MILTON SILVA
v
SUMANASIRI

COURT OF APPEAL
EKANAYAKE, J.
SARATH de ABREW, J.
CALA 412/2000 (LG)
DC KALUTARA L/4611
FEBRUARY 10, 18, 2005
JUNE 23, 2006

Civil Procedure Code – Section 76 3 (2) amended by Act 53 of 1980 – section 149 – Judicature Act 2 of 1978 – section 23 – Amended by Act 37 of 1979 – Writ pending appeal – Substantial loss – Substantial questions of law – Burden on whom – Discretion of Court to make a fit and proper order as justice may demand – Issue framed after proceedings were concluded – Bad in law?

Held:

(1) The law applicable to stay execution of decree pending appeal is contained in section 23 of the Judicature Act 2 of 1978 as amended by Act 37 of 1979 and section 763 (2) of the Civil Procedure Code as amended by Act 53 of 1980. However these two provisions are not linked.

Per Sarath de Abrew, J.

"It goes without saying that if a writ is stayed to avoid substantial loss being caused to the judgment debtor equally anticipated loss or damage to a certain degree would result to the judgment creditor who is unable to enjoy the fruits of his victory after protracted litigation".

(2) Court should be satisfied of the probability of substantial loss resulting to the judgment debtor if the writ is not stayed and mere inconvenience and annoyance is not enough to induce the Court to take away from the suffered party the benefits of the decree.

(3) As far as section 23 of the Judicature Act is concerned, the rule is the execution of the writ whereas the exception is the stay of the writ. Other than the mandatory provision compelling the entering

into a bond, section 23 does not spell out or specify any other precautions as to under what conditions writ may be stayed, but leaves the entire exercise to the judicial discretion of the District Judge concerned to make a fit and appropriate order.

(4) In assessing loss pecuniary or otherwise, the mere expectation or belief of the defendant as recited by him unsupported by other credible material may not be sufficient to satisfy Court of its existence – in the instant case the defendant has failed to discharge his burden.

Held further:

(5) The learned District Judge by raising an issue without notice to parties after the judgment had been reserved to the effect that what had been leased is the business only and not the premises – raises the question of the existence of substantial questions of law.

APPLICATION for leave to appeal with leave being granted from an order of the District Court of Kalutara.

Cases referred to:

1. *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. of Ceylon Ltd* - 1990 1 Sri LR 19.
2. *Esquire Industries Garments Ltd.* v *Bank of India* – 1993 – 1 Sri LR 130 (SC)
3. *Saleem* v *Balakumar* – 1981 – 2 Sri LR 74.
4. *Kandasamy* v *Ghanasekaram* – CALA 78/81 – C.A.M. – 17.7.1981.
5. *Shajehan* v *Mahabooh and others* – CALA 78/81 – CAM 17.7.81
6. *Mustapa* v *Thangamani* – CALA 70/91
7. *Cooray* v *Illukkumbura* - 1996 - 2 Sri LR 263
8. *Fauz* v *Gyl and others* – 1999 – 3 Sri LR 347
9. *Charles Appuhamy* v *Abeysekera* – 56 NLR 243
10. *Sediris Singho* v *Wijesinghe* – 70 NLR 181
11. *Sokkal Ram Sait* v *Nadar* – 41 NLR 89

Wijayadasa Rajapakse PC with *Rasika Dissanayake* and

Ananda De Silva instructed by *Nimal Dissanayake* for the plaintiff-petitioner-petitioner.

Defendant-respondent-respondent absent and unrepresented.

Cur.adv.vult

February 23, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Kalutara dated 02.10.2002 (P11) where the petitioner had sought to set aside the aforesaid order of the District Judge staying the execution of the decree pending appeal and thereby sought to execute the decree pending appeal. Leave had been duly granted by this Court on 30.01.2004.

