# APPUHAMY
# V.
# FONSEKA AND ANOTHER

COURT OF APPEAL
GUNASEKARA, J.
ISMAIL, J.
C. A. 246/96.
D.C. NEGOMBO 3397/L.

*Civil Procedure Code - S.761 and S.763 - Writ pending appeal - Substantial loss - appealable Time - "forthwith"*

Plaintiffs-Respondents instituted action seeking a declaration that they were entitled to the premises in question. The case proceeded to trial and judgment was entered on 23.4.1990 against the Defendant - Petitioner. The Defendant - Petitioner appealed against the said judgment. During the pendency of the appeal 2nd Plaintiff-Respondent died on 15.8.91; and the 1st Plaintiff has been substituted as the legal representative of the deceased 2nd Plaintiff. On 23.3.95, after a lapse of nearly 3 years of the decree the Plaintiff-Respondent applied for execution of writ pending appeal under S.761. After inquiry, on 4.4.1996 the Learned District Judge allowed the Writ of Execution pending appeal.

The Defendant-Petitioner contends that -

(1) The application for writ pending appeal should have been rejected for the reason that it had not been filed forthwith.

(2) If the judgment debtor at a writ pending inquiry establishes that substantial loss would be caused, Court should not allow the aplication for writ.

**Held:**

(1) If a judgment and decree is entered on the first day of a month, ordinarily an application for Execution of the Decree shall not be entertained until after the expiry of the 14th day of that month, but however if an appeal is preferred against the said judgment on the second day of the same month the proviso to S.761 entitles a judgment-creditor to make an application for the execution of decree pending appeal on the third day of the same month without waiting till the expiry of the 14th day.

A right is given to a judgment creditor to apply for writ at any time, after an appeal is preferred, up to the time of the hearing of the appeal.

(2) The question as to whether substantial loss would be caused to a judgment debtor in the event of writ pending appeal if allowed, is a question of fact to be determined having regard to the circumstances of each case. Substantial loss to one may not be substantial loss to another depending on the facts and circumstances of each case. On a consideration of the order sought to be impugned the learned District Judge had failed to consider the evidence in finding that no substantial loss had been caused to the Defendant-Petitioner. The only reference to the question of loss in the order is not a reference to the question of substantial loss but to a reference to considerable loss.

The burden to satisfy the Court that substantial loss would be caused is on the debtor. In the instant case the judgment debtor had discharged this burden on a preponderance of Evidence led on his behalf which the learned District Judge had failed to consider in the correct perspective.

The failure of the Defendant-Petitioner who was old and feeble to have personally testified in regard to the question of he would suffer in the event of writ being issued cannot be held against him. He had established this position by calling his son who is a partner.

**APPLICATION** in Revision from the order of the learned District Judge of Negombo.

**Cases referred to:**

1. *Fernando v. Nikulas Appuhamy* 22 NLR 1.
2. *Gunasekera v. Arasakularatne* 26 NLR 67.
3. *Rex v. Fareed* 29 NLR 206.
4. *Brooke Bond (Ceylon) Ltd., v. Gunasekara* 1990 - 1 SLR 71 at 83.
5. *A. J. S. Perera v. Gunawardane* - 1993 2 SLR 27.

Miss. Maureen Seneviratne P.C. with *Hilton Seneviratne* for the Defendant-Petitioner

*Mr. N.R.M. Daluwatta P.C.* with *Champaka Ladduwahetty* for the Plaintiff-Respondent.

**Order – 26.6.96**

We have considered the submissions made by the learned Counsel, the contents of the petition and affidavits, the statement of objections and the

authorities cited and are of the view that the learned District Judge erred when she in her Order dated 04.4.1996 held that the Defendant - Respondent Petitioner had failed to establish that substantial loss would be caused in the event of writ pending appeal was issued.

