

DON PIYASENA
v.
MAYAWATHIE JAYASURIYA

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND RAMANATHAN, J.

CA/LA 53/81.

D. C. GAMPAHA 15375/L.

SEPTEMBER 2, 1985.

Civil Procedure – Execution pending appeal – Section 763 of the Civil Procedure Code as amended by Act No. 53 of 1980 – Section 23 of the Judicature Act as amended by Act No. 37 of 1979.

The provisions of section 23 of the Judicature Act and section 763 (2) of the Civil Procedure Code make it clear that unless there is proof of substantial loss that may otherwise result, execution of decree will not be stayed merely on the ground that an appeal has been filed.

APPEAL from order of the District Judge of Gampaha.

S. D. Jayasundera for the 2nd defendant-petitioner.

T. B. Dillimuni for the plaintiff-respondent.

Cur. adv. vult.

October 23, 1985.

RAMANATHAN, J.

This is an application by the defendant-petitioner to set aside the order of the District Judge dated 9.3.81 disallowing stay of execution of writ. The material facts are as follows :

Judgment was entered in favour of the plaintiff-respondent ejecting the 1st and 2nd defendants from the premises in suit. The 2nd defendant-petitioner appealed against the judgment.

The plaintiff-respondent made application for writ of ejectment and possession pending appeal. The 2nd defendant-petitioner filed objections and averred that he was carrying on business yielding an income of about Rs. 3,000 a month, that he had stock-in-trade worth about Rs. 50,000 furniture and fittings worth Rs. 50,000.

The learned District Judge had considered the provisions of section 763 of the Civil Procedure Code as amended by Act No. 53 of 1980. The learned District Judge has stated after considering all the facts, in particular, the age of the plaintiff-respondent, the date on which the action had been filed, the circumstances of the case, he took the view that execution of the decree should not be stayed as the 2nd defendant failed to show sufficient cause. The learned District Judge made order allowing the application for writ of execution.

At the hearing before us learned counsel for the 2nd defendant-petitioner urged that the District Judge failed to evaluate the hardship caused to the defendant-petitioner who is carrying on business yielding an income of Rs. 3,000 a month, stock worth Rs. 50,000, articles worth Rs. 50,000. If the 2nd defendant-petitioner were to be ejected, he would lose his business, his sole means of livelihood and his employees would then be out of work.

Counsel for the plaintiff-respondent contended that the learned District Judge has correctly exercised his discretion, having regard to the relevant facts as to the age of the plaintiff, the date of institution of action and the history of the case. Furthermore, the 2nd defendant-respondent has had sufficient time to find alternative accommodation and the grounds set out by the 2nd defendant-respondent did not amount to a substantial loss.

The Judicature Act No. 2 of 1978 (section 23) merely gave a judgment-debtor a right of appeal. Further it was by the Judicature Amendment Act No. 37 of 1979 – section 23, that relief was granted by stating thus –

“Any party who shall be dissatisfied with any judgment, decree or order pronounced by a District Court may (excepting where such a right is expressly disallowed) appeal to the Court of Appeal against such judgment, decree, or order. But no such appeal shall have the effect of staying the execution of such judgment, decree or order unless the District Judge shall see fit to make an order to that effect. In such a case the party appellant shall enter into a bond with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgment of the Court of Appeal.”

The other relevant provision is section 763 of the Civil Procedure Code as amended by Act No. 53 of 1980 :

- “(2) The Court may order execution to be stayed upon such terms and conditions as it may deem fit where –
- (a) the judgment-debtor satisfied the Court that substantial loss may result to the judgment-debtor unless an order for stay of execution is made ; and
 - (b) security is given by the judgment-debtor for due performance of such decree or order as may ultimately be binding upon him”.

The law applicable today, is the provisions of section 23 of Judicature Act (as amended by Act No. 37 of 1979) read with section 763 (2) of the Civil Procedure Code (as amended by Act No. 53 of 1980).

Therefore, the position today is that section 23 permits the Court to stay writ of execution if it seems fit and section 763 (2) enables Court to stay writ, provided the judgement-debtor satisfies court that substantial loss may result.

It is clear from the provisions of law applicable that unless a defendant-petitioner has satisfied the District Judge that a substantial loss may result to him the execution of decree will not be stayed merely on the grounds that an appeal has been filed.

We have considered the defendant-petitioner's affidavit filed and the submissions made on his behalf. The material is not adequate to establish that a substantial loss would be caused to the defendant if execution of writ is stayed. There is no evidence that he has looked for and failed to find alternative premises in the area. There may be no difficulty in finding alternative premises having regard to his financial resources.

On the slender material placed before the District Judge, he could only have come to the conclusion that no substantial loss would be caused to the defendant. In our opinion, the learned District Judge has correctly and properly exercised his discretion in refusing the application for stay of execution of writ. The appeal is dismissed with costs fixed at Rs. 210.

H. A. G. DE SILVA, J. – I agree.

Appeal dismissed.