

CHARLOTTE PERERA

v.

THAMBIAH AND ANOTHER

SUPREME COURT,
WANASUNDERA, J., RATWATTE, J.,
AND ABDUL CADER, J.
S.C.NO. 47/82, S.C.SPECIAL
LEAVE TO APPEAL NO. 69/82
APPLICATION NO. C.A.(L.A.)NO. 60/81,
D.C. MOUNT-LAVINIA,
CASE NO. 667/RE.
OCTOBER 10, 1983.

*Landlord and Tenant - Action in ejectment on the ground of
sub-letting - S 10 (5) of Rent Act No.7 of 1972 - Appeal.*

1972 - Appeal - Execution pending appeal - S.23 of the Judicature Act (as amended by Act No.37 of 1979 - S. 763 (2) CPC (as amended by Act No. 53 of 1980) - S. 761 C.P.C. - S. 777 C.P.C. - S. 22 (11) of Rent Act.

In an action in ejectment against the 1st defendant on the ground of subletting, plaintiff obtained judgment for ejectment of the defendants. The 1st defendant appealed and the appeal was pending in the Court of Appeal. The plaintiff applied for execution pending appeal. Both defendants objected but the District Judge allowed execution pending appeal. The two defendants applied to the Court of Appeal for leave to appeal and revision. The Court of Appeal stayed execution pending determination of the appeal. The plaintiff appealed to the Supreme Court.

Held (Sharvananda J. dissenting)

For a Court to stay execution pending appeal the judgment-debtor must show that execution may result in "substantial loss". Then and only then can stay be ordered (S. 763(2) C.P.C.). Security will have to be given by the judgment-debtor for stay. Section 23 of the Judicature Act as amended by Act No. 37 of 1979) permits the Court to stay execution if it sees fit.

Under S. 761 C.P.C. the judgment-creditor's right to move for execution is postponed till after the expiry of the appealable time.

No insuperable difficulty exists to restore the evicted judgment-debtor to possession in case he wins the appeal. In Section 777 C.P.C. there is ample provision to restore the judgment-debtor to possession in the interests of justice.

Vethamanicam v. Dawoodbhoy (1962) 63 N.L.R. 548
overruled

Cases referred to

1. *Vethamanicam vs. Dawoodbhoy* (1962) 63 N.L.R. 548
2. *Wickremanayake vs. Simon Appu* (1972) 76 N.L.R. 166
3. *Shell Transport Company vs. Dissanayake* (1924) 26 N.L.R. 363, 365.

Appeal from judgment of the Court of Appeal

Miss. Maureen Seneviratne with *Hilton Seneviratne*
for plaintiff-appellant.

A.C. Goonaratne Q.C. with *S. Rudramorthy* for 1st
defendant - respondent.

Cur. adv. vult.

July 29, 1983.

SAMARAKOON, C. J.,

The Appellant instituted this action on 12-07-1978 in the District Court of Mount Lavinia against the 1st Defendant-Petitioner-Respondent (hereinafter referred to as 1st Respondent) and the 2nd Defendant-Respondent (hereinafter referred to as 2nd Respondent) to have them ejected from the premises in suit. The Appellant alleged that the 1st Respondent had sublet a part of the premises to the 2nd Respondent in contravention of the provisions of section 10(5) of the Rent Act No. 7 of 1972. The 1st Respondent denied the allegation. The 2nd Respondent admitted the sub-letting but denied that it was in contravention of the Law. After trial the learned District Judge entered judgment for the Appellant and ordered inter alia the ejection of the two Respondents. The 1st Respondent appealed from this order to the Court of Appeal and that Appeal is pending. On 27-08-1982 the Appellant filed an application for the

execution of the decree pending appeal. Each of the Respondents filed objections to this application. After inquiry on 18-01-1983 the District Judge made order on 27-01-1983 allowing the application for execution of writ. The Respondent then made two applications to the Court of Appeal. They are No.CA/LA.6/83 being an application for leave to appeal and No.CA.210/83 being an application for revision of the order of the District Judge. They were heard together and by order delivered on 15th March, 1983, the Court of Appeal stayed execution of the writ till final determination of the appeal. The appellant has appealed against the order in both Applications and the Appeals in this Court are numbered S.C.29/83 (Application for leave to Appeal) and S.C.30/83 (Application for Revision). The two appeals were heard together and this order covers both.

