PARAMANATHAN AND ANOTHER
v.
KODITUWAKKU ARACHCHI

SUPREME COURT.
AMERASINGHE, J.
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
S.C. APPLICATION NO. 37/88.
C.A. NO. 48/87.
S.C. APPLICATION NO. 38/88.
C.A. NO. 383/87.
D.C. KANDY 1426/RE.
OCTOBER 19, 1992.

Civil Procedure - Execution pending appeal - Revision and application for leave to appeal - Civil Procedure Code - sections 752(2), 753, 755(4), 756(5), (6), (7), 761, 763(2). Lex non cogit ad impossibilia.

In a rent and ejectment case the District Judge gave judgment for the landlord. The tenant appealed. The landlord then filed application for execution pending appeal. The application for execution was allowed but the reasons for the order were not in the record though the relevant journal had an entry "vide proceedings". After the order allowing execution an order for deposit of security by the landlord was made. The tenant moved in revision and applied for leave to appeal. Objection was taken *in limine* to these two applications of the tenant on the ground that he had failed to comply with Rule 46 of the Supreme Court Rules.

Held:

1. A tenant against whom an order for execution pending appeal has been made can proceed in two ways: File an application for leave to appeal (s. 752(2) C.P.C.). Here stay of execution can be obtained only if leave is granted after the landlord is heard (section 756(5), (6) and (7) CPC). Before such leave is granted, there is nothing to preclude the landlord from getting the writ of ejectment against the tenant executed. The other method is to move the Court of Appeal in revision and obtain a stay of execution order *ex parte* (s.753).

2. Neither the application for leave to appeal nor the application for revision had the reasons for the order to execute the writ pending appeal made by the District Court. Objection was taken based on this omission that there was non-

compliance with Rule 46 of the Supreme Court Rules, as the copy of the reasons was not filed in the record the tenant cannot be faulted for this omission on the ground of non-compliance with Rule 46. *Lex non cogit ad impossibilia.*

Cases referred to:

1. *Kiriwanthe and Another v. Navaratne and Another* BALJ Vol. III part 11 p. 15.
2. *Samarasekera v. Mudiyanse* [1990] 1 Sri LR 13.

APPEAL from order of Court of Appeal reported in (1988) 1 Sri LR 315.

K. N. Choksy P.C. with *L. C. Seneviratne P.C., Faiz Musthapha P.C.* and *Lakshman Perera* for Appellant.

A. K. Premadasa P.C., with *T.B. Dilimuni* and *G. H. A. Suraweera* for the respondent.

Cur. adv. vult.

December 02, 1992.

DHEERARATNE, J.

This is an appeal from a judgment of the Court of Appeal, rejecting *in limine* two applications made by the appellants (defendant tenants). The first was a revision application (C.A. 383/87), and the second a leave to appeal application (C.A. 48/87), both in relation to an order **dated** 24.3.87 made by the learned Additional District Judge, Kandy, allowing an application for execution of writ pending appeal, made at the instance of the respondent (plaintiff landlord), in terms of section 761 of the Civil Procedure Code. The only matter for consideration by us is whether the Court of Appeal was right in dismissing both applications *in limine*. This judgment of the Court of Appeal reported in [1988] 1 Sri LR 315, was commented upon in the decision of this court in *Kiriwanthe and Another v. Navaratne and Another* [1] decided on 16.10.1990. I may add that had it been brought to the notice of this court in the course of arguments in *Kiriwanthe's* case that this judgment was pending in appeal before this court at that time, this court would probably have avoided any comment on it as it did with reference to the Court of Appeal judgment in *Samarasekera v. Mudiyanse* [2], which too was in appeal.

The respondent filed action against the appellants on 5.8.80, to have them ejected from the rent controlled business premises situated in the heart of the Kandy Municipality. The grounds of ejectment are immaterial for the purpose of this appeal. After trial, the

learned Additional District Judge gave judgment in favour of the respondent on 20.11.85 and the appellants appealed from that judgment to the Court of Appeal. That appeal, we are informed, is still pending having not yet passed the initial step of preparation of the briefs. On 5.3.86, the respondent moved the District Court to get the decree executed against the appellants pending appeal. Objections of the appellants were filed on 22.10.86. The inquiry into the application of the writ which took the form of submissions of counsel only, was concluded on 19.1.87 and the learned Additional District Judge who held that inquiry (not the learned Additional District Judge who heard the main case) gave the date for his order as 5.2.87. The order was not delivered on that day, but was postponed for several dates viz. 11.2.87, 10.3.87, 17.3.87 and finally for 24.3.87. I should not be misunderstood for mentioning these several dates of postponement as casting any aspersions on this Additional District Judge; we were informed that he was not in the best of health during this time and that he later unfortunately succumbed in harness to the serious illness he was suffering from.

