

1969 *Present* : H. N. G. Fernando, C.J., and Pandita-Gunawardene, J.

S. K. KODIKARA, Petitioner, and M. I. M. CASSIM, Respondent

S. C. 582/68—*Application for Revision in D. C. Galle 6909/L*

Civil Procedure Code—Section 761—Application thereunder for stay of execution of decree—Duty of Court to consider it though petition of appeal has not been filed.

The fact that a petition of appeal has not yet been filed is not a ground for the refusal of an application made under Section 761 of the Civil Procedure Code for stay of execution of an appealable decree.

APPPLICATION to revise an order of the District Court, Galle.

D. R. P. Goonetilleke, for the defendant-petitioner.

Percy Karunaratne, for the plaintiff-respondent.

May 3, 1969. H. N. G. FERNANDO, C.J.—

In this case decree was entered on 7th October 1968 against the defendant for ejection from certain premises, and the plaintiff's proctor almost immediately after judgment was delivered made an application

for the execution of the decree and for the issue of a writ of possession. On the same day the proctor for the defendant moved for stay of execution, but the learned District Judge refused to entertain this application on the ground that a petition of appeal had not yet been filed.

Section 761 of the Code expressly empowers a court to order stay of execution if an application for stay be made before the expiry of time allowed for an appeal. Thus the refusal of the Judge to entertain the defendant's application denied to the defendant the right which he had that the Court should consider and determine his application.

In the result the defendant was ejected from the premises without his having had the opportunity that the Court should first consider the matters which he might have urged in his application for stay of execution.

We make order that the District Judge should now consider the defendant's application for stay of execution of the decree and make an appropriate order thereon. If the District Judge so decides, the writ of possession should be recalled and steps taken requiring the plaintiff to restore possession to the defendant. The defendant will be entitled to a sum of Rs. 200 as the costs of this application.

PANDITA-GUNAWARDENE, J.—I agree.

Application allowed.
