IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal against the Judgment of the Provincial High Court of Central Province dated 11/02/2015 in Case No. CP/HCCA/Kandy/67/2012 (F) D.C. Kandy Case No. 12245 X

SC/APPEAL/177/17
SC/HCCA/LA/118/15
CP/HCCA/Kandy/67/2012(F)
D.C. Kandy Case No. 12245 X

In the District Court of Kandy

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiffs

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendants

And Between in the Provincial High Court of Central Province

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiff - Appellants

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendant – Respondents

And Now Between in the Supreme Court

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiff – Appellant – Petitioners

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendant – Respondent – Respondents

Before : Sisira J. de Abrew J

L. T. B. Dehideniya J and

E. A. G. R. Amarasekara J

Counsel : Dr. S.F.A. Cooray for the Plaintiff – Appellant – Appellant

Nihal Jayawardena PC with S.W. Wilwaraarachchi instructed by Hasitha Amarasinghe for the Defendant – Respondent – Respondents

Argued on : 29.06.2020

Decided on : 31.05.2021

E. A. G. R. Amarasekara J

Plaintiff – Appellant – Petitioners (hereinafter sometimes referred to as the petitioners or the plaintiffs) by a plaint dated 03.05.1999, instituted case no.12245X in the District Court of Kandy against the Defendant – Respondent – Respondents (hereinafter sometimes referred to as the respondents or defendants); and by an amended Plaint dated 12.12.2002 prayed,

- For the demarcation of the east boundary of the land described in the schedule to the amended plaint, in accordance with the plan No. 914 (marked as V1 and P7 at the trial),
- For a declaration that the damages to the east boundary of the plaintiffs' land had been caused due to the negligence and wrongful actions of the defendants,
- For an order to compel the defendants to erect a retention wall at the east boundary of the plaintiffs' land at their own cost, or in the alternative, for an order that the plaintiffs can, jointly or severally, recover the cost for such retention wall from the defendants,
- For an order for damages owing to the acts of the defendants in breach of peaceful enjoyment and consumption of the plaintiffs' land,
- For costs and other reliefs.

As per the amended plaint,

- The plaintiffs are the lawful owners of Lot No.8 and the defendants are the lawful owners of Lot no.9 of plan no. 914 mentioned above.
- The land from lot 8 to lot 9 in the said plan is inclined to East from West. Thus, the Lot 8 is situated on a higher elevation of about 15 feet above the lot 9.

- The defendants, from the beginning of 1999, started to shovel off the soil in between the elevated land of the plaintiffs and the land of the defendants which was at a lower level to build unlawful constructions on the western boundary of the defendants' land causing soil erosion in the inclined area.
- Due to the removal of soil done by the defendants on the eastern boundary of the plaintiffs' land the said boundary has become dangerously unstable and the protective wall has been damaged on several places and further, it has caused considerable damage to the house and other buildings of the plaintiffs endangering the lives of the members of the plaintiffs' family.
- The plaintiffs requested the defendants to erect a protective wall prior to commencing any construction by the east boundary of the plaintiffs but the plaintiffs intentionally ignored the said request.
- The plaintiff states that the encroachment through excavation is shown in the plan no. 2360 of Bernard P. Rupasinghe, licensed surveyor (herein after mentioned as B.P. Rupasinghe, L.S.).
- The plaintiffs estimate the total compensation including the cost to build the protective wall for Rs.500000.00.

The defendants filed amended answer dated 02.10.2003 and, while denying the allegations and the cause of action mentioned in the plaint, the defendants stated that,

- After the defendants bought the land and house in lot 9 on 08.09.1997, they came to reside in the said house.
- Even at the time they came to reside in their land, the soil that had been gathered due to the construction of the Plaintiffs' house had been slid down with water and heaped up along the rear wall of the defendants' house causing damages to and resulting the collapse of the said rear wall.
- Accordingly, the defendants had to remove the said soil gathered against the rear wall of the defendants' house and build the said rear wall spending lot of money, and in 1998, even the plaintiffs too helped him in removing the said soil gathered against his rear wall; The defendants had not built any new building and had no intention to build a new one; As such the defendants' actions could not be the cause for damages to the plaintiffs' land and house.

