

**A. D. H. PERERA**  
**v.**  
**GUNAWARDENA**

SUPREME COURT  
FERNANDO, J.  
AMERASINGHE, J. AND  
WADUGODAPITIYA, J.  
SC APPEAL 27/91  
CA NO. 1052/90  
DC MT. LAVINIA N<sup>o</sup>. 1352/RE  
JULY 08, 1991.

*Appeal – Execution pending appeal – Substantial loss – Judicature Act, s. 23.*

An application for writ of execution to eject the defendant-appellant was allowed on security being furnished although an appeal had been filed. Acting in revision the Court of Appeal reversed the order permitting execution.

**Held :**

(1) As the defendant-respondent had failed to satisfy the Court that substantial loss may result unless execution was stayed, the plaintiff was entitled to execution pending appeal.

(2) While some consideration of the degree of hardship to the judgment-creditor may perhaps be relevant especially in borderline cases, there is certainly no burden on him to establish comparatively greater hardship as a condition of the grant of execution. The burden is on the judgment-debtor to satisfy the Court that the loss would be substantial.

(3) The owner of a business is not entitled to the maximum tenure that the law allows. Such a proposition would effectively deny execution pending appeal and introduce a new test under the guise of interpretation.

(4) Mere assertions of the judgment-debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion and similar matters, are insufficient. The material upon which such assertions were based should have been made available to enable the Court to assess the loss, and to determine, in relation to the judgment-debtor, whether such loss was substantial, and also to determine the quantum of security. While generally goodwill does attach to a business, there is no presumption that every business has a goodwill and certainly not as to the extent of the goodwill.

**Case referred to :**

*Charlotte Perera v. Thambiah* (1983) 1 Sri LR 352.

APPEAL from order of Court of Appeal.

*P. A. D. Samarasekera, P.C.* with *W. P. Gunatilleke, C. Nilanduwa and U. S. Sooriyarachchi* for plaintiff-respondent-appellant.

*A. K. Premadasa, P.C.* with *Faiz Mustapha, P.C.* and *Miss F. Abeyratne* for sub-defendant-petitioner-respondent.

*Cur. adv. vult.*

September 05, 1991.

**FERNANDO, J.**

The plaintiff-respondent-appellant (the "appellant") instituted this action on 15.1.1981 against the original defendant for ejection from business premises No. 97, Stanley Tillakaratne Mawatha, Nugegoda, which are admittedly excepted premises.

The original defendant died on 11.11.1981, and in 1982 the appellant applied to substitute the widow; she objected to substitution on the ground that the business carried on at the premises had been a partnership business between the defendant and his daughter the substituted defendant-petitioner-respondent (the "respondent") who was continuing to carry on that business in the premises, and that it was the daughter who should be substituted. Thereupon the appellant applied to substitute the respondent, who was duly substituted and filed her answer on 25.7.1983. On 3.5.1985 the respondent filed an amended answer averring that the

defendant had left a Last Will No. 260 dated 5.11.1981 attested by Jauffer Hassen, Attorney-at-Law and Notary Public, and claiming that her mother, as the executrix named in the Last Will, should have been substituted in place of the defendant, Jauffer Hassen was the Attorney-at-Law who had filed proxy on behalf of the original defendant, and proxy and answer for the respondent ; it seems that he had also appeared for the widow.

The trial commenced on February, 1989. On 10.2.89 and 27.2.89 several issues were raised. One group of issues raised the question whether the deceased defendant had left a Last Will under which the widow was named executrix, and if so whether the action was maintainable against the respondent. Upto this stage, no reference was made to the grant of probate or the institution of a testamentary case. Issues relating to other defences were also raised by Counsel for the respondent, but on 13.3.89 he withdrew all these issues, leaving only the issues relating to substitution.

On 3.1.90 the learned District Judge gave judgment in favour of the appellant, for ejection, arrears of rent and damages in a sum of Rs. 48,200, continuing damages and costs. The respondent filed a notice of appeal. On 3.5.90, the appellant applied for execution pending appeal under section 763 of the Civil Procedure Code ; the respondent filed objections, with a supporting affidavit, averring that the respondent was a spinster of 28 years, that she was carrying on a business called New Lanka Shoe Palace at the premises, that the income from that business was her only means of livelihood, and the said business would be completely ruined if the writ was executed, that the respondent had no alternative premises and all efforts to obtain alternative premises had failed ; that the issues on which the case was decided, and the question whether it was section 398 or section 404 of the Civil Procedure Code which was applicable in respect of the substitution effected in this case, involved important questions of law.

The matter was taken up for inquiry on 21.8.1990 ; no evidence was led, and the parties were content to rely on their affidavits and written submissions. On 22.10.1990 the learned District Judge allowed the appellant's application for execution pending appeal, on security being furnished. The respondent applied to the Court of Appeal to revise that order, and that application was allowed 15.1.91. The appellant now appeals against that order with special leave.

Three matters were urged in the Court of Appeal. After judgment was reserved, both parties submitted additional material in regard to alternative accommodation allegedly available to the respondent, namely shop premises obtained by her in 1987 at the Nugegoda supermarket. The Court of Appeal declined to go into that question, which we too need not consider in view of our decision on the other questions.