At the hearing we had the benefit of an exhaustive argument from opposing Counsel on the law applicable to an application of this kind. On account of the seeming confusion that appears to have been caused by a succession of amendments I desire to delve into the history of the legal provisions touching this matter. Since the introduction of the Civil Procedure Code (Cap.101) of 1889 these applications have been governed by the provisions of Chapter LIX. Section 761 reads as follows:-

"761. Execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree; but, if any application be made for stay of execution of an appealable decree before the expiry of time allowed for appealing therefrom, the court which passed the decree may for sufficient cause order that execution be stayed:

Provided that no order shall be made under this section unless the court making it is satisfied -

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security is given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

An analysis of this section reveals the following ingredients:-

1. The filing of an appeal does not stay execution of the decree appealed against. The judgment - creditor's right to apply for such execution was unquestionable.

2. The Court may stay execution if before the expiry of the appealable period the judgment-debtor without unreasonable delay makes application for stay of execution.

3. The court may then stay execution for sufficient cause if *and only if* -

(a) such cause may result in substantial loss to the judgment-debtor, and

(b) if security is given by the judgment-debtor to honour the ultimate decree or order of the Supreme Court.

Section 763 stipulates that a sale of immovable property in execution of a decree for money which, is the subject of an appeal, *shall* be stayed on the

application of the judgment-debtor until the appeal is disposed of provided security is furnished. The judgment-debtor's right to a stay on furnishing security is absolute.

The above are provisions relating to the relief of the judgment-debtor. The rights of the judgment-creditor to execution of the decree pending appeal is limited by the provisions of section 763. The relevant portion of which reads as follows:-

"763. In the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent.

If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court.

In terms of this section -

(a) The judgment-debtor must be made Respondent to the application for execution of the decree.

(b) If the judgment-debtor shows sufficient cause, then security shall be required of the judgment-creditor as a pre-requisite for the execution of the decree.

The Civil Procedure Code was repealed by the provisions of the Administration of Justice Law No.25 of 1975 but was revived by section 4(1) of the Civil Courts Procedure (Special Provisions) Law

No.19 of 1977 in terms of which "the provisions of the Civil Procedure Code shall for all purposes be deemed to be, and to have been, in operation as if the same had not been repealed and shall continue to be the law governing the procedure and the practice in Civil Courts". By the provisions of section 114 of the Civil Procedure Code (Amendment) Law No.20 of 1977, section 671 and section 672 of the Code were repealed. Section 671 was replaced as follows:-

"761. No application for execution of an appealable decree shall be instituted or entertained until after the expiry of the time allowed for appealing therefrom:

Provided, however, that where an appeal is preferred against such a decree, the judgment-creditor may forthwith apply for execution of such decree under the provisions of section 763."

By this new section the judgment-creditor's right to apply for execution of the decree was postponed till after the expiry of the appealable time and such application had to be considered in terms of section 673. The right of the judgment-debtor to apply for stay of execution thereby ceased to exist. He was left high and dry. There remained only his limited right in section 673 of showing cause why security should be obtained. Then came the Judicature Act No.2 of 1978. Section 23 of that Act gave the judgment-debtor a right of appeal and nothing else. His predicament seems to have been noticed in the year 1979 and an attempt was made by the Judicature (Amendment) Act No.37 of 1979 to give him relief. Section 23 was repealed and substituted as follows:-

"23. Any party who shall be dissatisfied with any judgment, 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 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 did not go to the extent of permitting the judgment-debtor to make an application for stay of execution. It merely gave the discretion to Court to stay writ of execution if it thought fit to make such an order. It was only in 1980 that the judgment-debtor's right of application to stay of writ was restored. This was done by an amendment to section 763 by the Civil Procedure Code (Amendment) Act No.53 of 1980 which reads as follows:-

"(2) 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 order as may ultimately be binding upon him."

From 1977 to 1979 the judgment-debtor was without any remedy and for a further year and a

half he could make no application himself for stay of writ.

It appears to me that the law as it stands today is somewhat wider than the provisions of section 761 of (Cap.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 it 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.