- The plaintiffs while constructing their house had not appropriately constructed the system of drains and ditches for the proper flowing of water and as such, water flows to the defendants' land causing damages mentioned in the amended plaint as well as damages to the defendants' land.

However, the defendants had consented to demarcate the boundary as per the aforesaid plan no 194 and had stated in their amended answer and had further stated that the common boundary is correctly depicted in the plan no.1450 of S. M. K. B. Mawalagedara, licensed surveyor (hereinafter referred to as Mawalagedara, L.S.) as well as in plan no. 4006 of C. Palamakumbura, licensed surveyor (hereinafter referred to as Palamakumbura, L.S.).

Thus, the defendants prayed among other things,

- For a dismissal of the plaintiffs' action;
- To demarcate the Western boundary of the Defendants' land according to aforesaid plans no. 914 or no. 1450 or no. 4006,
- For a permanent injunction preventing the flowing of water in the manner plaintiffs have caused it to flow,
- For damages in a sum of Rs. 500,000/-.

By replication filed on 12/02/2004, the plaintiffs had denied an accrual of any cause of action against them to the defendants as described in paragraph 11 of the amended answer and, further took up the position that the said cause of action is time barred.

As per the admissions recorded at the commencement of the trial, it is clear that there was no dispute between the parties as to the ownership of lot 8 (the land in the 1st schedule to the amended plaint) and lot 9 (the land in the second schedule to the amended plaint and in the schedule to the amended answer) of the aforementioned plan no. 914, which respectively belonged to the plaintiffs and the defendants. It was further admitted that the dispute relates to the common boundary which is the east boundary of the plaintiffs' land and western boundary of the defendants' land and that parties had expressed their willingness to fix their common boundary through their pleadings. Even though, several issues were raised at the trial, the main contention between the parties were,

a) Whether the defendants removed the soil of the supportive embankment at the said east boundary of the plaintiffs' land, encroaching into plaintiffs' property causing harm to the lateral support given by the said embankment to the plaintiffs' property which in turn damaged the plaintiffs' land and buildings as described in the plaint or whether such harm and damage was due the acts and deeds of the plaintiffs themselves as stated by the defendants.
b) Whether the common boundary be demarcated on the ground as per the plan no. 2360 of B. P. Rupasinghe, L.S. or plan no.1450 of Mawalagedara, L.S., and/or plan no.4006 of Palamakumbura, L.S.

Aforesaid plan no. 2360 was made on a commission taken by the plaintiffs while the plan no. 1450 was made on a commission taken by the defendants. The case record itself indicates that plan no.4006 was taken on a joint commission taken by the parties in view of a settlement to demarcate the common boundary- vide journal entries dated 22.01.2001 and 24.01.2001. It appears that after the making of the plan on the joint commission to demarcate the common boundary, the plaintiffs had filed a petition praying to withdraw from the said settlement – vide journal entry dated 31.05.2001 and the petition dated 25.05.2001 in the district court brief. Even the report of the plan no.4006 indicates that the plaintiffs were not willing to accept the common boundary found as per the joint commission. Proceedings dated 27.11.2000 referred to in journal entry of the same date and in the order dated 05.06.2002, that appears to have contained the settlement cannot be found in the said district court brief. Though there was no reference to missing proceedings dated 27.11.2000, as per the proceedings dated 08.09.2011, 16.08.2011 and 17.08.2011, it appears that certain parts of the original case record had been missing for some time and later certain proceedings relating to trial were reconstituted. However, the aforesaid petition and the contents of the order dated 05.06 2002 indicate that the said settlement made on 27.11.2000 was limited to the demarcation of the common boundary and the rest of the dispute remained to be solved. Nevertheless, as per the case record, there is no order before us to show that any order was made with regard to the aforesaid petition allowing the plaintiffs to resile from the settlement. It is apparent from the brief, though the plan no.4006 was made due to a settlement on a joint commission, the plaintiffs refused to accept the result of the said commission, and the said plan.

