the time the plaintiff's application was accepted. Appuhamy had made a Building Application in respect of these identical premises to convert it from a running repair garage into a place for keeping and using a rice and paddy cleaning machine.

The Public Health Inspector Dehigama inspected the premises and made his report D6 dated 3.11.1967 in which he pointed out that the trade proposed to be carried on was an offensive trade and that the premises falls within the area reserved for residential purposes under the Zoning Scheme. This report was made some months prior to the application P3 of the plaintiff. This application of Appuhamy was considered by the Sanitation Committee on 15.3.1968 and was rejected by three votes to two and subsequently confirmed by the Council by seven votes to six (P10). So that at the time the plaintiff's application was considered and accepted the defendant Council was well aware that the premises to which the supply was requested was situated in a residential area in a planning zone. The only conclusion one can come to is that the defendant Councli at that time was of the view that in the discharge of its duty as a licensee under the Electricity Act the purpose for which the supply of energy was asked for was an irrelevant consideration.

This is as it should be. For if the plaintiff carried on a trade or profession which he was prohibited by the regulations from carrying on then he would be liable to prosecution and punishment. This has nothing to do with the Electricity Act. However it is obvious that the plaintiff know nothing about the premises being situated in a residential area of a planning zone in which the carrying on of the trade of milling of paddy was prohibited as being an offensive or dangerous trade. He said in his evidence that he did not at any time intend to contravene the law and that if he could not carry on the trade without a licence he would apply for a licence. If a licence was refused he would not carry on the trade but use the supply to carry on some other business in the premises. The trial Judge has accepted this evidence and said in his judgment that the plaintiff is entitled to credit when he says that granted the electric supply he would not have engaged in anything that was not permissible.

In this connection we were referred to the case of *Nallammah et al v. Vijayaratnam* (4) where it was held inter alia, that the defendant's application for a licence to run a rice mill was not in conformity with the by-law 1 (1) (*a*) and by-law 7 of the Jaffna Municipal Council as admittedly there was another dwelling house on the other side within 145 feet of the proposed mill and the licence could not have been granted without doing something illegal. What was held in that case was that there was a prohibition against issuing a licence to run a rice mill if there was a dwelling house within 200 feet of it and since there was a dwelling house within 145 feet of the proposed mill the Council itself would be doing something illegal or contrary to the by-laws if it issued the licence. In the instant case the defendant Council would be doing nothing contrary to any laws or by-laws by giving the supply of energy. It would be the plaintiff who would be doing something illegal if he operated a paddy mill in spite of the prohibition. If given the supply he may do something perfectly lawful.

Another case to which we were referred was the case of *Glamorgan County Council v. Carter* (5) to show that the use to which the energy should be put was a legal use. But that case dealt with the question as to whether a planning permission was necessary and turned on the interpretation of the word "use" in section 12 (5) of the Town and Country Planning Act 1947, which omitting unnecessary words is as follows: "Notwithstanding anything in this section permission shall not be required under this part of the Act—.. (*c*) in the case of land which on the appointed day is unoccupied in respect of the use of the

land for the purpose for which it was used.... " It was held that the word " use " in this context must mean lawful use and consequently that the respondent whose occupation was illegal could acquire no rights. But this case has no relevance to the facts of the instant case for the purpose for which the supply of electricity was required is irrelevant. Besides here there has been no illegal use to which the supply has as yet been put. We are only in the realm of intention which has not yet been turned into reality and which can at any moment be changed.

I hold therefore that there has been a breach by the defendant Council of its duty imposed on it by the Act as a licensee and a breach of a right conferred by the Act on the plaintiff. Can such a breach without more confer on the plaintiff a right to claim damages from the defendant ? The trial Judge held that it did. In this judgment he has stated " It is not seriously contended, and it does not appear that the defendant acted from ill will, and it is perhaps understandable that the defendant thought that having refused Appuhamy's building application it had nothing further to say to the plaintiff. But all that cannot avail the defendant and is irrelevant. What is relevant is that the plaintiff complains of the breach of an obligation imposed by the Act on the licensee and the breach of the right conferred by the Act on him ". And he holds that the person subject to the duty having committed a breach of it his act is equivalent to *culpa*.

