

**GRINDLAYS BANK LTD.**  
**v.**  
**MACKINNON MACKENZIE & CO. CEYLON LTD.**

COURT OF APPEAL,  
P.R.P. PERERA, J, AND L. WEERASEKERA, J.,  
C. A. No. 752/89, D. C. COLOMBO 87249/M,  
OCTOBER 26 and 27, 1989.

*Civil Procedure - Civil Procedure Code ss. 754, 761, 763, 763 (2) — Execution pending appeal - Section 23 of the Judicature Act as amended by Act, No. 27 of 1979 - Stay of execution - Substantial loss.*

The plaintiff - respondent obtained judgment against the defendant-petitioner for damages (*damnum emergens*) but its claim for consequential loss was disallowed. The defendant appealed against the judgment and, the plaintiff too appealed against the part of the judgment which disallowed consequential loss. The Plaintiff moved for execution pending appeal of the part of the decree which ordered payment of damages in his favour. The District Judge issued writ of execution on deposit of security.

**Held :**

(1). There was a judgment in favour of the plaintiff for damages (*damnum emergens*) against which defendant had appealed. The decree ordering this payment can be executed pending appeal.

(2) If the judgment debtor desires stay of execution pending appeal, he should establish substantial loss. The usual course is to stay proceedings pending an appeal when execution would cause irreparable injury. Mere inconvenience and annoyance is not enough. The damage must be substantial and the defendant must prove it.

**Cases referred to:**

- (1) *Charlotte Perara v. Thambiah* 1983 1 Sri L. R. 352.
- (2) *Sokkatal Ram Sait v. Kumaravel Nadar and Others* 13 CLW 52.
- (3) *Walford v. Walford* LR 1867 — 83 — Ch. App. Cas. 812.
- (4) *Fakira Mahadagi Marathe and Another v. M. T. Rumsukhibai* 33 AIR 1946 Ragpoor 428, 430.

APPEAL against issue of writ of execution pending appeal.

*Dr. H. W. Jayewardene, Q. C. with H. L. de Silva, P. C., I. S. de Silva, Harsha Amerasekera, Harsha Cabraal and Prasanna Jayawardena* for defendant - respondent - petitioner.

*K. N. Choksy, P. C. with P. A. D. Samarasekera, P. C., J. de Almedia Guneratne, P. Agalawatte and A. Vikun Fernando* for plaintiff - petitioner - respondent.

December 04, 1989.

**P. R. P. PERERA, J.**

The Plaintiff - Petitioner - Respondent (hereinafter referred to as the Respondent), instituted action against the Defendant - Respondent - Petitioner (hereinafter referred to as the Petitioner), in the District Court of Colombo, claiming a sum of Rs. 10,250,000/- being the capital loss incurred by him in consequence of a fire caused by the alleged negligence of the petitioner as specifically pleaded in paragraphs (8), (9) and (10) of the plaint.

In paragraph (13) of the plaint, the petitioner claimed a sum of Rs. 2,070,000/- as consequential loss and damage suffered by him by reason of being deprived of the rentals from the tenants who occupied the southern portion of the said building which had been destroyed by the fire, for the period October 1980 up to the end of September 1982. The respondent in the above premises prayed for judgment against the petitioner in the aggregate sum of Rs. 12,320,000/- with legal interest thereon.

The petitioner filed answer denying the claim of the respondent and stated *inter alia* that the losses said to have been incurred by the respondent were due to its own negligence and in any event, that the fire

that resulted in loss and damage to the respondent were not caused by an omission or negligence on the part of the petitioner.