On the facts and circumstances of this case we are of the view that the Defendant-Petitioner has established on cogent and uncontradictory evidence that substantial loss would be caused to him in the event writ pending appeal was issued. Therefore we set aside the Order of the learned District Judge dated 04.4.1996. In view of the additional pleadings filed by the Defendant-Petitioner disclosing that the Defendant-Petitioner had been ejected upon execution of the writ we direct that the Defendant-Petitioner be restored to possession in the premises in question forthwith upon the Defendant-Petitioner depositing a sum of Rs. 100,000/- in cash. The Plaintiffs-Respondents are not to hinder the Defendant-Petitioner being restored to possession of the premises in question either directly or indirectly. The Defendant-Petitioner will have to bear the costs involved in the restoration of possession.The Defendant-Petitioner is not to erect any new buildings in the pemises in question under the guise of restoration of possession but is permitted to effect necessary repairs if any to the three buildings occupied by him before he was ejected.

A Certified copy of this Order is to be forwarded to the learned District Judge of Negombo and certified copies of the same may be issued to the parties on the payment of usual fees.

The reasons for this Order would be pronounced on 03.7.1996.

*Cur. adv. vult.*

July 15, 1996.
**GUNASEKERA, J.**

This is an application in Revision filed against the Order of the learned District Judge of Negombo dated 04.04.1996 by which Order writ of execution pending appeal as prayed for by the Plaintiff-Petitioner was issued on the Plaintiff-Petitioner depositing a sum of Rs. 10,000/- as security to the credit of this case.

The facts relating to this application are as follows:

The Plaintiffs-Respondents instituted action No. 3397/L in the District Court of Negombo against the Defendant-Petitioner for a

declaration that they were entitled to the premises described in the schedule to the plaint and for the ejectment of the Petitioner and all those holding under the Petitioner. The Petitioner filed answer denying the Plaintiff-Respondent's right to ask ejectment and moved that the Respondent's action be dismissed and/or in the alternative that the Defendant-Petitioner be awarded a sum of Rs. 95,765/- for improvements effected by the Defendant-Petitioner and for a *jus retentionis* until the said sum is paid in full.The case proceeded to trial and at the conclusion of the trial judgement was entered against the Defendant-Petitioner on 23.4.1990. At the time the judgement was entered the Plaintiffs were J. Maureen Rita Fonseka and K.Nicholas Flamidian Fonseka. The Defendant-Petitioner appealed against the said judgement within the appealable period and the said appeal is numbered CA54/90 F. During the pendency of the appeal the 2nd Plaintiff Flamidian Fonseka died on 15.8.1991 and the 1st Plaintiff K. Maureen Rita Fonseka has been substituted as the Legal representative of the deceased 2nd Plaintiff. On 23.3.1993 after a lapse of nearly 3 years of the decree being entered the Plaintiff-Respondent applied to the District Court for execution of writ pending appeal in terms of Section 761 of the Civil Procedure Code.Objections were filed by the Defendant-Respondents to the application of the Plaintiff-Petitioner for the execution of the writ pending appeal. An inquiry was held at which Don Lesley Wanniarachchi a son of the Defendant-Petitioner and K.S. Ananda Pathirana an officer of the Forest Department gave evidence and produced several documents on behalf of the Defendant-Petitioner, whilst the Plaintiff-Respondent Maureen Rita Fonseka gave evidence on her own behalf after which the learned Disrict Judge made Order on 04.04.1996 allowing the writ of execution pending appeal. It is this Order that is being sought to be impugned in this application.

At the hearing of this application learned President's Counsel appearing for the Defendant-Petitioner contended that the Order of the learned District Judge dated 04.04.1996 must be set aside on three main grounds:

(1) Firstly it was submitted by the learned President's Counsel that the application for writ pending appeal made by the Plaintiff-Respondent should have been rejected for the reason that it had not been filed forthwith after the appeal was preferred against the judgement and decree entered in April 1990.

(2) Secondly that when an application for writ pending appeal is made that if the Judgment debtor establishes that substantial loss would be caused if the writ is executed that the court shall not allow the application for writ.

