TISSERA
v
FERNANDO AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CALA 425/01 (LG)
DC PANADURA 554/L
JUNE 28, 2004
JULY 25, 2006

Civil Procedure Code section 479-763(2) – Act 53 of 1986. Writ pending appeal- Judicature Act 2 of 1979 as amended by Act 37 of 1979 – Ingredients necessary to stay the writ? Defendant a minor – Guardian not appointed -- Is it a substantial question of law?

Held:

(1) The law applicable to stay of execution of decree pending appeal is contained in section 23 of the Judicature Act and also in section 763(2) of the Civil Procedure Code.

(2) Where section 23 of the Judicature Act is concerned the rule is the execution of the writ whereas the exception is the stay of the writ.

(3) On the other hand section 763(2) which is not linked to the provision of the Judicature Act stipulates distinctive condition as the court may stay the writ, if the judgment debtor satisfies the court that substantial loss may result to him and security is given by the judgment debtor for the due performance of the decree.

(4) Though if a writ is stayed to avoid substantial loss equally unexpected loss or damage to a certain degree would result to the judgment creditor who is unable to enjoy the fruits of his victory-however what matters is not the balance of convenience or inconvenience of the concerned parties but the fact on the material placed before court, the judgment debtor should discharge the burden placed on him to the satisfaction of court.

(5) Even in the absence of substantial loss, the existence of a substantial question of law is sufficient ground to stay execution of the writ.

(6) There is a duty cast on the judgment debtor to take whatever possible steps to minimize his loss, he cannot fall back on his inaction and inertia and claim substantial loss would be caused to him.

Per Sarath de Abrew J.,

"If the dogmatic and arrogant approach of the judgment debtor is allowed to succeed, no judgment creditor would be safe from the clutches of an unscrupulous judgment debtor who has school going children in a school close to the premises in suit - for if a genuine effort was made, there was a strong likelihood that the judgment debtor could have succeeded in procuring alternative accommodation within striking range of the school his children are attending or was about to attend.

(7) It is evidence that the 3rd defendant was a minor at the time the plaint was filed. The trial judge has failed to comply with the mandatory provisions of section 479 of the code and failed to appoint a *guardian ad litem* on behalf of the minor defendant before proceeding with the case, therefore a substantial question of law will arise as to whether the judgment or decree would be binding on the 3rd defendant-respondent and what would be the effect it would have on the 1-2 defendant-respondents.

Held further

(8) The amount of security should be such as would reasonably safeguard the interest of the judgment creditor in the event of the judgment appealed from being eventually affirmed in appeal.

APPLICATION for leave to appeal from an order of the District Court of Panadura with leave being granted.

Cases referred to:

1. *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. of Ceylon Ltd* 1990 1 Sri LR 19
2. *Esquire Industries Garments Ltd* v *Bank of India* – 1993 – 1 Sri LR 130 (SC)
3. *Saleem* v *Balakumar* - 1981 – 2 Sri LR 74
4. *Kandasamy* v *Ghanasekaram* – CALA 78/81 – C.A.M. 17.7.1981
5. *Shajahan* v *Mahaboob and others* – CALA 117/89
6. *Mustapa* v *Thangamani* – CALA 70/91
7. *Cooray* v *Illukkumbura* – 1999 – 2 Sri LR 63
8. *Fauz* v *Gyl* and *others* – 1999 – 3 Sri LR 345
9. *Mohamed* v *Seneviratne* – 1989 – 2 Sri LR 389
10. *Amarange* v *Seelawathie Weerakoon* 1990 – 2 Sri LR 332
11. *H. Darlin Silva* v *Chithranganie Fernando* – 2 CALR 469 at 473
12. *Lalith Siriwardena* v *Piyasena Munasingha* – 1986 1 CALR 496
13. *Somasundaram* v *Ukku* - 44 NLR 446
14. *W. Sobitha Unnanse* v *Piyaratne Unnanse* – 55 NLR 249

Manohara de Silva PC with *Ms. Anusha Perusinghe* for the plaintiff-petitioner.
Chithral J. Fernando for the defendant-respondent.

Cur.adv.vult

May 30, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Panadura dated 06.11.2001 (P2) where the petitioner had sought to set aside the aforesaid order of the District Judge staying the execution of the decree pending appeal and thereby sought to have the writ executed pending appeal. Leave had been already granted by this Court on 13.12.2005.

