

AMARANGE
v.
SEELAWATHIE WEERAKOON

COURT OF APPEAL,
K. PALAKIDNAR, J., AND H. W. SENANAYAKE, J.,
C.A. NO. 387/85,
D.C. KANDY 875/RE,
JUNE, 06 1990.

Appeal – Stay of execution pending appeal – Section 763 (2) of the Civil Procedure Code – Judicature Act S. 23 – Substantial loss – Article 138 (1) of the Constitution

Section 763 (2) of the Civil Procedure Code envisages a stay order only where a judgment – debtor satisfies the Court that substantial loss may result unless a stay is granted.

Section 23 of the Judicature Act empowers the District Judge to stay execution if he “shall see fit” but does not spell out on what grounds the discretion should be exercised except that the discretion should be exercised judicially as the Justice of the case may demand.

The two provisions are not linked.

The lodging of an appeal from a judgment of the District Court by an aggrieved party does not *ipso facto* have the effect of staying the execution of judgement. Unless there is proof of substantial loss, execution of decree will not be stayed merely on the ground that an appeal is filed.

Substantial loss is not necessarily monetary loss. The expression must have a relative meaning and must vary with the facts of each case.

Where the petitioner had been a tenant for 16 years, made attempts to get alternative accommodation but failed, had four children out of them two were school going children depending on him and had only two more years to retire from his teaching profession, substantial loss can be inferred. The District Judge had failed to evaluate and consider this evidence and has misdirected himself on the application of the law.

Unlike in England, the appellate Court is not bound by the exercise of discretion of the original Court. Article 138 (1) of the Constitution enables the appeal court to review the exercise of discretion by the original court.

cases referred to :

1. *Charlotte Perera v. Thambiya* 1983, 1 Sri LR 354
2. *Don Piyasena v. Mayawathie Jayasuriya* 1986 1 Sri LR 06
3. *Mack v. Nadesapillai Shanmugam* 111 Sri Kantha Reports 89
4. *Mohamed v. Seneviratne* S.C. No. 45/88 CA/LA 14/88 – D.C. Colombo 4459 RE – S.C. Minutes of 16.06.1989
5. *Abdul Rahim v. Gunasena Corporation Ltd.* 66 NLR 419, 420
6. *Coplans v. King* 1947 2 All ER 393.

APPLICATION for revision of the order of the District Judge of Kandy.
Faisz Mustapha, P.C. for petitioner.

D. R. P. Gunatilleke with *J. C. Boyange* for substituted – Plaintiff-respondent.

Cur. adv. vult.

September 07, 1990

H. W. SENANAYAKE, J.

The Petitioner is seeking to revise the order dated 15.03.1985 of the Learned District Judge allowing execution of writ pending appeal directing the ejection of the Petitioner and his family from the residential premises situated at Bulumulla in Kiribathkumbura.

The Learned Counsel for the Petitioner submitted that the Learned District Judge has held that no substantial loss would be caused to the Petitioner by the issue of the Writ; He had failed to analyse the evidence or give any reasons. He submitted that the Learned District Judge had misdirected himself on the law and on the facts.

The Respondent made an application for writ pending appeal and the Petitioner filed his objections. The Petitioner in his objections stated *inter alia* as follows:—

- (a) That he was a teacher by profession and that he and his family had been occupying the premises as Tenants for the last 16 years;
- (b) That the family was dependent totally on his salary as a Teacher and had no other property or residential house;
- (c) That there was substantial questions to be determined at the hearing of his appeal that if the Writ is executed he and his family would be thrown on to the streets.

There appears to be force in the submissions made by the Learned Counsel for the Petitioner. He submitted that the Learned District Judge has relied on the authority of *Charlotte Perera v. Thambiya*⁽¹⁾ and misdirected himself on the facts and the law without giving his mind to the evidence led at the inquiry.

It is relevant to consider the provisions of Section 763(2) of the Civil Procedure Code which reads as follows:—

“The Court may order execution to be stayed upon such terms and conditions as it may deem fit: Where—

- (a) The Judgment-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 other as may ultimately be binding upon him”.

This section envisages a stay order only where a Judgment-debtor satisfies the Court that substantial loss may result unless a stay is granted. This section spells out as to what should be done by the Judgment-debtor when one compares with Section 23 of the Judicature Act, which reads as follows:—

“Any party who shall be dissatisfied with a Judgment, decree or appeal to the Court of Appeal against any Judgment, 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 Judgment, 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 Judgment of the Court of Appeal upon the Appeal”.

This section empowers the District Judge to stay execution if he “shall see fit”. It does not spell out on what grounds the discretion should be exercised except that the Courts discretion should be exercised Judicially as the justice of the case may demand.