Mr. Jayawardene however contends that to enable the plaintiff to maintain an action for damages it is not enough for him to show simply that there was a breach of a statutory duty but must prove further that the defendant was either negligent in the performance of his duty or was actuated by ill will or malice. But in the case of *David v. Abdul Cader* (6) it was held otherwise. In that case the Chairman of a local authority offered a licence to the plaintiff to operate a cinema but subject to the restriction that " the Council's lights should be employed provisionally between the hours 9.30 p.m. to midnight daily and 6 p.m. to 9.30 p.m. on every other day. " The plaintiff refused to accept the licence and brought this action claiming damages.

The District Judge held that the defendant had not wrongfully or maliciously refused to issue the licence as he had not acted out of ill will or bad faith. In appeal it was held that the excuse which the trial judge was able to find for the conduct of the defendant did not relieve him of liability. H. N. G. Fernando, C.J. pointed out at page 23 " .....and the defendant, in refusing the licence for which the plaintiff applied and

in offering a licence which contained an invalid restriction, acted in a manner not authorised by law, and denied to the plaintiff his right under the law. This denial constituted a breach of the duty which the defendant owed, to issue licences under the Ordinance to persons entitled to such licences. The judgment of the Privy Council at an earlier stage of this action contemplated that under the Roman Dutch Law such a breach of duty might well be actionable".

Mr. Jayawardene submitted that this was based on a misconception of the judgment of the Privy Council which was delivered in an earlier stage in the proceedings in the same case—*David v. Abdul Cader* (7) in regard to two issues which were tried as preliminary issues of law. In the lower Court the action was dismissed on the ground that it did not disclose a cause of action against the defendant in his personal capacity. In appeal the Supreme Court did not decide this question but dismissed the action on the ground that there was no right vested in the plaintiff and that he could not maintain an action for damages even if the licensing authority had acted maliciously in withholding the licence. The Privy Council set aside this judgment and held that the action was properly constituted and that "it seems impossible to say that the respondent did not owe some duty to the appellant with regard to the execution of his statutory power; and if as pleaded he had been malicious in refusing or neglecting to grant the licence, it is equally impossible to say without investigation of the facts that there cannot have been a breach of duty giving rise to a claim for damages".

The Privy Council stated that "such consultation as their Lordships have thought it wise to make of the institutional writers on Roman Dutch Law, Voet, Lee and Wille has not led them to think that the conceptions of that law would regard as necessarily inadmissible a right of compensation to a plaintiff for a malicious invasion of his statutory 'rights' to have his claim to a licence subjected to bona fide determination by a public authority". They did not decide what would amount to a "malicious invasion of his statutory rights" but left it to be decided at the trial by the lower courts in accordance with the principles of the Roman Dutch Law. But certainly H. N. G. Fernando, C.J. was right in saying that the Privy Council "contemplated that under the Roman Dutch Law such a breach of duty might well be actionable" and on a consideration of certain of the Roman Dutch Law writers he concluded that it

was not necessary to prove ill will or spite and that it was immaterial that the object which the defendant had in view was a laudable one. There was, if I may say so, with respect, no misconception on his part of the judgment of the Privy Council.

Dealing with this aspect of the matter *Wille—The Principles of South African Law* (5th Ed.) 302, states "Legislation by imposing a duty, positive or negative on one person, may impliedly confer a right on another person or persons..... If the person subject to the duty commits a breach of the duty his act or omission is equivalent to *culpa* and is an infringement of the right; and the owner of the right is entitled to legal redress by way of an interdict without having to prove any actual damage for in such circumstances damages are presumed to have been sustained". Where, however, he claims damages he has to prove the damages sustained by him.