The plaintiff-judgment creditor-petitioner (hereinafter sometimes referred to as the petitioner) instituted the aforesaid action bearing No. 554/L in the District Court of Panadura to evict the defendants from the land and household premises set out in the schedule to the plaint and recover vacant possession thereof. The premises in suit was a 14 perch premises at 14/1, St Joseph Street, Uyana, Moratuwa, where the defendants-judgement debtor respondent (hereinafter sometimes referred to as respondents) were residing. The 2nd and 3rd respondents were the younger brothers of the 1st respondent, whereas the petitioner was an aunt of the respondents. After trial the learned trial Judge entered judgement in favour of the plaintiff, further ordering damages in a sum of Rs. 1000/= per month from 28.04.90 the date of the plaint, payable to the petitioner by the respondents.

Being dissatisfied with the aforesaid judgement, the respondents have lodged an appeal to the Court of Appeal. Thereafter the petitioner has filed an application for the execution of the decree pending appeal. The learned District Judge of Panadura, who had succeeded the learned Judge before whom the trial was conducted, consequent to an inquiry held with regard to the application of the petitioner to enforce the execution of the decree, has made order on 06.11.2001 (P2) refusing the application on the basis that the respondents have succeeded in establishing that substantial loss would be caused to them unless the execution of the decree was stayed pending appeal. While making this order, the learned District Judge had further ordered the respondents to deposit Rs. 1 lakh as

security in Court. In his order, the learned judge has not proceeded to consider the question of the presence of a substantial question of law as he was satisfied as to the existence of substantial loss to the respondents if the decree was to be executed against them. It is against this impugned order dated 06.11.2001 that the petitioner has made the present application to the Court of Appeal.

The law applicable to stay execution of decree pending appeal is contained in the provisions of section 23 of the Judicature Act No. 2 of 1978 as amended by Act No. 37 of 1979 and also section 763(2) of the Civil Procedure Code as amended by Act No. 53 of 1980. Before examining the material placed before Court as to the merits and demerits of this application, its is expedient to examine and assess the implications of the above statutory provisions.

Section 23 of the Judicature Act (as amended by Act No. 17 of 1979) provided as follows:-

"Any party who shall be dissatisfied with any judgement, decree or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Court of Appeal against any such judgement, decree or order from any error in law or in fact committed by such court, but no such appeal shall have the effect of staying the execution of such judgement, decree or order unless the District Judge shall see fit to make an order to that effect, in which case the party appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgement of the Court of Appeal upon the Appeal."

It is noteworthy to observe that, as far as the above provision is concerned, the rule is the execution of the writ whereas the exception is the stay of the writ. Furthermore, other than the mandatory provision compelling the entering into a bond, the above provision does not spell out or specify any other preconditions as to under what conditions a writ may be stayed but leaves the entire exercise to the judicial discretion of the learned District Judge concerned, to make a fit and proper order as the justice of the case may demand.

On the other hand, section 763(2) of the Civil Procedure Code (as amended by Act No. 53 of 1980), which is not linked to the provision in the Judicature Act, stipulates a distinctive condition as follows,

Court may order the execution to be stayed upon such terms and conditions as it may deem fit, where:-

(a) The judgement -debtor satisfies the Court that substantial loss may result to the judgment-debtor unless an order for stay of execution is made, and

(b) Security is given by the judgment-debtor for the due performance of such decree or order as may ultimately be binding upon him.

On a construction of the above provision, the discretion of the learned Judge is not unfettered to the extent that in order to stay a writ, there must be sufficient material placed before Court that substantial loss may result to the judgment-debtor. It goes without saying that if a writ stayed to avoid substantial loss being caused to the judgment-debtor, equally anticipated loss or damage to a certain degree would result to the judgment-creditor who is unable to enjoy the fruits of his victory after protracted litigation.

However, what matters is not the balance of convenience or inconvenience of the parties concerned, but the fact that on the material placed before Court, the judgment-debtor should discharge the burden placed on him to the satisfaction of Court that substantial loss would be caused to him unless the execution of the writ was stayed. Therefore, it is now settled law that writ must be stayed until the final disposal of the appeal if the judgment-debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made by Court.

In the case of *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. of Ceylon Ltd.*(1), it had been held that Court should be satisfied of the probability of substantial loss resulting to the Judgment-debtor if the writ is not stayed and mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of the decree. Further in the case of *Esquire Industries Garments Ltd. v Bank of India*(2) the concept of substantial loss had been extended not only to include the immediate pecuniary loss of the judgment-debtor but also to include the social and economic impact on the employees in the present social context.