The provisions of Section 763(2) of the Civil Procedure Code and Section 23 of the Judicature Act was considered in the case of *Charlotte Perera v. Thambiya*⁽¹⁾ Samarakoon, C.J., stated in the Judgment :

“It appears to me that the law as it stands today is somewhat wider than the provisions of Section 761 of Chapter 86 – Under that Section a Court could stay writ for sufficient cause, but whatever that cause may be it must be shown to the satisfaction of Court that it may result in substantial loss. Then and only then can the order be made. Today the matter is governed by the Provisions of Section 23 of the Judicature Act (as amended by Act No. 37 of 1979) read with Section 763(2) of the Civil Procedure Code (as amended by Act No. 53 of 1980). Section 23 permits the Court to stay writ of execution if it sees fit and Section 763(2) permits to stay writ if the Judgment-debtor satisfies the Court that substantial loss may result. The two provisions are not linked as in Section 761”.

The lodging of an appeal from a Judgment of the District Court by an aggrieved party does not *ipso facto* have the effect of staying an appeal. It was held in *Don Piyasena v. Mayawathie Jayasuriya*⁽²⁾ that the provisions of Section 23 of the Judicature Act and Section 763(2) of the Civil Procedure Code made it clear that unless there is proof of substantial loss that may otherwise result in execution of decree will not be Stayed merely on the ground that an appeal has been filed.

The substantial loss is not necessarily monetary loss. In *Mack v. Nadesapillai Shanmugam*⁽³⁾ Justice Siva Selliah observed:

“that substantial loss does not necessarily carry with it a monetary connotation such an interpretation may well be in relation to business premises. The word ‘Substantial loss’ must have a relative meaning and must vary with the facts of each case”.

This was highlighted in the recent Judgment *Mohamed v. Mrs. I. S. Seneviratne*⁽⁴⁾. His Lordship Chief Justice Ranasinghe observed :

“The Defendant-Appellant had stated in evidence that he has four school going children. Even if the Defendant-Appellant has not proved by express evidence the nature and extent of the loss he would suffer as a result of being ejected from the premises in suit which he had been in occupation of from the year 1976 the dispossession of the Defendant-Appellant with his school going children from the said premises without the prospect of a roof over their heads even though it may not be for a long period of time must meritably result in a considerable loss and damage being caused to him.”

In the instant case the Learned District Judge had failed to consider the evidence of the Petitioner, that he had been a tenant in this premises for 16 years, that he had made attempts to get alternative accommodation and he had not been successful, he had four children out of them two school going children depending on him, that the Petitioner had only two more years to retire from his teaching profession I find that the Learned District Judge had failed to evaluate and consider this evidence and he had misdirected himself on the application of the law.”

The Learned Counsel for the Respondent cited Megarry on the Rent Law that where the Trial Judge has formed an opinion this Court would not intervene.

I have considered this submission and it is my view that position is only peculiar to English law and refers to a determination pertaining to reasonable requirement. This position had been considered in *Abdul Rahim v. Gunasena Corporation Ltd.*,⁽⁵⁾ Sri Skanda Raja, J. observed in page 420:

"Relying on *Coplans v. King*⁽⁶⁾ Mr. Perera for the Respondent argued that the decision of the District Judge regarding comparative hardship when considering whether or not to make an order for possession within the Rent Restriction Act on the ground of reasonable requirement was final and cannot be made the subject of Appeal to this Court. He further argued that once the trial Judge had exercised his discretion and come to a conclusion as regards reasonable requirement his finding would be one of fact and therefore final and not subject to Appeal.

In England Section 105 of the County Courts Act 1934 makes the decision of a County Court Judge who hears such cases on question of fact final. There was a similar provision in our Civil Procedure Code regarding the decision on certain matters of a Commissioner of Requests viz. Section 834A which has now been repealed by Act No. 5 of 1964. The extent of the Appellate Jurisdiction of this Court is contained in Section 36 of the Court Ordinance. It extends to the correction of all errors in fact or in law which shall be committed by an District Court. I would therefore hold that Mr. Perera's submission's are untenable".

I am unable to accept this submissions of the Learned Counsel for the Respondent. Article 138(1) of the Constitution reads:

"The Court of Appeal shall have and exercise subject to the provisions of the Consitution or of any law an appellate Jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance"

This right is also conferred by Section 23 of the Judicature Act.

In the circumstances I am of the view that the *status Quo* should remain until the issues between the parties are finally determined by the Court of Appeal.

I therefore allow the application of the petitioner and set aside the order of dated 15.03.1985, of the Learned District Judge. The execution of the decree of the District Court is directed to be stayed pending the final determination of the appeal. The petitioner is directed to enter into the bond which would be considered necessary by the Learned District Judge in terms of the provisions of Section 763(2)(b) of the Civil Procedure Code.

The Petitioner will be entitled to the costs fixed at Rs. 525.

PALAKIDNAR, J.—I agree.

Application allowed.
