

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

1. W. Gunawathie
No. 15/75, Palenwatta,
Pannipitiya.

and 2 others

PLAINTIFFS

C.A No. CA 591/99 (F)
D.C. Panadura 2532/SPL

Vs.

P.D. Ratnetilaka (**Dead**)
No. 16/50, Pelenwatta,
Pannipitiya.

DEFENDANT

And Between

1. W. Gunawathie
No. 15/75, Palenwatta,
Pannipitiya.

PLAINTIFF-APPELLANTS

Vs.

P.D. Ratnetilaka (**Dead**)
No. 16/50, Pelenwatta,
Pannipitiya.

DEFENDANT-RESPONDENT

And Now Between

P. Don Chanaka Ratnatilaka of
No. 16/50, Pelenwatta,
Pannipitiya.

PETITIONER

**(Party sought to be added as
the Substituted Defendant**

2. W. Gunawathie
No. 15/75, Palenwatta,
Pannipitiya.

And 2 others

**PLAINTIFF-APPELLANT-
RESPONDENTS**

Vs.

P.D. Ratnetilaka (**Dead**)
No. 16/50, Pelenwatta,
Pannipitiya.

**DEFENDANT-RESPONDENT
RESPONDENT**

BEFORE: Anil Gooneratne J.

COUNSEL: 1st and 2nd Plaintiff-Appellants are absent and unrepresented.
W. Prematillake for the Defendant-Respondent.

ARGUED ON: 10.10.2011

DECIDED ON: 19.10.2011

GOONERATNE J.

This was an action filed in the District Court of Panadura by the Plaintiffs against the Defendant for a declaration (on a delict of private nuisance) that the actions of the Defendant in his timber depot of loading an unloading timber, working till late hours and transporting timber in heavy vehicles cause a private nuisance by noise. Plaintiff-appellants have sought a permanent injunction to restrain the above and damages in a sum of Rs. 3,00,000/- It appears that Plaintiff reside on the adjoining land and parties share common boundaries on the north and south. Parties proceeded to trial on 1 admission and 5 issues.

The material before this court indicates that the Magistrate's Court (No. 25550) by order directed the Defendant-Respondent to move the saw mill to another location since the Defendant commenced a mill within a residential area. (case record burnt) It is also in evidence that two other cases were filed in the Magistrate's Court bearing No. 10760 and 10761 by the

UDA. (P30 & P31) against the Defendant-Respondent. As a result the mill and the machinery were sealed. Such orders were deemed to be made since the activity of the Defendant was contrary to the UDA regulations. I also find that in Magistrate's Court Case No. 24519 from which the accused appealed to the High Court (Case No. 27/95) the 1st Accused was found guilty and fined. The 1st Accused was the Defendant-Respondent. In the trial in the District Court the above material along with several documents were marked in evidence.

It is apparent that the material placed before this court and in the District Court indicates that the Respondent had been dealt with from time to time for causing various wrongs to the Appellants and punishment were also imposed on him by the High Court and Magistrate's Court. There is no doubt that the Appellants were harassed by the Respondent party as indicated by the material submitted before this court. However in the District Court Plaintiff-Appellant's action was dismissed. The trial Judge seems to take the view that as at the date of filing plaint the nuisance complained of by the Plaintiff party could not be proved, by way of a private nuisance. Though the case had not been proved on a balance of probability in the District Court, prior incidents, were dealt with as and when it occurred, by the relevant court with criminal jurisdiction.

The learned District Judge has based his conclusions more or less on the alleged acts of harassing the Plaintiff as at the time of filing plaint. The following extract from the judgment to be noted in this regard. (මක් නිසාද මෙම නඩුවෙන් හෙලි වූ කරුණු අනුව මෑත කාලයේ ඒ තරම් කරදර හිරි හැරයක් සිදු වූ බවක් පෙනී යන්නේ නැත. 3 වෙනි පැමිණිලිකාරියගේ සාක්ෂියෙන්ම ඒ බව හෙලි වී ඇත. මක් නිසාද රු කාලයේ ලී බැම අන්තිමට කලේ මීට අවුරුදු 2 ට කලින් බව පවසා ඇත. ඉදිරිපත් කල පාඨාරූප පවා නඩු විභාගයේදී ලකුණු කර ඇත්තේ මීට වසර 2 ක් 3 ට ප්‍රථමයෙන් බැවින් මෑතකදී ඔවුන්ගෙන් කරදර හිරි හැරයක් සිදු වූ බව පෙනී යන්නේ නැත. පීඩාවට (nuisance) යන දිගටම පවතිමින් යන ක්‍රියාවකි. නමුත් මෙහිදී එම ක්‍රියාව දැන් පවතිමින් බවට සාක්ෂියක් නැති බැවින් මෙම පැමිණිල්ල පවත්වාගෙනයා හැකිද නැද්ද යන්නද ප්‍රශ්නයකි. කෙසේ වෙතත් විත්තිකරු ඔහුගේ දැව ගබඩාව අතිකුත් අයට හිරි හැරයක් කරදරයක් නොවන ආකාරයට ඔහුගේ සේවකයින් මෙහෙයවා පවත්වාගෙන යාමට යන බලාගත යුතුය. විත්තිකරුගේ ලී ගබඩාව හේතුවෙන් ඇගේ නිවසට අලාභ සිදුවී ඇති බවට 1 වෙනි පැමිණිලිකාරිය සාක්ෂි දී ඇතත් එකී නිවසේ තත්වය පිලිබඳ වාර්තාවක් ඉදිරිපත් කිරීමට හෝ තක්සේරු කරුවකු ලවා තක්සේරු වාර්තාවක් ලබාගෙන ඉදිරිපත් කිරීමට පැමිණිලිකාරිය ක්‍රියා කර නැති බැවින් අලාභ ලී ගබඩාවට හේතුවක් සිදු වී ඇති යයි ඔප්පු කිරීමට පැමිණිලිකාරිය අපොහොසත් වී ඇත.

In all the above circumstances I do not wish to disturb the factual findings of the learned District Judge. Primary facts need not be disturbed unless highly unacceptable. Further the appellants were absent and unrepresented on several dates when this case was mentioned in this court and finally absent and unrepresented when the case had been fixed for

argument. Failure of the Appellants to prosecute the appeal is another ground that makes the Appellant's appeal liable to be rejected. Therefore in all the above circumstances I dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL