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

1. R.T. Wijetillake
2. (Mrs.) D.R. Wijetillake
   Both of No.23, Independence Avenue,
   Colombo 7.

C.A. No.270/97(F)

D.C. Colombo Case No.11228/MR

Defendants-Appellants

Vs.

1. N.D. Paranavithana
   No.4/1, Col. T.G. Jayawardena
   Mawatha, Colombo 03.

2. (Miss) S.R. Paranavithana (Decd)
   No.100, Kynsey Road,
   Colombo 08.

3. Dr. (Mrs.) M.E. Wijesinghe nee
   Paranavithana
   No.55, Hullsyde Parade, Strathmore,
   Victoria 3041, Australia.
   (Appearing by her Attorney Mahinda
   Wijesinghe (holder of Sri Lanka
   National Identity Card No,400982619V)
   Of Talangama South)

Plaintiffs-Respondents

C.A. No.270/97(F) - **D.C. Colombo Case No.11228/MR**

BEFORE : M.M.A. GAFFOOR J.

COUNSEL : Palitha Kumarasinghe PC with Priyantha Alagiyawanna and Asanka Ranwala for the Defendants-Appellants

Suren de Silva for the Plaintiffs-Respondents

ARGUED ON : 04.07.2017

WRITTEN SUBMISSIONS TENDERED ON : 24.11.2017 (Plaintiffs-Respondents)
13.12.2017 (Defendants-Appellants)

DECIDED ON : 10.05.2018

M.M.A. GAFFOOR J.

This is an appeal from the judgment of the District Court of Colombo dated 30th May 1997. The plaintiffs-respondents (hereinafter called as respondents) originally instituted this action in the District Court to recover damages and loss caused to them by the defendant's conduct.

The Respondents became the owners of property described in the 1st schedule to the plaint and the 2nd defendant (2nd appellant) is the owner of the property described in the 2nd schedule to the plaint.

The defendants (hereinafter called as appellants) demolished their old house in order to construct a multi-storied building on it.

The respondents pleaded that, the conduct of the appellant by earth-filling operations and using heavy machinery like bull dozers and road rollers to consolidate earth caused damage to the house belonging to them and it was rendered useless. Further damage due to the negligence of the appellants' ignorance, the protest of the respondents' and the failure to take adequate precautions resulted the respondents to suffer loss and damages amounting to a sum of Rs.1,180,000/= assessed on the basis that -

a) damage caused to the building Rs.1,000,000/=
b) loss of rental receivable from the said building rate of 10,000/= per month for 18 months.

The appellants argued that work was done by an independent contractor, denied the liability and stood up the position that the respondents' building was very old and is about 40 to 50 years and there

were already several cracks on the building prior to the earth work done by the 2nd appellant, adequate precautions were taken by them and also the house was constructed in a flood-prone area with underlying peat soil.

According to the evidence led by the Engineer Hemachandra (Report P3), he had photographed the premises and testified in detail of the damages seen by him the filling was done in one setting. In his opinion the load of the earth plus the load of the building, the land on which the building stands was the cause of damage. P3 with the report and appendices gives a clear picture of the cracks widened as a result of filling operation and further he testified that the house could last for 60-70 years.

The learned Additional District Judge had held the appellants' acts of negligence only accelerated the unworthiness of the house in suit and appellants jointly and severally are liable for the damages suffered by the respondents and he valued such damages in sum of Rs.450,000/- with legal interests.

The appellants also disputed the quantum of damages awarded by the Trial Judge to the respondents, namely a sum of Rs.350,000/= or which has been through an inadvertent typographical error being stated as Rs. 450,000/= in the body of the judgment.

In the said judgment the learned Additional District Judge had come to a conclusion that the damages suffered, amounts to Rs.350,000/=.

The main argument of the defendant-appellants are based on the regularity and the way in which the issues that had been raised in the case were decided by the learned Additional District Judge.

The bone of contention as regards is issue No.8, where the defendant-appellants aver that there is a *ex facie* irregularity in answering the issues which amounts to an erroneous conclusion reached by the learned Additional District Judge.

The plaintiff's main contentions are that due to the purported and admitted acts of the defendant the house in issue had been rendered useless and further it is uneconomical to bring it to the former position by restoration or repair.

The plaintiff had sought Rs.1,000,000/- and a further sum of Rs.180,000/- for loss of income caused by the acts of the defendants.