After the trial, learned district judge granted relief only to demarcate the common boundary but as per the plan no.4006 of Palamakumbura, L.S. Even though, the plaintiffs also wanted to get the common boundary fixed by putting up a retention wall at the expense of the defendants which was not granted, the relief granted by the learned district judge is more in accordance with the relief prayed in the prayer 'c' of the amended answer dated 02.10 2003. In the appeal made to the Civil Appellate High Court of Kandy by the plaintiff, the learned district judge's judgment was confirmed subject to the variation which expressed the opinion of court that, if the parties are interested in the wellbeing of the two properties, both parties should bear the cost of building up the retaining wall on the common boundary. Since the said variation added by the High Court is an expression of an opinion subject to the phrase 'if the parties are interested' it cannot be enforced through a decree unless the parties are willing and interested in putting up a wall. As such the variation added by the High Court has no practical effect. In that sense, the High Court Judgment, as said before, only confirms the district court Judgment with an additional opinion which cannot be put into effect without the consent of the parties. It must be noted that it was only the plaintiffs who have prayed to build a retention wall at the expense of the defendants and the defendants' prayer was to demarcate the common boundary but without any prayer to put up a wall. Hence, the prayers do not indicate that both parties are interested in putting up a wall through a court order. However, proceedings recorded at the trial indicate that the defendants were willing to put up a wall at the expense of both the parties.

Being aggrieved, the plaintiffs preferred a leave to appeal application to this Court and leave has been granted on the following grounds as stated in paragraph 12 (1) (3) and (4) of the petition and on another question of law suggested in open court (which is reproduced below as issue of law no.4) by the counsel for the plaintiff, which are renumbered as follows;

(1). "Did the learned High Court err in coming to the conclusion that the learned trial Judge had observed that evidence does not support the fact that the Defendant – Respondent's actions had caused the Plaintiff Appellant's lateral support on the eastern boundary to be demolished?" - vide para 12(1) of the petition.

(2). “Did the learned High Court err in coming conclusion (Sic) that the Defendant Respondent has not acted in a manner which makes him liable to bear the entire cost of building?” – vide para 12(3) of the petition.

(3). “Did the learned High Court err in failing to give specific procedure to be followed by the Defendant and the Plaintiff when sharing the cost of construction of the retaining wall?” – vide para 12(4) of the petition.

(4) “In any event did the District Court err by holding the common boundary should be as set out in Plan No. 4006 made by Mr. C. Palamakumbura Survey (Sic) which was objected to by the plaintiff- appellant – petitioner at the time of the survey?” – vide proceedings dated 14.09.2017.

With regard to the renumbered question of law no.4 above, this Court observes that no relief is prayed for in the prayer to the petition to this court dated 23.03.2015 to set aside or amend or vary the district court judgment. What has mainly been prayed for was to set aside or reverse the High Court Judgment and to hold that defendants’ actions have caused the boundary of the plaintiffs’ land to deteriorate and that the defendants should bear the cost of the retaining wall to be built on the common boundary – vide prayer ‘c’ of the petition. To grant this relief this court may have to amend, vary or set aside the finding of the learned district judge which was to the effect that the defendants are not responsible for the deterioration of the embankment- vide page 13 of the district court judgment. Even if one considers the said prayer “c” as one impliedly praying to amend the relevant part of the learned district judge’s judgment, there is no prayer in the petition directly or indirectly praying to set aside, vary or amend the decision of the learned district judge which directs to fix the boundary as per the plan no. 4006 made by Palamakumbura, L.S. Thus, in relation to the district court judgment, there is no corresponding prayer in the petition to the issue of law no.4 above raised in open court. In other words, even though, the plaintiffs challenge the acceptance of plan no.4006 through the said question of law and rely on the plan no.2360 made by B. P. Rupasinghe L. S. in their submissions, no relief is made to set aside the district court judgment or to vary or amend the relevant portion of the district court judgment.