Judgment in this case was delivered by the District Judge on 21-05-82. On 03-08-82 the Appellant made an application for execution of writ pending appeal. On 15-11-82 the 1st Respondent filed objections pleading that "irreparable damage" will be caused if he is ejected from the premises. I will refer to this in detail later in this judgment. The 2nd Respondent had apparently left the premises but he filed objections on 11-10-82 and requested Court to assist him to reoccupy the premises he vacated. However he did not appear at the inquiry into these objections. After inquiry the District Judge delivered order on 27-01-83 allowing the execution of writ pending appeal. It is difficult to gather from the order what precise reasons motivated the Judge to allow the application. I shall however do the best I can to analyse it as I have the benefit of submissions made by Counsel for the Respondent as a guide. The Judge refers to the case of *Vethamanicam vs.*

Dawoodbhoy cited to him but makes only a passing reference to it. Counsel submits that this being a tenancy case the oft quoted dictum of T.S.Fernando, J. should have been accepted and followed by the Judge. The Court of Appeal was of the opinion that in assessing whether substantial loss will result to the tenant a primary consideration that would weigh against the issue of a writ was that set out in the dictum of Fernando, J. in the said case. That case was also a tenancy case in which the judgment-creditor made an application to execute writ pending appeal in terms of section 763 Civil Procedure Code. Holding that the Judge should have refused the application Fernando, J. reasoned thus:-

"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 ejection? 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."

There is no doubt that a landlord who lets premises governed by the Rent Act cannot eject the tenant in order to comply with the order of Court. But that is not the be all and end all of the matter. The law is not powerless to act in such cases. If the Supreme Court reverses the decree entered in favour of the judgment-creditor than the judgment-debtor is entitled in law to a restoration

of the *status quo*. There is no longer a valid decree under which the judgment-creditor or anyone claiming under him could continue to occupy the premises. "Justice therefore requires that the Plaintiff, who had been placed in possession in execution of a decree which had turned out to be invalid, should no longer be allowed to continue in possession of the land." per H.N.G.Fernando, C.J. in *Wickremanayake vs. Simon Appu* (2). I would go further, where the process of Court has been utilised to deprive a judgment-debtor of his occupation of premises pending appeal and subsequently the decree upon which that process was issued is invalidated by the order of the Supreme Court, justice requires that the judgment-debtor be restored to occupation by the removal of all those in occupation, irrespective of the means by which, or the rights upon which, they entered into occupation. It is the duty of the Courts of Law to provide such relief to the displaced judgment-debtor. Section 777 Civil Procedure Code is ample provision for such procedure. Fernando, J. expressed his final conclusion thus -

"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."

Nature of the suit? Nowhere in his judgment does he categorically state that in tenancy actions by reason of their very nature, applications for execution of decrees pending appeals should not be entertained. As for "the relief available to a successful tenant-applicant" I have already indicated that he is not without adequate remedy. In the result I am unable to agree with either the reasoning or the conclusion of Fernando, J. I am therefore of the view that the decision in

Vethamanickam vs., Dawoodbhoy (supra) is wrong in law and must be overruled.

Counsel for the 1st Respondent submitted that a person who enters into occupation of these premises pending appeal in ignorance of the fact that a decree in ejectment had been entered against the former tenant of the premises cannot be ejected under the provisions of section 777 of the Civil Procedure Code. He cited the provisions of section 22(11) of the Rent Act No.7 of 1972. This is a special provision made for cases in which a decree for ejectment has been entered on the ground of reasonable requirement, and therefore has no relevance to this case. In any event I believe this provision became necessary because the provisions of section 777 of the Civil Procedure Code would otherwise have applied and the occupant would have been ejected.

The only other reason given by the District Judge is that it is "unjustifiable to deprive" the Plaintiff of his success. This is hardly a reason and I do not need to consider it. The Court of Appeal has however given another reason besides that given in the judgment of Fernando, J. It took into account the fact that "the loss that may result to the Petitioner (1st Respondent) if ejected at this stage consists.....of the deprivation of a residence for his immediate occupation", as it "is a well known fact that there is a shortage of residential houses in the area." Perhaps there is a shortage of residential houses in that area. Perhaps he is unable to find one for his immediate use in the same area. But why confine it to the same area? The 1st Respondent is a pensioner drawing a pension of Rs.600/= per mensem. His financial resources are such that it would be impossible to find alternative accommodation in the same area. There is no evidence whatsoever that he looked for alternative accommodation within his