Mr. Jayewardene submits that in this context one has to consider whether the duty is imposed in the interests of a person or class of persons or the public generally. But this is a matter of construction of the provisions of the Statute and is relevant only for the consideration of the question as to whether a particular person has a right to redress or not. Where the duty is imposed in the interests of the public generally an individual has no right of redress unless he can prove that he has sustained actual pecuniary loss by reason of the contravention of the statute—*Ellis v. Vickerman* (8). In the instant case the statute imposes the duty not in the interests of the public generally but in the interests of a class of persons namely those owners or occupiers of premises who are qualified to receive the supply of energy.

Lord Kinnears pointed out in *Black v. Fife Coal Co. Ltd.* (9) "But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention". In this context it is relevant to note that in the case of *Cape Central Railways v. Nothling* (10) De Villiers, C.J. laid down four propositions the first of which is as follows:— "where a statute or statutory by-law enacts that a certain thing shall be done for the benefit of a person he has in the absence of any indication in the statute or by-law of an intention to the contrary, a civil remedy for any special damages sustained by him by reason of non-compliance with the terms of the statute or by-law".

It would be different if the duty which was imposed by the Act was merely one of care. In such a case it is immaterial if what was imposed was a power or duty; the duty of care may exist in either case. In such cases it must be established that either the act was outside the ambit of the power or the duty of care had not been exercised—see *Anns v. London Borough of Merton* (11). I am therefore of the view that the plaintiff is entitled to claim damages from the defendant for the breach of a duty imposed on it by the Act and which infringed a correlative right vested in him, on the mere proof of the breach of the duty, without more.

The trial judge has assessed the damages sustained by the plaintiff at Rs. 10 per day on the basis that "either by using his huller and the premises himself or by handing over the building to others the plaintiff could have hoped for a prospective profit of at least Rs. 10 per day given the electricity supply applied for. From the plaintiff's evidence it was not clear as to what use he was going to put the premises and the supply of energy. He said that if he was not allowed to carry on the trade of milling paddy he would buy paddy from villagers, hull it and sell the paddy. This is on the basis that hulling paddy himself for the purpose of selling the rice was not carrying on the trade of milling paddy. See *Don Albert v. Municipal Revenue Inspector* (12). But it is doubtful whether that case would apply to the facts of the instant case. Alternately he said he could have carried on welding work and that several people offered to pay rent for this purpose. But none of these people were called as witnesses except Appuhamy who said that he was prepared to pay Rs. 15 per day if electricity was available. On this basis he said that he could have got a profit of about Rs. 700 per month.

The plaintiff himself is an aratchchi attached to the Court and had no experience of business of this kind. All that he could say was what he learnt from the inquiries he had made. Besides, the damages that he can claim is the damages occasioned to him as a result of the failure to give him the supply of energy and not what he could have obtained by renting out the premises and the machinery. The plaintiff said that at first what was offered was Rs. 150 per mensem. I think that this would include the rent for the premises which I would estimate at Rs. 50 per mensem. So that the reasonable estimate of the damages sustained by the plaintiff as a result of the breach of the statutory duty by the defendant to supply the

energy would be Rs. 100 per mensem. On this basis he will be entitled to Rs. 2,000 for 20 months from the date of the plaint till July 1970 and at Rs. 100 per mensem thereafter.

It was also submitted that the notice required under section 307 of the Municipal Councils Ordinance had not been given. This notice is necessary only if the Council is sued in respect of anything done or intended to be done under the provisions of that Ordinance or of any by-law, regulation or rule made thereunder. In the instant case the defendant Council is sued not in respect of anything done under the Ordinance or by-law etc. made under it but in respect of a breach of duty imposed by the Electricity Act. It was so held in the case of *Weerasooriya Arachchi v. The Special Commissioner, Galle Municipality* (13).

Subject to the variation in regard to the damages the appeal is dismissed with costs.

RANASINGHE, J.—I agree.

Appeal dismissed.