(3) Thirdly that the execution of the writ itself is bad in that

(a) that the writ was executed after sun set in violation of Section 365 of the Civil Procedure Code

(b) that police powers were used to execute the writ

(c) that the judgment creditor has actually participated in the execution of the writ

(d) that unauthorised persons had assisted the fiscal in executing the writ

(e) that the learned trial Judge had made an illegal Order when she had made an Order to break open the padlocks after resistance by the judgment debtor.

In regard to the first submission made by the learned President's Counsel that the application for writ pending appeal made by the Plaintiff-Respondent should have been rejected for the reason that it had not been filed forthwith after the appeal was preferred against the judgment and decree entered in April 1990, it was the contention of the learned President's Counsel that the judgment creditor made an application nearly three years later and there is no explanation other than the statement in paragraph 3 of the petition dated 23rd March 1993 that the Plaintiff-Respondent was away from Sri Lanka and had returned on 28.2.1992 and there were no valid reasons given as to why the Plaintiff-Respondent delayed in filing the application for execution of writ pending appeal.

It was submitted that the second Plaintiff died on 15.8.1991 approximately after one year and four months after judgment and decree and there was no explanation as to why he did not make an application for writ within his life time even though the first Plaintiff was abroad.

Learned Counsel for the Defendant-Petitioner contended that the

word "forthwith" has been interpreted to mean "within a reasonable time" in the case of *Fernando v. Nikulas Appuhamy*[1] "without any delay that can possibly be avoided" *Gunasekera v. Arasakularatne*[2]. "as soon as possible" in *Rex v. Fareed*[3] and submitted that the delay of nearly three years in making the application for a writ execution pending appeal was bad.

Whilst we are in agreement with the interpretation given to the word "forthwith" in the above decisions cited, the question for determination in this application is as to whether a judgment creditor should make an application for execution of writ pending appeal forthwith after the expiry of the time allowed for preferring an appeal.

Section 761 of the Civil Procedure Code reads as follows:

"No application for execution of an appealable decree shall be instituted or entertained until after the expiry of the time allowed for appealing therefrom:

Provided, however, that where an appeal is preferred against such a decree, the judgment creditor may forthwith apply for execution of such decree under the provisions of section 763.

On a reading of section 761, it is clear that an application for execution of an appealable decree shall not be instituted or entertained until after the expiry of the time allowed for appealing therefrom.The proviso however enables a judgment creditor to apply for execution before the expiry of the appealable period in the event of an appeal being preferred earlier. In the case of *Brooke Bond (Ceylon) Ltd. v. Gunasekera*[4] Athukorala, J. with H. A. G. de Silva, J. and Bandaranayaka, J. agreeing held that for the purpose of Section 761 of the Civil Procedure Code the time allowed for appealing from an appealable decree is 14 days (the time allowed for giving notice of appeal) and that an appeal is preferred against such a decree upon the lodging of the notice of appeal within 14 days in terms of Section 754(3).

Therefore it is clear that if a judgment and decree is entered on the first day of a month, ordinarily an application for execution of the decree shall not be entertained until after the expiry of the 14th day of that

month, but however, if an appeal is preferred against the said judgment and decree on the second day of the same month the proviso to Section 761 of the Civil Procedure Code entitles a judgment creditor to make an application for the execution of decree pending appeal on the third day of the same month without waiting till the expiry of 14th day.

Therefore in our view the first submission of the learned counsel that the application of the Plaintiff -Respondent for writ pending appeal made in this case nearly 3 years after judgment and decree was entered should have been rejected by the learned District Judge as untenable. In our view a right is given to a judgment creditor to apply for writ at any time after an appeal is preferred up to the time of the hearing of the appeal.