As far as the common boundary is concerned, the learned district judge has correctly observed that both parties have no objection in demarcation of the common

boundary and the plaintiffs' claim that the retention wall on the boundary has to be done by the defendants is based on the premise that defendants excavated the embankment to extend their land for new constructions to their house - vide page 10 of the district court judgment, also see the admission no.4 where parties expressed their consent to demarcate the common boundary. However, the learned district court judge, after referring to the plan no. 2360 made by B. P. Rupasighe, L.S. and plan no.1450 made by Mawalagedara, L.S., has decided to demarcate the common boundary as per plan no. 4006 made by Palamakumbura, L.S. for the reasons that it was a plan made on a joint commission pursuant to an agreement between the parties and the Palamakumbara, L.S. had used the plan no.914 in making the said plan and, further, the plaintiffs have not given any acceptable reason for not accepting the common boundary shown in that plan. It is apparent that the learned district judge has not given detailed reasons for not accepting the aforesaid plan no. 2360 which the plaintiffs argue as the one that shows the correct boundary. Even in the high court judgment, no reason is given for not preferring plan no.2360 over plan no. 4006. In that context, now I would consider the evidence at the trial to see whether there was evidence to show that plan no. 2360 of B.P. Rupasinghe L.S. could have been preferred over the plan no. 4006 of Palamakumbura L.S.

Even though, B.P. Rupasinghe L.S. states in his report (marked as X1) that he superimposed the plan no.914 of C.D. Adihetti L.S., he does not state in his report that he identified the common boundary through superimposition. Further he has not revealed what were the fixed points or positions or spots that he identified and used to do the superimposition. As per item 5 of the 1st page and paragraphs 1 and 3 of the 2nd page of his report, boundaries and lot 1 and 2 that purportedly belong to the plaintiffs were identified as shown by the plaintiffs. However, in the evidence given in open court he contradictorily says that he identified the common boundary by superimposition -vide page 186, but there also, to establish the accuracy of the superimposition, he has not revealed what are the fixed points or positions or spots he identified and used to do the superimposition. Furthermore, he has not marked the plan no.194 in his evidence in chief and also, has not revealed the nature of the copy of plan no.194 that he used for the said superimposition; that is to say whether it was the original, a tracing or a photocopy etc. It was only in his cross-examination he identifies the plan no.194 shown by the defendants' counsel which was marked as

V1. Even in the re-examination, it was the V1 marked by the defendants that has been shown to him. Plaintiffs have submitted a copy of plan no.194 as P7 but the signature placed by the learned district court judge by the marking of P7 indicates that it was tendered to court on 21.10.2007 which is a date after the close of plaintiffs' case. However, it seems that this plan marked P7 was actually marked on 21.10.2008 during the cross examination of the defendants' witness, Mawalagedara L.S.- vide page 302 of the brief. It appears that no witness called on behalf of the plaintiffs had referred to this P7. Reference to a P7 can also be found at the close of the plaintiffs' case but it appears to be another document marked as P7, namely a certificate from the mediation board which appears to have been marked on 21.06.2006. If B.P. Rupasinghe, L.S. had the original or a reliable copy of the plan no.194 for superimposition it is questionable why he did not produce it through his evidence to support the accuracy of his superimposition.

In contrast, the defendants have tendered plan no.1450 (V2) of Mawalagedara L.S. and plan no. 4006 of Palamakumbura L.S. to show the ground situation. Mawalagedara L.S. in his report (V2) at paragraph 8 has stated that he has shown the boundaries shown by the parties as well as the boundaries found by superimposition of plan no.194. However, he too has not disclosed in his report the fixed points or positions or spots that he considered in identifying the correct boundaries by superimposition. However, diagram of Mawalagedara's plan indicates that unlike B.P. Rupasinghe L.S.'s plan which takes into account only the area covered by the purported lots belonging to the parties and the adjoining part of the road, Mawalagedara L.S. has done a detailed superimposition taking into consideration the setting of the highway on the east end, and the setting of the 12 feet road (lot 12) in the original plan no.194 of C.D. Adihetti L.S.. While giving evidence Mawalagedara L.S. has identified plan no. 914 marked as V1 as the plan he used for superimposition and in cross examination he has repeatedly denied the suggestion that he used a photocopy. Original of V1 was marked by the defendants. Thus, it is more probable that it was used by this surveyor who surveyed on the commission taken by them. Aforesaid facts indicate the possibility of a better accuracy in Mawalagedara's plan when compared with the plan of B.P. Rupasinghe L.S. Further, through evidence of Mawalagedara, the defendants have marked the plan no.4006(V4) made by Palamakumbura, L.S., and its report(V4a) and no objections were raised at the time

