

**COORAY
V.
ILLUKUMBURA**

**SUPREME COURT.
DR. AMERASINGHE, J.,
WADUGODAPITIYA, J.,
WIJETUNGA J.,
S.C. NO. 62/91.
C.A. 653/90.
D.C. MT. LAVINIA 1592/RE.
DECEMBER 05, 1994.**

Writ pending Appeal - Section 763(2) - Civil Procedure Code - Amended by section 53 of 1980 section 23 of Judicature Act - amended by Act No. 37 of 1979 - Substantial loss - substantial question of law- Hardships caused to 3rd parties.

Held :

(i) The matter is governed by the provisions of section 23 of the Judicature Act as amended by Act No.37 of 1979 and 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.

Section 763(2) permits it to stay writ if the judgment debtor satisfies the court that substantial loss may result. These two provisions are not linked. The Court is empowered to act under either of these sections :

"The Judge should take into account hardships to all who may be affected by the grant or refusal of an order for possession-relatives, dependents, lodgers, guests and the stranger within the gates-but should weigh such hardship with due regard to the status of the persons affected and their proximity to the tenant or landlord and the extent to which consequently, hardship, to them would be hardship to him.

Per Wijetunga, J.

"Claims of third parties would in relation to business premises apply to the hardship that may be caused to the employees of the tenant on the basis of their proximity to him.

(2) That there were substantial questions of law for determination in appeal would also have been a valid reason, for court to have "seen it fit" to stay execution of writ under Section 23.

AN APPEAL from the judgment of the Court of Appeal.

Cases referred to:

1. *Charlotte Perera v. Thambiah* - 1983-1 SLR 352
2. *Suppiah Chettiar v. Samarakoon* - 56 NLR 161 at 163
3. *Harte v. Frampton* (1947) 2 All E.R. 604
4. *Perera v. Gunawardene* - 1991 BLR 7

Faiz Musthapha P.C., with *Amarasiri Panditharatne* for Petitioner.

H.L. de Silva P.C. with *Sanath Jayatileke* for Respondent.

Cur.adv.valt.

January 31, 1995.

WIJETUNGA, J.

The Plaintiff - Respondent Appellant (Appellant) instituted this action in the District Court of Mount Lavinia against the Defendant -Petitioner-Respondent (Respondent) seeking inter alia the ejection of the Respondent from premises No. 16/1, Church Street, Nugegoda, of which the Respondent is the tenant. It was admitted at the trial that the premises are business premises, governed by the Rent Act and that the monthly rental was over Rs. 100/-.

The basis of the action is that the premises in question were required by the Appellant and the members of her family for occupation as a residence, as well as to conduct a business, within the meaning of section 22(2) (ii) (b) of the Rent Act. as amended.

The Respondent in his answer stated inter alia that his mother came into occupation of the said premises as a tenant of the Appellant's father in 1967 and commenced a business under the name and style of Modern Pharmacy. He became the tenant thereafter in 1971 and subsequently the Appellant became his landlady in 1976. He claimed that his tenancy was protected under the Rent Act.

The Appellant as well as the Respondent gave evidence at the trial and adverted to their respective hardships. The learned District Judge delivered judgment in favour of the appellant on 26.1.88. The Respondent appealed therefrom to the Court of Appeal. While the said appeal was pending, the Appellant made an application to the District Court for execution of the decree which had been entered in her favour. The Respondent filed his objections and, after inquiry the learned District Judge made order on 29.6.90 directing the issue of writ, three months after the date of the said order.

The Respondent made applications to the Court of Appeal for Leave to Appeal as well as for Revision. The Court of Appeal by its order dated 20.11.90 set aside the order of the learned District Judge dated 29.6.90 allowing execution of writ pending appeal and directed that execution of the decree of the District Court be stayed pending the final determination of the appeal.

The Appellant being aggrieved by the said order sought and obtained leave from the Court of Appeal to appeal to this Court. The question before us, therefore, is whether the Court of Appeal was right in reversing the order of the learned District Judge, on the basis that the status quo should remain until the issues between the parties are determined by the said Court, in appeal.

