

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

In the matter of an application for Leave to Appeal under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006

SC Appeal No. 102/2023

WP/HCCA/KAL/153/2014(F)

D.C. Panadura Case 1843/L

1. Pandithakoralalage Don Hilmon
No. 249, "Samanala",
Malamulla West,
Panadura

2. Kopiyawattage Mebel Somalatha
Perera
No. 249, "Samanala",
Malamulla West,
Panadura

PLAINTIFFS

Vs.

1. Douglas Danister Nanayakkara
No. 7, Rathmalana Flats,
Mount Lavinia

2. Poddiwelakankanamge Ajith
Priyantha,
"Nelum", South Magala
Karandeniya

3. Paththadeva Pradipika Mendis,
"Nelum", South Magala
Karandeniya

4. Angage Deepali Swarna Rajakarua
alias, Angage Deepali Swarna Perera
No. 304, Galle Road,
Thalpitiya
5. Angage Pushpa Shanthi Perera,
No. 97, Nidolhetiya,
Kolonbage Ara,
Embilipitiya
6. Angage Prithi Ranjanie Perera,
Dharmaraja Mawatha,
No. 1/12, Allen Avenue,
Dehiwala
7. Thuduwage Rosalin Perera,
“Sriyani”, New Avasa Road,
West Malamulla,
Panadura

DEFENDANTS

AND

4. Angage Deepali Swarna Rajakarua
alias, Angage Deepali Swarna Perera
No. 304, Galle Road,
Thalpitiya

4th and 7A DEFENDANT APPELLANT

5. Angage Pushpa Shanthi Perera,
No. 97, Nidolhetiya,
Kolonbage Ara,
Embilipitiya

5th and 7B DEFENDANT APPELLANT

6. Angage Prithi Ranjanie Perera,
Dharmaraja Mawatha,
No. 1/12, Allen Avenue,
Dehiwala

6th and 7C DEFENDANT APPELLANT

DEFENDANT-APPELLANTS

Vs.

1. Pandithakoralalage Don Hilmon
No. 249, “Samanala”,
Malamulla West,
Panadura
2. Kopiyawattage Mebel Somalatha
Perera
No. 249, “Samanala”,
Malamulla West,
Panadura

PLAINTIFF-RESPONDENTS

1. Douglas Danister Nanayakkara
No. 7, Rathmalana Flats,
Mount Lavinia
2. Poddiwelakankanamge Ajith
Priyantha,
“Nelum”, South Magala
Karandeniya

3. Paththadeva Pradipika Mendis,
“Nelum”, South Magala
Karandeniya

**1st, 2nd AND 3rd DEFENDANT-
RESPONDENTS**

AND NOW

1. Pandithakoralalage Don Hilmon
No. 249, “Samanala”,
Malamulla West,
Panadura
2. Kopiyawattage Mebel Somalatha
Perera
No. 249, “Samanala”,
Malamulla West,
Panadura

**PLAINTIFF-RESPONDENT-
APPELLANTS**

Vs.

4. Angage Deepali Swarna Rajakarua
alias, Angage Deepali Swarna Perera
No. 304, Galle Road,
Thalpitiya

4th and 7A DEFENDANT APPELLANT

5. Angage Pushpa Shanthi Perera,
No. 97, Nidolhetiya,
Kolonbage Ara,
Eabilipitiya

5th and 7B DEFENDANT-
APPELLANT-RESPONDENT

6. Angage Prithi Ranjanie Perera,
Dharmaraja Mawatha,
No. 1/12, Allen Avenue,
Dehiwala

6th and 7C DEFENDANT
APPELLANT- RESPONDENT

DEFENDANT-APPELLANT-
RESPONDENTS

1. Douglas Danister Nanayakkara
No. 7, Rathmalana Flats,
Mount Lavinia
2. Poddiwelakankanamge Ajith
Priyantha,
“Nelum”, South Magala
Karandeniya
3. Paththadeva Pradipika Mendis,
“Nelum”, South Magala,
Karandeniya

DEFENDANT-RESPONDENT-
RESPONDENTS

AND NOW BETWEEN

1. Pandithakoralalage Don Hilmon
No. 249, “Samanala”,
Malamulla West,
Panadura

2. Kopiyawattage Mebel Somalatha
Perera
No. 249, "Samanala",
Malamulla West,
Panadura

PLAINTIFF-RESPONDENT-
APPELLANTS

Vs.