At the trial, seventeen issues were raised, on behalf of the parties, and accepted by court. Issues (1) - (10) which are relevant to this application are reproduced below:-

- (1) Did a fire take place on 4th October, 1980 in the said premises bearing No. 37?
- (2) Did the said fire take place on account of a defect in the electrical wiring system of the Defendant's building?
- (3) Was the entirety of the Defendant's said building engulfed by the said fire which spread and damaged the Plaintiff's building?
- (4) Was the said defect due to the failure and neglect of the Defendant to maintain its wiring system in good order and/or due to the failure and neglect by the Defendant and its authorised agents to take care and precaution in the course of effecting repairs to the said electrical systems of re-wiring the same?
- (5) Was the damage caused to the Plaintiff's building referred to in issue 3' above caused by one or more or all of the acts or omissions set out in paragraph 10 of the Plaintiff?
- (6) (i) if the above issues (1) to (5) are answered in favour of Plaintiff is the Plaintiff entitled to recover damages?
- (7) (ii) if (1) above is answered in the affirmative what quantum of damages is the Plaintiff entitled to recover?
- (7) At the time of the said fire was the Southern portion of the said building rented out to various tenants?
- (8) Was the Plaintiff deprived of the said rents by reason of the fact that the said portions let to the said tenants were destroyed by the aforesaid fire?
- (9) If issues numbered (1) to (5) and (7) and (8) are answered in favour of the Plaintiff, is the Plaintiff entitled to recover damages?
- (10) If issue (9) is answered in the affirmative, what damages is the Plaintiff entitled to recover?

The District Judge, delivered his judgment answering issues (1) - (6) and (9) & (10) in favour of the respondent but held that issue (7) had not been proved and that therefore issue (8) did not arise. The District Judge, awarded a sum of Rs. 8.4 million on the claim based on capital loss, and disallowed the claim for Rs. 2.07 million relating to consequential loss.

The petitioner has appealed from the said order which is presently pending before this Court. The respondent has also appealed against that part of the judgement rejecting his claim of Rs. 2.07 million relating to consequential loss.

Thereafter, in November 1988, the respondent sought to execute the decree entered in its favour for the recovery of the sum of Rs. 8.4 million by the District Court. The respondent pleaded *inter-alia* that it was prepared to furnish a Bank Guarantee as security for an amount, equal to the value of the decreed sum or that as an alternative it was willing to execute a mortgage over immovable property the value of which would be in excess of the decreed sum.

The petitioner filed objections and sought a dismissal of the application for the execution of the decree by the respondent notwithstanding the appeal.

After inquiry into the application for execution of decree, the District Judge, delivered his order permitting the respondent to execute the decree notwithstanding the appeal, on the respondent depositing an unconditional Bank Guarantee for an amount of Rs. 20,000,000/- (twenty million) valid for 10 years with the Registrar of the District Court. This order has been produced marked 'D'. It is this order of the learned District Judge, dated 27.09.89, that the petitioner is seeking to set aside in the present proceedings by invoking the revisionary powers of this Court.

Dr. H. W. Jayewardene, Q. C., who appeared in support of this application contended that the respondent cannot have and maintain an application for execution of decree pending the appeal from the judgment, and that the District Court has no jurisdiction to grant execution to the respondent as the respondent himself has appealed from the judgment and decree in this case. It was Dr. Jayewardene's contention that where a party has appealed from a judgment, he had questioned the finality of that judgment and decree, and cannot therefore seek execution of that decree in the District Court. Counsel urged, that neither the provision of the Judicature Act nor the provisions of the Civil Procedure Code, permitted such a course of action.

Mr. K. N. Choksy P. C., submitted however, that neither section 23 of the Judicature Act nor section 761 of the Civil Procedure Code contained

any limitation of the right of the judgment creditor to apply for execution of a decree in his favour under the provisions of section 763 of the Civil Procedure Code. In point of fact, section 23 of the Judicature Act, specifically provides that "no such appeal shall have the effect of staying the execution of such judgment, decree or order." Mr. Choksy, contended further, that in terms of section 754:

"Any person who shall be dissatisfied with any judgment pronounced by any original Court in any civil action, proceeding or matter to which he is a party, may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law."