The matter is governed by the provisions of section 23 of the Judicature Act, as amended by Act No. 37 of 1979 and by section 763(2) of the Civil Procedure Code, as amended by Act No. 53 of 1980. This Court has, in *Charlotte Perera v. Thambiah*.⁽¹⁾ held that section 23 permits the Court to stay writ of execution if it sees fit, while section 763(2) permits it to stay writ if the judgment debtor satisfies the Court that substantial loss may result; and these two provisions are not linked. The Court is thus empowered to act under either of these sections.

The original tenant, the mother of the Respondent, had as stated above carried on the pharmacy business from 1967 and the Respondent had succeeded to the same in 1971. It is the Respondent's position that he had a large volume of business in the said premises. After he received the notice to quit, he made every endeavour to obtain alternative accommodation but was unsuccessful. He placed an

advertisement in the newspapers (ReceiptV1) with a view to obtaining alternative accommodation. He also responded to advertisements offering accommodation in Nugegoda. He has produced (V2) to (V6) to show that the response he had did not result in his being able to obtain suitable alternative premises where he could continue his business.

He has in his affidavit dated 5.3.90 submitted to the District Court, given cogent reasons why the available premises were not suitable for his business.

It also appears that the learned District Judge had, in considering the question of the Respondent's ability to obtain suitable alternative accommodation, erroneously assumed that the action against the Respondent had been instituted in 1968 and, as the judgment had been delivered in 1988, the Respondent had about 20 years within which to look for alternative accommodation. But, in fact, the plaint had been filed only on 29.10.81 and the judgment had been delivered on 26.1.88. This error seems to have coloured the District Judge's attitude to the question of assessment of substantial loss.

As observed by Sansoni, J. (as he then was) in *Suppiah Chettiyar v. Samarakoon*⁽²⁾ "the advantage of continuing to occupy the same premises and the proportionate disadvantage suffered by being forced to leave them, are not matters that should be regarded lightly The value of a business such as this would depend to a large extent on the length of time that it has been carried on in the same premises, for it is to those premises that their customers would naturally have acquired the habit of going."

The Appellant further submitted that the Court of Appeal was in error when it considered the ejection of the Respondent not only from the stand point of the Respondent, but on an extended basis, taking into account its effect on the Respondent's employees.

Suppiah Chettiyar v. Samarakoon (*supra*) at page 164 is once again relevant. His Lordship having made the observation that "the further question then is whether it is hardship to the landlord or the tenant alone that must be taken into account or whether there is a claim of third persons whose reflected hardship, so to speak, may be taken

into account". cited with approval the following dictum of *Asquith L.J. in Harte v. Frampton*, ⁽³⁾ "The true view, we think, is that the county court judge should take into account hardship to all who may be affected by the grant or refusal of an order for possession - relatives, dependents, lodgers, guests and the stranger within the gates - but should weigh such hardship with due regard to the status of the persons affected and their proximity to the tenant or landlord and the extent to which consequently, hardship to them would be hardship to him."

That case, however, was dealing with certain provisions of law relating to the ejection of a tenant from a dwelling house, claimed to be reasonably required by the landlord, where the Court had to be satisfied that having regard to all the circumstances of the case, including the question of availability of other accommodation for the landlord or the tenant, whether greater hardship would be caused by granting the order or judgment than by refusing to grant it.

But, I am of the view that the principle laid down in that case regarding the claims of third parties would, in relation to business premises, apply to the hardship that may be caused to the employees of the tenant on the basis of their proximity to him. The Court of Appeal was, therefore, right in taking into consideration the effect of such an order on the Respondent's employees.

Perera v. Gunawardena,⁽⁴⁾ on which the Appellant relied can be distinguished, as the facts in that case did not warrant a stay of execution pending appeal.

Taking the totality of the relevant circumstances into consideration, I think the Court of Appeal was justified in its view that the Respondent had placed adequate material before the Court to satisfy it that the status quo should remain until the issues between the parties are determined by that Court.

On the submissions made by learned counsel at the hearing of this matter, the Court of Appeal has identified two substantial questions of law which arise for determination at the hearing of the main appeal. Similar submissions had been made before the District Court too, though that Court had paid no heed to them. That there were such substantial

questions of law for determination in appeal, would also have been a valid reason for the learned District Judge to have seen it fit to stay execution of writ, under the provisions of section 23 of the Judicature Act.

For the reasons aforesaid, I would dismiss this appeal with costs.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal dismissed.