

1939

Present : Moseley and Soertsz JJ.

ATUKORALE v. SAMYNATHAN.

[IN REVISION.]

D. C. Ratnapura, 5,916.

Revision—Appeal pending—Powers of Supreme Court to revise order of the District Court—Civil Procedure Code, s. 753, Courts Ordinance, ss. 21 and 40.

The powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by an original Court whether an appeal has been taken against it or not.

This right will be exercised in a case in which an appeal is pending only in exceptional circumstances as, for example, to ensure that the decision given on appeal is not rendered nugatory.

A PPLICATION for revision of an order of the District Judge of Ratnapura.

H. V. Perera, K.C. (with him N. E. Weerasooria, K.C., E. A. P. Wijeyeratne, E. B. Wikremanayake, and U. A. Jayasundere), for defendant, petitioner.

R. L. Pereira, K.C. (with him Barr Kumarakulasingham), for plaintiff, respondent.

M. T. de S. Amerasekere, for Proctor O. M. L. Pinto.

Cur. adv. vult.

March 17, 1939. SOERTSZ J.—

On January 10, 1939, the District Judge of Ratnapura entered decree declaring the plaintiff-respondent entitled to certain lots of land and ordering the defendant-petitioner to pay as damages which had accrued at the date of the action, a sum of Rs. 2,000 and further damages at Rs. 150 a month till the plaintiff is restored to possession of those lots. The decree also made order for the payment by the plaintiff to the defendant of certain compensation in respect of improvements. On January 11, 1939, the defendant petitioner appealed against the judgment and decree entered by the District Judge. On January 19 the plaintiff-respondent applied for execution of the decree "by issue of writ for the recovery of damages allowed until delivery of possession and also by issue of order of delivery of possession of the lots decreed to the plaintiff". This application was opposed by the defendant-respondent on February 23, 1939, which so far as I can gather from the material before me, was the date fixed for inquiry into the matter of the legality and sufficiency of the security tendered for costs in appeal.

The learned Judge made order on the question of security, and then addressing himself to the application for writ of execution said "no objection by affidavit or otherwise was made by the defendant against the allowance of the application. I would therefore allow the application of the plaintiff for execution". From this order too, the defendant has appealed. In the ordinary course, these appeals will not come up for hearing for some time, and the petitioner makes this application for the revision of the order made by the District Judge in regard to execution on the ground that if the writ is executed in the manner execution is prayed for, in the event of his appeal turning out successful, it will be of doubtful, if of any value to him.

Counsel for the plaintiff-respondent opposes this application for revision on a matter of law and on the merits. He contends firstly that in the circumstances as alleged by the petitioner, this Court has not the right to exercise its powers of revision, because there is already an appeal pending. He relies on two Indian cases in support of this proposition, namely, the cases reported in the *All India Reports, 1923 (D. C.)* page 128, and *All India Reports, 1931 (Bombay)*, page 232. I have examined those cases, and in my opinion they have no application at all on the point with which we are concerned in this case. They deal with the question of the occasion on which the powers of review given by the Indian Code of Civil Procedure will or will not be exercised.

The power by way of revision conferred on the Supreme Court of Ceylon by sections 21 and 40 of the Courts Ordinance (Vol. I., page 25) and by section 753 of the Civil Procedure Code (Vol. II., page 428) are very wide indeed, and clearly this Court has the right to revise any order made by an original Court whether an appeal has been taken against that order or not. Doubtless that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory.

In a matter similar to the present application, namely, in the matter of an application to stay execution in *D. C. Chilaw, 5,502, Shaw and de Sampayo JJ.* held that "this Court would have jurisdiction to stay execution so that the decision of the appeal in this Court should not be rendered nugatory".

In my opinion the preliminary objection must be overruled. In regard to the merits of the application it is desirable not to say too much in view of the fact that there is an appeal pending from the decision given by the trial Judge on the question of the rights of the plaintiff and of the defendant in respect of the land in question in this case. On this application made to us to stay the execution of the writ allowed by the trial Judge, it is sufficient, I think, to say that so far as the writ which the Judge has ordered to issue directs that the plaintiff be placed in possession of the lots decreed to him, it was open to the petitioner to take steps under section 761 of the Civil Procedure Code or if he failed to do that, to ask for security under section 763. He neglected to avail himself of those provisions and his present plea that irreparable loss will accrue to him by the plaintiff being put in possession is not very convincing. In the case I have already referred to, *Shaw J.* said, "this action was brought claiming declaration of title to a building used as a Baptist Meeting House, and judgment had been given for plaintiff for declaration of title and ejectment. No loss will be suffered by the defendants, even if they win the appeal on the merits should they be prevented from using the building pending the appeal. Should they succeed they will be again placed in possession of the building. Those remarks are applicable to the facts of this case.

Counsel for the petitioner argued very strongly that the decree did not direct that the defendant be ejected from and the plaintiff be put in possession of the lots the plaintiff was declared entitled to. That would appear to be so according to the copy of the decree typed to us, but there is the fact that the trial Judge orders in the decree that the defendants pay to the plaintiff damages at a certain rate *per mensem* till the plaintiff is restored to possession.

In his judgment he says, "the defendant will have to pay to the plaintiff as damages Rs. 2,000 with further damages at Rs. 150 a month till he (plaintiff) is restored to possession of the land decreed to him".

If the decree, as entered, is inadequate in that it does not specifically provide for ejectment of the one and restoration of premises to the other it may perhaps mean an application to amend the decree to bring it into conformity with the judgment.

I would also point out in this connection that Counsel did not take this objection when he opposed execution before the trial Judge. I must therefore refuse this application so far as it relates to the placing of the plaintiff in possession of the lots decreed to him.

In regard to the issue of the writ for the recovery of the damages awarded to the plaintiff there is the matter of the compensation for improvements made by the defendant. If the defendant is entitled to recover the sum of Rs. 17,500 from the plaintiff on account of compensation there is section 346 of the Civil Procedure Code to be considered

and I think it best that the issue of the writ for the recovery of damages be stayed, pending the hearing of these appeals. The petitioner will pay the respondent half the costs of this application.

Owing to a misunderstanding of the order made by us when we allowed substituted service of notice, Mr. Pinto, plaintiff's proctor, was also noticed to appear. We had directed that substituted service should be effected by the notice being affixed to the door of the plaintiff's last known residence, and also by a copy of it being served on the plaintiff's proctor. The petitioner's proctor should have seen to it that the notice went out in accordance with the directions given. I therefore order the petitioner to pay Rs. 31.50 as costs incurred by Mr. Pinto.

MOSELEY J.—I agree.

Order varied.