The next submission of the learned President's Counsel was that the learned District Judge erred in law when she came to a finding that the judgment debtor (Defendant-Petitioner) has failed to establish to court that substantial loss may result to him unless an order for stay of execution is made. In this connection it was submitted by learned Counsel that the learned District Judge had failed to consider the objections of the Defendant-Petitioner dated10th August 1993. It was submitted by the learned Counsel that in the objections filed and marked G1 that the Defendant-Petitioner stated that due to special circumstances existing in this case that grave and irreparable loss and damage would be caused to the Defendant-Petitioner if writ pending appeal was issued. It was averred that the Defendant-Petitioner was carrying on a timber business called St.Anthony's Timber Depot since 1950 having obtained the necessary licenses from the relevant authorities such as Urban Council, the Forest Department and the Environmental Authority.The stock in trade in the said business was worth about Rs.1 million.The Chartered Accountants of the Defendant-Petitioner's firm namely A. Pathmaperuma & Co. had valued the stocks as at 31.5.93 at Rs. 990,100 in proof of which a certificate marked X12 was produced.The Defendant-Petitioner owned a lorry bearing No. 42-4249 and a tractor with trailer which was used in the transportation of timber to and from their depot.There were about 10 emloyees employed under the Defendant-Petitioner four of whom were skilled in their trade in manufacturing furniture.The Defendant-Petitioner paid income tax, and business turnover tax in respect of the income derived from the

business in proof of which he produced the documents marked X15 - X22 and X23 - X30, further that the Defendant-Petitioner searched for an alternative space to relocate his business after the judgment was pronounced but was unable to secure a suitable place.The Defendant-Petitioner had also installed machinery worth Rs. 300,000 which were used in his trade and constructed three buildings for which he had obtained a three phase electricity connection and a water supply. It was the case of the Defendant-Petitioner that the above matters referred to in the objections of the Defendant-Petitioner was supported by the oral testimony of the Defendant-Petitioner's son Lesly Wanniarachchi who was a partner in the business and that of one Mr. Pathirana a representative of the Forest Department. It was contended by the learned Counsel that the Defendant-Petitioner himself could not give evidence since at the time of the inquiry he was about 80 years old and had a loss of memory. This evidence was given by the son and was uncontroverted. The Plaintiff-Respondent herself testified at the inquiry and admitted that the Defendant-Petitioner was carrying on a lucrative and substantial business at the premises in question and did not in any way controvert the evidence given on behalf of the Defendant-Petitioner that his business would come to a stand still in the event writ was issued pending appeal.

Learned President's Counsel at the hearing of this applicaton submitted that the Defendant-Petitioner had by cogent and uncontroverted evidence led on his behalf established beyond reasonable doubt that substantial loss would be caused to him in the event writ pending appeal was issued, and that the learned District Judge had misdirected herself on the facts and law in respect of the finding made by her in the order dated 4.4.1996.

It was contended by the learned Counsel that in issuing the writ that the learned District Judge failed to consider the evidence placed before court on behalf of the Defendant-Petitioner that

(a) every effort has been made by him to find suitable alternative accommodation but he had failed to obtain same due to the condition laid down by law in respect of the area in which a timber depot could be established.

(b) that the timber stored in the premises in suit requires buildings of certain specifications to keep out rain and sunlight and that such buildings had to be specially constructed and consequently the issue of writ would cause substantial loss and damage to the stock in trade which is valued at approximately Rs. 1 million.

(c) that the business established by the Defendant-Petitioner in about 1950 had earned a reputation and goodwill in the locality yielding substantial income to the Petitioner and if the writ is allowed would bring the business to a stand still and cause substantial loss to the petitioner.

(d) that the employees whom the Defendant-Petitioner employed with special skills would seek employment elsewhere and deprive Petitioner of their skill and expertise in the event writ is issued and the Petitioner deprived of their services.

(e) the Petitioner would be deprived of his sole source of income and would cause tremendous and substantial loss to him.

In dealing with the order learned President's Counsel contended that the learned District Judge had accepted the fact that the business of the Petitioner brings him a substantial income but had erred in holding that "the Court cannot conclude that he be permitted to continue his business in this place further merely because he is carrying on the business satisfactorily."

The question as to whether substantial loss would be caused to a judgment debtor in the event of writ pending appeal if allowed in our view is question of fact to be determined having regard to the circumstances of each case. Substantial loss to one may not be substantial loss to another depending on the facts and circumstances of each case. In the instant case we are of the view that sufficient evidence has been placed on behalf of the Defendant-Petitioner which evidence has not been controverted to establish that substantial loss would have been caused to the Defendant-Petitioner in the event writ was issued.

