

ESQUIRE (GARMENTS) INDUSTRIES LIMITED

v.

BANK OF INDIA

SUPREME COURT

G. P. S. DE SILVA, C.J., KULATUNGA, J.

AND RAMANATHAN, J.

SC APPEAL NO. 53/92

CA REV. APPLICATION, NO. 1019/91 WITH CA LA NO. 224/91

DC COLOMBO, NO. 92958/M

19 MARCH, 1993.

Civil Procedure – Execution of decree pending appeal – Settlement Security – Can defendant retract from it – Sections 23 of the Judicature Act and 763 (1) and (2) of the Civil Procedure Code.

1. When an application for execution of a decree pending appeal is made in the exercise of rights conferred under section 23 of the Judicature Act and section 763 (1) of the Civil Procedure Code the District Judge may make any of the following orders :

a). Order execution or stay it, *if he sees fit* to order a stay, subject, however, to the appellant furnishing a bond to abide the judgment of the Court of Appeal upon the appeal (s. 23 Judicature Act).

b). Order execution ; and *if sufficient cause is shown* by the appellant, require security to be given for the restitution of the property which may be taken in execution or the payment of the value of such property and for the due performance of the decree or order of the Court of Appeal (s. 763 (1) of the C.P.C.).

c). Order stay of execution upon such conditions as it may deem fit, where –

i. the judgment-debtor satisfies the court that substantial loss may result to him unless an order for stay of execution is made ; and

ii. the judgment-debtor gives security for the due performance of the decree or order as may be ultimately binding on him. (s. 763 (2) of the C.P.C.).

2. Where after two abortive attempts to execute the decree pending execution, the parties arrived at a settlement on 01. 08. 91 whereby they agreed that the execution of the decree be stayed subject to the defendant tendering security by a bank guarantee before the end of 30. 10. 91 and if no such security was tendered, execution could proceed without further notice, and the defendant without tendering such security attempted to reargue the matter urging that it

was not possible to furnish a bank guarantee and that if writ was issued without adequate security payable by the plaintiff irreparable loss and damage would be caused to the defendant.

Held :

- (a) There was no accidental slip or omission on the part of the District Court in making its order dated 01. 08. 91 when it failed to require the plaintiff to give security prior to writ being issued.
- (b) The defendant-appellant could not be permitted to retract from the settlement; and the District Judge had no power to vary it.
- (c) The object of the defendant-appellant in neglecting to give security and making further applications was to delay execution of the writ and obtain undue advantage at the expense of the plaintiff-respondent.

Case referred to :

Sumanadeva v. Sediris (1990) 1 Sri LR 27 (CA).

APPEAL from order of the Court of Appeal.

S. Mahenthiran for defendant–appellant.

I. S. de Silva with *Prasanna Jayawardena* for plaintiff-respondent.

Cur. adv. vult.

April 28, 1993.

KULATUNGA, J.

This appeal relates to a dispute concerning the execution of decree in the above action pending appeal. Judgment was entered by the District Court against the defendant (a garments manufacturing company) in a sum of Rs. 43 Million in favour of the plaintiff. An appeal to the Court of Appeal from the said judgment is presently pending in that Court. In the meantime, on 06. 10. 89 the plaintiff applied to the District Court for execution of decree pending appeal presumably in the exercise of his rights under s. 23 of the Judicature Act and s. 763 (1) of the Civil Procedure Code. Upon such application it was competent for the District Judge to have made any of the following orders :

- (1) order execution or stay it, *if he sees fit* to order a stay, subject, however, to the appellant furnishing a bond to abide the judgment of the Court of Appeal upon the appeal (s. 23 Judicature Act).

- (2) order execution ; and *if sufficient cause is shown* by the appellant, require security to be given for the restitution of the property which may be taken in execution or the payment of the value of such property and for the due performance of the decree or order of the Court of Appeal. (s. 763 (1) of the C.P.C.).
- (3) order stay of execution upon such conditions as it may deem fit, where –
- (a) the judgment - debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made; and
- (b) the judgment - debtor gives security for the due performance of the decree or order as may be ultimately binding on him. (s. 763 (2) of the C.P.C.).

