1938

Present : **Keuneman and Nihill JJ.**

SOKKALAL RAM SAIT *v.* NADAR *et al.*

94—D. C. (Inty.) Colombo, 6,138

Execution—Stay of execution pending appeal—Proof of irreparable injury and substantial damage—Civil Procedure Code, s. 761.

Stay of execution pending appeal is granted only when the proceedings would cause irreparable injury to the appellant and where the damages suffered by the appellant by execution would be substantial.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *N. K. Choksy*), for defendants, appellants.

R. L. Pereira, K.C. (with him *Aiyer*), for plaintiff respondents.

Cur. adv. vult.

December 14, 1938. KEUNEMAN J.—

In this case the plaintiff sued the defendants for infringement of certain trade marks, and claimed an injunction, and also damages for passing off. The learned District Judge entered judgment for plaintiff allowing injunction to issue in terms of the prayer, but awarded no damages. On June 23, 1938, before the expiry of the time allowed for appealing, the defendants moved for stay of execution, and they also filed an appeal against the judgment, which is now pending. The learned District Judge refused to stay execution, and dismissed the application made in this connection. The present appeal is taken from that order.

Under section 761 of the Civil Procedure Code, the District Judge had a discretion to allow stay of execution for sufficient cause, but he could not make such order, *inter alia*, unless he was satisfied that substantial loss might result to the party applying for stay of execution, unless the order was made.

One point taken for the appellants was that the learned District Judge had misdirected himself by stating in this order that the defendant's user of the trade mark had not been honest, as found by himself in the judgment in the case. In the first place it is not quite clear from the context whether this statement was merely incidental, or whether the District Judge rested some part of his finding on this. But even if we take the latter view, I do not think the District Judge is debarred from taking such a matter into consideration. In dealing with a similar application Sir W. Page-Wood, V.C., said, "I do not think I ought to hold my hand simply on account of the decision being under appeal, unless I have some doubt of the justice of the decision." (*A. G. v. Proprietors of the Bradford Canal*[1]. I do not think there has been any misdirection here.

[1] *2 Eq. 71 at 79.*

It is also argued for the appellant that the failure to stay execution would result in substantial, and even irreparable damage to the defendants. The evidence in support of this contention is not strong. In the affidavit field in support of the application there is a statement that "if they (the appellants) are ultimately successful they will sustain considerable loss and damage and also considerable prejudice to their trade marks." It is to be noted that nothing has been said as to the amount of business done in this particular class of goods, or whether this is the only class of business done by the defendants, or if not what proportion of the business is done in these goods. It has however been argued before us that the loss of currency of the defendants' trade mark until the determination of the appeal may have serious consequences, and that in any event the defendants will not be able to recoup themselves or any losses suffered during this period. The learned District Judge thought that though the defendants would suffer inconvenience or damage by the continuance of the injunction, they would not suffer irreparable damage which could not be adequately compensated by damages. I must confess that I do not myself see that the defendants would be able to recover damages for the period during which the injunction continues, but on the other hand I do not think that it has been shown that the damage would be substantial. It has been stated in England that "the usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant, mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree. (*Walford v. Walford*[1]). Even if we are to regard the damages as being irreparable in the sense that the defendants could not recover the damages (I wish to add that I do not hold that they could not recover the damages), yet I think that under our law it must be shown that the damage would also be substantial, and I do not think that has been established in this case.

Further, in this case the District Judge has taken into account the balance of convenience and inconvenience in granting or refusing stay of execution. He has pointed out that to permit the defendants to use the mark during the pendency of the appeal might cause irreparable prejudice to the plaintiff. Certainly, if the defendants continued to use these marks in competition with the plaintiff, damage would result to the plaintiff. and it might be difficult or impossible for the plaintiff to recover these damages.

I think this was a matter which the District Judge was entitled to take into account in exercising his discretion in this case.

The appeal is dismissed with costs.

NIHILL J.—

I have read my brother's judgment in the case and I agree with it. I can see no grounds for interfering with the discretion of the learned District Judge which seems to me to have been properly based upon a

[1] *L. R. (1867) 3 Ch. App. Cases 812.*

just appreciation of the relative positions of the two parties. It should not be overlooked, I think, that whilst there may have been concurrent user of the two marks in Ceylon over a period of years, the plaintiff in the action took the trouble to apply for and obtained registration of their mark in 1934. The defendants' mark is unregistered.

Appeal dismissed.