Counsel contended therefore, that in terms of this section a partly successful plaintiff is entitled to a right of appeal, and that there is nothing contained in section 763 of the Civil Procedure Code, which prohibits such a partly successful plaintiff from seeking execution of a decree.

In the instant case, the respondent's claim for damages was made up as follows:-

- (a) a sum of Rs. 10,250,000/- being the capital loss in respect of destruction caused to a part of its building;
- (b) a sum of Rs. 2,070,000/- as consequential loss suffered by the respondent namely the loss of rents from the tenant to whom the said destroyed part of the building had been let by the respondent.

The learned Trial Judge, has awarded the respondent a sum of Rs. 8.4 Million in respect of the damage caused by the destruction of a part of its building (*damnum emergens*) but has rejected the claim of the respondent based on consequential loss arising from the loss of income as set out above. The petitioner has filed an appeal against this judgment. The respondent has also appealed against a part of the said judgment insofar as it relates to the findings in respect of issues (7) and (8) rejecting the claim of the respondent for consequential loss in a sum of Rs. 2.07 million. The respondent, has not appealed against the award made in his favour in a sum of Rs. 8.4 million although his original claim on this account has been reduced by the learned Trial Judge. There is then clearly a judgment in favour of the respondent in a sum of Rs. 8.4 million against which an appeal has been filed by the petitioner. The respondent in our opinion, is entitled to seek execution of this judgment and decree in his favour in

terms of section 763 of the Civil Procedure Code in the District Court. We therefore hold that this objection raised by learned Queen's Counsel, must fail.

Dr. Jayewardene also submitted, that the learned Trial Judge has failed to direct his mind to the question that the purpose of section 761 and section 763 of the Civil Procedure Code, as amended is to ensure that a judgment creditor would be able to enjoy the fruits of his success in the event of his succeeding in the Appellate Courts, and to protect and safeguard the interests of the judgment debtor in the event of the judgment being set aside in appeal. It was Counsel's complaint that the District Judge has failed in particular to consider the provisions of section 763 (2) which empowered the Court to order execution to be stayed upon such terms and conditions as it may deem fit where:

- (a) the judgment debtor satisfied the Court that "substantial loss" may result to the judgment - debtor unless an order for stay of execution is made and security is given by the judgment -debtor for the due performance of such decree or order as may ultimately be binding upon him.

Counsel submitted that the learned District Judge has failed to consider the fact that the petitioner was prepared to give a Bank Guarantee either from its own bank, or from another bank or any other security as determined by Court for the full decreed sum in the event of the respondent succeeding in appeal and therefore the fruits of the respondents success would be assured. It was Counsel's submission that in fact substantial loss would be caused by the petitioner unless an order for stay of execution is made.

Section 23 of the Judicature Act, as amended by Act No. 37 of 1979 lays down the principle that execution of decree under appeal shall not be stayed by reason only of an appeal having been preferred against the decree. This principle applies generally to executions of decrees pending appeal. This principle is however subordinated by its application to another fundamental principle that is enshrined in section 763 (2) of the Civil Procedure Code that the 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. It is therefore clear, on an examination of the relevant provision of the Judicature Act, and the Civil Procedure Code, that the District Court may make an order staying execution "when it shall see fit to make an order to that effect". In terms of section 23 of the Judicature Act, as amended by Act No. 39 of 1979 or when it is satisfied that substantial loss will result to the appellant unless an order for stay of execution is made and the appellant gives security for the due performance of such decree or order as may ultimately be binding upon him in terms of section 763 (2) of the Civil Procedure Code, *Vide Charlotte Perera v. Thambiah* (1).