It is to be noted that the plaintiff who claims compensation admits that the house in issue was 40 to 50 years old and there were

several cracks in the building prior to the earth work done by the defendant. And it is in evidence that the land on which the building in issue stands is situated in a low level area where there is stagnation of water due to rain. Furthermore, the house was constructed on a land where the underlying soil is described as peat soil. It is to be noted that none of the parties had done a soil test to ascertain the strength of the underlying soil which could have been a very important piece of evidence in regard to the nature of the soil which existed at the time of the incident.

It is submitted by both parties that the acts of filling of land which underwent a new construction, the filling had been done by heavy machinery such as tractors and road movers in the process of the construction carried out. But the defendant-appellants submit that they have taken precautionary measures to reduce the vibrations and had used hand rollers in filling operations at the proximity of the plaintiff's land.

It is also to be noted the plaintiff had prayed for damages as regards the value of the house and the rental, but the plaintiff had not prayed for cost of repairing.

In this case 8 issues were raised by the plaintiff. Issues No.9-23 were raised by the defendant respectively. In order to substantiate their case 2 Civil Engineers Rodrigo and Hemachandra and

Marasinghe the Municipal Valuer had given evidence. The documents marked P1 to P9 were read in evidence and the plaintiff closed his case. At the trial the Balaraja Arunasalam (neighbour of the plaintiff and defendant) Gamini Karunarathna a Chartered Architect and another Karunarathna a structural engineer testified for the defendants and closed their case reading in evidence documents marked from D1 to D12.

It is to be noted in the case of ***Surangi vs. Rodrigo*** 2003 (3) SLR 35 His Lordship Gamini Amarathunga held that,

1. No court is entitled to or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint.

In the above case the court has referred to undernoted judgments.

1. ***Sirivansa Thero v. Sudassi Thero*** – 63 NLR 31
2. ***Martin Singho v. Kularathne*** – CA 248/95 CAM 18.12.96
3. ***Wijesuriya v. Senaratne*** – (1997) 2 Sri LR 323
4. ***Dinoris Appuhamy v. Sopinona*** – 77 NLR 188 (Distinguished)

In the above said judgments the learned Judges had referred to Section 40(e) of the Civil Procedure Code and come to a conclusion "no court is entitled to or has jurisdiction to grant relief to a party which is not prayed for in the plaint. Further, mere

assertion of damages in the body of the plaint does not provide for relief which had not been specifically prayed.

It is to be noted that the Supreme Court in the case of ***J.R. Punchi Appuhamy and another vs. Dingiri Banda*** BASL Law Journal 2016 Vol. 22 page 40 where the court has to decide "whether the plaintiff is entitled to a lesser relief than prayed for..."

In this case H/L Eva Wanasundera J had held thus,

> 2. Applying the principle that the fact that the plaintiff has prayed for a greater relief than what he is entitled to, should not prevent him from getting a lesser relief which he is entitled to ....."

In the similar vein in the case of ***Aththanayaka vs. Ramyawathie*** (2003 1 SLR 401) H/L Shirani Bandaranayake J had to decide whether the claimant should establish his claim to the extent he had prayed for. Court observed although a larger claim had been made a lesser claim can be awarded by court.

This court observes that although the plaintiff had claimed for a larger amount of damages this court has inherent powers to award a justifiable and an equitable judgment.

In the case of ***Wilson vs. Kusumawathie*** 2015 BLR 49, it was held that it is undoubtedly incumbent upon the court to utilize the statutory provisions and grant the relief embodied therein if it appears to court that it is just and fair. Recently referred to in **SC Appeal 96/17, SC/HCCA/LA/630/16 D.C. Colombo 4415/09 SC appeal decided on 06.03.2018.**

Therefore, this court has to consider the above said line of authorities as enumerated by the Supreme Court and come to a conclusion on the quantum of damages. Because, it is seen by this court that *ex facie*, damages had been caused by the construction according to the evidence that had been led.

Therefore, on the above said judgments and the facts of this case cry for justice which cannot be ignored by this court.

Another contention of the defendant-appellants is that the principle based on ***Ryland vs. Fletcher*** enunciated by His Lordship Blackburn J is not applicable in this case. The basis of this argument is that there is no evidence relating to any damages directly resulting from construction of the building. Furthermore, it is submitted by the defendant-appellants that the above concept in ***Ryland vs. Fletcher*** is

based on negligence arising out of strict liability. Therefore, we agree with the contention that the learned trial Judge had not considered the rulings on ***Ryland vs. Fletcher*** in comparison to the facts of this case.

It is to be further noted when a trial Judge in his judgment in p.824 had very correctly observed that the filling of the land is not an unnatural use of the land. Therefore, this observation and the application of ***Ryland vs. Fletcher*** are contradictory. Therefore, we have to dissent from this finding of the learned trial Judge on this point.