The plaintiff-petitioner-petitioner (hereinafter referred to as the plaintiff) instituted the aforesaid action bearing No. 4611/L in the District Court of Kalutara to recover vacant possession of the land and shop premises belonging to him bearing assessment number 461, Galle Road, Kalutara, wherein a bakery business under the name and style of "Pradeepa Bake House" had been conducted by the defendant-respondent-respondent (hereinafter referred to as the defendant) in terms of the lease agreement No. 35 (marked P1 at the trial), on the basis that the aforesaid lease expired on 10.02.1977. After trial, judgment was entered in favour of the plaintiff.

Being dissatisfied with the judgment, the defendant lodged an appeal to the Court of Appeal. Thereafter the plaintiff filed an application for the execution of the decree pending appeal. The then learned District Judge of Kalutara, who had succeeded the learned Judge before whom the trial was conducted, consequent to an inquiry held with regard to the application made by the plaintiff, made order on 02.10.2002 (P11) refusing the application for the execution of the decree pending appeal. It is against this order that the plaintiff has made the present application in the Court of Appeal.

The law applicable to stay execution of decree pending appeal is contained in the provisions of section 23 of the Judicature Act No. 2 of 1978 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.

Before examining the material placed before Court as to the merits and demerits of this application it is opportune to examine and assess the implications of the above statutory provisions.

Section 23 of the Judicature Act (as amended by 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 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".*

It is noteworthy to observe that, as far as the above provision is concerned, the rule is the execution of the writ whereas the exception is the stay of the writ. Furthermore, other than the mandatory provision compelling the entering into a bond, the above provision does not spell out or specify any other preconditions as to under what conditions a writ may be stayed but leaves the entire exercise to the judicial discretion of the learned District Judge concerned, to make a fit and proper order as the justice of the case may demand.

On the other hand, section 763(2) of the Civil Procedure Code (as amended by Act No. 53 of 1980), which is not linked to the provision in the Judicature Act, stipulates a distinctive condition as follows,

> *"Court may order the 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.*

On a construction of the above provision, the discretion of the learned Judge is not unfettered to the extent that in order to stay a writ, there must be sufficient material placed before Court that

substantial loss may result to the judgment-debtor. It goes without saying that if a writ is stayed to avoid substantial loss being caused to the judgment-debtor, equally anticipated loss or damage to a certain degree would result to the judgment-creditor who is unable to enjoy the fruits of his victory after protracted litigation.

However, what matters is not the balance of convenience or inconvenience of the parties concerned, but the fact that on the material placed before Court, the judgment-debtor should discharge the burden placed on him to the satisfaction of Court that substantial loss would be caused to him unless the execution of the writ was stayed. Therefore it is now settled law that a writ must be stayed until the final disposal of the appeal if the judgment-debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made by Court.

In the case of *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. Ceylon Ltd.*,[1] it had been held that Court should be satisfied of the probability of substantial loss resulting to the judgment-debtor if the writ is not stayed and mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of the decree. Further in the case of *Esquire Industries Garments Ltd.* v *Bank of India*[2] the concept of substantial loss had been extended not only to include the immediate pecuniary loss of the judgment-debtor but also to include the social and economic impact on the employees in the present social context.

Provisions of section 763 of the Civil Procedure Code is not exhaustive in respect of the relief available to the judgment-debtor. In *Saleem* v *Balakumar*.[3] Abdul Cader, J. with O.S.M. Seneviratne, J. agreeing a substantial question of law to be adjudicated upon at the hearing of the appeal was considered a sufficient ground to stay the writ till the disposal of the appeal. This judgment had been delivered soon after section 763(2) was introduced to the Civil Procedure Code by Amendment Act No. 52 of 1980. A long line of judgments thereafter had followed this concept where it had been held that even in the absence of substantial loss caused to the judgment-debtor, the existence of a substantial question of law to be decided at the appeal was sufficient ground to stay the execution of the writ. In this respect the following cases may be cited.