In order to appreciate the contending positions taken up by the appellants and the respondent, I think it is necessary to briefly outline the legal machinery available for the enforcement of respective rights of a landlord who is a judgment-creditor and a tenant who is a judgment-debtor. While a landlord will be most anxious to enjoy the fruits of a judgment obtained in his favour as expeditiously as possible, his tenant will be (perhaps even stubbornly) desirous of retaining possession of the rented premises until he exhausts all his rights in getting the original court judgment reviewed by the appellate courts. The filing of an appeal by the tenant, does not *ipso facto* stay execution of the decree obtained against him (sections 755 [4] and 761 of the Civil Procedure Code). The landlord can file an application for execution of the decree obtained by him, after the expiry of the time allowed for appealing from the decree (section 761) or where an appeal is preferred against such decree, he may forthwith apply for execution (section 761 proviso). In the event of such an application being made by the landlord, on sufficient cause being shown by the tenant, the original court may require security be given by the landlord for restitution of the property etc. before execution is allowed (section 761 [1]). The original court may also order stay of execution of the decree given in the landlord's favour, upon such terms and conditions, if the tenant satisfies that substantial loss may result to him and if security is given by him for the due execution of the decree eventually (section 763 [2]). When the original court makes an order

in favour of the landlord for execution of the decree pending appeal, the aggrieved tenant may desire to canvass the correctness of that order in the Court of Appeal. This could be done in two ways. The first method is to file an application for leave to appeal in the Court of Appeal (section 752 [2]). The important question of staying the order for execution of the decree will then arise only at the stage leave is granted by the Court of Appeal, after having heard the landlord (section 756 [5], [6] and [7]). Before such leave is granted, there is nothing to preclude the landlord from getting the writ of ejectment against the tenant executed. This brings into play the other remedy available to the aggrieved tenant to canvass the order of execution of the writ. That is, to move the Court of Appeal in revision (section 753) as expeditiously as possible and obtain a stay order having satisfied the Court of Appeal on an *ex parte* application. The order to stay execution of the writ, could be granted by the Court of Appeal to be effective until the landlord is heard in opposition or until the matter is disposed of by court finally. This legal mechanism, understandably, demands the most diligent and swift attention on the part of the attorney-at-law for the tenant, who is professionally obliged to do his best at all times to safeguard the interests of his client. The foregoing general observations demonstrate the practical necessity of two applications being made – one of revision and the other seeking leave to appeal made to the Court of Appeal by the aggrieved tenant. We cannot turn a blind eye to these realities.

The revision application was filed on 25.3.87 and supported on 26.3.87; the leave to appeal application was filed on 31.3.87 and was supported on 6.5.87. The Court of Appeal issued notice on the respondent in both applications. Neither application of the appellants contained the order of the learned Additional District Judge giving **reasons** for his determination to execute the writ. That is precisely what led the Court of Appeal to reject both applications *in limine* on objection being taken on behalf or the respondent that there was non-compliance by the appellants of Rule 46 of the Supreme Court (Appeal) Rules of 1978.

In both applications among other grounds, the appellants alleged:-

1. that the learned Additional District Judge had not delivered his reasons for the said order but had merely made order for execution of the writ **in the Journal entry;** (emphasis added); and

2. that the learned Additional District Judge had not ordered the plaintiff respondent to deposit any security as required by section 763 of the Civil Procedure Code.

The appellants produced with the petitions a certified copy of the journal entry of the case record obtained on 24.3.87, containing the signature of the Registrar of the District Court of Kandy dated 24.3.87 and bearing the seal of the Court indicating the same date. The relevant journal entry (as translated), according to the certified copy marked G, reads as follows:

"[82] **87.3.24**

Order
Plaintiff present.
1st Defendant present.
2nd Defendant absent.
(Vide proceedings)
I order execution of the decree.
Signed
A.D.J."

When the revision application was supported in the Court of Appeal on 26.3.87, learned counsel for the appellants brought to the notice of court, that reasons for the Additional District Judge's order to execute writ was not available. The relevant portion of the order made by the Court of Appeal on 26.3.87 reads as follows:–

"Court has heard submissions of counsel for the petitioners. Mr. Choksy P.C., wishes it to be recorded that up to yesterday afternoon no reasons have been given by the learned District Judge for his order issuing writ of execution. Mr. Choksy further states that on 25th March '87 the learned District Judge had ordered the plaintiff to deposit a sum of Rs. 10,000 as security".

The Court of Appeal ordered notice to be issued on the respondent and further directed that the writ of execution be stayed until 5.5.87 on the appellants depositing a sum of Rs. 50,000 in the District Court of Kandy.

Subsequently on 8.9.87, an affidavit of the registered attorney-at-law on record in the District Court of Kandy, N. W. Jayawardene,

affirmed on 2.9.87, was filed in the revision application, the important averments of which are as follows:–

"2. I am the instructing Attorney for the defendant-petitioners abovenamed in D.C. Kandy case No. 1426/RE and depose to the facts hereinafter set forth out of my personal knowledge.

3. I have perused the record in D.C. Kandy case No. 1426/RE on 24th and 25th March 1987. The record was in the custody of the Registrar of the District Court of Kandy. On 24th March 1987 the 1st defendant petitioner S. Paramanathan was with me at the time I looked into the record.