Provisions of section 763 of the Civil Procedure Code is not exhaustive in respect of the relief available to the judgment-debtor. In *Saleem* v *Balakumar*,[3] Abdul Cader, J. with O.S.M. Seneviratne, J. agreeing a substantial question of law to be adjudicated upon at the hearing of the appeal was considered a sufficient ground to stay the writ till the disposal of the appeal. This judgment had been delivered soon after section 763(2) was introduced to the Civil Procedure Code by Amendment Act No. 52 of 1980. A long line of judgments thereafter had followed this concept where it had been held that even in the absence of substantial loss caused to the judgment-debtor, the existence of a substantial question of law to be decided at the appeal was sufficient ground to stay the execution of the writ. In this respect the following cases may be cited.

Kandasamy v *Ghanasekeram*[4].
Shajahan v *Mahaboob and others*[5].
Mustapa v *Thangamani*[6].
Cooray v *Illukkumbura*[7].
Fauz v *Gyl and others*[8].

It was held in the latter case of *Fauz* v *Gyl (supra)* that questions of law arising for determination must be substantial in relation to the facts of the case at hand and that one of the interpretations of the word "substantial" is to mean "actually existing."

Having examined the statutory provisions and other case law authorities governing the subject, I now proceed to examine all the material placed before Court in order to determine the validity and correctness of the impugned order of the learned District Judge of Panadura dated 06.11.2001, with a view to elucidate the presence of any one of the following ingredients in order to justify the stay of execution of the decree.

1) Whether the respondents have placed sufficient material before Court for the learned District Judge to be satisfied that substantial loss would incur to the respondents if the execution of the decree was not stayed.

2) Whether the Court could be satisfied of the existence of a substantial question of law that has arisen for determination at the hearing of the Appeal.

The following are the main contentions raised by the petitioner in her petition and the oral and written submissions tendered to Court.

1) The learned District Judge erred in holding that there was substantial loss caused to the respondents if the writ is executed on the sole basis that the 1st defendant-respondent had school-going children and a child that is going to be admitted to school.

2) The learned District Judge erred in disallowing the application of the petitioner to execute the writ when it was established that the 1st respondent had not made any attempt to find any alternative accommodation.

3) The security ordered by Court was insufficient, in any event.

The following authorities were brought to the notice of Court in support of the above contentions.

Mohamed v *Seneviratne*[9]

Amarange v *Seelawathie Weerakoon*[10]

H. Darlin Silva v *Chithranganie Fernando*[11]

Lalitha Siriwardena v *Piyasena Munasinghe*[12]

Grindlays Bank Ltd. v *Mackinon Mackenzie & Co. Ltd.(supra)*

On the other hand, the oral and written submissions tendered on behalf of the 1st respondent have raised the following contentions.

1) Sufficient material has been placed before Court to show substantial loss or damage would be caused to the 1st respondent if the writ was executed.

2) As the 3rd defendant was a minor at the time plaint was filed on 29.08.90. the failure of the learned Trial Judge to comply with the mandatory provision of section 479 of the Civil Procedure Code in failing to appoint *a guardian ad litem* which was a main ground of appeal, has raised a substantial question of law to be determined at the final appeal.

The following authorities were quoted in support of the above contentions of the 1st respondent.

A. Rahuman Shajaham v *A. Rahuman Mahaboob (supra).*

R. Mohamed v *L.S. Seneviratne (supra).*

Having carefully examined the entirety of the pleadings, proceedings, oral and written submissions and case law authorities submitted by both parties I am inclined to disagree with the learned trial judge's finding that execution of the writ would have caused substantial loss to the 1st respondent, for the following reasons.

The 1st respondent giving evidence had stated that his eldest son attends St. Sebastians College, his elder daughter attends Kusinara School while his younger daughter is due to attend the Convent from the following year. According to him these schools were situated within a radius of 21/2 kilometers from the premises in suit. The learned District Judge had concluded that if the writ was executed it would disrupt the education of the two elder school going children while the respondent will have problems in admitting the youngest child to the intended school due to inability to confirm residence within the area. In his affidavit to Court the 1st respondent had sought to mislead Court by stating that St. Sebastians College was situated next-door to his residence, whereas in cross-examination he has admitted it was situated 11/2 kilometers away.

On the other hand examination of the evidence of the 1st respondent at the writ inquiry clearly reveals that he has stubbornly refused to seek out an alternative place of abode, not only during the period the trial was proceeding from 29.08.1990 to 01.11.2000 when the judgment was delivered, but also for one full year thereafter till the order of the writ inquiry was delivered on 06.11.2001. As there is a duty cast on the judgment-debtor to take whatever possible steps to minimize his loss, he cannot now fall back on his inaction and *inertia* and claim substantial loss would be caused to him. If a genuine effort was made, there was a very strong likelihood that the 1st respondent could have succeeded in procuring alternative accommodation within striking range of the schools his children were attending or was about to attend. There was also the possibility of boarding his children in the respective school itself or other suitable place till the 1st respondent procured suitable alternative accommodation. If the dogmatic and arrogant approach of the judgment-debtor is allowed to succeed, no judgment-creditor would be safe from the clutches of an unscrupulous

judgment-debtor who has school-going children in schools close to the premises in suit. As Justice P.R.P. Perera held in the *Grindlays Bank case* quoted above, substantial loss is much more than mere inconvenience and annoyance which is not enough to take away from the successful party the fruits of victory and the benefit of the decree.

Therefore for the foregoing reasons, I uphold the contention of the petitioner that the learned District Judge had erred in law in coming to the erroneous conclusions that the 1st respondent had placed sufficient material before Court to establish substantial loss.

However, the learned Judge had failed to examine whether a substantial question of law existed to be decided at the final Appeal, even though the respondents had specifically averred so in their petition of appeal. On an examination of the material placed before Court, it is quite evident that the 3rd defendant was a minor at the time plaint was filed. The learned trial Judge had failed to comply with the mandatory provision of Section 479 of the Civil Procedure Code and failed to appoint a *guardian ad litem* on behalf of the minor 3rd defendant before proceeding with the case. In fact the issues 06, 07 and 08 raised by the defendants on this question at the commencement of the trial had been ignored by the learned trial judge in making her final order.

Section 479 of the Civil Procedure Code provides that:-

> "Where the defendant to an action is a minor, the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the action for such minor, and generally to act on his behalf in the conduct of the case."

In *Somasunderam* v *Ukku*[13] it was held that where a decree is entered against a minor who is unrepresented by a guardian he may move to have the proceedings set aside under section 460 of the Civil Procedure Code after he attains majority.

In the instant case, the 3rd defendant-respondent was a minor born on 05.05.1973 and had not yet attained the age of 18 years when the plaint was filed on 29.08.1990. (Page 69 of Proceedings). This is admitted by the plaintiff-petitioner in her evidence. The trial had proceeded without the compliance of section 479 of the Civil Procedure Code. The 3rd defendant had attained majority as the case

proceeded and was no longer a minor when the judgment was delivered. Therefore, a substantial question of law will arise as to whether the judgment or decree would be binding on the 3rd defendant-respondent, and what would be the legal effect it would have on the 1st and 2nd defendant-respondents. This matter has been specifically raised by the respondents in their petition of appeal. The petitioner has chosen to be silent on this issue in the written submissions filed. The learned District Judge too has failed to dwell on his crucial matter in his impugned order of 06.11.2001. Therefore on the basis of the above findings I am satisfied as to the presence of a substantial question of law to be adjudicated at the final Appeal.

Therefore I hold that the order of the learned District Judge to stay the execution of writ is justified not on the grounds of substantial loss to be caused to the 1st respondent, but on the grounds of a substantial question of law being present for adjudication.

It is now opportune to consider the question of quantum of security. The learned District Judge had ordered the deposit of Rs. 100,000/- in cash. In terms of the judgment of the trial Judge, the defendant-respondents were liable to pay Rs. 1000/- per month as damages to the plaintiff-petitioner. By the time the order in the writ inquiry was pronounced, the total amount of damages accrued was in excess of Rs. 1,25,000/-. If the result of the final appeal is in favour of the petitioner, by the time the result is achieved, the amount of total damages payable would be of excessive proportions. In *W. Sobitha Unnanse* v *A. Piyaratne Unnanse*(14), it was held that "the amount of security ordered to be furnished should not be unduly excessive. The amount of security should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the Judgment appealed from being eventually affirmed in appeal."

In view of the above circumstances of this case, I am of the view that the amount of Rs. 100,000/- ordered to be furnished as security is not sufficient to safeguard the interests of the petitioner, but a sum of Rs. 150,000/- in cash would meet the ends of justice.

In view of the foregoing findings and reasons, I make order dismissing the application of the petitioner to set aside the order dated 06.11.2001 of the learned District Judge of Panadura. I affirm the said order subject to the variation that the defendant-respondents are

directed to furnish security in a total sum of Rs. 150,000/- in cash with two sureties acceptable to the learned District Judge of Panadura within a period of 03 months this order is conveyed to them by the District Court, and to enter into a bond for the same amount for the due performance of the decree if and when required once the appeal is finally adjudicated. Taking into account all the circumstances of this case I make no order as to costs.

Accordingly the application is dismissed subject to the above variation.

EKANAYAKE, J. – I agree.

Application dismissed subject to variations.