Kandasamy v *Ghanasekaram* (4)

Shajahan v *Mahaboob and others* (5)

Mustapa v *Thangamani* (6)

Cooray v *Illukkumbura* (7)

Fauz v *Gyl and others* (8)

It was held in the latter case of *Fauz* v *Gyl* that questions of law arising for determination must be substantial in relation to the facts of the case at hand and that one of the interpretations of the word "substantial" is to mean "actually existing".

Therefore, with regard to the impugned order of the learned District Judge of Kalutara dated 02.10.2002 (P11), in order to determine the correctness of the order, the material placed before Court should be carefully examined as to the presence of any one of the following requirements in order to justify the stay of the execution of the writ.

1) Whether the defendant (judgment-debtor) has placed sufficient material before Court for the learned District Judge to be satisfied that substantial loss would incur to the defendant if the execution of the writ was not stayed.

2) Whether Court could be satisfied of the existence of a substantial question of law that has arisen for determination at the hearing of the appeal.

On a perusal of the written submissions filed by the petitioner and the oral submissions tendered, the petitioner had argued that neither of the above requirements were present in this case. Though the respondent was absent and unrepresented when the matter was taken up for argument, in the written submissions filed on behalf of the respondent, it was the contention of the respondent that both the above requirements were present in this case that justified the stay of execution of the writ.

I shall now proceed to consider the grounds urged by the defendant upon which he claimed substantial loss unless execution was stayed.

The following grounds had been urged on behalf of the defendant in this regard.

1) The defendant was carrying on a bakery business "Pradeepa Bake House" in the premises in suit.
2) About eight employees were working under him in the said business.
3) The defendant had been carrying on the said business for well over ten years from the date of the lease agreement 10.08.1992 to the date of the impugned order of the District Judge of Kalutara, namely 02.10.2002, and built up goodwill with regard to his business.
4) The defendant made efforts to find an alternative location for his business but failed.
5) The defendant is married and having three children, two of them of school going age, and the entire family is supported from the proceeds of this business.

The learned District Judge in his impugned order had failed to evaluate the evidence in order to determine whether substantial loss would be caused to the defendant but has erred in law and based his decision to stay the execution of the writ on the following grounds.

1) The fact that several questions of law had been raised on behalf of the defendant. The learned Judge had not considered whether they were substantial questions of law.
2) The fact that eight employees working under the defendant would loose their livelihood.
3) On a balance of convenience, the loss caused to the defendant would be much greater than that caused to the plaintiff.

However, on a careful perusal of the material available to Court, on a consideration of the grounds urged by the defendant in order to sustain substantial loss. I am inclined to take the view that

the defendant had failed to satisfy Court as to the existence of substantial loss for the following reasons.

Though the defendant had stated he has eight employees working under him, he has failed to satisfactorily explain why he cannot deploy them at an alternative place of business. Further, on a perusal of the documents produced with regard to ETF payments, document P7R7 reveals only six names, while the other documents P7R8 to P7R10 reveal only the name of one employees, namely Premalal Perera. Further the defendant had failed to produce any supporting documentary evidence such as attendance registers or duty rosters as proof that such employees were working under him.

The defendants claim that he made efforts to find an alternative place of business in close proximity to the premises in suit is only supported by a purported newspaper advertisement inserted in the Silumina of 16.09.2001 (P7R6). Judgment had been delivered against the defendant on 07.03.2001 (P1) while the defendant had filed objections against the execution of writ on 08.06.2001 (P4). Therefore it is quite evident that placing a newspaper advertisement more than six months after the judgment as the writ inquiry approached cannot be considered a genuine effort on the part of the defendant to find a suitable alternative place of business. Furthermore it is quite significant to find the defendant's address in the pleading given as 497/1, Galle Road, Nagoda, Kalutara which is in close proximity to the premises in suit, 461, Galle Road, Kalutara. Therefore it appears that the defendant held and possessed an alternative premises in close proximity where he may have continued his bakery business without affecting the goodwill.

In assessing substantial pecuniary or otherwise, the mere expectation or belief of the defendant as recited by him unsupported by other credible material may not be sufficient to satisfy Court of its existence. Therefore on a consideration of the totality of the above factors militating against the defendant. I have to determine that the defendant has failed to discharge the burden cast on him to satisfy Court of substantial loss caused to him.