means in any other area. The 1st Respondent did not himself urge the reason given by the Court of Appeal. He sought to take advantage of the provisions of section 763(2) of the Civil Procedure Code and endeavoured to prove substantial loss. In fact he pleaded irreparable loss. For this purpose he pleaded that if he is ejected he cannot find alternative accommodation. At the inquiry he modified this plea and stated that it was difficult to find another house "*all of a sudden on this occasion*". He pleaded in his objections that he was a pensioner paid Rs600/= per mensem and had no other source of income. Yet upon the Court making order allowing the issue of writ the 1st Respondent's Counsel promptly moved that the issue of the writ be delayed by one week and offered to deposit security in Rs.36000/= as security for such delay. He has failed to satisfy the Court that substantial loss will result.

For the above reasons I would set aside the order of the Court of Appeal and allow both appeals. The Appellant will be entitled to one set of costs in this Court and in the Court of Appeal.

Wanasundera, J. I agree.

Wimalaratne, J. I agree.

Ratwatte, J. I agree.

SHARVANANDA, J.

I regret my inability to agree with the judgment of the Hon. Chief Justice.

I agree with the judgment of the Court of Appeal that substantial loss will result to the 1st defendant if Writ of Execution is not stayed pending the final decision of his appeal against the judgment of the District Judge, holding that

the 2nd defendant was a sub-tenant of the 1st defendant and that the plaintiff was entitled to have the 1st defendant ejected from the premises in suit.

The premises in suit, namely No.1, Campbell Place, Dehiwela, are rent-controlled and are subject to Rent Act No. 7 of 1972. The 1st Defendant had been a tenant of the premises under the plaintiff from March 1968. The plaintiff instituted this action on 12.7.1978 for the ejection of the defendant on the ground that the "1st defendant on or about 1.5.78, in contravention of section 10(5) of the Rent Act No. 7 of 1972, sub-let a part of the premises to the 2nd defendant." The 1st defendant denied the allegation and stated that the 2nd defendant was only a boarder and not a tenant. After trial the District Judge entered judgment for the plaintiff and ordered that the defendant be evicted from the premises in suit. The 1st defendant duly preferred an appeal to the Court of Appeal and that appeal is pending. On 27.8.82 the plaintiff filed an application for execution of the Decree in her favour, pending appeal. The 1st defendant filed objection to this application. In his affidavit filed along with his objections, the 1st defendant stated, inter alia, that he, his wife and unmarried daughter are the occupants of the house in suit, that he does not have any sub-tenants or boarders in his house; and that if he was ejected from the premises he could not find alternative accommodation; that he was a pensioner receiving an income of Rs. 600/- a month and that he does not have any other source of income and that if an order is not made for the stay of execution of the Writ, irreparable damage would be caused to him. The plaintiff did not file any counter affidavit traversing the facts stated by the 1st defendant in his affidavit, nor did she choose to cross-examine

the 1st defendant on the truth of the averments stated by him in his affidavit.

At the inquiry held into the application for execution, Counsel of the plaintiff appears to have confined her submissions to the question that according to the Judicature Act, the Court had no authority to suspend the Writ of Execution and that the facts relied on by the 1st defendant were "not required for the Writ of Execution" and that much damage would be caused to the plaintiff if the Writ of Execution was not issued, though the nature or extent of the damages was nowhere specified or indicated. After inquiry, by his order dated 27.1.83, the District Judge allowed the plaintiff's application for the issue of Writ. The 1st defendant then moved the Court of Appeal by way of an application for Leave to Appeal and by way of Revision to have the order of the District Judge set aside. The Court by its order delivered on 15.3.1983 set aside the order of the District Judge and directed Stay of Execution of the Writ till final determination of the 1st defendant's appeal. From the said order the plaintiff has preferred this appeal.

I agree with the comment of the Court of Appeal, respecting the order of the District Judge allowing execution that "there is no attempt whatsoever by the learned District Judge to assess the loss (which I think is very substantial) that may result to the petitioner, if he were ejected pending the appeal that has been filed by him. There has thus been a failure on the part of the Judge to properly exercise the discretion vested in him."