of marking it as evidence. In terms of section 154 of the Civil Procedure Code plan no 4006 and its report become evidence of the case at hand. This was the plan made on a joint commission. As per this plan and paragraph 7(iii) of the report Palamakumbura L.S. has used 9 fixation points for the superimposition of plan no.194 including two fixation points situated on the corners of a house found to the east of Uduwela - Kandy high road even in plan 194. Like in Mawalagedara's plan, superimposition in this plan no.4006 also appears to have taken into more details such as setting of 12 feet wide road way and the setting of the high road in its superimposition when compared to the plan no. 2360 of B.P. Rupasinghe. Palamakumbara, L.S in his report has explained that to decide the positioning of the common boundary he surveyed the other necessary details in plan no.194. Like with the B.P Rupasinghe, L.S plan and report, it is not mentioned what type of copy of the plan no.194 was used for superimposition but, as this was a joint commission, it is probable that he was provided with the original copy marked by the defendants. Since the factual position indicates that he used several fixation points as described above and other details in the plan no. 194, it is more probable that the accuracy of superimposition in the plan made by Palamakumbura L.S. more acceptable than that of plan made by B.P. Rupasinghe, L.S. Further as observed by the learned district judge, plan no.4006 of Palamakumbura L.S. was made on a joint commission pursuant a settlement to demarcate the common boundary. The plaintiffs have not given any reason as to why they wanted to withdraw from the agreement. It may be for the reason that, after the survey, they found that the common boundary lies not on the place they want but on a place that benefits the defendants. Hence, even though the learned district judge or the learned high court judges have not given reasons in detail as to why they did not accept B.P. Rupasinghe, L.S.'s plan, the factual situation as described above does not warrant an interference of this court to change the decision with regard to the plan that should be used in deciding the location of the common boundary. On the other hand, as said before, the prayers to the petition does not ask for a relief to set aside or vary the district court judgment except for a judgment to state that the defendants are responsible for the deterioration of the common boundary and they should bear the cost of the retaining wall. Thus, the question of law no.4 raised at the support stage has to be answered in favour of the defendants.

As per the 1st question of law mentioned above, this Court has to ascertain whether the learned high court judges erred in coming to the conclusion that the learned trial Judge had observed that evidence does not support the fact that the defendant – respondents' actions had caused the deterioration of the plaintiffs' lateral support on the east boundary. As a matter of law, it is true that a land owner has a right to have lateral support from the adjacent lands. The need to have this lateral support from the land below may be much stronger when the adjoining lands are situated along a gradient or different level. Referring to **Bandappuhamy Vs Swamy Pillai (1950) 52 N L R 234, Thurston V Hancock 12 Mass 220, Lasala V Holbrook, 4 Paige Ch 169(1833),** the plaintiffs argue that this entitlement to lateral support is a natural right. I do not see any disagreement regarding this right but to impose liability on the defendant or defendants in a given case, it must be proved that it was the acts of the defendant/s that caused the deterioration or the removal of lateral support.