Therefore the first ground with regard to stay of execution of writ cannot succeed.

Now it is left for Court to determine whether the defendant can succeed on the second ground, namely the existence of a substantial question of law to be determined at the final appeal. The following grounds have been urged by the defendant as substantial question of law, denied by the petitioner in his written submissions.

1) The action of the learned trial judge in formulating issue No.2A without notice to parties after judgment had been reserved, purportedly under Section 149 of the Civil Procedure Code, is bad in law.
2) As the issue thus framed changed the scope of the action and allowed no opportunity for the defendant to answer this issue and give evidence, this occasioned a failure of justice.
3) In any event the learned trial Judge had erred in law by giving an incorrect construction to the lease agreement (P1) by holding only the business was given on lease, whereas a proper construction of the instrument apparently indicates that the land and building together with the business had been rented out, in which case the defendant was entitled to the protection of the Rent Act, and therefore the action should have been decided in favour of the defendant.

I have considered the totality of the material placed before Court inclusive of the written submissions tendered by both parties and the oral submissions tendered by the petitioner. I have also considered the authorities submitted by the petitioner in the course of oral submissions, namely:

Charles Appuhamy v *Abeysekera*[(9)] – Nagalingam, S.P.J.

Sediris Singho v *Wijesinghe* [(10)] – Sansoni, CJ.

Sokkal Ram Sait v *Nadar* [(11)]– Keuneman, J.

On a perusal of the above, I am strongly of the view that the defendant has succeeded in establishing the existence of substantial questions of law for adjudication at the appeal, for the following reasons.

1) The opening passage of the judgement of the learned trial Judge dated 07.03.2001 indicates that issue No. 2A had been framed outside Court proceedings after all the proceedings were concluded when the matter was due for judgement, without notice to the parties, purportedly under Section 149 of the Civil Procedure Code.

2) On a perusal of the issues raised at the trial, issue No. 01 raised by the plaintiff relates the lease agreement to the land, hotel building and implements mentioned in the lease. However the learned trial Judge, while referring to the condition "ජු" of the lease, on his own, had apparently raised issue 2A to the effect that what had been leased out is the business only and not the premises. Having answered this issue in the affirmative, the learned trial Judge had decided the case in favour of the plaintiff, whereas had this additional issue not been raised, and if the learned Judge allowed the case to proceed solely on the issues framed by the parties, the lease agreement would have been construed as a lease of land and premises with the business, in which case the defendant would have received the protection of Rent Act, and the judgement would have been in favour of the defendant.

3) Perusal of the lease agreement indicate that the subject matter of the lease was a 13 perch land with a bakery shop premises and other utensils used for bakery business as clearly stated in the schedule thereto, even though there are restrictive clauses in the instrument with directions as to how to run the bakery business.

<u>On the strength of the above findings, I am satisfied that substantial questions of law exist for determination at the final appeal.</u> Therefore the stay of the execution of the writ is justified on the above ground.

On the basis of my findings and reasons enumerated earlier in this judgement, I hold therefore that the impugned order of the learned District Judge of Kalutara dated 02.10.2002 to stay the execution of the writ is correct, though not for the reasons given by the learned Judge in his order, but for the reasons specified by me above.

In view of the foregoing findings and reasons, the application of the plaintiff-petitioner to set aside the order dated 02.10.2002 of the learned District Judge of Kalutara is hereby dismissed with costs fixed at Rs. 7500/-. However, I set aside that part of the aforesaid impugned order which required the defendant-respondent to enter into a bond for Rs. 1,50,000/- before the Registrar, and instead make order for the defendant-respondent judgement-debtor to furnish security in a sum of Rs. 100,000/- in cash with two sureties acceptable to the learned District Judge of Kalutara and enter into a bond for the same amount for due performance of the decree if and when required once the appeal is heard.

EKANAYAKE, J. – I agree.

Appeal dismissed.