In my view the District Judge has completely failed to address his mind to the relevant questions involved in an inquiry into Stay of Execution pending appeal. There is not even a

reference in his order to the relevant provisions of law - section 763(2) of the Civil Procedure Code or to section 23 of the Judicature Act. The only reason that appears to have motivated the District Judge to allow the plaintiff's application is to be gathered from the following excerpt:

"today no one can say what its (appeal's) results will be. Sometimes the defendant might succeed, sometimes he may lose, why should the plaintiff be deprived of his present success or victory. I am of the opinion that it is unjustified to deprive the plaintiff of his success. I hold that it is highly unfair to deprive the plaintiff of his success which he achieved after having fought for such a long time on the presumption that he will lose in the end, in the circumstances I allow the application".

In my view, no value whatsoever can be attached to this judgment of the District Judge.

Prior to the coming into operation of the Administration of Justice Law No. 44 of 1973, on 1.1.74, the provisions of law relating to the execution of a decree under appeal and to the Stay thereof are to be found in sections 761 to 764 of the Civil Procedure Code. (Chap. 101 of the 1956 Legislative Enactments) and section 73 of the Courts Ordinance (Chap.6). It is not necessary for me to refer to the subsequent legislative repeals and amendments of these provisions as they have been set out fully in the judgment of the Chief Justice. In my view the law today relating to the jurisdiction of the District Court, to stay execution of judgments pending appeals are to be found in section 23 of the Judicature Act No.2 of 1978, as amended by section 2 of the Judicature Amendment Act No. 37 of 1979 and sections 761 and 763(1) & (2) of the present Civil Procedure Code, Chap. 101

as amended by Civil Procedure Code Amendment No. 53 of 1980.

Section 23 of the Judicature Act No.2 of 1978 as amended by Judicature Amendment Act. No. 37 of 1979 provides as follows :

"Any party who shall be dissatisfied with any judgment, 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 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 or 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 by the judgment of the Court of Appeal, upon the appeal."

Section 763 of the Civil Procedure Code, as amended by Act No.53 of 1980 reads as follows;

763 (1) "In the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent. If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court".

(2) 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 order as may ultimately be binding upon him"

Garvin J. pointed out in *Shell Transport. Company vs. Dissanayake* : (3)

"The leading principle relating to the issue of an execution of decree under appeal is that it shall not be stayed by reason only of an appeal having been preferred against the decree. These are the opening words of Chapter LIX of the Civil Procedure Code, which deals with the execution of decrees under appeal"

Though the opening words of Chap.LIX (section 761) are not present in the current amended Civil Procedure Code, this principle is in my view kept alive by section 23 of the Judicature Act, as amended by Act No.37 of 1979, and applies generally to executions of decrees pending appeal. This principle is however subordinated in its application to another fundamental principle, that is enshrined in section 763(2) of the Code, that execution may be stayed if the appellant satisfies the Court that substantial loss may result to him thereby. It is thus competent for the Court to order stay of execution on the application of the party appealing, on its being satisfied of the probability of substantial loss resulting to the appellant and on his giving the necessary security. The District Court, thus may make order staying

execution "when it shall see fit to make an order to that effect"-vide section 23 of the Judicature Act, as amended by Act No. 39 of 1979 or when it is satisfied that substantial loss may result to him unless an order for stay of execution is made and he gives security for the due performance of such decree or order as may ultimately be binding upon him - vide section 763(2) of the Code.

Today's legal position thus appears to me to be that it is not competent for the Court to stay execution of the decree merely on the ground that the judgment-debtor has preferred an appeal against it, but it is competent for the Court to stay execution of a decree against which an appeal is pending, if the judgment-debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made and furnishes the necessary security for the due performance of such decree, as may ultimately be binding upon him. It is significant that the words used in section 763(2) are "the Court may order execution to be stayed." It is not absolutely obligatory to make the stay order even if the judgment-debtor satisfies the conditions prescribed by section 763(2), (a)&(b). If such an order would operate grave injustice to the judgment-creditor, if on a balance of the claims of judgment-debtor and judgment-creditor, the judgment-creditor would suffer substantial loss in equal or greater measure than the judgment-debtor the Court may be justified in refusing to make a stay order under section 763(2); a discretion to make such an order is vested in the Court to be exercised not arbitrarily but judicially as the justice of the case may demand. In a case where decree for ejectment is entered in favour of the plaintiff on the ground of his reasonable requirement, the Court may well be justified in refusing Stay of Execution under section 763(2).