As per the judgment of the learned district judge it is clear that the learned judge has come to the conclusion that the defendants are not liable to the deterioration of the embankment as they have come to reside in the land belongs to them only after the cutting of embankment by their predecessors in title and therefore, they are not liable to bear the cost of putting up a retention wall. Further the learned district judge has come to the conclusion that the soil erosion shown as lot 2 in plan X of B P Rupasinghe L. S. was a result of irregular flow of water – vide page 13 of the district court judgment. Further, it appears the learned district judge opined that the impugned embankment was not a natural embankment but one created by predecessors of the defendant for the building of the house and that it was not proved that the defendants started excavating the embankment from the beginning of 1999 - vide answer to issue no.2. Even the learned high court judges were of the view that the witnesses of the plaintiffs do not support that the defendants had behaved in an irresponsible manner. Thus, the learned high court judges also endorsed the view of the learned district judge that the evidence led did not support that lateral support to the plaintiffs' land had been disturbed by the defendants.

The plaintiffs' stance was that to put up a new construction the defendants started to excavate the inclined area of the land that existed between the higher elevation of their land and the defendants' land which was on the lower level. The defendants' stance was that they bought the land with the house but the soil that had come with

the water flow from plaintiffs' land was stuck against the part of their wall making its collapse and they only removed said soil gathered against their wall and built that part. It appears that the same stance had been taken by the defendants even when they made statements to the police- vide P5. No independent witness who had seen the defendants cutting out soil had been called to give evidence on behalf of the plaintiffs, other than the surveyors and police officers who made observations after the incident. Hence it is the plaintiffs' version against the defendants' and the Court has to decide reliability of these versions on preponderance of evidence with the help of observations made by these witnesses.

One Seneviratne, an officer from the Pradeshiya Sabha, has been called as witness by the plaintiff to give evidence with regard to a building application made by the defendants. His evidence reveals that the proposed building as per the application have been mainly shown on the eastern side of the defendants' land and not on the side relating to the dispute. He also specifically has answered that between the wall of the old building and disputed embankment, no new building has been constructed - vide pages 1666 and 169 of the brief. Thus, it is clear that if any building or renovation has been done by the defendants on the side where the common boundary exists, it has been done within the limits of the old house. In certain occasions this witness has attempted to introduce defendants' buildings as unauthorized structures but at page 170 of the brief he has admitted that the relevant laws for approved plans came into force in 1983 in the towns and 1991 in the village areas and he does not know when the old building shown in P2 plan was built. This indicate that his evidence is not sufficient even to say that the house that was there when the defendants bought the land was an unauthorized structure. Whatever it is, as per his evidence, there is nothing to say that it was the defendants who excavated or removed soil from the embankment.

The police officer Weerawardane Weerasinghe who gave evidence for the plaintiffs to produce the police complaints and statements has not given any evidence with regard to the removal or cutting down of the embankment by the defendants. Tikiri Banda Rathnayake is the other police officer who had visited the subject matter for observations as per the complaint made by the plaintiffs. He has observed the erosion of soil but he does not reveal anything that is sufficient to set the liability on the defendant. As per his evidence, it appears the distance between the rear wall of

the defendants' house and the embankment is only about 3 feet. As per the evidence given by Mawalagedara L.S on behalf of the Defendant this gap is around 1meter and 25 centimeters. Since the defendants bought the land with the house, it is more probable if there was a cutting down of the embankment or the inclined area, it would have taken during the time the house was built. Otherwise, the rear wall might not have been built.