The defendant objected to the application for execution of decree and stated, *inter alia*, that he is ready and willing to furnish security for the due performance of the decree or order as may be ultimately binding on him. After inquiry, the District Court by its judgment dated 08. 09. 90 allowed execution of the decree. This was challenged by the defendant in the Court of Appeal. Acting in revision, the Court by its judgment dated 08. 01. 91, set aside the District Judge's order holding that substantial loss may result to the defendant having regard, *inter alia*, to the danger to the economic viability of his company and the loss of employment to the employees which may occur by the closure of the factory upon execution of the decree. The Court directed that execution be stayed provided security is given; and directed the defendant to give security by a bank guarantee in an amount considered necessary by the District Judge in terms of s. 763 (2) of the C.P.C.

When the record was returned to the District Court, the learned District Judge after further inquiry made order dated 08. 02. 91 that security be given in Sri Lankan Rupees equivalent to the value of US Dollars in the decree "to be determined by the valuation of the Central Bank of Sri Lanka at the time". This order was challenged by the defendant by way of revision on the ground that it was contrary to law, and vague; and that the District Court had failed to quantify

or nominate security. The Court of Appeal by its judgment dated 16. 05. 91, agreed that the District Judge had failed to specify and quantify the amount to be furnished as security, set aside the impugned order and sent back the record to the District Judge to nominate the amount of security to be furnished by the defendant by way of a bank guarantee.

When the matter came up before the District Judge on 01. 08. 91, parties came to a settlement whereby they agreed, *inter alia*, that the execution of decree be stayed subject to the defendant tendering security by a bank guarantee in a sum of Rs. 20 Million, before the end of 31.10.91; if no such security was tendered on or before 31. 10. 91, parties agreed that the plaintiff was entitled to take out writ without further notice to the defendant. The Court ordered that execution of decree be stayed accordingly and allowed execution in the event of a breach of the conditions of settlement.

Instead of tendering security as agreed, the defendant filed an application dated 17.10.91 stating :

- (a) that in making its order dated 01.08.91 nominating security to be given by the defendant, (for stay of execution) the Court had by an error failed to require the plaintiff to give security prior to writ being issued, for the due performance of the decree or order of the Court of Appeal in the event of the defendant being successful in appeal ;
- (b) that in terms of s. 763 (1) of the C.P.C. it was imperative to require the plaintiff to give such security ;
- (c) that despite several efforts in that behalf the defendant had not been able to obtain a bank guarantee ; and
- (d) that if writ was issued without adequate security, irreparable loss and damage would be caused to the defendant.

In the circumstances, the defendant prayed that in the event of writ being issued, the plaintiff be directed to tender security in a sum of Rs. 40 Million by cash or a bank guarantee.

On a motion by the defendant's Attorney-at-Law, the said petition was called and supported before the Roll Court on 21. 10. 91 when the Additional District Judge ordered notice to issue to the plaintiff, returnable on 02.03.92.

On 15.11.91 a motion was filed on behalf of the plaintiff moving for the issue of writ of execution. It was supported by Counsel on 19.11.91 in Court No. 2 in which Court Counsel for the defendant was also present. Counsel for the plaintiff submitted that as the defendant had failed to give security in terms of the settlement dated 01.08.91, the plaintiff was entitled to the writ of execution, without further notice to the defendant. Counsel for the defendant submitted that if writ was to issue, it was imperative in terms of s. 763 (1) of the C.P.C. to require the plaintiff to give security; that the Court had already issued notice on that question for 03.02.92 and moved for time to make further submissions. The Court ruled that in view of the settlement between the parties it had no power to make a different order and directed writ to issue.

The defendant sought leave to appeal to the Court of Appeal from the said order of the District Court and also applied to have it set aside by way of revision. The Court of Appeal by its judgment dated 02. 06. 92 dismissed the revision application for the failure by the defendant, in breach of Rule 46 of the Supreme Court Rules, to file a copy of the impugned order of the District Judge or even to apply under Rule 50 for permission to rectify his default. The Court also upheld the order made by the District Judge and refused the application for leave to appeal. The defendant appealed to this Court.