The question which the learned District Judge was called upon to determine at this inquiry then was whether the petitioner had satisfied the Court, that 'substantial loss' would be caused to him if the execution of the decree is not stayed. Section 763 (2) requires the petitioner to prove substantial loss. The only material relevant to the question on 'substantial loss' relied upon by the petitioner is contained in paragraph (6) (c) of the objections filed by the petitioner in the District Court. This document has been produced marked 'D'. Paragraph (6) (c) reads thus:

"any alleged delay in the use of the building as alleged in the petition is due to the plaintiff/petitioner, and its own financial resources which even suggests the necessary inference that execution of the decree appealed against by both the parties could cause irreparable loss and prejudice, and loss to the defendant respondent in the event of the judgment and decree being set aside by the Appellate Courts and may even give rise to further litigation between the parties for enforcement of the guarantee referred to in the petition".

The effect of the said averment is that execution of decree would cause loss and prejudice to the petitioner in the event of the judgment and decree being set aside by the Appellate Courts and that furnishing of a bank guarantee, or mortgage by the respondent, could give rise to further litigation between the parties in such event.

Mr. Choksy contended that the learned District Judge has addressed his mind to the provisions of section 763 (2), and has made an appropriate and proper order in this case. It was Counsel's submission that the petitioner has failed to establish that substantial loss may accrue to him unless an order for stay of execution is made. Counsel cited the

case of *Sokkalar Ram Sait v. Kumaravel Nadar and others* (2) on the question as to what constitutes "substantial loss". In this case, Keuneman J. states thus:

"It has been stated in England that 'the usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant; mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of its decree — *Walford v. Walford* (3) . Even if we had to regard the damages as being irreparable, in the sense that the defendants could not recover the damages yet I think, that under our law, it must be shown that the damage would also be substantial and I do not think that has been established in this case".

Further in support of this view Counsel cited *Fakira Mahadaji Marathe and another, v. M. T. Rumsukhibai* (4).

I find that there is merit in the submission of Counsel for the respondent that the petitioner has failed to adduce sufficient material to establish substantial loss. Further, in the present case the learned District Judge has in my view taken into account whether or not a non compliance causes prejudice to the opposite party. It is in this context that Judges have stressed the mandatory nature of some of the rules and the need to keep channels of procedure open for justice to flow freely and smoothly. The position of course counts the balance of convenience and inconvenience of the parties in allowing the application for execution of writ. The learned District Judge has also taken into consideration the scheme of the Civil Procedure Code which provided for the execution of decrees and the matters set out by the petitioner in his statement of objections in exercising his discretion in this matter. The District Judge has directed the respondent to deposit with the Registrar of the Court an unconditional bank guarantee for Rs. 20 million in favour of the Registrar valid for a period of 10 years as a pre-condition for the issue of the writ. The District Judge has also ordered that in the event the said bank guarantee was not deposited by 19th October, 1989, the application for writ will not be considered further.

I can see no grounds for interfering with the decision of the learned District Judge, which seems to me to have been properly based upon a just appreciation of the relative position of the two parties.

Dr. Jayewardene invited our attention to the fact that the decretal amount as at date stands at Rs. 16,499,885 and 93 cts. inclusive of interest and having regard to the present inflationary trends in the currency of this country and the fact that it would take several more years for the final appeal to be concluded, that the order of the District Judge directing the respondent to furnish a bank guarantee for Rs. 20,000,000/- in favour of the Registrar must necessarily be enhanced.

Having regard to the special circumstances of this case, I agree that there is justification to increase the quantum of the bank guarantee and I direct the respondent to deposit with the Registrar of the District Court an unconditional Bank Guarantee for a sum of Rs. 25,000,000/- (Rupees Twenty Five Million) subject to the same conditions specified in the order of the learned District Judge, as a precondition to the issue of writ in this case. The application to set aside the order of the District Judge dated 27th September, '89 is refused with costs fixed at Rs. 2,100/- payable by the defendant-respondent-petitioner to the plaintiff-petitioner-respondent. The stay order issued by this Court would cease to be effective from today.

Both parties had agreed to abide by the decision in this application in the leave to appeal application No. C. A. L. A. No. 98/89.

That application is also accordingly proforma dismissed.

**L. WEERASEKARA, J.** - I agree.

*Execution allowed, pending appeal on enhanced security.*

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