B.P Rupasinghe, L.S. also has given evidence for the plaintiff with regard to the preparation of his plan no. 2360 and the observations he made. He attempts to indicate that the damage to the plaintiffs' buildings and the soil erosion at lot 2 in his plan is due to the construction of part of the house shown as 'F' in his plan (vide page186 of the brief), but paragraph 4 of his report indicates that this was what the plaintiff told him. At page 188 of the brief, he suggests to put up a protective wall to reduce the threat of soil erosion caused by excavating inclined area but there also he expresses that the plaintiffs had stated that excavation of soil from the inclined area was done for the building of the part marked as F in his plan. Thus, it is clear he was not expressing his own opinion as to cutting down of soil in the slanted area between lot 2 and "F" in his plan, but expressing what he was told by the plaintiffs. However, his evidence at page 205 of the brief indicates that lot 2 is an area where soil was eroded with the flowing of water. This supports the stance taken by the defendants that soil that came with flowing of water was gathered against their rear wall damaging it and they only removed that soil and built that part, since even the part of building marked as 'F' in the said plan does not protrude beyond the other portion of the rear wall. It appears that 'F' has been built within the limits of the existing building. As such it is hard to believe that the defendants had to remove soil from the supporting embankment for the building of "F" other than removing the soil gathered against his wall. Even though, this witness had stated in paragraph 5 of his report marked X1, that cutting out of soil vertically on the area where the common boundary has caused the soil erosion, it is not sufficient to decide that the defendants are liable for it as the house made by their predecessors in title was there when they bought it, and the bank between the two lands would have been created for such construction. This situation is well explained by the Mawalagedara L.S when he gave evidence for the defendants while submitting the plan and report made by him. As per his report and evidence, both parties have built their houses by

cutting out the soil from the upper part of the land and filling part of the lower part secured by retention walls, and thus, levelling the area needed for building the house. He has also explained that there was no other alternative to prepare the lands for building due to the inclination of the area in its natural setting. This clarify if there was any cutting out of soil making vertical embankments or near vertical embankments, it would have taken place at the time the plaintiffs or the predecessors of defendants made their houses. He further has expressed that the damages caused to the plaintiffs' buildings has resulted due to the unsteadiness of the filled area as it has sunk. He opines that if it was due to the cutting out or loosening of soil in the embankment, it would have first caused damages to the retention wall that exists in between. As per his evidence common boundary is in the possession of the plaintiffs. He has also observed a ditch/trench marked as H, H1, F2and C1 in his plan which carry rain water and waste water from the plaintiffs' land towards the lower area. He has stated that part of this, namely H, H1, F2, was made of cement and concrete but the rest is on bare land across the inclined area. He has also expressed that flowing water from this ditch/trench causes soil erosion – vide evidence in chief of this witness and his plan and report marked as V2 and V2a. This court also observe that this ditch is situated in the area where the soil erosion is shown as lot 2 in the plan of B. P. Rupasinghe L.S. the plaintiffs, while referring to **Marikar vs de Rosairo (1912) 15 NLR 507** and **Fernando v Fernando 2 bal 202** submit that the lower proprietor is obliged to receive water that flows in the ordinary course of nature from the upper tenement. However, if the nature of the upper land has been changed to built houses or ditch or trench is constructed for the flow of water one may not be able to argue that the change of flow of water resulting due to such facts is still a flow in the ordinary course. Anyhow, in the case at hand, there is no injunction against the plaintiffs by the lower courts or a cross appeal made by the defendants for not giving such permanent injunction.

As explained above, the plaintiffs have failed in proving their case against the defendants and the defendants have also explained the causes for alleged damages to the plaintiffs through evidence. As such, this court cannot hold that the learned high court judges erred in coming to the conclusion that the learned trial Judge had observed that the evidence led at the trial does not support the fact that the

defendant – respondents' actions had caused the deterioration of the plaintiffs' lateral support on the east boundary.

If it is not proved that the defendants did cause the deterioration of the lateral support or damages to the embankment or the inclined area in between plaintiffs' land and the defendants' land, defendants cannot be asked to put up a retention wall at their expense or to contribute for the construction of a retention wall. This may be the very reason for,

- that the learned district judge limited the relief for demarcation of the common boundary which was consented through the admissions made and,
- that the learned high court judges made their opinion that both parties should bear the cost of building the retaining wall on the common boundary if both parties are interested, namely in a conditional manner, and for not to give specific procedure to be followed by the defendants and the plaintiffs when sharing the cost of construction of the retaining wall.

For the foregoing reasons it is the view of this court that all the questions of laws renumbered above has to be answered in the negative. Thus, this appeal shall be dismissed with costs.

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Judge of the Supreme Court

Sisira J de Abrew, J.

I agree.

……

Judge of the Supreme Court.

L. T. B. Dehideniya J.

I agree.

……..

Judge of the Supreme Court.