

**AFEELA UMMA
vs
SARA UMMA**

COURT OF APPEAL
BASNAYAKE. J
CHITRASIRI. J
CA 46/2002
HC CHILAW 22821/RE
FEBRUARY 13, 2009

Civil Procedure Code - Section 763- Section 765 (2) - Writ pending appeal - Substantial loss alleged - If writ is stayed, Conditions to be imposed? - Deposit of security - Mandatory? - Writ pending appeal application - Can it be dismissed?

The defendant - petitioners application to stay execution of the writ pending appeal on the ground of "substantial loss" was dismissed by the District Court.

It was contended that such an application cannot be dismissed but Court should have either allowed the execution or stayed the same until a determination is made in the appeal finally. It was further contended that Court has not considered the 'substantial loss' that would be caused to the judgment debtor.

Held:

- (1) When an application for writ pending appeal has been properly made Court cannot and should not dismiss the same. In such a situation Court shall make an order either allowing or staying the execution.
- (2) When the judgment debtor satisfied Court that there exists substantial loss if he is evicted from the premises in question, then the Court should stay execution of writ upon such terms and conditions as it may deem fit - Section 763(2)

Per Chitrasiri. J.

"I have carefully examined the reasoning of the District Judge and the evidence that had been led in this connection, relevant evidence, I believe is sufficient to prove substantial loss".

APPLICATION for leave to appeal from an order of the District Court of Chilaw.

Cases referred to:-

1. *Don Piyasena vs. Mayawathie Jayasuriya* 1986 1 Sri LR 6
2. *Grindlays Bank Ltd. vs. Mackinnon Mackenzie & Co. Ceylon Ltd* 1990 1 Sri LR 19
3. *Amarange vs. Seelawathie Weerakoon* 1990 2 Sri LR 332

Ranjan Suwandarathne with Vipule Maninnage for plaintiff-petitioner-petitioner

S. N. Tirimanne for defendant-respondent-respondent.

Cur. adv. vult

March 18, 2009

CHITRASIRI, J.

The Plaintiff Judgment Creditors-Petitioners-Petitioners (hereinafter referred to as Petitioners) filed action against the Defendant-Judgment Debtors-Respondents-Respondents (hereinafter referred to as Respondents) for declaration of title to the land referred to in the schedule to the plaint filed in the District Court of Chilaw. The learned District Judge entered judgment in favour of the Petitioners and made order to evict the Respondents from the land in dispute. Petitioners thereafter made an application to the District Court in terms of the provisions contained in Chapter LIX of the Civil Procedure Code for writ of execution against the Respondents since an appeal had been preferred against the Judgment. The learned District Judge having considered the evidence placed before him dismissed the aforesaid application of the Petitioners on 30th January 2002.

The Petitioners sought leave of this Court to appeal against the said order dated 30th January 2002 and also prayed that it be set aside. Learned Counsel for the Petitioners submitted that the learned District Judge has erred in law in determining the issue of “substantial loss” referred to in Section 763(2) (a) of the Civil Procedure Code. On the other hand, contention of the learned Counsel for the Respondents was that the learned District Judge having properly considered the circumstances had come to the correct decision envisaged in the said section of the Civil Procedure Code.

The learned Counsel for the Petitioners has also taken up the position that an application of this nature cannot be dismissed by the District Judge as seen in this instance but the Judge should have either allowed the execution or stayed the same until a determination is made in the appeal finally. Therefore, the application of the petitioners is to obtain an order from this Court to have the writ executed pending appeal reversing the order of the learned District Judge on the basis:

- that he has erred in law when ascertaining “substantial loss” caused to the judgment-debtor; and
- that the judge had not followed the proper procedure by dismissing the petition.

I have carefully considered the way in which “substantial loss” referred to in Section 763 has been interpreted by this Court as well as the Supreme Court in the past. In the case of *Don Piyasena v. Mayawathie Jayasooriya*,⁽¹⁾ it was held that “unless there is proof of substantial loss that may otherwise result, execution of the decree will not be stayed” This proposition has been re-iterated in *Grindlays Bank Ltd v. Mackinnon Mackenzie & Co Ceylon Ltd*⁽²⁾. In that it had been held “If the Judgment-Debtor desires to stay of execution pending appeal, he should establish substantial loss”. In the

case of *Amarange v Seelawathie Weerakoon*,⁽³⁾ it was held that “Execution be stayed only where a Judgment-Debtor satisfies the Court that substantial loss may result unless a stay is granted”.

Therefore, it is settled Law that a duty is cast upon the Judgment-Debtor, to prove substantial loss that may be caused to him /her if the writ of execution is allowed, in order to succeed in an application made in terms of Section 763 of the Civil Procedure Code. Moreover, it is our Law that mere filing an appeal would not be a fact to stay execution pending appeal.

Justice H.W.Senanayake, dismissing an order made by the District Judge in the aforesaid case of *Amarange V Seelawathie Weerakoon* (supra) where similar circumstances had arisen, has held thus:

“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,..... he had four children out of them two school going children, depending on him,.....”.