In the present case the plaintiff came into Court seeking ejection of the defendant on the alleged ground that the latter had sub-let a part of the rented premises, which he had been occupying from 1968. The plaintiff resides in her own separate house and does not require the premises in suit for her own occupation or for the occupation of any member of her family. She will suffer no hardship or loss by execution being stayed pending appeal. On the other hand the 1st defendant-tenant will suffer grave hardship and loss by being dislodged from the premises and deprived of the roof which the Rent Act had secured for him from 1968. The 1st defendant has in his affidavit praying for stay of execution stated that he could not find alternative accommodation. The plaintiff appellant has not traversed this statement, may be, for the good reason which the Court can take notice of, namely, that it is well nigh impossible for a person of the limited financial means of the 1st defendant to find alternative accommodation. The non-availability of housing accommodation to a person of the class of the 1st defendant within his purse strings is a notorious fact. It is in this perspective that the loss which will result to the 1st defendant by the issue of execution will have to be viewed.

A point was made of the fact that the 1st defendant was ready and willing to deposit a sum of Rs.36000/- as security. This circumstance should not be counted against him. It drives home the desperate plight of the tenant. It is not proof of the fact that with this sum of Rs. 36000/-, the 1st defendant could have found alternative accommodation. Section 9 of the Rent Act makes it unlawful for anyone to pay any premium or any amount as advance of rent exceeding the authorised rent for a period of three months. It may be that the 1st defendant may be able to raise a loan of Rs.36000/-

and give the security, as condition for the due performance of the decree that may be ultimately binding upon him. That sum is not lost to him. It will be released to him when his security bond is discharged; but a premium given for alternative accommodation will invariably be lost to him. In any event no evidence has been placed before the Court that this premium of Rs. 36000/- will be sufficient today to secure alternative accommodation, leave alone the question of purchasing any premises for that amount.

In any view the dispossession and the disturbance of the status quo ante which the issue of execution will involve, will inevitably result in substantial loss to the 1st defendant - he and his family will be turned out of their home and be left without a roof over their head. On the other hand the plaintiff-landlord will not lose anything if the Writ is stayed pending appeal. I agree that the fact that the decree-holder will suffer no loss, if the execution is stayed, is not sufficient ground for the stay of execution, but, on the other hand the fact that the judgement-debtor will suffer grave loss if the execution is not stayed is very relevant - it makes a vital difference to the situation. The legislature has, in the interests of justice, provided that such a circumstance is a sufficient ground for stay of execution pending appeal. Hence I agree with the conclusion of the Court of Appeal that on the undisputed facts of this case the 1st defendant-tenant has established that he will suffer substantial loss if the Writ is not stayed.

Reference was made in the course of the argument to the judgment of T.S.Fernando, J., in *Vedamanickam vs. Dawoodbhoy* (1). In that case the landlord made an application under section 763 of the old Civil Procedure Code (which corresponds to section 763(1) of the present code as amended by

Act No 53 of 1980) to execute the decree. Even though considerations arising under section 763 (2) of the Code were not agitated in that case and the only question was the adequacy of security, T.S. Fernando, J. refused the application for execution, stating,

"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 had ejected one tenant and rented his premises to another, may find himself physically and legally incapable of ejecting that new tenant, so that he may comply with the order of the Court of Appeal. I am of the opinion that having regard to the nature of the suit and the relief available to the successful tenant-applicant the learned Commissioner should have refused the landlord's application made for the execution of decree".

I agree with the Chief Justice that the law is not powerless to act in the cases referred to by T.S. Fernando, J., and that if the Supreme Court reverses the decree entered in favour of the judgment-creditor then the judgment-debtor is entitled in law to the restoration of the status quo ante. But one cannot overlook the fact that the restoration remedy, in the nature of things involves long frustrating delay that will render the relief largely illusory and discourage a displaced tenant from pursuing his appeal as the appeal will be purposeless. A tenant cannot reasonably be expected to make short-shift arrangements in the meantime without suffering grave hardships. In my view the probability that the landlord may rent out his premises to another or

that the landlord may demolish the premises are not considerations irrelevant to the inquiry, whether substantial loss may result to the tenant unless an order for stay of execution was made under section 763(2).

I dismiss the appeal No. 29/83 with costs and dismiss appeal No.30/83 without costs.

Appeal allowed.