and a person who has been married being taken in adoption that shall continue to be in force.

(9) Whatever doubt there may be regarding the custom permitting adoption of married man with children, as already stated, there is no doubt and it is well settled law in this part of the country that there was a definite and recognised custom among Hindu Jats of adopting married men irrespective of their age. This will, therefore, squarely come within the excepted custom provided in conditions No. 3 and 4 of Section 10 and, therefore, adoption in this case was quite legal and valid.

(10) In the result second appeal fails and it is hereby dismissed. There will, however, be no order as to costs.

P.C.G.

Before G. R. Majithia, J.

DARSHAN RAM AND ANOTHER,—*Appellants.*

versus

NAZAR RAM,—*Respondent.*

Regular Second Appeal No. 2036 of 1987

August 29, 1988.

Code of Civil Procedure (V of 1908)—Order XXXIX, Rls. 1 and 2—Tort—Public nuisance—Installation of furnace—Emission of abnoxious smell and harmful gases causing discomfort and inconvenience to plaintiff neighbour—Such nuisance—Whether actionable —Permanent injunction—Whether can be issued.

Held, that the defendant cannot be permitted to use their property in a manner which creates nuisance to their neighbour. The working of the furnace has caused nuisance to the plaintiff. Hence permanent injunction can be granted.

(Para 8).

Code of Civil Procedure (V of 1908)—O. 6, Rls. 2 and 4—Pleadings —Suit framed for permanent injunction restraining defendant from committing attempted nuisance—Proof that nuisance was caused—Use of word 'attempted' in plaint—Effect of use of word.

Held, that it is a settled rule of law that the averments made in the pleadings drafted in the *Mufissal* has to be liberally construed. In the evidence plaintiff has proved that as result of working of the furnace recently installed by the defendant he and his family members are worst affected. Thus infact it is not the case of attempted nuisance but a case where nuisance has resulted from an accomplished fact. Merely because a particular word was not used in the plaint is in-consequential. It is well settled that if the parties knew that a point arises in a case and they produce evidence on it, though

it does not find place in the pleadings and no specific issue has been framed on it, the court can still adjudicate thereon.

(Para 7).

Held, that the defendant cannot be permitted to use their property in a manner which creates nuisance to their neighbour. The working of the furnace has caused nuisance to the plaintiff. Hence permanent injunction can be granted.

(Para 8).

Regular Second Appeal from the decree of the Court of the Additional District Judge, Kapurthala dated the 6th day of April, 1987. affirming with costs that of the Sub Judge 1st Class, Phagwara, dated the 11th December, 1985, decreeing the suit of the plaintiff for permanent injunction restraining and prohibiting the defendants to commit nuisance by operation of their ore melting Furnace (Kupla) furnance newly errected by them and leaving the parties to bear their own costs.

CLAIM:—Suit for permanent injunction restraining and prohibiting the defendants permanently to commit attempted nuisance by the operation of their ore melting Furnace newly erected by them which shall certainly emit abnoxious smells, harmful smoke and unbearable heat which the defendants intend to operate very soon causing permanent and continuous source of annoyance and constantly recurring injury, interfering in plaintiff's use and enjoyment of his residential building and also resulting into their ill health due to pollusion of air, smell and gases.

J. C. Verma, Advocate, (Dinesh Kumar Advocate with him), *for the Appellants.*

K. K. Cuccuria, Advocate, *for the Respondent.*

JUDGMENT

G. R. Majithia, J.

(1) This Regular Second Appeal is directed against the judgment and decree dated 6th April, 1987 of the learned Additional District Judge, Kapurthala.

(2) I am referring to the parties by the description given in the plaint. The plaintiff and defendant No. 1 are brothers. They are in occupation of the property which adjoins each other. It is however, divided by a six feet high wall. The defendants were running their business in the premises of the defendant No. 1 and they were manufacturing the machinery parts and for this they were melting ores in a crucible furnace which was located at a distance of 50 feet from the house of the plaintiff. The defendants installed another ore melting furnace having a base diameter of 7 feet and 15 feet in height. It was installed by the defendants at a distance of 16

feet from the house of the plaintiff. The big furnace emits abnoxious and offensive smell, harming gases and smell. The working of furnace created lot of heat causing discomfort and inconvenience to the plaintiff and his family members.

(3) The defendants filed a joint written statement and pleaded that the melting furnace had been in existence since 1970 and none objected to during all this period and that a valid licence had been issued by the Phagwara Municipal Committee for carrying on this business. The assertion that the furnace having a base diameter of 7 feet and 15 feet in height was recently installed was denied. It was also denied that the furnace caused any inconvenience to the plaintiff.

(4) The trial Judge, from the pleadings of the parties, framed the following issues: —

1. Whether the suit is not maintainable in the present form? OPD.
2. Whether the plaintiff has locus standi to file the present suit? OPP.
3. Whether the plaintiff is estopped to file this suit on account of his act and conduct? OPD.
4. Whether the plaintiff is entitled to the injunction prayed for? OPP.
5. Relief.

The learned trial Judge came to the conclusion that the suit was maintainable and the plaintiff has locus standi to file the suit and was also entitled to obtain the injunction prayed for. Before the first appellate Court, no fault was found with the conclusion arrived at by the learned trial Court under issue No. 1. The decision of the learned trial Judge under issues No. 2 to 4 was assailed.