At the hearing before us the learned Counsel for the defendant-appellant submitted that in the event of an order for execution of decree pending appeal being made, s. 763 (1) of the C.P.C. enjoins the judgment - creditor to give security for restitution in the event of the appeal being successful ; that in making its order dated 01. 08. 91 pursuant to a settlement, the District Court had overlooked the fact that the defendant-appellant is entitled under s. 763 (1) to be so secured ; and that this was an error which that Court had the power under s.189 read with s. 839 of the C.P.C. to correct as it was an accidental slip or omission. He cited in support the decision in *Sumanadeva v. Sediris* ⁽¹⁾.

Learned Counsel for the plaintiff-respondent submitted that in every proceeding held in relation to the plaintiff-respondent's application for execution of decree pending appeal, ending with the settlement dated 01. 08. 91, the defendant-appellant consistently sought a stay of execution subject to the giving of security by him ; that he obtained an order from the Court of Appeal to that effect ; that the requirement as to the plaintiff-respondent giving security was never the subject matter of relief sought in the Court of Appeal ; that the requirement for the judgment - creditor to give security contained in s. 763 (1) is a protection, which the judgment - debtor may waive ; that in the instant case the defendant-appellant had by his conduct waived this protection ; that in the circumstances, the order made in terms of the settlement agreed to on 01. 08. 91 was final and binding and could not be varied particularly for the reason that the said order gave effect to a direction by the Court of Appeal ; and that as such the order dated 19.11.91 made by the learned District Judge and the Judgment of the Court of Appeal which affirmed the said order are correct.

I am of the view that there is no accidental slip or omission here; nor is there any deprivation of a right to which the defendant-appellant was entitled in terms of s. 763 (1) of the C.P.C. The impugned order was the culmination of efforts by the defendant-appellant himself in several judicial proceedings. It was made by way of settlement, agreed to by the parties. The defendant-appellant cannot be permitted to retract from the settlement and the District Court had no power to vary it. If the said order was erroneous the proper course was to challenge it in a higher Court. More particularly, it is to be noted that the requirement of s. 763 (1) for the giving of security by the judgment - creditor in the event of an order for execution is not automatic but conditional upon the appellant showing sufficient cause therefor. Here the appellant satisfied the Court that execution of decree may result in substantial loss to him ; having regard, *inter alia*, to the loss of employment which would occur by the closure of his factory in the event of execution. On that basis, he obtained an order from the Court of Appeal for stay of execution on condition of his giving security by way of a bank guarantee. If he was unable to obtain a bank guarantee in the sum which he himself agreed to do, the plaintiff-appellant was entitled to the issue of writ. In that event, the defendant-appellant has no right to demand security

from the plaintiff-respondent ; and in the circumstances, the defendant-appellant must take the full consequences of the execution of the decree.

Before concluding this judgment, I wish to refer to the fact that the defendant-appellant has not placed any material before the original Court or the Court of Appeal or this Court in support of the averment that despite several efforts in that behalf he was unable to obtain a bank guarantee. He has not produced any documentary evidence eg. correspondence with banks. In the written submissions filed on 22. 09. 92 on behalf of the defendant-appellant, it is stated that his bank had liquidity problems and later "crashed". This was repeated before us by learned Counsel for the defendant-appellant. In the absence of proof of such facts, I am unable to consider this submission. On the other hand, paragraph 16 of the affidavit dated 17.10.91 filed in the District Court on behalf of the defendant-appellant states that the defendant company is a 100% export oriented garment industry and it has several orders to the value of US Dollars 580,000 to execute. If so, the defendant-appellant is a viable company with dependable sources of revenue, and being thus credit-worthy the defendant-appellant might have been able to obtain a bank guarantee, if a genuine effort in that behalf was made. The failure to give such security in such circumstances tends to give credence to the allegation made in the written submissions filed on behalf of the plaintiff-respondent against this appeal that the object of the defendant-appellant in neglecting to give security and making further applications was to delay execution of the writ and to obtain undue advantage at the expense of the plaintiff-respondent.

For the foregoing reasons, I dismiss the appeal and affirm the judgment of the Court of Appeal with costs fixed at Rs. 5,000.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.