

## Fernando v. Girigoris

COURT OF APPEAL

COVEN THOMAS, J. AND ATUKORALE, J.  
C. A. 1423/79—D.C. GAMPAHA 17857/M.  
JULY 27, 1979.

*Civil Procedure Code, sections 761, 763—Application for execution of a decree pending appeal—Power of Court to grant stay of execution—Requirement that judgment debtor be made respondent to such application for execution—Effect of Civil Procedure Code (Amendment) Law, No. 20 of 1977.*

Where an application is made for the execution of a decree in respect of which an appeal has been filed the provisions of section 763 of the Civil Procedure Code make it imperative that the judgment-debtor should be made a party respondent. Under the section the Court has

a discretion either to grant or refuse an application for the execution of a decree pending appeal and the fact that the new section 761 brought in by Law No. 20 of 1977, does not provide for an application for a stay of execution to be made to court, does not mean that a court is now powerless to grant a stay.

**Cases referred to**

*Vethamanickam v. Davoodbhoy*, (1962) 63 N.L.R. 548.  
*Edward v. de Silva*, (1945) 46 N.L.R. 342.

APPEAL from the District Court, Gampaha.

A. J. I. Tilakawardena, for the petitioner.  
 P. A. D. Samarasekera, with G. L. Geetananda, for the respondent.

*Cur. adv. vult*

July 27, 1979.

**ATUKORALE, J.**

This is an application to revise the order of the learned District Judge made on 16.5.1979 allowing the issue of a writ of execution against the petitioner in an action filed by the respondent to eject her from certain premises. In delivering judgment for the respondent as prayed for in the amended plaint, the learned District Judge held that the respondent had leased out to the petitioner's deceased husband the business of a barber saloon and not the premises in suit. A few days later the petitioner filed a notice of appeal and on 21.2.1979 she tendered the petition of appeal. In the meantime on 8.1.1979 the respondent filed an application for execution of the decree by the issue of a writ. The petitioner (who was named a respondent to this application) filed her objections to the issue of writ and the matter was fixed for inquiry on 2.5.1979. On 16.5.1979 the learned District Judge in a very brief order held that there was no provision in law to grant a stay of execution and ordered writ to issue on the respondent furnishing security in a sum of Rs. 2,000. The petitioner now seeks to have this order revised.

According to the provisions of section 763 of the Civil Procedure Code it is imperative that the judgment-debtor should be made a party respondent to any application for execution of a decree against which an appeal is pending. It further states as follows:—

“If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree.....”

The plain meaning of these words make it quite clear that the court has a discretion to either grant or refuse an application for execution of a decree pending appeal. In fact the object of

making the judgment-debtor a party respondent to such an application is obviously to give him or her an opportunity of showing cause, if any, against the issue of the writ of execution. In the case of *Edward and De Silva*, (1) Soertsz A.C.J. in considering section 763 stated that it was open to the Court under that section to refuse an application for execution of a decree pending appeal. In the case of *Vethamanickam v. Davoodboy* (2) T. S. Fernando, J. observed as follows :—“The purpose of making a judgment-debtor a party respondent to an application under s. 763 is to enable him to show cause against a granting of it.” The order of the learned District Judge is thus clearly wrong in law.

Prior to the enactment of the Civil Procedure Code (Amendment) Law No. 20 of 1977, sections 761 and 762 of the Code made express provision for an application for the stay of execution of an appealable decree to be made before the expiry of the time allowed for appealing from such a decree. These sections were, however, repealed by Law No. 20 of 1977 aforesaid, and a new section 761 substituted in place of the former section 761. The new section does not now make provision for an application for a stay of execution to be made to court. But this does not mean that a court is now powerless to grant a stay. As stated earlier, the court has a discretion to grant or to refuse to grant a stay of execution when an application for execution of the decree is made by the judgment-creditor.

For the above reasons I am of the view that the order of the learned District Judge is wrong *ex facie*. As such this order dated 16.5.1979 is set aside. I also direct that a fresh inquiry be held into the objections of the petitioner. The petitioner will be entitled to the costs of this application.

**COLIN THOME, J.**—I agree.

*Application allowed.*

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