(5) The learned first appellate Court found that the location of the *Cupla* furnace has made it uncomfortable for the plaintiff to live in his house. With the working of the furnace temperature gets raised up to 1,400 degree centigrade. The high temperature has natural consequences on the environment. Use of heavy quantity of coal would emit smoke and the plaintiff will get maximum share. The height of the *Cupla* is only 4 feet and its chimmney cannot take the gases and smoke so high so as to save the occupants of the plaintiff's house.

(6) The learned Judge also found that the *Cupla* furnace is a recent development in the premises of the defendants. He took notice of the report of verifying Officer Exhibit D.W. 5/B who reported that the demand of the defendants for additional supply of coal was genuine and obviously it was required for use in the new furnace installed by him. The stand of the defendants that the *Cupla* furnace was working for the last many years was found to be false. It was found that the *Cupla* furnace is a recent development in the premises of the defendants and the plaintiff and other members of his family were worst affected on account of the working of this furnace. No meaningful argument could be raised by the learned counsel for the appellants that the conclusion arrived at by the learned Judge on appreciation of evidence, was not correct or that the conclusion arrived at and referred to above were not based on evidence. The learned counsel made two submissions namely; that the case pleaded by the plaintiff was only of attempted nuisance and no suit for permanent injunction was maintainable and that the *Cupla* existed for the last many years and the plaintiff had not led any meaningful evidence to prove that the gases emanating from the furnace have, in any way, affected the health of the plaintiff and his family members.

(7) The plaint is not happily worded. It is corrected that in the heading of the plaint, the plaintiff has stated that they are praying for permanent injunction retraining the defendants from committing attempted nuisanceby the *Cupla* furnace newly erected. It is a settled rule of law that the avernments made in the pleadings drafted in the *Mufissal* has to be liberally construed. In the evidence at the trial, the plaintiff has proved by positive evidence that as a result of the working of the furnace recently installed by the defendants, he and his family members are worst affected. Thus, in fact it is not the case of attempted nuisance but a case where nuisance has resulted from an accomplished fact. The parties had led catena of evidence both documentary and oral to prove and disprove their respective contentions and as held by the learned appellate Court, the new furnace has been recently installed by the appellants and this has resulted in nuisance to the plaintiff. Merely because a particular word was not used in the plaint is in-consequential. It is well settled that if the parties know that a point arises in a case and they produce evidence on it, though it does not find place in the pleadings and no specific issue has been framed on it, the Court can

still adjudicate thereon. Reference can be usefully made to a Privy Council decision reported as *Ravi Chandra Kanwar* v. *Narpat Singh* (1), followed by the Apex Court in *Nagubai Ammal* v. *B. Shama Rao and others* (2) and to a Division Bench decision of this Court in *Ram Niwas* v. *Rakesh Kumar* (3), where the above proposition was reiterated.

(8) In the light of the ratio of this jugdment I hold that the defendants cannot make much capital out of the lose wordings used in the pleadings. The parties led evidence fully knowing the case projected by each of them. Even otherwise, I am of the considered opinion that once the parties have led evidence, it is for the Court to mould the relief on the basis of the case proved. The other submission made by Mr. Verma is that the plaintiff has not been able to prove that as a result of the public nuisance any particular injury has been caused to him. I am afraid the submission is not sustainable. No one can be allowed to use his own property in such a manner that it creates a nuisance for his neighbours. The basic authority for this proposition is reported as *John Rylands and Jehu Horrocks* v. *Thomas Fletcher* (4). Their Lordships of the House of Lords held as under:—

> "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of his major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient......"

As stated supra, the learned appellate Court has arrived at a firm finding of fact that as a result of the working of the furnace installed in the premises of the defendants the plaintiff and members of his family are worst affected. The ratio of the judgment rendered in *John Rylands's* case (supra) is fully attracted to the facts of the

(1) 34 I.A. 27.
(2) A.I.R. 1956 S.C. 593.
(3) 1984 P.C.R. 9.
(4) 1968(3) Law Reports 330.

present case. The defendants cannot be permitted to use his property in a manner which creates nuisance to his neighbour. The working of the furnace has caused nuisance to the plaintiff.

(9) Somewhat identical question arose for determination in *Amar Singh* v. *Hari Singh and others* (5).

(10) In that case, the plaintiff filed a suit for issuance of permanent injunction against the defendant from working their foundry in the adjoining house as foul smell was omitting from the furnace on account of melting of iron which was unbearable. M. R. Sharma, J. held "the principle that no one should be allowed to use his own property in such a manner that it creates nuisance for his neighbours has been well settled."

(11) The learned counsel for the appellants has placed strong reliance on *Bhagwan Dass* v. *Town Mag Budaun and others* (6) and *Behari Lal* v. *James Maclean and others* (7). The principle laid down in these authorities is not remotely attracted to the facts of the instant case. In *Bhagwan Dass's case* (supra), the Allahabad High Court held that a person founding a cause of action on public nuisance must establish a particular injury to himself beyond what has been suffered by the rest of the public. In *Behari Lal's case* (supra) what was laid down was that in order to establish nuisance actionable discomfort must be substantiated. The ratio of the judgment in *Amar Singh's* case (supra) is fully attracted to the facts of the present case. Relying upon the same, I hold that the plaintiff has fully established his case for grant of permanent injunction. I do not find any infirmity in the judgment of the learned Additional District Judge and uphold the same and dismiss the appeal filed by the defendants. However, in the circumstances of the case, I leave the parties to bear their own costs.

R.N.R.

(5) 1983 Curr.L.J. 230.
(6) A.I.R. 1929 All. 767.
(7) A.I.R. 1924 All. 392.