4. I did not find any written reasons for the order issuing writ of execution in this case when I perused the said record on the dates stated above. There was the journal entry of 24th March 1987, a certified copy of which was obtained on 24th March 1987 itself, and this certified copy is filed in these proceedings before your lordships court as (G).

5. When I perused the record on 25th March 1987, there was a further order directing the plaintiff-respondent abovenamed to deposit Rs. 10,000 as security.

6. I informed counsel appearing for my client of the aforesaid, on 25th March 1987 as my clients' application to your Lordships' Court was to be supported before Your Lordships Court on 26th March 1987."

The respondent filed his objections for the two applications made by the appellants, appending to them certified copies of the District Court proceedings in the writ application, including the journal entries and the **reasons** given by the learned Additional District Judge **dated** 24.3.87. This certified copy issued under the hand of the Registrar of the District Court of Kandy, bears the date 24.4.87. In these certified copies the journal entry of 24.3.87 (as translated) reads as follows:–

(82) **87.3.24**

Order
Plaintiff present.

1st Defendant present.
2nd Defendant absent.
(Vide Proceedings)
I order execution of the decree.
Signed
A.D.J."

"Later

I order the plaintiff to deposit
Rs. 10,000. Rs. 10,000 in cash as
security.
Signed'
A.D.J."

The difference between the journal entry No. 82 in the certified copy issued on 24.3.87 and that issued on 24.4.87 is significant; and it does support the version of the attorney-at-law for the appellants to some extent. The respondent produced a letter from the Registrar of the District Court of Kandy dated 3rd February 1988, addressed to the attorney-at-law for the respondent, sent by way of a reply to his letter dated 1st February 1988. According to this letter, the Registrar had perused the register maintained in the record-room of that court for issue of records for reference to attorneys and their clerks, for the period 1.3.87-31.3.87, and found that no application had been made by any attorney or a clerk to obtain the record in case No. 1426/RE, for reference, on the 24th or 25th of March 1987. This letter does not disprove that the attorney-at-law for the appellants did peruse the record which was in the custody of the Registrar on the 24th and 25th. Nor does it disprove that the attorney-at-law for the appellants did obtain a certified copy of the journal entries on 24.3.87. As a matter of fact, we have before us the journal entries issued by the registrar on 24.3.87.

It is common ground that the journal entry of 24.3.87 states "vide proceedings" but the question is whether those proceedings namely the reasons given by the learned Additional District Judge had reached the record on 24.3.87; or when it did reach the record. It may not have reached the record for several reasons; it may have been misplaced or the learned Additional District Judge may have removed it to correct typing mistakes. We need not enter into any

speculation about that, and it is established as a fact that the reasons were not in the record either on the 24th or the 25th. I am unable to agree with the submission of learned counsel for the respondent that the attorney-at-law or the appellants have attempted to "contradict the record". If the order given by the learned Additional District Judge was there in the record on 24.3.87, there is no reason for the attorney-at-law Jayawardene for not obtaining a copy of that order for the purpose of submitting the same to the Court of Appeal. Neither he nor the appellants stand to gain anything by falsely denying the existence of that order in the record on 24.3.87 if in fact it was there. I can find no trace of wilful non-disclosure, deception or negligence on the part of the attorney-at-law for the appellants.

On this crucial question, the Court of Appeal came to the following important finding which cannot be faulted; "Thus it is beyond doubt that the order X must in this case be accepted as an order made by the judge on 24.3.87, but had not reached the record when document G was taken". The order must reach the record for action to be taken expeditiously to safeguard the interests of the appellants by their attorney-at-law. I can find no positive proof, nor did the Court of appeal find, as to when that order reached the record. In these circumstances, I am of the view, that to hold that there was non-compliance with Rule 46 of the Supreme Court (Appeal) Rules of 1978 by the appellants would be to ignore the principle *lex non cogit ad impossibilia*. See *Kiriwanthe and Another v. Navaratne and Another* (*supra*).

The respondent filed the order of the learned Additional District Judge specifically averring that it was "not meant to supplement the omission made" by the appellants. The appellants do not deny that the order of the judge found its way into the record sometime after 25.3.87. The Court of Appeal appears to have misunderstood this admission as an attempt on the part of the appellants to retract from their original position which they had pleaded. The purpose of the requirement of the appellants filing that document (which came to the record subsequently) had been satisfied and the Court of Appeal was in full possession of the necessary material to do justice between the parties. Any other view of the matter would be highly technical and artificial.

For the above reasons, I set aside the judgment of the Court of Appeal delivered on 19.2.88 and further direct the Court of Appeal to take up the two applications C.A. 383/87 and C.A. 48/87 together (as was done earlier) and to hear and determine them on their merits. The stay order issued by this court on 2.9.88 will remain in force until the two applications are finally disposed of by the Court of Appeal.

The appellants will be entitled to a sum of Rs. 2500 from the respondent as costs of this appeal.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.
Further steps ordered.