4. Angage Deepali Swarna Rajakarua
alias, Angage Deepali Swarna Perera
No. 304, Galle Road,
Thalpitiya

4th and 7A DEFENDANT APPELLANT

5. Angage Pushpa Shanthi Perera,
No. 97, Nidolhetiya,
Kolonbage Ara,
Embilipitiya
(Deceased)

5A. Ishwarage Don Walter Appuhami,
Galawatimodara Road,
Nalluruva, Panadura

SUBSTITUTED 5A & 7B DEFENDANT
APPELLANT

6. Angage Prithi Ranjanie Perera,
Dharmaraja Mawatha,
No. 1/12, Allen Avenue,
Dehiwala

6th and 7C DEFENDANT APPELLANT

DEFENDANT APPELLANTS

1. Douglas Danister Nanayakkara
No. 7, Rathmalana Flats,
Mount Lavinia
2. Poddiwelakankanamge Ajith
Priyantha,
“Nelum”, South Magala
Karandeniya
3. Paththadeva Pradipika Mendis,
“Nelum”, South Magala
Karandeniya

**1st, 2nd AND 3rd DEFENDANT-
RESPONDENT-RESPONDENTS**

Before: **Justice A. L. Shiran Gooneratne**
Justice K. Priyantha Fernando
Justice Menaka Wijesundera

Counsel: Uditha Malalasekara with Amila Amarasekara and Angelica Nanayakkara instructed by Saumya Jayasena for the **Plaintiff-Respondent-Appellants.**

Dr. Sunil Coorey with Mrs. Sudarshani Coorey instructed by Ms. Diana Rodrigo for the 4th & 7A **Defendant-Appellant-Respondents.**

Argued on: 24/10/2025

Decided on: 10/02/2026

A. L. Shiran Gooneratne J.

By Plaintiff dated 21/09/2004, the Plaintiff-Respondent-Appellants (hereinafter sometimes referred to as the “*Plaintiff-Appellants*”) instituted Action No. D.C. 1843/L in the District Court of Panadura against the Defendant-Appellant-Respondents (hereinafter referred to as the “*Defendant-Respondents*”). The Plaintiff-Appellants sought, *inter alia*, an order directing the construction of a retention wall or other form of lateral support along the south-eastern boundary of the Plaintiff-Appellants’ land, more fully described in the first schedule to the Plaintiff, to prevent soil erosion, alternatively, an order directing the Defendant-Respondents to reimburse the costs incurred by the Plaintiff-Appellants in erecting such a retention wall, and further, a claim for damages in respect of soil erosion already caused.

In the Plaintiff, the Plaintiff-Appellants averred that the Defendant-Respondents had continued to excavate soil along the south-eastern boundary of the Plaintiff-Appellants’ land, notwithstanding an undertaking allegedly given by them to construct a parapet or retention wall.

The 1st Defendant-Respondent, and the 2nd and 3rd Defendant-Respondents, by Answers dated 30/03/2007 and 06/07/ 2007 respectively, denied liability and disputed the Plaintiff-Appellants’ entitlement to damages. The 4th to 7th Defendant-Respondents, by Answer dated 19/01/2007, denied responsibility for the alleged soil erosion and pleaded that, during the period material to the action, they had transferred their rights in respect of the subject matter to the 1st to 3rd Defendant-Respondents. They further denied having undertaken or promised, at any time, to construct a retention wall.

In paragraph 11 of the Answer, the 4th to 7th Defendant-Respondents further stated that, in any event, a retention wall had been constructed at their own expense and benefit to cover their portion of the land on the northern boundary.

When the matter was taken up for trial on 11/09/2008, the 2nd and 3rd Defendant-Respondents were discharged from further proceedings, upon the agreement of the Plaintiff-Appellants that they would erect a retention wall to the required standard.

At the conclusion of the trial, the learned District Judge, by Judgment dated 26/06/2014, held, inter alia, that the Defendant-Respondents had failed to construct a retention wall to mitigate the danger arising from the excavation of soil. The Court therefore directed the 4th to 7th Defendant-Respondents to construct the remaining portion of the retention wall and entered Judgment in favor of the Plaintiff-Appellants.

Being dissatisfied with the said Judgment, the Defendant-Respondents, by Petition of Appeal dated 07/08/2014, appealed to the High Court of the Western Province exercising Civil Appellate Jurisdiction holden in Kalutara (“the Appellate Court”). The Appellate Court, after hearing the parties and considering the issues for determination, by Judgment dated 15/06/2020, set aside the Judgment of the District Court and allowed the Appeal with costs.

The Plaintiff-Appellants, thereafter by Petition dated 27/07/2020, invoked the jurisdiction of this Court seeking to set aside the Judgment of the Appellate Court dated 15/06/2020.

By Order dated 28/06/2023, this Court granted Leave to Appeal on the following questions of law:

1. Did the judges of the Civil Appellate High Court fail to consider whether the Plaintiffs had proved the damages caused to them by the said excavation?

2. In the circumstances, are the 4th – 7C Defendant-Respondents responsible for causing the same damage?

Thus, the present action is now confined solely to the question of the award of damages claimed by the Plaintiff-Appellants, arising from the alleged failure of the 4th to 7th Defendant-Respondents to provide the required lateral support to the Plaintiff-Appellants' land.

It is settled law that where excavation is carried out without taking reasonable precautions, and such excavation causes damage to an adjoining land, liability for damages may arise based on negligence.

As submitted by the learned President's Counsel for the Defendant-Respondents, the evidence placed before the trial court, together with the report of Lal Chandra, a licensed consultant architect, fails to establish that any soil erosion or damage is attributable to the acts or omissions of the 4th to 7th Defendant-Respondents.

In **Pediris v. Batcha** 26 NLR 89, this Court held that liability to pay damages for withdrawal of lateral support does not arise from the act of excavation per se but only when that excavation results in actual and ascertainable damage to the adjoining land. Mere apprehension of damage or the possibility of future soil displacement is insufficient to support a claim for damages. The right to compensation arises only upon proof that damage has in fact occurred, whether immediately or subsequently, as a direct consequence of the withdrawal of lateral support.

In **Bandappuhamy v. Swamy Pillai** (52 NLR 234), the defendant, who owned a land adjoining that of the plaintiff, carried out excavations on his own land. The plaintiff complained that such excavation had removed the natural lateral support of his land and sought relief on the basis that the excavation had caused, or was likely to cause, damage to his property. At the time the action was instituted, however, no actual damage to the plaintiff's land had been proved. The issue before Court was

whether a cause of action arose merely upon the act of excavation or likely danger, or only upon the occurrence of actual damage from the withdrawal of lateral support.

It was held that “the damage that could be claimed should be restricted to what was incurred by, and naturally flowed from, the subsidence of soil which actually resulted from the excavations. Plaintiff was not entitled to claim the cost of putting up a retaining wall to prevent further damage.”

***Backhouse v. Bonomi* (1859) 9 H. L. Cas. 503** affirmed the principle that, in cases of withdrawal of lateral support, the cause of action arises only upon the occurrence of actual damage, and not at the time of excavation, and that liability is determined by the harmful consequences flowing from the act, rather than by the mere act of excavation itself.

Accordingly, in the absence of proof of existing damage, no liability can arise in respect of speculative or future harm. It is incumbent upon the Plaintiff-Appellants to establish that the Defendant-Respondents caused the damage complained of, rendering them liable in damages.

According to the testimony of witness Lal Chandra, no damage has been caused to the Plaintiff-Appellants’ land as a result of the alleged excavation. Lal Chandras’ evidence has been duly considered by the Appellate Court, which correctly reasoned that the Plaintiff-Appellants had failed to prove any damage caused by the excavation and that, consequently, the action could not succeed.

The Appellate Court further held that:

“It is clear from the evidence adduced in this case that the 4th to 7th Defendants have already constructed a retaining wall covering their portion of land, and that the only area which requires construction as part of a retaining wall is the portion of land belonging to the 1st Defendant. [...]”

I find no reason to disagree with the findings of the Appellate Court. Accordingly, questions of law Nos. 1 and 2 are answered in the negative.

For the foregoing reasons, the impugned Judgment dated 15/06/2020, delivered by the Civil Appellate High Court, is affirmed.

The Appeal is dismissed. I make no order as to costs.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree

Judge of the Supreme Court