Having considered the law referred to above, it is my opinion that when an application under Section 763 of the Civil Procedure Code is made to the District Court, it is the duty of the Judge to consider whether a judgment-debtor satisfies the Court that substantial loss may result unless a stay is granted. Moreover, the term “Substantial loss” could be determined only after due consideration of all the circumstances of the case. Therefore, an issue under Section 763 has to be determined on case by case basis and specific reason cannot be laid down. in order to prove substantial loss caused to the judgment debtor. Reasons for substantial loss to one person may not necessarily become reasons for another. Therefore, great care should be taken by

a District Judge considering all the circumstances at a given time when arriving at a decision as to the substantial loss caused to a judgment –debtor.

Against this back-ground, I will now look at the reasons given in the impugned order in respect of the substantial loss that may be caused to the Respondents. In his Order dated 30th January 2002 the learned District Judge has stated thus:

"තවද ඉහත සඳහන් කරුණු අනුව විත්තිකරුවන් ස්ථිරව පදිංචිව සිටීම හා දිසාඅධිකරණයේ නඩුව පැවරීමට පෙරාතුව අවුරුදු 10 කට වඩා අධික කාලයක් සනාථ කිරීමෙන් විත්තිය විසින් සිදු කෙරී ඇති අවස්ථාවකදී එය පැමිණිල්ල විස්තර බිඳ නොහෙළා ඇති විටකදී මෙම අධිකරණයෙන් විත්තිකරුවන්ට එරෙහිව දෙන තීන්දුව අභියාචනයට ලක්කර ඇති විටකදී විත්තිකරුවන්ට එරෙහිව රිච් ආඥාවක් නිකුත් කොට ඔවුන් මෙම ඉඩමෙන් ඉවත් කළහොත් දිගුකාලීන භුක්තියේ රැඳී සිටී ඔවුන්ට යාමට ඒමට තැනක් නොමැති වීමෙන් තදබල අගතියක් සිදු වනු නොඅනුමානය. ඊට හේතුව වන්නේ පැමිණිල්ලෙන් යෝජනා කළ නමුදු විත්තිය විසින් ප්‍රකාශ කළේ මෙම විත්තිකරුවන්ගේ ඉඩමට අමතරව එකී විත්තිකාරියගේ ප්‍රකාට ලැබුණ ඉඩම ඔහුගේ විවාහය අසාර්ථක වීම නිසා විකුණා දමා ඇති හෙයින්, දැනට මෙම ඉඩමෙන් නෙරපුවොත් යාමට ඒමට කිසිදු තැනක් මිහිපිට නැති බවය. තවද එසේ යාමට ඒමට තැනක් මෙහි පදිංචිව සිටින විත්තිකරුවන් වන තම දුවරුන්ටද මෙම පාසල් යන දරුවන්ටද නොමැති බවය."

I have carefully examined the reasoning given by the learned District Judge including the above and also the evidence that has been led in this connection. Relevant evidence, I believe is sufficient to prove substantial loss that may be caused to the Respondent in the event the writ of execution is permitted. The District Judge, who had the opportunity of looking at the demeanor of the witness as well as the opportunity of considering the evidence recorded, is the best person to decide such an issue. Therefore, I am not inclined to interfere with the decision of the learned District Judge in respect of substantial loss caused to the respondents.

Section 763 of the Civil Procedure Code also provides for the manner in which the order, to allow or to stay the execution should be made. It is seen that the Court when making an order under Section 763 of the Civil Procedure Code:

- firstly should consider whether the execution should be allowed or stayed and;
- secondly the conditions that should be imposed when such an order is made.

Therefore, it is clear when an application for writ pending appeal which has been properly made, Court cannot and should not dismiss the same. In such a situation, Court shall make an order either allowing or staying the execution. Furthermore, when the judgment-debtor satisfies Court that there exists substantial loss if he/she is evicted from the corpus then the Judge should stay execution of writ upon such terms and conditions as it may deem fit. This is clearly stated in Section 763(2) of the Civil Procedure Code.

In this instance, learned District Judge disregarding these provisions of law has dismissed the petition of the petitioners which obviously is erroneous. Since the learned District Judge has properly held that the judgment - debtor had proved substantial loss that may be caused to Respondents in the event the writ is allowed, he should have stayed the execution of writ upon which terms in accordance with the manner provided in Section 763(2) of the Civil Procedure Code.

In the circumstances, I set aside the order of the learned District Judge dated 30th January 2002 and substitute therefor an order staying the execution of writ on the condition that the Defendant- Respondents - Respondents

deposit security in a sum of money which shall be determined by the District Judge as prescribed in Section 763(2) (b) within a period of three months from the date this decision is communicated to the Respondents.

Registrar of this Court is directed to communicate this decision forthwith to the District Judge of Chilaw.

No party is entitled to the costs of this application.

BASNAYAKE J. - I agree

Application allowed

Writ stayed Security to be deposited as determined by the District Judge