It is further submitted by the appellants that the learned trial Judge had not properly analyzed the evidence of the witnesses brought before court.

Balraj Arunasalam has been considered as worthy of credit and not a partial witness. He had submitted to court that on 10.09.1989 the 1st defendant had purchased the old house which was demolished within a period of one month. Furthermore, the structural engineer had suggested that a soil test should be done and accordingly it had been carried out. At page 582 the appellants have filling work under the supervision of Consultants S.A. Kularathna and Gamini Karunarathna. The plaintiff-appellants have been mindful of the complaint and had used

hand rollers for the purpose of filling land, page 635. Witness S.A. Karunarathna had testified that he advised the appellants not to use heavy machinery and to use manual roller in order that the operations will not harm the adjoining property. The vibrations emanating from the machines had been minimized. Therefore, when perusing the evidence of the expert engineers we observe that the evidence conforms to the fact that the defendants have taken adequate precautions in filling operations.

Although, the defendant-appellants had contended that a detailed report of the cost of damages have not been tendered and the learned District Judge had awarded cost of repairing, we see no reason to split hairs on this issue as the learned District Judge had considered the cumulative effect on the evidence led before him and had come to this decision regarding the value of the said house/cost for repaying the said house. It may be that what has been considered by the learned District Judge is not the grammatical connotations of the claim but the facts that had been elicited before court in the form of evidence.

Furthermore, we note that filling the land for construction purposes is not using the land for unnatural purpose. As said above the defendant-appellants have taken all possible precautions to avoid vibrations which may have caused damages to the adjoining property. We observe that the learned trial Judge had come to a conclusion that the

filling earth using heavy machinery tractors and road rollers which is not the real state of affairs that prevailed in the defendant's land.

It had also been submitted that even prior to the operation of filling and construction the land in dispute there had been numerous cracks in the premises No.24. The said house had been built on peat soil which had been subject to floods at various intervals.

The learned trial Judge had awarded a sum of Rs.350,000/- the cost of repairs of the house, but had not taken into consideration the value of the building or the rentals. The value of the house and the rentals had not been claimed in issue No.8. The cost of repairs is not an issue. Therefore, what had not been asked for cannot be awarded which is not relevant to the evidence.

But Section **189** of the Civil Procedure Code provides in a situation of this nature.

> **189.** (1) The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.

(2) Reasonable notice of any proposed amendment under this section shall in all cases be given to parties or their registered attorneys.

The Privy Council judgment of ***Jayawickrama vs. Amarasinghe*** 20 NLR 289 and the proviso to Article 138 (1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

In a recent case of **CA 1171/99(F) decided on 2.2.2018** Devika Livera Thennakoon J. delivering the judgment of the court observed that in the case of ***Mohamad Iqbal vs. Mohamad Sally*** 1995 2 SLR 310 –

> "Section 189 of the Civil Procedure Code is exhaustive for the causes for which a decree may be amended. In the above judgment court has cited H/L Ranaraja J– where he had observed "the power of court under Section 189 is to be exercised entirely at the discretion of court, and the discretion should be exercised sparingly and in general to avoid a miscarriage of justice; if not the principle of the finality of a judgment and decree will have no meaning."

The contention of the appellants was the issue No. 7 had not been properly answered. But taking into consideration the above authorities and the recent trends enunciated in these judgments the powers of this court are not restricted to strictly abide by the provisions, but as H/L Ranaraja J had very clearly enunciated corrective action should be taken within the framework of the law, to remedy the injury caused thereby. The modalities are best left to court and would depend on the nature of the error.

The appellants had invited this court to the observations and findings of the learned District Judge as regards issues No. 4 and 5. As a matter of completeness we had made our observations in that regard a repetition of those facts is unnecessary and will burden the case record. In answering these contentions, the court is empowered under the provisions of the Civil Procedure Code Section 189 to rectify errors and deliver a justifiable order.

We are mindful of the evidence of Consultant Engineer Hemachandra at page 317 of the brief, it is observed that the cracks are not mere cracks but gaping holes. These damages had caused the building uninhabitable. The observations are reflected in page 921 of the brief sub paras 3.1 to 3.8 demonstrate the damages in detail. These observations are not disputed in evidence. In light of the above, we see no ground to

dismiss the plaintiff's case but to hold that the damages awarded by the learned District Judge amounting to Rs.350,000/= although not the real value for the damages caused we have no alternative but to award the said cost of Rs.350,000/= and legal interests.

Subject to these variations this appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL