# GNANANATHAN
# v.
# PREMAWARDANE

COURT OF APPEAL.
WEERASEKERA, J. (P/CA),
JAYASINGHE, J.
C.A. NO. 44/93 (F).
D.C. COLOMBO NO. 6908/RE.
JULY 8, 1997.
NOVEMBER 5, 11, 24, 1997.

*Rent Act, No. 7 of 1972 – S. 22 (2) (d) – Nuisance – Evaluation of Evidence – Guilty – Mens Rea or intention considered – Prescription Ordinance, s. 10 – Plea of Prescription – Civil Procedure Code, s. 44.*

The plaintiff-appellant instituted action for the ejectment of the defendant-respondent from the premises in suit, on the ground that the defendant-respondent was guilty of conduct amounting to a nuisance to the adjoining occupier including the plaintiff-appellant – S. 22 2 (*d*). The defendant-respondent denied the allegation. The District Court dismissed the plaintiff-appellant's action.

On appeal –

**Held:**

*Per* Weerasekera, J.

> "Nuisance in my view is one of fact and should be construed as normal and sober people in the country would construe it, though certainly not fanciful something, acts that not merely disturbs bourgeois delicacy or fastidiousness but an annoyance which troubles the mind and peaceful life and ordinary day to day living of an ordinary reasonable person."

(1) The District judge erred in his conclusion when he preferred to act only on positive evidence and not draw the inference of how a reasonable man would behave from the evidence of admitted facts.

(2) The District Judge erred and misdirected himself factually in the evaluation of the evidence in regard to whether acts complained of were a nuisance

and having erred in his understanding of them proceeded to err in law by misdirecting his mind to relate it to contain a concept of *mens rea* or intention, as the word guilty is used in s. 22 (2)d.

(3) It is settled law and that for salutory reasons lest all the basic rules of law particularly that of the rule of *'Audi Alteram Partem'* that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings.

*Per* Weerasekara, J.

"For the first time this defence of prescription was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which Judges should desist."

(4) Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, Court will not take the statute into account unless it is expressly pleaded by way of defence.

(5) Party cannot be permitted to present before even the trial Court a case materially different from the case presented in his pleadings and in particular a plea of prescription.

**APPEAL** from the judgment of the District Court of Colombo.

**Cases referred to:**

1. *Perera & Sons Ltd* v. *Pate* – 56 NLR 334.
2. *Brampy Appuhamy* v. *Gunasekera* – 50 NLR 253.
3. *Talwatte* v. *Somasunderam* – 1996 vol. IV page 2 Bar Association Law Journal Report.

*P. A. D. Samarasekera,* PC with *T. B. Dillimuni* for substituted plaintiff-appellant.

*N. R. M. Daluwatte,* PC with *Ravi Algama* and *C. Sarathchandra* for defendant-respondent.

*Cur. adv. vult.*

March 20, 1998.

**WEERASEKERA, J.**

The plaintiff-appellant as landlord instituted this action for the ejectment of the defendant-respondent from the premises in suit bearing assessment No. 137 1/1, Ananda Rajakaruna Mawatha, Colombo 10 and for recovery of damages at Rs. 124.18 per month from 01. 10. 1987, on the ground that the defendant-respondent was guilty of conduct amounting to a nuisance to the adjoining occupier including the plaintiff-appellant as contemplated by section 22 (2) (*d*) of the Rent Act.

The defendant-respondent denied the allegation that he conducted himself in a manner that it amounted to a nuisance to the other occupiers and the plaintiff in particular and further pleaded that the condition of the premises had deteriorated though this formed no part of the plaintiff's case. Much as I tried to I have failed to understand the import and meaning of this defence though an explanation has been given by the defendant-respondent in evidence. The plea of prescription was not taken in the defendant's pleadings.

At the trial the defendant-respondent whilst admitting that he was the tenant of premises No. 137 1/1, Ananda Rajakaruna Mawatha also admitted that these premises formed an upper floor flat or apartment of a set of 4 such flats. Below the defendant-respondent's apartment was the ground floor flat bearing assessment number 139. The flat to the opposite separated by the stairway and across was flat 137 1/2 occupied by the plaintiff-appellant's son. Right below that flat 137 1/2 occupied by the plaintiff's son was the ground floor apartment 137 occupied by the plaintiff-appellant. It was also conceded that the premises in suit were residential premises and that the standard rent was below 100 rupees per month. The receipt of the letter of termination of the tenancy was admitted though not its validity and that the Rent Act, No. 7 of 1972 applied.

The learned District Judge by his judgment dated 15. 01. 1997, dismissed the plaintiff's action. This appeal is from that judgment.

I have given my very close consideration to the evaluation of the evidence and the reasoning of the learned District Judge in his judgment. Having considered the evidence, the learned District Judge in the totality of his reasoning has found and concluded that in general the acts complained of have and do amount to a nuisance but inasmuch as those acts of nuisance were not done intentionally by the defendant-respondent and as no other occupiers have complained of their being a nuisance proceeded to hold that the acts taken as a whole do not constitute what is contemplated as a nuisance in terms of section 22 (2) (*d*) of the Rent Act.

It is my considered opinion that the learned District Judge erred and misdirected himself factually in the evaluation of the evidence in regard to whether the acts complained of were a nuisance and having erred in his understanding of them proceeded to err in law by misdirecting his mind to relate it to contain a concept of *mens rea* or intention as the word 'guilty' is used in section 22 (2) (*d*). This, in my view resulted in a ludicrous misconception of the law.

How best should I examine this question than to quote Meggary.

Meggary at page 404 vol. I 11th edition on the Rent Acts states as follows:

> "Although the word guilty has been used to indicate some degree of gravity it means no more than that the acts were knowingly done. The tenant's intention in doing them is irrelevant."

Moreover, it is my view that adjoining occupiers are reasonable persons as is the tenant and if an adjoining occupier complains of an act or acts which he considers to be a nuisance and if the person who is alleged to commits those acts not only attempts to justify them but also admits them and proceeds to continue to do so, brazenly

and with arrogance then it is no mistake or done in brevity, but knowing that brevity is no excuse the only irresistible inference I would be led to would be one of knowledgeable unmistakable nuisance. Nuisance in my view is one of fact and should be construed as normal and sober people in the country would construe it though certainly not fanciful something, acts that not merely disturbs bourgeois delicacy or fastidiousness but an annoyance which troubles the mind and peaceful life and ordinary day to day living of an ordinary reasonable person.

Has the learned District Judge erred in applying these tests to the various acts complained of by the plaintiff-appellant? Admittedly, the defendant-respondent, a retired pedagogue, was the tenant of the original landlord Wesley College where he was a teacher before the plaintiff-appellant became the owner of the four apartments. It would not have been unknown to him that the plaintiff was not of the same ethnicity and had to leave the premises during a period of civil strife and the defendant-respondent had also made an application for the purchase of the premises from the Housing Development Authority which inquiry was concluded in plaintiff-appellant's favour about 2 months prior to the filing of this action.

Now, consider the question of the wrong address been given by the defendant-respondent in his mail and the complaint of nuisance occasioned by repeated such deliveries to the plaintiff-appellant. The defendant-respondent admits he did so but states it was a mistake but knowledge he did have. But, is that how he reacted when these letters were sent to him by the spouse of the plaintiff-appellant. In my view the most ordinary reasonable inference I could draw from P7 is that the person who wrote it was arrogant and an unrepentant annoyer. P8 clearly confers this view that is that even the telephone directory gives the plaintiff-appellant's assessment number and not that of the defendant-respondent. If as the defendant-respondent states the original number given to him when he first became a tenant was 137 what proof is there of this fact. D1 to D25 though referred to by him in his examination in chief was not tendered to Court or to

counsel for cross-examination with the excuse that they have been lost. Such lame excuses leave me with that pungent smell of a person speaking the untruth and in any event the only inference any reasonable person could come to by such non-availability of D1 to D25 is to draw an adverse inference on the facts they seek to support.

Consider the other category of acts of nuisance complained of regarding the sale of goods by advertisement. The defendant-respondent admits he is the tenant of premises No. 137 1/1 which is above the ground floor flat No. 139. Why on earth should any reasonable ordinary sober person advertise his goods for sale by P2 to P4 by stating they were available over (or upstair of No. 137) except for any ordinary sober reasonable person to come to the inference that it was to cause a nuisance and annoyance to the peaceful enjoyment of his life of the occupier of premises No. 137. And, why on earth should it be advertised that the goods could be seen after 1 p.m. and that on Sundays as evidenced by P1 except to annoy and cause nuisance to the plaintiff-appellant. All these acts were in 1976 to all of which the plaintiff-appellant complained. All this while the defendant-appellant admits that he knew in 1976 that the correct number of his apartment was 137 1/1 and that he lived above premises number 139 and not No.137. I am, therefore, unable to equate this behaviour and the consequent acts to fanciful acts, or made in jest. If it were so it must have been with a perverted sense of humour.

Consider the question of the Registration of the telephone in the Directory as being in premises number 137 which had been brought to his notice by P8 in as far back as 1975 and he continues to Register it nevertheless upto 1984 as evidenced by P16 and P17 and the Registration of a number of different numbers of cars as is evidenced by P10 to P12 under the plaintiff-appellant's assessment number 137. The electricity connection is taken under assessment number 137 as evidenced by P24. The defendant-appellant is a pensioner and his pension returns are directed to postal address No. 137.

The learned District Judge had considered the unauthorised water connection by the defendant-respondent to have interfered with the plaintiff-appellant's repair of the premises. To digress the repair was consequent to the damages caused during the civil commotion in 1982. It was when the plaintiff-respondent was a refugee in Jaffna from his own house at No. 137, Ananda Rajakaruna Mawatha that admittedly the defendant-respondent had taken this connection. It was admitted by the defendant-respondent in evidence that this unauthorised connection interfered with the supply of water to the other upstair flat. How then could the learned District Judge and by what process of reasonable evaluation could he conclude that even though the act interfered with the plaintiff-appellant's repair it was not an act of nuisance. The learned District Judge clearly erred and misdirected himself to arrive at the reasonable conclusion.

I am, therefore, of the view that the learned District Judge's evaluation of the fact of nuisance is perverse and he has misdirected his mind to come to an incorrect evaluation. All these acts enumerated and the historical record and sequence and the defendant-respondent's own admission in regard to some of them that he did make a mistake and knew that the correct number of assessment of the apartment he occupied was 137 1/1, but, his persistence and continuance to use the plaintiff-appellant's residing house number is in my view clearly and factually acts of nuisance committed knowingly, definitely not fanciful and the cumulative effect of which I am undoubtedly certain would have seriously interfered with the peaceful life of any ordinary being and in particular the plaintiff-appellant. Even though intention is no part of the legal requirement of section 22 (2) (*d*) of the Rent Act if these acts and conduct do not indicate intention I cannot conceive of what could be inferred as to be intentional.

The next aspect that has to be investigated is whether the plaintiff-appellant has to discharge a burden of establishing by direct evidence that and by the evidence of adjoining owner they were also the subject of the nuisance.

In this regard I am guided by the words of Sansoni, J. in the case of *Perera & Sons Ltd v. Pate*[1] :

> "I do not think it was necessary that evidence should have been given by the plaintiff herself, that she considered the conduct complained of a nuisance. Upon proof capable of having this effect the Court is entitled to infer that it had that effect, even if there is no positive evidence that it did. The Court is entitled to presume that the adjoining occupiers are reasonable people to whom the conduct is reasonable."

In this action the plaintiff-appellant gave evidence in support of his contention that the various acts he complained of were a nuisance to him. The defendant-respondent has admitted that the adjoining flat was occupied by the plaintiff's son but that at that time complained of there was another school teacher in residence. The defendant-respondent has admitted that he did stack broken chairs, worn out tyres, etc., on the landing at the top of the common stairway but that the tenant then in occupation had not complained. I prefer to presume that the previous tenant a school teacher in this same school as the defendant-respondent was a reasonable ordinary person and that such admitted conduct of the defendant-respondent would by inference amount to a nuisance though there is no positive evidence in that behalf. In any event consider the position of a number of tenants occupying high rise tenanted buildings consisting of flats and apartments, a common phenomena in the context of modern day urban housing. If, for instance one of the tenants on such a high rise tenanted building were to act as is complained of it would be a futile extravagant exercise to expect the positive evidence of all the tenants who use the stairway whereas a more prudent exercise would be to infer the impact of such conduct on an ordinary reasonable tenant in the absence of positive evidence. The learned District Judge, therefore, erred in his conclusion when he preferred to act only on positive evidence and not draw the inference of how a reasonable man would behave from the evidence of admitted facts.

At this appeal no arguments were urged on the legality of the notice to quit. I, therefore, do not propose to examine that question.

The learned District Judge did not direct his mind rightfully in the judgment to issues 7, 8 and 9 in view of his finding that the acts complained of did not amount to a nuisance in terms of section 22 (2) (*d*) of the Rent Act by reason of his finding that the acts complained of were not intentional acts of nuisance.

In view of the reasons set out hereinbefore my considered view is that the learned Additional District Judge has misdirected himself in the evaluation of the evidence on the fact of nuisance and its legal implication and that his conclusions are in error both on the facts and the law. It is, therefore, necessary for me to consider the import of issues 7, 8 and 9 which I shall now proceed to do.

Presumably, the defence taken in the issue is based on section 10 of the Prescription Ordinance. The acts of nuisance complained of are thus sought to be shown to have taken place long prior to the 3-year period. To that the plaintiff-appellant's answer is that the application of the defendant-respondent to the National Housing Department for the premises to purchase was finally concluded only 2 months before the institution of the action.

Be that as it may the position in law is quite clear and settled. In the case of *Brampy Appuhamy* v. *Gunasekera*[2] Basnayake, J. held:

> "Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will *not take the statute into account unless it is expressly pleaded by way of defence."*

It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of *audi alteram partem* that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary

because reason, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unawares of a defence taken that the action is barred by lapse of time.

In this action the answer did not state that the cause of action was prescribed in law. For the first time this defence was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which judges should desist. In any event the defendant-respondent has denied all the acts of nuisance acts pleaded, but also for some inexplicable reason pleaded non-deterioration. Therefore, a piea of prescription cannot arise without the act or acts of nuisance being admitted whereas the defendant-respondent has in his answer specifically denied them. The plea is, therefore, not only in law, but also at the stage it was so done, both bad in law, but also contradictory in itself.

The acceptation of these issues is also repugnant to the law inasmuch as the date of commencement of prescription is vague in that the absence of a plea as to whether it was the acts of nuisance or the date of the notice to quit. It is, therefore, additionally for the same reason of reasonableness that as is required by section 44 of the Civil Procedure Code that a plea of the reasons for the non-operation or application of prescription is mandatory that it is equally reasonable and fair that the law requires that the defence of prescription be specifically pleaded in the answer.

I am, therefore, of the view that issues 7, 8 and 9 should not have been accepted as issues for adjudication and that the order accepting them is bad, insupportable and made *per incuriam.* I, therefore, reject them.

In any event issues 7, 8 and 9 are issues involving question of fact and law. Can these questions be now considered in the Court of Appeal. I do not think that this plea can be considered as it now

arises for the first time in appeal as it had not been considered by the learned Additional District Judge.

Chief Justice G. P. S. de Silva in *Talwatte* v. *Somasundaram*[3]:

> "In this connection it is well to bear in mind the provision of explanation 2 of section 150 of the Civil Procedure Code. A *fortiori* a party cannot be permitted to present in appeal a case materially different from the case presented before the Court".

I go further and state a *fortiori* a party cannot be permitted to present before even the trial Court a case materially different from the case presented in his pleadings and in particular a plea of prescription. The effect of the Prescription Ordinance is that it only limits the time within which an action may be brought. This, in my view, is reasonable, fair and just.

For these reasons I must set aside the judgment of the learned District Judge dated 15. 01. 1997.

The appeal is allowed with taxed costs. Enter judgment for the plaintiff-appellant in terms of the prayer to the plaint. The plaintiff-appellant will be entitled to taxed costs in the lower Court.

**JAYASINGHE, J.** – I agree.

*Appeal allowed.*