Mr. Daluwatta P.C. appearing for the Plaintiff-Respondent submitted that the main question for determination in this application is as to

whether the Defendant-Petitioner had placed material before the learned District Judge to satisfy court that substantial loss would result to him unless an order for stay of execution was made. He contended that the wording of subsection 2 of Section 763 of the Civil Procedure Code as amended by Act No. 53 of 1980 makes it quite clear that the burden of satisfying that substantial loss would result to a judgment debtor unless an order for stay of execution is made is on him. He submitted that in the instant case the judgment debtor (Defendant-Petitioner) did not himself give evidence but chose to call one of his sons and a representative of the Forest Department. It was contended on behalf of the Plaintiff-Respondent that substantial loss does not necessarily relate to the substantial nature of the business carried on by the Defendant-Petitioner. It was his contention that the fact that judgment debtor has to relocate his business in another place after removal of his machinery and stock in trade in the event of decree being issued may cause some inconvenience to him but that by itself does not cause substantial loss.

He drew attention of court to the evidence of the Plaintiff-Respondent that the Defendant-Petitioner had owned properties at Puttalam and Munnakkarya close to the place where he was carrying on business and could have without much difficulty shifted his business to one of those properties. It was submitted that although the Defendant-Petitioner's son in his evidence stated that the Defendant-Petitioner looked out for an alternative accommodation and made inquiries from the customers that came to his establishment to look out for an alternate place to locate his business, the learned Disrict Judge had not been satisfied on that evidence that the Defendant-petitioner had discharged the burden that substantial loss would be caused to him in the event writ was issued. It is in evidence that the Defendant-Petitioner was olc and feeble and had a loss of memory which fact is uncontradicted. Thus in our view the failure of the Defendant-Petitioner to have personally testified in regard to the question of he would suffer in the event of writ being issued cannot be held against him. He had established this position by calling his son who is a partner in the business and the learned District Judge in our view, has failed to consider the evidence led on behalf of the Defendant-Petitioner in its correct perspective. Thus we are unable to agree with the contention of the learned President's Counsel for the Plaintiff-Respondent that the Defendant-Petitioner has

failed to satisfy the District Judge that substantial loss would be caused to him in the event writ pending appeal was issued.

On a consideration of the order sought to be impugned in these proceedings in our view the learned District Judge had failed to consider the evidence in finding that, no substantial loss had been caused to the Defendant-Petitioner. The only reference to the question of loss in the order which appears at page 7 is not a reference to the question of substantial loss but to a reference to considerable loss. Question of substantial loss has been considered in several cases the last of which is *A.J.S. Perera v. Gunawardena* (5) where Mark Fernando, J. with Amerasinghe, J. and Wadugodapitiya, J. held that the burden to satisfy the court that substantial loss would be caused is on the debtor. In the instant case we are of the view that the judgment debtor had discharged this burden on a preponderance of evidence led on his behalf which the learned District Judge had failed to consider in the correct perspective.

In view of our finding in regard to this submission of the learned President's Counsel it is not necessary for us to consider the third submission made on behalf of the Defendant-Petitioner that the execution of writ is bad for the reasons set out earlier.

Therefore we set aside the order of the District Judge dated 4.4.96 and made order dated 26.6.96 allowing this application-petition and directing that the Defendant-Petitioner restored to possession of the premises in question forthwith upon the Defendant-Petitioner depositing a sum of Rs. 100,000 in cash.

We have set out our reasons for the order pronounced on 26.6.1996. Thus the application in revision is allowed and with costs in sum of Rs. 2,500/- in cash.

**AMEER ISMAIL, J.** – I agree

**Application allowed Defendant-Petitioner restored to possession forthwith upon depositing Rs. 100,000/- in cash.**

Note by Ed. Special leave was refused by the Supreme Court in SC. Spl. L 343/96.