

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

Court of Appeal case no. CA 1239/98/F

D.C. Mount Lavinia case no. 374/95/L

Chandani Wijerathne

69/1, Galle Road, Dehiwala

Plaintiff

Vs.

M. Gunasekara

71, Galle Road, Dehiwala

Defendant

And Now

M. Gunasekara

71, Galle Road, Dehiwala

Defendant Appellant

Vs.

Chandani Wijerathne

69/1, Galle Road, Dehiwala

Plaintiff Respondent

Before : L.T.B. Dehideniya J. (P/CA)

Counsel : Manohara De Silva PC with Hirosha Munasinghe for the
Defendant Appellant.

: Nihal Fernando PC with Rohan Dunuwila for the Plaintiff
Respondent.

Argued on : 13.07.2016 & 21.09.2017

Written submissions filed on 19.10.2016 & 17.03.2017

Decided on : 30.10.2017

L.T.B. Dehideniya J. (P/CA)

This is an appeal against a judgment of the District Court of Mount Lavinia.

This appeal was argued before a bench comprising of myself and H/L Madawala J. Due to sudden demise of Madawala J. the President's Counsel for both parties requested me to deliver the judgment. Accordingly, I deliver this judgment as a single judge bench.

The Plaintiff Respondent (hereinafter sometimes called and referred to as the Respondent) instituted this action in the District Court of Mt. Lavinia claiming compensation for the damages caused to her house by constructing a building in the adjoining land by the Defendant Appellant (hereinafter sometimes called and referred to as the Appellant). After trial the learned District Judge delivered the judgment in favour of the Respondent. Being aggrieved by the said judgment, this appeal was presented.

The ownership of the two lands, i.e. the Respondent's land and the Appellant's land was admitted. The construction of the Appellant's building adjoining the Respondent's house was also admitted. Further the damages in the Respondent's house were also not in issue. The only issues are whether the damages were caused by the construction of the Respondents house or not and the quantification of the damages.

The Respondent in her evidence stated that the cracks in the walls and in the concrete slab started only after the Appellant started the construction. The engineer Rathnayake who inspected the premises explained the damages caused to the house. He was unable to give the exact period that

the damages caused. He was of the view that it has to be ascertained by questioning the neighbours. The Respondent testified to the fact that the damages caused only after the Appellant started the constructions. The witness Rathnayake was aware of the fact that the soil of the area is sandy. The witness called by the Appellant has also not tested the soil. Therefore there is no reason to disbelieve the witness Rathnayake on the quality of soil. He has found that the Appellant had not taken any measure to give a lateral support to the existing building before excavating on the adjoining boundary and the Appellant admitted this position. Witness Rathnayake further found that there is a gap in between the foundation constructed by the Appellant and the edge of the ditch excavated for the foundation. His opinion is that the cracks may have caused due to the settlement of soil.

A Court commission was issued to the Institute of Engineers to inspect and report. Their report is filed marked as V4. In paragraph 2.2.1. they reported that;

“The crack on the floor slab along wall A is suggestive of settlement due to ground disturbances. The crack on the floor in the kitchen appeared to be old crack and it cannot be attributed to construction of house No.71.

The afro mentioned factors suggest that there has been some ground movement adjacent to wall A causing cracking or additions to the problems of cracks seen in the passage.”

This means that the Court commissioners also of the view that there was ground movement under the foundation of the Respondent's house.

This report further strengthens the observation of witness Rathnayake that the damage may have caused due to excavation without offering lateral support to the Respondent's building.

The Appellant argue that the Respondent's house is a very old house. The portion which was damaged is a newly build one. It is about 8 to 10 years old, but the other portion of the house is about 30 to 50 years old. The new section is the one close to the boundary where the excavation was done and the damage caused to that portion. Therefore the age of the house is immaterial. The damages caused to the wall parallel to the Appellant's newly constructed building, not to the old house.

The Appellant's Architect Lakshmanrathne stated that he instructed the workers not to fix a nail even to the wall of the Respondent because it is weak. Further he knew that the soil is sandy. Therefore he should have instructed the Appellant to take precautions before excavating adjoining to the existing building, but had failed. He states that he did not use the metal shutters because the vibration can be harmful. It was reveled in evidence that there are several other measures that can be used such as providing wood panels or even chemically treating the soil to make it hard. Without doing so he left a space between the foundation and the edge of ditch allowing the soil to settle.

The finding of the learned District Judge that the damages caused to the Respondent's house was due to the construction of the Appellant's building is supported by the evidence. The Appellate Court does not interfere with a finding of a fact unless it is perverse. (Sarathchandra v. Dingiri Menike [2004] BLR 76)

Accordingly I see no reason to interfere with the finding of the learned District Judge.

I dismiss the appeal subject to costs fixed at Rs. 15,000/=

President of the Court of Appeal