Secondly, it was contended on behalf of the respondent that a substantial question of law was involved in the appeal. The Court of Appeal did not consider this submission which it regarded as a mere technicality intended to delay proceedings.

It was the third aspect which the Court did consider : " the question of relative hardships and the irreparable loss to the respondent " ; It was held that the ejection of the respondent would cause irreparable loss, because—

" It is a fact that the premises in question is a business premises as conceived by law. The petitioner's father has established a business in the shoe trade. It is an incontrovertible fact that goodwill attaches to a business. It is a valuable accrual to a business. Not the least important element in this factor is the location of the business itself. The owner of such business is entitled in the circumstances to have the maximum tenure that the law could permit him to avail of. The learned trial Judge has in my view not addressed his mind to (this) important factor. "

It was further held that :-

" a competing claim of urgency or substantial loss as a result of delay in being quieted in possession has not been made out before the learned trial Judge by the plaintiff. He has in fact not given cogent reasons to justify comparatively greater hardship on the part of the plaintiff. "

Learned President's Counsel for the respondent very properly conceded that the Court of Appeal was in error in considering that " irreparable loss " to the judgment-debtor, and " comparatively greater hardship " to the judgment-creditor, were the relevant factors. Execution pending appeal may be stayed under section 763 where the judgment-debtor satisfies the Court that " substantial

loss " to him may otherwise result (*Charlotte Perera v. Thambiah*, (1) ); while some consideration of the degree of hardship to the judgment-creditor may perhaps be relevant, especially in borderline cases, there is certainly no burden on him to establish comparatively greater hardship as a condition of the grant of execution. He contended that the objections and affidavit filed by the respondent had not been controverted by a counter-affidavit, and that the parties had invited the Court to make an order upon the application for execution on the basis of affidavits and written submissions ; that the appellant thereby accepted the truth of the averments in the respondent's affidavit, in which she had averred that the income from the business was her sole means of livelihood, that the business would be completely ruined if she was ejected, and that even if she was restored to possession after winning the appeal the business could not thereafter be rehabilitated ; therefore, he submitted, substantial loss had been proved.

It was certainly open to the parties to agree to the Court making its order on the basis of affidavits ; however, in the absence of an express admission it cannot be presumed that the parties accepted one affidavit or the other as correct. Here, the appellant's affidavit averred, for various reasons, that execution pending appeal would not cause substantial loss to the respondent ; the respondent averred that execution would ruin her business. This conflict in the affidavits could not be resolved by assuming, despite the absence of a recorded admission, that the contents of the later affidavit (of the respondent) were impliedly admitted by the appellant. While ejection from any premises, residential or business, would cause loss, the burden is on the judgment-debtor to satisfy the Court that such loss would be substantial. In any event, mere assertions of the judgment-debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion, and similar matters, are insufficient. The material upon which such assertions were based should have been made available to enable the Court to assess the loss, and to determine, in relation to the judgment-debtor, whether such loss was substantial ; and also to determine the quantum of security. While generally goodwill does attach to a business, there is no presumption that every business has goodwill, and certainly not as to the extent of such goodwill. The Court of Appeal considered that the trial Judge erred in failing to consider the question of goodwill, but in the absence of any evidence

regarding goodwill the trial Judge could not have come to any finding in that respect. The Court of Appeal also erred in holding that the owner of such business is entitled to the maximum tenure that the law allows ; such a proposition would effectively deny execution pending appeal to every judgment-creditor in respect of business premises : not because substantial loss has been proved, but because the premises are business premises. This would be replacing the test enacted by the legislature with a different test devised by the Courts under the guise of interpretation.

The respondent having failed to satisfy the Court that substantial loss may result unless execution was stayed, the appellant was entitled to execution pending appeal.

Learned President's Counsel for the respondent submitted that the respondent's appeal against the decree of ejectment involved an important and substantial question of law, as to whether the respondent had been properly substituted, and that execution should have been stayed under section 23 of the Judicature Act. Under that section, the Court has a discretion, if it " shall see fit ", to make an order staying execution. The failure to disclose the existence of the Last Will, the delay in applying for probate, the widow's objections to substitution, and the withdrawal of all the issues relating to the substantive defences, were all circumstances relevant to the exercise of the discretion under section 23, and it is not surprising that the Court of Appeal regarded these as dilatory tactics. Since the respondent has failed to establish the loss and prejudice that would be caused if execution was allowed, it can hardly be said that the refusal to exercise the discretion under section 23 was in any way illegal or improper. No prejudice is caused, for, as held in *Charlotte Perera's* case, there is adequate provision to restore an evicted judgment-debtor to occupation if he succeeds in his appeal.

I therefore set aside the judgment and order of the Court of Appeal, and restore the order of the District Court. The appellant will be entitled to costs in a sum of Rs. 5,000.

**AMERASINGHE, J.** – I agree.

**WADUGODAPITIYA, J.** – I agree.

*Appeal allowed.*