

1978 Present: Wimalaratne, J., Udalagama, J. and
Walpita J.

E. CHELLIAH, Defendant-Appellant

and

Mrs. P. J. JANSZ, Plaintiff-Respondent

S.C. 60/77 (*Inty*)—D.C. Colombo 418/ED

Civil Procedure Code, sections 761, 763—Administration of Justice Law, No. 44 of 1973, section 325 (1)—Action under section 27 of Rent Act, No. 7 of 1972—Judgment entered for plaintiff—Application for stay of execution pending appeal—Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977—Civil Procedure Code (Amendment) Law, No. 20 of 1977—Effect on application for stay—Just and reasonable order—Applicability of provisions of section 7 of Law No. 19 of 1977.

In an action instituted under the provisions of section 27(1) of the Rent Act, when judgment had been entered for the plaintiff the defendant gave notice of appeal under section 325(1) of the Administration of Justice Law, No. 44 of 1973, and moved that proceedings in execution be stayed pending the determination of the appeal. The learned District Judge refused this application and the defendant appealed from that order. In the meantime the Administration of Justice Law was repealed and the Civil Procedure Code had come into operation once again (with effect from 15th December 1977) and its provisions in terms of section 4(1) of the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, were for all purposes deemed to be and to have been in operation as if the Civil Procedure Code had not been repealed earlier. There was accordingly now no provision for automatic stay of proceedings pending appeal.

Held: That having regard to the provisions of section 27(5) of the Rent Act and the provisions of the Civil Procedure Code (Amendment) Law, No. 20 of 1977, a just and reasonable order in such a case would be that the plaintiff before writ of ejectment is executed, do furnish security for the due performance of the order of the Court in the main appeal. Section 7 of Law No. 19 of 1977 made provision for such an order.

APPEAL from a judgment of the District Court, Colombo.

D. R. P. Goonetillake, for the defendant-appellant.

L. V. R. Fernando, for the plaintiff-respondent.

Cur. adv. vult.

March 31, 1978. WIMALARATNE, J.

The plaintiff-respondent instituted this action under the provisions of section 27(1) of the Rent Act, No. 7 of 1972, and obtained judgment on 19.9.77 for the ejectment of the defendant-appellant from the ground floor of premises No. 11, College Street, Colombo 13, and for arrears of rent amounting to Rs. 1,452.19. The defendant gave notice of appeal on 22.9.77, and also moved that proceedings in execution be stayed, in terms of section 325(1) of the Administration of Justice Law, No. 44 of 1973, until the determination of the appeal. The learned District Judge, by his order dated 6.12.77, has refused the application for stay of execution of the decree for delivery of possession, and has directed that writ of possession be issued in terms of section 27(2) (b) of the Rent Act.

Section 27(5) of the Rent Act provides that “where an order under sub-section (2) is issued to the Fiscal by a court, the execution of such order shall not be stayed in any manner by reason of any steps taken or proposed to be commenced in any court with a view to questioning, varying or setting aside such order”. The learned District Judge has taken the view that the above provision is special legislation which is not effected by the general words contained in the later statute, namely section 325(1) of the Administration of Justice Law, which is to the effect that “upon the notice of appeal being accepted by court, all proceedings in such action shall be stayed.”

The effect of section 325(1) of the Administration of Justice Law need not now be considered because that section is no longer law, by reason of section 4(1) of the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977 (which came into force of 15.12.77) in terms of which “the provisions of the Civil

Procedure Code shall for all purposes, *be deemed to be, and to have been*, in operation as if the same had not been repealed and shall continue to be the law governing the procedure and practice in civil courts". "Civil Procedure Code" in section 4 means the "Civil Procedure Code" as amended from time to time, and in force on December 31, 1973.

Now, the Civil Procedure Code in force on 31.12.73 did not make provision for the automatic stay of proceedings pending an appeal. Section 761 provided, however, that if any application be made for stay of execution of any appealable decree before the expiry of the time allowed for appealing therefrom, the court which passed the decree may for sufficient cause order that execution be stayed. The party applying for stay of execution had to satisfy the court that substantial loss may result to him unless such order is made. He had also to make such application without unreasonable delay and had to give security for the due performance of such decree or order as may ultimately be binding on him.

But unfortunately the defendant⁶ could not have had resort to that provision of the Civil Procedure Code because that was not the law in force when he gave notice of appeal on 22.9.77.

A solution to this difficulty is contained in section 7 of Law No. 19 of 1977, which provides that "If any matter or question of procedure shall arise in any civil court in consequence of the coming into operation of that law or in respect of any matter or question of procedure not provided for by that law, the court shall have power to make such orders and give such directions as the court considers necessary to prevent injustice and as the justice of the case may require."

One has to bear in mind that section 27 of the Rent Act is a special provision meant to be applicable only where a landlord seeks to eject a tenant from part of residential premises, another part of which is occupied by the landlord himself. Another relevant factor is that the new Civil Procedure Code (Amendment) Law, No. 20 of 1977, does not provide for stay

of execution of decrees for ejectment pending appeal. This has been made clear by the substitution of a new section in place of the former section 761, and also by the repeal without replacement of section 762. But when the judgment creditor applies under section 763 for the execution of a decree against which an appeal is pending the court 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 and for the due performance of the decree or order of the Supreme Court.

An order which is just and reasonable in the present case, in my view, is one requiring the plaintiff-respondent to furnish security for the due performance of the order of this court in the main appeal. I would, therefore, dismiss this appeal subject to the variation in the order made by the learned District Judge, namely, that the plaintiff-respondent do give security in a sum of Rs. 2,000 in cash for the due performance of the order that will be made by this court in the appeal against the learned Judge's judgment dated 19.9.77. The plaintiff-respondent is to furnish this security before the writ of ejectment is executed by the Fiscal.

There will be no costs of this appeal.

UDALAGAMA, J.—I agree.

WALPITA, J.—I agree.

Varied.
