

1962

Present : T. S Fernando, J.

V. H. D. VETHAMANICKAM, Petitioner, and C. A. DAVOODBHOY,
Respondent

S. C. 548—Application in Revision in C. R. Colombo, 77,712

Appeal—Tenancy action in respect of rent-controlled premises—Decree entered for ejection of tenant—Condition that writ shall not issue for some time—Application for stay of execution of writ pending appeal—Computation of time limit—Application for execution of decree pending appeal—Discretion of Court to refuse such application—Civil Procedure Code, ss. 761, 763.

A tenant who seeks, pending appeal, a stay of execution of decree entered against him for ejection must, under section 761 of the Civil Procedure Code, make his application before the expiry of the time allowed for appealing against the decree, notwithstanding that the decree contains a direction that writ of ejection shall not issue till a specified date has expired. The circumstance that the decree has directed that writ of ejection shall not issue for a certain period cannot have the effect of extending the time limited by section 761.

When a judgment-creditor makes application under section 763 of the Civil Procedure Code for execution of decree pending appeal, the existence of a valid application for a stay of execution is not the only circumstance that can be taken into account by the Court as militating against the issue of writ of execution.

Where a tenant of rent-controlled premises prefers an appeal to the Supreme Court against a decree for ejection entered against him, it is competent for the Court to refuse the landlord's application for execution of decree having regard to the difficulty of restoring the tenant to occupation of the premises in the event of the appeal being successful.

APPPLICATION to revise an order of the Court of Requests, Colombo.

Siva Rajaratnam, for the defendant-petitioner.

W. D. Gunasekera, for the plaintiff-respondent.

Cur. adv. vult.

March 12, 1962. T. S. FERNANDO, J.—

The plaintiff in C. R. Colombo Case No. 77,712 successfully sued the defendant, his tenant, for ejection of the latter from premises No. 281/1, Galle Road, Wellawatte. Judgment in his favour was delivered by the learned Commissioner on 29th June 1961, and within the appealable period the defendant preferred an appeal to the Supreme Court against the judgment which had ordered his ejection. By that same judgment the Commissioner had directed that writ of ejection shall not issue till 30th September 1961.

On 29th September 1961 the defendant applied to the Court of Requests for a stay of execution of the decree, and notice of this application was directed to be served on the plaintiff and thereafter inquiry was to take place on 14th November 1961. Meanwhile the plaintiff himself applied for execution of decree pending appeal, but failed to make the defendant a party respondent to his application. Both applications appear to have been taken up for inquiry on 14th November 1961 in the presence of counsel and proctor for both parties and, after hearing argument, the learned Commissioner reserved his order for 21st November 1961 on which day he allowed the application of the plaintiff for execution of decree. The defendant thereupon on the same day, with notice to the plaintiff, applied for a vacation of that order and an interim order staying execution of decree pending the disposal of his latest application. The learned Commissioner by his order made on 4th December 1961 dismissed the defendant's application of 21st November and refused a stay of execution.

The application to this Court is designed really to canvass the correctness of the order of the Commissioner made on 21st November 1961 allowing the application for execution of decree. Counsel for the

defendant-petitioner first contended that the plaintiff's application for execution of decree should not have been entertained because of his failure to comply with the imperative terms of section 763 of the Civil Procedure Code which require the defendant to have been made a party to the application. The omission on the part of the plaintiff is conceded, as indeed is the defect in the application. As, however, the defendant had notice of the nature of the application by the time the inquiry took place on 14th November and as he was represented at that inquiry, I am unable to hold with the defendant-petitioner on this first contention.

Learned counsel for the plaintiff-respondent argued before me that an application for stay of execution can be made under our law only as provided for by section 761 of the Civil Procedure Code which requires that such an application be made before the expiry of the time allowed for appealing from the decree. He contended that as the defendant failed to make the application in time the Court is powerless to grant the application. The circumstance that the decree directed that writ of ejectment shall not issue till 30th September 1961, it was argued, cannot have the effect of extending the time limited by section 761. I think this contention is a sound one, although I find myself unable to agree with the further contention of counsel that the only circumstance that can validly be taken into account by a Court as militating against an issue of writ of execution on application made under section 763 is the existence of a valid application for a stay of execution made in terms of section 761. The purpose of making a judgment-debtor a party respondent to an application under section 763 is to enable him to show cause against a granting of it. If all that a judgment-debtor can be permitted to show by way of cause is that he has made an application under section 761, I venture to think that the Court is in as good a position as the judgment-debtor for acquainting itself on the point whether an application under section 761 has been made. I think the Court has a wider discretion in exercising its powers under section 763 than counsel is willing to concede. What kind of security a landlord can offer will compensate a tenant ejected from rent-controlled premises in the event of the Supreme Court in appeal holding against the landlord and refusing ejectment? The most law-abiding landlord who has ejected one tenant and rented his premises to another may find himself physically and legally incapable of ejecting the new tenant so that he may comply with the order of the court of appeal. I am of opinion that, having regard to the nature of the suit and the relief available to a successful tenant-applicant, the learned Commissioner should have refused the landlord's application made for execution of decree.

I set aside the orders of the Court of Requests made on 21st November 1961 and 4th December 1961.

There will be no costs of the application to this Court.

Application allowed.